CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 January 2021 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

There were only four candidates who sat this paper.

The weaknesses of the failure scripts included lack of sufficiently detailed knowledge, failure to address the specific issues raised by the questions and, in particular, inability to apply the law to problem scenarios.

Three questions were each attempted by three candidates, permitting some observations, but the scope of these is very limited by the number of scripts.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

(a) Role as component of relevant market noted. Limited detail on procedure for identifying the products in the pool.
(b) Limited knowledge here. Important factors such as market structure, vertical integration, cross-elasticity of supply and durability over time needed to be addressed.
(c) Distinction not clearly made between normal discounting for quantity/regularity, which is acceptable for a dominant undertaking, and other discounting, e.g. all requirements and cumulative, which are anti-competitive abuse by foreclosing the market.

Question 2

Good answers focused on the definition of direct and individual concern respectively, and showed an understanding of the rationale for the revision to include regulatory acts with direct effect and the underpinning case law. More could have been said on those situations which do not come within the modification.

Question 3

Even weaker candidates demonstrated some understanding of the basic structure and purpose of Art 267. There was too much exposition, and not enough analysis and evaluation. Only the good answer to this question really got to grips with the specific requirements and dealt very well with the way in which the CJEU has used its powers under this Article to develop the law by re interpreting the questions posed and adopting an activist approach.

Question 4

Not attempted.

Answers to similar past questions have demonstrated the ability to describe the governance and organisation structures. They lacked critique and evaluation, and often failed to focus on the specific issues. Here the actual role of the Commission should have been the focus, and the extent to which it 'runs' the EU, as opposed to the role of the Parliament, Council and Member States' parliaments, explored.

Section B

Question 1

Not attempted.

Answers to similar past questions tend not to fully account for the much more relaxed approach to vertical agreements, such that VABER essentially applies Art 101.3 to exclusive and selective distribution agreements absent hardcore restrictions. Information on market share needs to be applied for NOAMI and VABER respectively. Here Raamat would fall outside VABER, but the

agreement with Knihe is within scope. Identify how clauses fit into structure – e.g. (ii) is non-compete, (iii) arguably price maintenance and (iv) prevents passive sales.

Question 2

Need to correctly characterise the measures.

(a) Clearly indistinctly applicable MEQR, so consider rules of recognition and reason. Proportionality of the measure.
(b) Clearly internal taxation (Art 110). Products are similar, but there is indirect differential impact. This can be justified if addressing a legitimate aim using objective criteria.

This was only achieved to a limited extent due to inadequate analysis.

Question 3

Answers to this were very confused, and irrelevantly discussed Brexit, did not apply Art 27 of the Directive and were very weak on the legislation and caselaw relating to mutual recognition and equal treatment.

Question 4

As is normal, candidates can usually give a basic account of direct effect, in particular as it applies to Directives. Coverage of indirect effect and member state liability is usually less strong. Good answers certainly explained the law in all three areas effectively and made reasonable attempts at application. The weaker answers omitted member state liability altogether, were weak on indirect effect and lacked effective application.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 6 - EUROPEAN UNION LAW

SECTION A

Question 1(a)

Art 102 TFEU prohibits the abuse of a dominant position as one of the two key elements of EU competition policy. Dominance does not exist in a vacuum, but in a concrete economic context. One key indicator is market share. Only an undertaking with a substantial market share is capable of being dominant. However, it is necessary to establish what the parameters of this market are. It is always necessary to establish which categories of goods constitute the relevant product market.

Based on the case law, the Commission Notice on market definition (1997) indicates that the relevant market consists of the relevant product market and the relevant geographical market. Beyond the notice, in rare cases temporal/seasonal issues may be taken into account.

The relevant product market is the main component of the overall relevant market and consists of those categories of product which are regarded as

being in competition with each other. The principal tool for determining this is cross elasticity of demand. Products will be regarded as falling within the same product market if the demand for one of them increases in response to an increase in price of another. The Commission, in the 1997 Notice, have adopted the Small but Significant Non-transitory Increase in Price (SSNIP) test for this. This posits an increase of 5 to 10% in the price of the product in question, either by looking at past market conditions or by modelling customer reaction. In United Brands (1978) it was found that bananas constitute a distinct market. The demand for bananas did not fluctuate as the prices of other fruits varied on a seasonal basis.

