CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW

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 September 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

This is a lower pass rate than in previous sittings, but with such small numbers it is difficult to make valid comparisons. The impression is that the weaker candidates were writing less using the online system, and it was certainly the case that the weaker answers were lacking in material rather than showing clear errors.

Part A answers tended to rely too heavily on the statute book, and much of the material presented was copied or closely paraphrased. There was generally too little attempt at any form of evaluation or critique. Some Part B Answers showed only a limited ability to apply the law to the given facts.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This question was only attempted by one candidate. That was insufficient development of the three points, and insufficient detailed knowledge to proceed to a critical assessment.

Question 2

Candidates were able, usually with copious reference to the text of the treaties, to explain the functions of the three institutions as such but only one or two stronger answers preceded to examine in any detail the way in which these institutions interact and cooperate.

Question 3

This question was generally answered as though it only related 2 applications brought by non-privileged applicants. It is in fact somewhat broader. What was noticeable was that several candidates struggled to articulate the concept of individual concern, and that material appeared to be being recycled from the suggested answers to previous questions on the same general topic.

Question 4

This question, together with the other competition question in Part B, was probably the most popular. In the first part of the question the explanation of the relevant market was not always clear and detailed and some candidates appeared to read this part very narrowly when a discussion of the way in which market shares of different sizes could be virtually conclusive proof of dominance or merely factors to be considered in a broader context was expected.

Section B

Question 1

Candidates did not really analyse the facts given to determine whether or not the behaviour described could be ascribed to an agreement or to a concerted practise. The question clearly indicates that the participants control the whole of the market in the relevant product, but a number of candidates tried to argue that the Notice on Agreements of Minor Importance could be relevant. There was also considerable irrelevant reference to block exemptions which apply only to vertical agreements. Generally, candidates were aware of the leniency programme and were able to describe this and indicate how it would apply reasonably well.

Question 2

Candidates were generally able to identify the potential relevance of direct effect and to discuss the criteria for this, but coverage of indirect effect and member state liability was much more patchy. However, application was not strong and there was little detailed comparison of the French and EU

legislation. Most answers failed to address the issue relating to the worrying of the chickens by the dog.

Question 3

Candidates were able to explain the general principles of free movement of goods, but application was again much weaker. Some answers did not really distinguish between the action taken in respect of the sweets and that taken in respect of the books. There was also considerable uncertainty over the characterization of the invoice for testing of the sweets.

Question 4

Candidates did not appear to have read this question carefully enough. The first part focused on whether the tribunal in question met the criteria for making a preliminary reference, the second part on the substantive criteria for a reference and the final part on the position of courts of last instance. There was again relatively little application to the facts. It was clear that as different courts had disagreed as to the effect of the provision it could not conceivably be regarded as acte clair, but many answers disregarded this.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW

Question 1(a)

Initially, free movement was regarded as essentially one of the four elements of the Common Market. This was free movement of labour as one of the factors of production. Of course, this entailed free movement for others, but essentially they were dependent on the worker. This reflected the fact that most workers would not relocate on a long-term basis without bringing their family with them. Secondary legislation provided for workers and their families to be dealt with on a non-discriminatory basis and gave them access to housing education and other social benefits. There were also measures to ensure that entitlements to Social Security and pensions were preserved despite a relocation within the EEC.

This remained the position until the creation of the European Union in the Maastricht Treaty. At this point, the status of a citizen of the Union was created. This was without prejudice to the status of workers and their dependents but created an alternative basis on which rights of free movement could be granted.

The Court tended to be activist in defining the scope of the rights of free movement for workers, and this approach continued in relation to the rights of EU citizens. In Martinez Sala (1998) it was held that an EU citizen lawfully resident in a host state was entitled to receive non-contributory and non-means tested benefits such as a child-rearing allowance (equivalent to child benefit) on the same terms as nationals. Failure to do so would constitute discrimination on grounds of nationality. While such benefits were social advantages available to workers, they were also available to EU citizens. The claimant in the case had worked in Germany although she was not currently doing so, but was nonetheless lawfully resident under national rules and relied

on her EU citizenship status to secure the benefit. A similar approach was taken in Grzelczyk (2001), where a student nearing the end of his course ran out of resources and applied for Social Security support available to nationals in similar circumstances. The Court held that denying access to funds would be inconsistent with the concept of citizenship of the EU, at least where it was for an objectively short and clearly defined period. The Court went so far as to suggest that citizenship of the EU was destined to be the primary status in the future. In Baumbast (2002) a similar approach was taken. The claimant was a German national who had lived and worked in the UK, but subsequently went on to work outside the EU. It was held that he nevertheless had rights as an EU citizen irrespective of the fact that he was not currently exercising his rights to work. These decisions were taken prior to the 2004 expansion of the EU, at a time when the exercise of rights of free movement was not seen as controversial.

In the intervening years, the attitude of the court has gradually changed. More recent cases such as Dano (2014), concerning an applicant who had never been economically active, and Alimanovic (2015), concerning applicants who had been economically active, but not for long enough period to qualify them to retain worker status, have stressed that the rights of EU citizens are subject to conditions as laid out in Arts 20/21 TFEU. In particular the entitlement to free movement is only enjoyed by those falling within the scope of Directive 2004/38, namely workers, students, those of independent means and their respective family members. Those who are economically inactive and without means do not enjoy rights and there is no obligation on the Member States to grant them non-contributory Social Security benefits. This represents a considerable change of emphasis. The earlier cases regard citizenship as a passport to at least some benefits in the host state. The later cases make it clear that citizenship alone is insufficient for this. In other words, freedom of movement becomes a much more precisely qualified right.

1(b)

The text of Art 45 TFEU provides that for the purposes of securing free movement of labour workers may move to another Member State to take up offers of employment actually made. As such, this does not create any rights of movement for those who are looking for work in another Member State. This issue was considered by the Court in the case of Royer (1976). Having regard to the then structure of the labour market, the Court accepted that it would be difficult for many workers seeking employment in other Member States to actually access such vacancies as existed. The Internet did not yet exist, so applicants were used to consulting offers of employment in newspapers or in employment agencies. Typically posts were not advertised internationally. In order to carry out an effective search for available employment, a worker would need to travel to the area where he believed employment was available. As a result the treaty was interpreted to allow free movement for those who were conducting such searches for employment.

The Royer case did not indicate exactly how long workers should be allowed for this purpose, although the period of three months was suggested as potentially appropriate. In Antonissen (1991) the Court indicated that a period of not less than six months should be allowed and that this could be extended provided the claimant could demonstrate that he was actively seeking employment and had a realistic prospect of achieving it. This represented a significant benefit, although the work seeker would not be entitled to Social Security in the host state during this period.

Subsequently, the Citizens Right Directive (CRD) 2004/38 made more detailed provision. Art 14 provides that a work seeker and their family members may not be expelled for as long as they can provide evidence that they are continuing to seek employment and have a genuine chance of being engaged. This gives statutory force to the decision in Antonissen. In addition, Art 7 provides that those who have been workers will retain that status even if they become involuntarily unemployed. If they have worked for more than 12 months this status could continue indefinitely, but if they have been employed for less than 12 months it will last for a further six months.

Case law and secondary legislation has therefore given very substantially greater rights to work seekers than the original Treaty Article. It may be questioned whether this latitude is still justified in circumstances where job vacancies are routinely advertised on the Internet. Furthermore all EU citizens have the right to move to another member state for up to three months for whatever purpose they wish, and it can be argued that even in those cases where the search for employment cannot realistically be conducted on the Internet, this three month period should suffice to determine whether or not the individual is likely to secure employment. In other words, it is arguable that the current situation relates to an outdated concept of the employment market and create too many opportunities for the economically inactive to prolong their residence in a host state under the colour of being work seekers.

1(c)

Normally, a state is entitled to determine who it will admit temporarily or for settlement, and on what terms. A non-citizen, or alien, is essentially present in the country at the will and pleasure of the authorities. The EU regimes of free movement for workers and their families, and subsequently for EU citizens, particularly students and those of independent means and their families, override these principles. One particular area where individual states adopt a variety of policies is in relation to the right of their citizens to marry a non-citizen and bring the spouse into the country for settlement. An EU citizen who is entitled to long-term residence in a host state as a worker is entitled to be accompanied or joined by a spouse of whatever nationality and irrespective of the spouse's own immigration status: Metock (2008).

The question then arises as to what happens on return to the home state. Normally, that state can apply its own rules as to the eligibility of a spouse to secure residence. However, this might mean that the returning citizen is treated less favourably than in the host state. In order to protect the right of citizens right to choose where in the EU to live and work, it has been held that they are entitled to benefit from at least the level of protection for their family interests that they enjoy under EU law. They are therefore entitled to have their spouse admitted to live with them irrespective of any national rules of law to the contrary: Surinder Singh (1992). However, more recently in O & B v Netherlands (2014), the Court of Justice interpreted Art 21 TFEU to restrict the Surinder Singh route. It was limited to those who have created or strengthened a family life with the non-EU national in the host state while resident under Art 7 or Art 16 of Directive 2004/38. It even added that the circumstances required to benefit from the route cannot be artificially created. This development helps to strike a fair balance between national immigration policies and the need to remove barriers to free movement. The same approach enabled a same sex spouse to reside in the home state of an EU citizen where same sex marriage is not lawful (Coman (2018)).

Question 2

In formal terms, the Parliament is the senior institution of the EU. This reflects the fact that the Parliament directly represents the democratic principle. However, the European Council and the Commission have primary responsibility for formulation and development of policy and legislative initiatives. Nevertheless, while the European Council is responsible for setting the overall political direction and priorities of the EU, it does so in consultation with the Commission and the Parliament. The short and long-term policy strategies, including the six-year multiannual planning structures result from an iterative process. Indeed, it can be strongly argued that this iterative approach is the hallmark of the decision-making process of the EU overall.

While the Commission is responsible for undertaking the initial research required to convert a policy initiative into a fully-fledged policy, it will do so by consulting with Member States and also those economic sectors directly concerned. Where the implementation of policy requires further legislation, the Commission has the responsibility of drafting this, but again will do so after an extensive process of consultation which may involve the preparation of preliminary drafts for consultation and comment. The great majority of Regulations and Directives are enacted using the ordinary legislative procedure. This is governed by Art 289 TFEU. This envisages up to three separate legislative phases. If both the Parliament and Council accept the Commission's draft verbatim, or the Council accept any amendments proposed by the Parliament, the measure can be adopted at first reading. At the second reading stage, the Parliament can reject the measure, but there is also a further opportunity for the co-legislators to agree, either on the Council's initial common position, or a further amended draft proposed by the Parliament. If agreement has not been reached, the conciliation procedure follows. This explicitly requires the representatives of the Parliament and Council to meet with a view to preparing an agreed joint text which can then be submitted before approval by the full Parliament and Council. However, while the Commission is required to participate in the whole process by presenting its own observations on the amendments made, it participates to a greater extent in the informal meetings which take place to clear the way for the formal conciliation committee hearings. This is a good illustration of the iterative process in action.

There is no doubt that the discussions which take place do facilitate the creation of a consensus, and the involvement of the Member States and their parliaments together with relevant representatives of civil society assist with this. It is clearly potentially a very long-winded process, and there are examples of particular legislative measures that have taken decades to actually clear the process. One example is the legislation concerning chocolate, which took 20 years from gestation to completion, largely because Member States such as Belgium tried to insist on a specification which excluded many mass-market products.