The targeted company will always seek to argue for a wide product market, as this is likely to reduce its market share. In the case of United Brands, while they did hold a share of somewhat over 40% of the relevant geographic banana market, their overall participation in the fruit market was much lower.

Overall, the relevant product market makes a critical contribution to the establishment of the relevant market overall, thus allowing the market share of the target company to be established, and this in turn is one of the key indicators of dominance.

1(b)

Dominance is concerned with an ability to act independently from the market (United Brands) and such independence can be determined by a range of key factors such as market share, entry barriers, financial and technical resources and vertical integration.

A market share of 80% or more will, in the absence of exceptional circumstances, in itself demonstrate dominance: Hoffman-La Roche (1979). By contrast, a market share of less than 40% is not consistent with dominance. When considering undertakings with a market share between 40% and 80%, the other factors need to be considered.

Entry barriers relate to the difficulty and costs of entering the market. Such barriers mean that those already operating on the market do not have pressure from potential competitors and that freedom allows for more independence (Hoffman-La Roche). Entry barriers could take the form of significant investment through to an absolute advantage where the undertaking has control of an essential raw material or even a strategic advantage because of customer loyalty and branding.

Financial resources can result in more independence. For example, in United Brands, it was recognised that the ability to heavily advertise could even reduce the cross elasticity of demand. The undertaking's technical resources enabled them to eliminate certain plant diseases and perfect ripening techniques resulting in further independence from the market.

Finally, vertical integration addresses the extent to which an undertaking has control over the supply chain. The more vertically integrated an undertaking is, the more independence it will have from the market. United Brands owned plantations, refrigeration ships and warehouses in key ports and this was all significant to the assessment of dominance.

While there are factors to assess dominance beyond market share, their relative importance will vary allowing for more disputes over dominance.

1(c)

Price discounting is a normal and legitimate business tactic. Discounts will be offered, both by manufacturers and at other levels in the chain of distribution down to the retailer for a variety of reasons, including introducing a new product to the market and as part of a publicity campaign. At the manufacturing level, discounts may also be offered for quantity and in relation to regularity of orders. These contribute to the ability to plan and organise production.

However, certain forms of discounting are more problematic. Deep discounting, below the variable costs of production, constitutes predatory pricing. While this clearly, in the short term, benefits the ultimate consumer, it is usually undertaken in order to drive out a competitor as in Akzo Chemie (1991), so where it is undertaken on behalf of a dominant undertaking it will be regarded as abusive.

Discounts which tie the customer to the supplier are also likely to be considered to be abusive, in particular discounts granted in return for the customer obtaining all its requirements from the supplier, and cumulative discounts which have the effect of tying the customer to the supplier, since towards the end of the reference period the impact of the cumulative discounts makes it economically impossible for the customer to place orders elsewhere. Both of these were considered in the Hoffman-La Roche case.

These restrictions on the use of discounts, which are in principle legitimate commercial tactics, illustrate the fact that a dominant undertaking is considered to have a form of duty of care to its competitors. Discounting is of course abusive only in the sense of being anti-competitive, since, at least in the short term, end-users should benefit from price reductions. The precise extent to which the Commission is entitled to insist on this duty of care is been controversial, and it has been suggested that a focus on anti-competitive abuse may give undue protection to less efficient competitors. In response, the Commission has adopted the 'as efficient competitor' test (Guidance on exclusionary abuse 2009) but it has not been addressed consistently by the Court.

Question 2

There are two principal mechanisms by which a nonprivileged applicant, i.e. a natural or legal person, can challenge the validity of an act of the institutions. The first is an action for annulment before the General Court under Art 263 TFEU. The second is to invoke the plea of illegality under Art 277 TFEU in proceedings before a national court and invite that court to make a reference to the Court under Art 267. A natural or legal person can of course also seek to persuade a Member State to pursue a claim as a privileged applicant under Art 263.