The various institutions clearly have the potential to adopt different sets of priorities. One attempt to mitigate this was the requirement imposed on the European Council by Art 17 TEU to have regard to the results of the most recent European Parliamentary elections when nominating a President of the Commission for election by the Parliament. Exactly what this required was a matter of debate, with the Parliament insisting that the lead candidate of the group obtaining the largest number of seats in the parliament should automatically become the nominee. While this occurred in 2014, there were

reservations expressed by a number of members of the European Council about the process, particularly those who had reservations about the suitability of the nominee in question. In 2019 the process of negotiation in the European Council led to an alternative nomination being made, although she came from the same political grouping as the original prospective lead candidate. The position at European level resembles that at national level, where in the great majority of Member States there are a number of political parties, none of which would normally expect to secure an absolute majority, as a result of which coalitions and other forms of collaboration are seen as normal. Those who come from political traditions which favour single party government naturally criticise this as leading to delay, and an excessive pursuit of compromise, but those who favour this approach argue that securing the broadest possible consensus results in policies and legislation being adopted which carry a broad range of support.

It should also be borne in mind that much of the work of the EU is in areas which are technical, and not particularly politically controversial. The collaborative and iterative process is well-suited to dealing with these. However, while the result of the process is of interest and concern to those directly affected, it is unlikely to attract wide media coverage, as it is not seen as being of significant interest to the majority of the population.

Overall, it is clear that there is a well-established approach, which benefits from a significant measure of support from within the institutions, but is not always subjected to the level of external scrutiny that might be desirable. There have been periods during which the EU's decision-making process has been hamstrung by objections, and there are still areas, for example in relation to refugees and asylum seekers, where an absence of consensus has resulted in an inability to produce effective measures. It is, however, probable that this reflects simply the complexity of seeking to achieve an acceptable common policy for 28 Member States with very different ideological and cultural attitudes in areas such as the acceptance of migrants. This does not mean that the EU institutions are failing, merely that they have to deal with extremely difficult political questions which cannot be easily resolved.

Question 3

Art 263 establishes the action for annulment. The Court (or in cases involving applications by natural or legal persons the General Court) has jurisdiction to annul any act of the institutions. The draughtsman appears to have brought together within Art 263 at least two distinct jurisdictions. The first is what might be described as constitutional judicial review. This enables a Member state or institution to challenge the legality of acts on the basis that they are ultra vires or constitute an abuse of powers. The actions by France against the European Parliament in 1996 and 2012 over the attempts of the Parliament to reduce the number and length of plenary sessions in Strasbourg are a case in point. France was successful because as a matter of EU constitutional propriety, it was the European Council which had responsibility for determining the seat of the Parliament and where plenary sessions were to be held, so the attempts by the Parliament itself to vary this were inconsistent with the constitutional structure of the EU. The precise wording is somewhat repetitive, but clearly encompasses ultra vires in the sense of acting outside the competence which is relied upon, and also procedural irregularities. Misuse of power has been interpreted to cover acts undertaken without a proper assessment of the facts. The other jurisdiction is in effect an appellate jurisdiction in relation to administrative or quasi-judicial decisions

taken by the Commission, for example in relation to alleged competition infringements.

Much of the controversy over the utilisation of the Art 263 procedure has resulted from efforts by nonprivileged applicants to avail themselves of it in circumstances which do not appear to fall within the original intention. It is clear that such applicants are entitled to seek the annulment of acts which are addressed to them, as this is the specific function of the "appellate" jurisdiction explicitly incorporated in Art 263. The original wording also entitled them to challenge acts which were of direct and individual concern. Direct concern is a relatively straightforward concept. It has been interpreted as meaning that it is the act itself which has consequences for the applicant, thus excluding challenges to measures which give discretion to, e.g. a Member State: Differdange (1984).

In the early case of Plaumann (1963) the Court held that individual concern should be interpreted as meaning that the applicant must demonstrate 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. It was not sufficient to be a member of a class affected, if that class was an open one which could be joined or left on the initiative of the individual undertaking. In the particular case the measure was addressed to Germany and related to the tax treatment of imported clementines. It affected the applicant as an importer of clementines, but any undertaking could decide to join or leave that particular class at any stage so individual concern was not established. Establishing individual concern has been difficult. The easiest method was to demonstrate membership of a fixed and defined closed class, for example those who had applied for a licence or permit under the Common Agricultural Policy at a fixed time in the past: Toepfer (1965). In other specific situations those who could demonstrate that they were affected as a result of contractual obligations they had entered into prior to the enactment of the measure were able to establish individual concern: Piraiki-Patraiki (1985). Similarly those who could demonstrate that a measure impacted on them differentially because of intellectual property rights which they held could also qualify: Codorniù (1994), as could those directly involved with a ruling on competition matters, such as the complainant: Metro (1977).

There has always been an alternative route for those nonprivileged applicants who wish to challenge the legality of an act of the institutions. This entails making an application for a preliminary reference under Art 267 TFEU in proceedings before a national court with a view to invoking the plea of illegality pursuant to Art 277 TFEU. If action is already being taken against an undertaking for alleged breach of a measure, this can be used by way of defence. However, in some Member States there is no legal mechanism allowing a prospective challenge, as a result of which it is not possible to obtain legal certainty without taking the potentially dangerous step of defying the measure in question and waiting for enforcement action. This was argued in cases such as Jégo-Quéré (2004) but was rejected by the Court on the basis that if there was a legal deficit, this was the responsibility of the Member States in question. Nevertheless, the Member States themselves recognised that this approach was unnecessarily restrictive, and as a result the wording of Art 263 was amended by the Lisbon Treaty to allow for a challenge to a regulatory act which was of direct concern to the applicant. This clearly fitted the facts of Jégo-Quéré, which concerned a Regulation made under delegated powers by the Commission concerning fishing net mesh sizes which directly concerned the applicant as it was fishing for a different species in the area

covered by the Regulation and would be adversely affected. It was not individually concerned, because, although it was in fact the only undertaking fishing in this way, this was a matter of pure accident. It was also the case that it had been involved in making representations during the process leading up to the adoption of the Regulation, but that had already been held not to be capable of amounting to individual concern: Spijker Kwasten (1983).

Initially it was not clear exactly what was covered by the phrase "regulatory act". Inuit Tapariit Kanatami (2014) confirmed, to no surprise at all, that it did indeed cover Regulations made under delegated powers and not by legislative process. Microban (2011) also confirmed that it applied to decisions which were of general application, as opposed to those which resolved a specific issue between an undertaking and the Commission.

It can be argued with some force that following the amendment an appropriate balance has been struck, ensuring that nonprivileged applicants do have direct access to the General Court where appropriate, while maintaining the alternative route involving the plea of illegality for those cases where proceedings have already been commenced in the national court. It does not appear to have been the original intention of the drafters of the Article to allow a broad right of access to nonprivileged applicants in cases involving the legislation of the EU, but to restrict this to non-legislative acts, and this is the result which has now been achieved, albeit over the initial objections of the Court itself.

Question 4(a)

Dominance is a concept which requires interpretation. In United Brands (1978) the Court indicated that dominance constituted 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". Clearly, for an undertaking to be dominant, it must have a substantial presence in the relevant market. Dominance does not exist in a vacuum. The first task of the investigator is to establish the relevant market and establish what market share is held by the undertaking under investigation. Once this has been achieved, the position must be evaluated. In Hoffmann-La Roche (1979) it was held that a market share of 80% plus would be regarded as sufficient evidence of dominance. An absolute monopoly is not required. An undertaking with such a high market share can normally disregard the activities of competitors and the interests of customers. However, the position becomes more complicated where the undertaking in question enjoys a lower market share. In United Brands a market share of approximately 40-45% was considered to be consistent with dominance, but this was in a context where the remainder of the market was relatively fragmented with a number of smaller competitors none of which had a market share in excess of 15%. Furthermore, the United Brands company enjoyed other advantages such as vertical integration. It is, nevertheless, possible that a market share of 40% would not be consistent with dominance in an oligopolistic market with two other undertakings with market shares of approximately 30%. Other cases involving lower market share in a fragmented market include Michelin (1983). It may also be necessary to examine how stable the market share is by looking at factors relating to cross elasticity of supply. Where barriers to entry are high, it will be difficult for new entrants to secure significant market share, as a relatively low market share may nevertheless indicate dominance: Michelin.

4(b)

It will always be necessary to examine the overall structure of the market, as opposed to the percentage market share. This will include the extent to which the market is fragmented between a large number of smaller undertakings. In such circumstances a relatively small market share, albeit one which is above the absolute threshold of market power, approximately 30%, may well be consistent with dominance; United Brands; Michelin. However the Commission has indicated in its guidance paper on exclusionary abuse (2009) that dominance with a market share below 40% is unlikely. It will also be necessary to establish the extent to which there is the possibility for supply substitution. If this is readily feasible, it may indicate that there is no durable dominant position: Continental Can (1973); Michelin. One area where the Commission has been criticised is that it has been said to take a snapshot of the market rather than looking at the way in which the market is evolving. One difficulty with these factors is that there is an element of circularity in the argument.

Two other factors could contribute to determine if an undertaking has a dominant position. The first is vertical integration where the undertaking operates on levels up or down the supply chain. United Brands provides an example of vertical integration being used as a factor. United Brands owned plantations, specialised ships and refrigerated warehouses in key ports. Such integration meant that the undertaking enjoyed more independence from the market.

Another factor is barriers to entry. An undertaking has a higher degree of independence when operating in a market that is very difficult for a new competitor to enter. Such a barrier could be a result of the high level of investment needed to enter the market as in United Brands or where those operating in the market are leaders in innovation (Hoffman La Roche (1979)). Barriers to entry could also be in the form of a strategic advantage such as favourable access to an essential raw material. Perhaps a more obvious barrier to entry relates to financial and technical resources of the undertaking. Again, these were factors contributing to the finding of a dominant position in United Brands. Their financial resources allowed for heavy advertising which could affect the cross elasticity of demand. They perfected ripening techniques and eliminated certain plan diseases and again, these aspects contributed to their independence, and therefore dominance.

4(c)

If an undertaking is found to be dominant, it is obliged to refrain from a range of activities and tactics which would normally be available to it. The undertaking is regarded as having a form of duty of care towards its customers and the end users of its products, and also towards competitors.

Offering discounts to potential customers is a perfectly normal and generally legitimate business practice. There are clear advantages to the undertaking offering discounts for quantity or for regular orders. A quantity based discount encourages larger orders while discounts for regular deliveries enable the undertaking to plan its production more efficiently. These discounts are regarded as being unobjectionable. Other forms of discount distort the relationship between the undertaking and its customers and between those customers and other potential suppliers. One example is discounts linked to exclusivity. If the customer is tied to the particular undertaking, this forecloses

the market and prevents other undertakings from competing for the business. Similar considerations apply to cumulative discounts which, even without exclusivity, make it very much more lucrative for the customer to continue to place business with the undertaking in question because of the retrospective impact of accumulation. This can be seen as effectively destroying any incentive on the part of the customer to consider alternative suppliers. Both of these forms of discount were considered in Hoffmann-La Roche, and both were held to be abusive. Either would have been perfectly acceptable if deployed by a non-dominant undertaking. This illustrates the way in which dominant undertakings are held to different standards.

SECTION B

Question 1

As a preliminary observation, the market share of SSL exceeds the limits provided for in the Notice on Agreements of Minor Importance. As a result that notice will not operate to protect SSL.

Potentially we are dealing with a cartel which constitutes an infringement of Art 101 TFEU. There may be either an agreement between undertakings, or a concerted practice by those undertakings with anti-competitive intent or effect. Clearly SSL and the other four producers are undertakings and we need to consider whether they have entered into an agreement or concerted practice which is contrary to Art 101.

An agreement does not have to be in formal terms, let alone in writing. An informal gentleman's agreement will suffice: Quinine (1969). As the undertakings are clearly operating in a number of EU member states, and for this purpose it is immaterial whether or not SSL is established in the EU, as it is clearly trading with the EU, there is no doubt that their activities may affect trade between Member States. The anti-competitive elements of an agreement will include directly or indirectly fixing purchase or selling prices and limiting or controlling production and markets. The information we have suggests that the various undertakings, while taking into account their own production costs, do coordinate prices so as to avoid competition on price, which is evidenced by the effectively simultaneous and identical price increases, and also have an understanding that they will focus on their own client base rather than actively competing for new business. This has resulted from regular contacts by telephone or face-to-face. At the very least this would appear to amount to a concerted practice. It constitutes "a form of coordination between undertakings which, without necessarily having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition": Dyestuffs (1972). It may well be that matters have gone further to the extent that there is an actual agreement, but this is not necessary for there to be an infringement of Art 101. They would certainly appear to be consolidation of the established positions of these undertakings to the detriment of the freedom of customers to choose their suppliers: Suiker Unie (1975).

While there are criteria which would enable an agreement which is prima facie within the scope of Art 101 to be legitimised, the arrangement we are dealing with here appears to be a classic cartel and the price-fixing and market sharing elements cannot be justified by reference to any of the criteria in Art 101.3.

1(b)

The Commission has established what is generally known as a leniency programme. This is detailed in the 2006 notice on immunity from fines and reduction of fines in cartel cases. Essentially, the first participant in a cartel which submits information and evidence which will enable the Commission to investigate or find an infringement of Art 101 in relation to the alleged cartel will secure full immunity from the imposition of fines, provided that it is acting in good faith and ceases to participate in the cartel forthwith. The rationale for this procedure is that cartels are by their nature secretive and it is therefore difficult to obtain appropriate evidence. Granting immunity will secure this evidence and will result in the cartel being terminated and the other participants may be subjected to penalties.

It would therefore be in the interests of SSL to become the primary informant in relation to this cartel thus securing the benefits referred to. In principle, a subsequent participant which provides additional information which is of material significance can also benefit from a reduction in fines, but the maximum benefit goes to the initial informant. However, SSL could still be liable to other undertakings for financial harm caused following a private action.

Question 2

This question requires consideration of the circumstances in which reliance may be placed on EU law in proceedings before national courts. In cases such as Costa (1964) the principle of the supremacy of EU law over national law was established. As a result, in principle if there is EU law governing the area in question it should be given effect rather than the national law if there is a conflict.

Regulations are explicitly declared to be directly applicable and are accordingly effective EU law. Directives, however, are intended as directions to Member States to ensure that, by the end of the specified implementation period, they have made any necessary amendments to their legislation to achieve the result prescribed by the Directive, using the forms and methods appropriate in that State: Art 288 TFEU. In van Gend en Loos (1963) the Court, finding that the then EEC constituted a new legal order in the field of public international law which could confer rights and impose obligations on natural and legal persons rather than simply the high contracting parties, held that Treaty Articles could, provided they were appropriately clear precise and unconditional (CPU), could create direct effect. Subsequently, in van Duyn (1975), the Court further held that Directives which were CPU could also have direct effect, at all events in relation to proceedings involving the Member State itself. In Tullio Ratti (1979) it was made clear that a Directive only becomes legally effective once the prescribed implementation date has passed, as, in the meantime, the State has the responsibility for making the necessary amendments and requires this time for that purpose. Subsequently in cases such as Marshall (No 1) (1986) it was confirmed that Directives could only have vertical direct effect as against the state and could not have horizontal direct effect as they were not addressed to the natural or legal persons concerned.

Pursuant to Art 4.3 TEU Member States are under an obligation to secure compliance with their obligations under EU law. This has been held, initially in von Colson (1984), and subsequently with specific reference to

unimplemented Directives in Marleasing (1990), to impose on the State, and in particular on its judicial authorities, an obligation to interpret any relevant national law consistently with the provisions of the Directive so far as it is possible to do so. This does not extend to interpretation which is not consistent and would therefore be contra legem: Wagner-Miret (1993). It will however justify a robust approach to interpretation.

The Court in Francovich (1991) established the principle of Member State Liability (MSL) in relation to a complete failure to transpose a Directive, and this was extended in Factortame (No 3) (1996) to include a wider range of violations of EU law, including defective transposition of a Directive provided that the failure to do so is sufficiently serious. Minor technical errors in transposition would probably not be sufficiently serious, but a complete failure to do so will be: Dillenkofer (1996).

To advise Nick, the first question will be to establish what the transposition date of the Directive is. The most common implementation period is two years, and if that applies here, the transposition date would be January 2020. If so, the Directive is now capable of direct and indirect effect and could be the basis of a claim for MSL.

The Art 4.3 obligation on the Member States applies to all the organs and emanations of the state. In this case the "French authorities" who are proposing to take action on the basis of the French Law would clearly qualify, and so vertical direct effect is potentially available. It is therefore necessary to consider whether the provision of the Directive requiring the use of free range principles is CPU. Although the use of the word "principle" might suggest that these are more in the way of general guidelines than specific requirements, the detailed wording refers to a system of farming, and this appears to be clearly enough defined to satisfy the requirements of CPU. If this is found to be the case, the French court must resolve the dispute between Nick and the authorities on the basis of the terms of the Directive, ignoring the inconsistent provisions of the French Law as in Marshall (No 1). However, if the provisions are not found to be CPU, so that direct effect is not available, there is a clear and obvious conflict between the wording of the French Law and that of the Directive. The expression "must not keep poultry outdoors" is clear and peremptory. It would be extremely difficult to find an interpretation of the French Law that was compatible with the requirement of the Directive for the use of free range methods.

In that case, Nick could seek to bring an action for MSL based on the enactment of the French Law as being inconsistent with existing EU legal obligations, or alternatively on the basis that the Directive has not, in practice, been implemented. The enactment of the Law appears to be quite deliberate, and although it may be argued that it has been done in good faith on the basis of scientific evidence and the necessity to take precautions against bird flu, it is nevertheless quite clearly incompatible with the requirements of the Directive. In the circumstances, it is likely to be seen as so serious as to justify a finding of MSL. The Directive is clearly intended to benefit those in the position of Nick, and, if he has suffered detriment as a result, which could be demonstrated by loss of profits if his sales to supermarkets have been disrupted, the cost of defending the proceedings, and any penalties imposed on him, he should be entitled to recover these by way of damages for noncontractual MSL.

The problem with the neighbour's dog worrying the chickens requires consideration of the provisions of the Directive requiring adequate measures to prevent injury or harm by dogs. As any action would be against the neighbour personally, this would be an example of horizontal effect. As already explained, Directives cannot have horizontal direct effect, so it is unnecessary to consider whether these provisions are CPU. On the face of it they appear to be general instructions requiring the state to take measures which could take a variety of forms, and would not therefore be CPU. We have not been given any precise information as to the content of the existing French legislation concerning livestock worrying. We are told that it is "restricted to" cattle, sheep and horses. More information would be needed as to the precise wording and also as to the approach to statutory interpretation adopted by the French courts to determine whether this could be seen as an indicative list rather than an exhaustive one, in which case it would be relatively easy to interpret the legislation expansively so as to include chickens among the potential victims. This would therefore enable Nick to achieve a remedy by way of horizontal indirect effect through appropriate interpretation. If this is not permissible as a matter of interpretation, Nick could again consider an action in relation to MSL. We are not told whether France has implemented the Directive to any extent. If there has been a complete failure to implement, this will on the basis of the authorities discussed above be a sufficiently serious breach, and it is clear that the provision in the Directive was intended to protect the interests of poultry farmers and that there is a direct link between the failure and the harm suffered in the shape of injury to the chickens, if this can be proved.

Question 3

This question concerns various aspects of free movement of goods. This is one of the four key elements of the original Common Market. The relevant provisions of TFEU cover tariff barriers, which involved a financial levy either because goods have crossed the frontier into or out of the Member State concerned: Art 30 TFEU, or because there is some form of discriminatory internal taxation: Art 110 TFEU. These two provisions are mutually exclusive: Lütticke (1966). In addition, there are provisions governing nontariff barriers which are prohibitions or restrictions or measures having equivalent effect but not involving a payment: Arts 34 – 36 TFEU. Sometimes a measure can involve both tariff and nontariff elements, and if this is the case, these must be examined separately.

It is clear that the seizure of the two consignments does not involve any financial payment, and must therefore be considered under the rules relating to nontariff barriers. By contrast the invoice is a demand for payment, and must be considered under the rules relating to tariff barriers.

Art 34 prohibits quantitative restrictions imposed on goods by reason of their entry into a Member State. Such restrictions were defined in Geddo (1973) as covering any prohibition or restriction by reference to quantity value or otherwise of the total amount of a product which may be imported. The scope of the measures having equivalent effect (MEQR) has been subject to can suitable analysis and refinement. Initially in Dassonville (1975) they were described as comprising any trading rules capable of affecting, directly or indirectly, actually or potentially, the flow of interstate trade which would otherwise take place. Considerable detail was given in the, now spent, Directive 70/50. This concentrated on distinctly applicable measures, namely those which were applied only to the imported product and did not apply to

the equivalent domestic product. The definition also comprises indistinctly applicable MEQR. These are rules which apply to all products of a particular type whatever their origin. However, they may be seen as having a greater impact on the imported product, e.g. because they require modifications to the production or labelling process: Walter Rau (1982). A further distinction was introduced in Keck (1993). Previously all trading rules affecting the marketing of goods had been treated as prima facie within the scope of MEQR. Keck distinguished between product characteristics, which were rules relating to the product itself, such as recipe, packaging and labelling. These continued to fall within scope. On the other hand selling arrangements, namely rules which govern the way in which commerce was carried on, for example restrictions on shop opening hours, advertising restrictions and rules limiting the outlets in which particular goods could be sold, provided they operated in the same way in law and in fact on products of any origin would fall outside scope and would not need to be justified. However, even in this case, an undertaking could seek to adduce evidence that the selling arrangement was in fact having a differential impact, e.g. advertising restrictions bearing more heavily on importers who were seeking to enter a market as compared to local producers who already had a substantial market share and consumer recognition: De Agostini (1997). If this was established, the measure would fall to be treated as an indistinctly applicable MEQR, but it was still open to the state to justify it.

Art 36 TFEU creates an exhaustive and quite selective list of permitted derogations. States can impose restrictions and MEQR in order to protect the health and life of humans animals or plants, public morality, public policy or public security. There are others, but they are not relevant to the facts in this scenario. It is for the state to produce evidence to demonstrate that the restriction is justified on the relevant ground, and it must not be a means of arbitrary discrimination or a disguised restriction on trade.

In Cassis de Dijon (1979) the Court laid down two important principles relating to nontariff barriers. The first, or rule of recognition, was to the effect that if a product was manufactured in a Member State in accordance with the regulatory requirements of that state, there was a strong presumption that it could be marketed throughout the EEC, and would not need to comply with the equivalent rules of the state where it was being sold. The second was the so-called rule of reason which provided that where there was an indistinctly applicable MEQR, the state could justify it on the grounds that it constituted a proportionate means to achieve a mandatory requirement, which essentially means an important interest of the state. These were not exhaustively defined, but they have been held to include public health (which overlaps very substantially with Art 36), protection of fiscal integrity, consumer protection, the integrity of consumer transactions and environmental issues. The requirement of proportionality means that there is an onus on the state to demonstrate why the measure in question is the least intrusive means of achieving the desired object, as well as providing evidence to justify the imposition of any restriction.

In this case it could be argued that the declaration that the books fall into a prohibited category constitutes a quantitative restriction, since the Irish authorities are in effect saying that there is a total ban on such products. This is similar to the position in Henn & Darby (1979) where a British prohibition on the importation of indecent and pornographic material was so classified. Such a measure is clearly capable in principle of being justified on grounds of public morality. Without more detailed information as to the exact nature of

the allegedly unsuitable material, it is difficult to form a view as to whether the Irish authorities do have legitimate grounds for taking this view. It will be necessary to examine the relevant Irish law to ascertain whether it provides a proper basis of classification, and the measure could be regarded as arbitrary discrimination if there is evidence that equivalent works produced in Ireland are permitted to circulate: Conegate (1986). Although it could be argued that the books should benefit from the rule of recognition, as they are apparently marketed lawfully in Sweden, this is a somewhat unusual case, and there is no real suggestion that the restrictions are being imposed with the intention of protecting Irish producers or maintaining the fragmentation of the market, and the recognition that there is no single European standard of public morality, e.g. in the European Court of Human Rights case of Handyside (1976), is likely to mean that the rule would not be applied here.

Turning to the jelly sweets, there is little to suggest that the limitations on what, if any, vitamins can be added to sweets without them being required to be sold through pharmacies do not apply to all such products of whatever origin. While we are told that a consignment of jelly sweets manufactured in Ireland presented no difficulties, we are not informed whether or not the ingredients included vitamins. If, of course, the rules relating to domestically produced sweets and imported ones are in different terms, and this would constitute a distinctly applicable MEQR which could be justified only under Art 36. There is a potential justification in relation to public health, but it would be incumbent on the Irish authorities to demonstrate that the limitation of products containing the relevant vitamins to sale through pharmacies had a sufficiently sound scientific basis. If locally produced products are allowed to be sold in shops despite containing the same ingredients, it would be very difficult to present such an argument.

On the assumption, which seems likely, that the rules in question do apply to all products of this type, we appear to be dealing with an indistinctly applicable MEQR. It relates primarily to the permitted ingredients for the product. It could also be argued that requiring products containing specified vitamins to be sold only in pharmacies is a selling arrangement, but this appears to be a subsidiary consideration. In any event, it can be argued that, even if it does constitute a selling arrangement, it will bear more heavily on the imported product, since it imposes requirements which mean that such products are in fact less likely to be able to comply, since there is no evidence that other states restrict vitamins in the same way, so imported products are going to be disproportionately affected, by having to be reformulated specially for the Irish market. The net result is that it will be necessary for the Irish government to demonstrate that there are sound reasons for the restriction. This will require evidence that the vitamins in question are potentially dangerous unless they are subject to the degree of supervision which sale through a pharmacy would provide. In the absence of any suggestion that any other Member State has taken a similar view, the burden of proof on the Irish authorities will be a heavy one.

The testing of imported sweets may also constitute a distinctly applicable MEQR. The scenario suggests that no such requirements were imposed on locally produced sweets, although it should not be excluded that such testing did take place, but before the sweets were sold wholesale. If the measure is held to be distinctly applicable, it can only be justified under Art 36. This will involve the Irish authorities demonstrating that these tests are necessary in the interest of public health. If the measure is found to be indistinctly applicable, it could also benefit from the rule of reason, but there would need

to be evidence of a significant potential problem justifying this intrusion in the ordinary commercial process for it to be proportionate.

Finally, we turn to the tariff barrier imposed by the €500 fee for testing the sweets. As there is no evidence of similar testing being carried out on domestic products, this would appear to be a charge imposed by virtue of the fact that the product has crossed the frontier into Ireland. While there is no suggestion that it constitutes a customs duty as such, it seems to fit fairly clearly into the definition of a charge having equivalent effect or CHEE. These were defined in Commission v Italy (Statistical Levy) (1969 as being any charge levied on goods by virtue of the fact that they crossed a frontier, whatever their amount or designation. Such charges are automatically void unless they can be characterised as a payment for services actually rendered, or they are mandated by EU law. There is nothing to suggest that either of these applies in this case.

Question 4

This question requires us to consider the preliminary reference procedure established under Art 267 TFEU. This provides that any court or tribunal in a Member State may make a reference to the Court of Justice of the European Union to obtain a definitive ruling on the interpretation of EU law. Furthermore, a national court against which there is no domestic right of appeal is, pursuant to Art 267.3, under an obligation to make such a reference.

(a)

The first question to be determined is what constitutes a court or tribunal for these purposes. There has never been any suggestion that those courts which form part of the regular judicial system of a Member State do not fall within this definition. However, the various Member States have quite varied dispute resolution mechanisms, and the question of which entities outside the formal court structure qualify as tribunals has required attention. The Court has considered this issue on a number of occasions and has devised a series of criteria which must be satisfied if a body is to be recognised as a tribunal for these purposes: Dorsch Consult (1997). This is an autonomous concept of EU law. The principal criteria are that the body should be independent, meaning that its members are not identified with the executive and have sufficient security of tenure to guarantee independence from the executive, that it has compulsory jurisdiction and applies rules of law and determines disputes inter partes and is permanently constituted, even though it may only sit as and when required.

A tribunal may be under the control of a private sector organisation, if it has nevertheless been charged by the state with carrying out adjudications under the general law: Broekmeulen (1981).

Historically, the Court has been reluctant to accept panels of arbitrators as constituting a tribunal for these purposes, largely on the basis that they were appointed to deal with individual disputes on an ad hoc basis and were not permanently constituted. In this case there appears to be a permanently constituted arbitral tribunal, and in such circumstances it may be eligible to be recognised as a tribunal: Merck Canada (2014).

From the scenario we learn that it has compulsory jurisdiction, and its decisions are legally binding. There is nothing to suggest that it does not apply rules of law, and it clearly deals with disputes inter partes. There is therefore a strong case for arguing that it constituted a tribunal for the purposes of Art 267. As a result, it did have power to make a preliminary reference.

4(b)

It is clear that appeal lies from the High Court to the Court of Appeal, and from the Court of Appeal to the Supreme Court. As a result, we can say that neither of these courts is a court against which there is no appeal within the national legal system. Consequently, while each court has a discretion to make a reference, there is no obligation to do so contained within Art 267. The short answer to the question is therefore that is a matter for the court itself to determine. Nevertheless, there are criteria which have been established to indicate when it would be appropriate to make a reference. These criteria were actually promulgated in the context of whether or not the obligation imposed on a court of last resort to make a reference should be treated as requiring such a reference be made in all cases, or whether there were exceptions. However, the exceptions to mandatory references can be seen as giving a clear indication of when a court should exercise its discretion as to whether or not to make a reference. The leading case in this area is CILFIT (1982). In this case the Court reiterated that a reference should only be made if it was necessary to enable judgment to be given. The Court was not interested in dealing with artificial or hypothetical questions, as they confirmed in Meilicke (1992). Furthermore, national courts were entitled to consider the existing jurisprudence, so if there was an existing authority directly covering the point a reference might not be necessary. This reflects long-standing case law, in particular Da Costa (1963). This case immediately followed van Gend en Loos (1963) and raised exactly the same point of law. The Court indicated that although the court in that case was one which was under an obligation to make a reference, the fact that there was an existing decision on the point emptied that obligation of its content. However, it is necessary to proceed with some caution. The Court of Justice of the European Union is not a self binding court. It can, and on occasion does, depart from its earlier decisions. It would not be improper for a reference to be made with a view to establishing whether or not the Court will stand by an earlier decision, particularly if it was made some years previously and economic and social conditions have changed in the meantime. Furthermore, previous decisions may not be directly in point. They may involve the interpretation of very slightly different language, or the same language but in a different context.

Finally, a national court is not obliged to make a reference if it is satisfied that there is no real issue as to the interpretation of the EU legislation in question. However, the Court has been at pains to point out that national courts should be cautious in reaching this conclusion. In particular, EU law is produced in multiple language versions each of which is equally authentic. While national courts are not expected to be aware of any possible discrepancies arising from this, if there is evidence in respect of this it would be appropriate to submit the matter to the Court for a final opinion. It is particularly important that autonomous concept of EU law, such as "worker" and "court or tribunal" are interpreted by the Court. The whole purpose of Art 267 is to ensure that there is a single authoritative source of interpretation. It is accepted that judges in national courts will typically have many years experience of dealing with EU law, and can be trusted to some extent to interpret it where the interpretation is clear. It would however interfere with the achievement of the objectives of

the EU if national courts overstepped the mark, as this could lead to the development of divergent approaches to EU law in different member states. Also, if there are divergent views among national judges as to the interpretation of EU law, this will normally mean that the matter in question is not clear, and a reference will be appropriate.

A further consideration is that, in order to provide a ruling, the Court expects to be presented with a clear account of the legal and factual context of the case. In some cases the facts are not in issue, and as a result a court of first instance can make a reference, particularly where it is a matter of interpretation of a Regulation or Treaty Article, as these are freestanding elements of EU law: Skills Motor Coaches (2001). Where the issues in the case involve interpretation of national law and the possible incompatibility of that law with a Directive, it may be necessary to obtain an authoritative ruling on the national law, so that it is clear what aspects of EU law need to be considered: Henn & Darby (1979). Subject to this, a reference can be made whenever the court considers it appropriate: Irish Creamery Milk (1981).

In this case, the initial hearing before the tribunal involved a decision that Michael was a trainee, and therefore was not a worker as defined in the Regulation. The High Court decision was that he was a worker as so defined. The Court of Appeal then concluded that he was not a worker. As we are dealing with an EU Regulation, this constitutes the law applicable in Ireland, and so a decision as to the interpretation of the relevant provisions is clearly necessary in order for the Irish courts to give judgment. We are not told that there has been any previous litigation concerning this interpretation, and as the three instances which have considered the matter have reached different conclusions as to whether or not Michael falls within the definition of worker, this point is clearly not clear and obvious and free from doubt. While neither the High Court nor the Court of Appeal is under an obligation to make a reference, it is clear that the information in their possession is such that it would have been appropriate to make a reference in order to obtain an authoritative definition of the scope of worker for these purposes.

4(c)

If we consider the CILFIT criteria which clearly apply when the Supreme Court is considering its position, it is clear that a decision on the proper interpretation of worker is necessary to enable the Irish court to give judgment. As previously stated, there is no evidence of any previous decision which the Irish court could rely on to obviate a reference. The point is obviously not one that is clear, and as the concept of worker is an autonomous concept of EU law, there is particular reason to submit this issue for a preliminary reference. There are therefore very strong arguments for the Irish Supreme Court to make a reference.

Were it to fail to do so, it potentially exposes itself to an action for Member State Liability. This derives from the obligation imposed on Member States under Art 4.3 TEU to comply with their obligations under EU law. One such obligation is that imposed on the Supreme Court to make a reference where appropriate. In Köbler (2004) it was established that a failure to make a preliminary reference at the Supreme Court level, could in principle constitute a sufficiently serious breach of the obligations of the Member State to justify an action in Member State Liability (MSL). However, it would be necessary to establish that the national court had committed a manifest, in other words obvious and egregious, error. Given that there has been a clear divergence of

opinion as to the interpretation of the provision by the lower courts, this would appear to be established here if the Supreme Court declined to make a reference.