Art 263, in its current form, permits a nonprivileged applicant to bring an action before the general court in three distinct situations. The first is a challenge to an act addressed to the applicant. Although not so described, this is essentially an appeal against a decision, typically of the Commission, on regulatory matters such as infringements of competition law. This aspect has been uncontroversial in relation to the availability of an effective remedy.

The second situation permits a nonprivileged applicant to institute proceedings in relation to an act which is of direct and individual concern to it. The requirement for direct concern has also been relatively uncontroversial. It has been interpreted as meaning that it is the act complained of which in itself produces the effect complained of. In other words, the act must mandate this. If any discretion exists, e.g. if the act is addressed to a Member State and gives it a discretion as to whether and how to act, it is not the EU act which creates the situation but the exercise of discretion: Differdange (1984).

However, the requirement for individual concern has been problematic. In Plaumann (1963), which is a very early case, the Court adopted a narrow interpretation of individual concern. The applicant was an importer of clementines. The Commission issued a decision addressed to the German government relating to the tax treatment of clementines imported from third countries. The decision did not contain any discretionary element, so the applicant was directly concerned. The Court stated that individual concern would only be satisfied where the applicant was affected "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed". This was not satisfied where, as here, the applicant was engaged in a commercial activity which was open to all.

Over time, a number of situations were identified where individual concern could be established. This applies to the complainant in relation to a competition investigation where the Commission ultimately concludes that there is no infringement: Metro (1977). It also applies where the measure affects only the members of a closed class identifiable at the time it was made, such as applicants for a permit or quota to be allocated on a specific day: Toepfer (1965). Here, the measure does not concern all those involved in a particular commercial activity, but only a clearly defined subset. Other situations have included those whose existing contractual arrangements have been adversely affected by a measure introduced at very short notice: Piraiki-Patraiki (1985), or whose specific intellectual property rights are affected by measure of general application: Codorniú (1994).

While many of the challenges were to decisions addressed to third parties, nonprivileged applicants also sought to challenge regulations, in particular regulations issued by the Commission in relation to the detailed management of the Common Agricultural Policy as it operated in the second half of the twentieth century. They enjoyed relatively little success, despite arguing that the plea of illegality alternative did not provide an effective remedy, as many national legal systems did not provide a mechanism whereby declaratory relief could be sought. It was argued that the applicant had no alternative but to infringe the regulation and await enforcement action before mounting the plea of illegality as a defence in those proceedings. Arguments that individual concern should be more broadly interpreted found some favour with Advocate General Jacobs and the then Court of First Instance but were firmly rejected by the Court in Jégo-Quéré (2004), with the Plaumann criteria firmly reaffirmed. Any deficiencies in the system were attributed to the failure of Member States to provide effective remedies at the national level.

The third situation, permitting a challenge to a regulatory act of direct concern not entailing implementing measures, was introduced in the Lisbon Treaty as a direct response to the issues outlined above. The concept of regulatory act is not defined, but has been interpreted as including regulations made by the

Commission under devolved powers and not utilising a legislative procedure: Inuit Tapariit Kanatami (2014), and also framework decisions intended to provide a general regulatory structure in a particular area: Microban (2011).

The alternative procedure involving the plea of illegality can operate effectively in those Member States which permit something equivalent to the English action for a declaration, which allows the court to address the legal effect of a measure before action is taken on the basis of it. It still has the limitations which were identified in Jégo-Quéré in those cases which do not fall within the ambit of regulatory acts, as individual concern will still be required.

In Telefonica (2013), the Court followed the Opinion of Advocate General Kokott who observed that the reform resolved the problems raised by Jégo-Quéré because if the regulatory act does require implementing measures it can be challenged at a national level.

Much of the history of litigation involving the standing of nonprivileged applicants has centred on attempts to use Art 263 in preference to the plea of illegality in national proceedings. In some cases, applicants were fairly clearly ignoring the need for there to be a specific impact on them, which is often difficult to identify in the case of legislation of general application, such as true regulations. The Lisbon Treaty amendment has resolved a number of the most pressing issues but has not addressed all deficiencies of the plea of illegality procedure. In particular, one remaining difficulty is that Member States will still not necessarily have an adequate internal mechanism to challenge the implementing measures of a regulatory act.

Question 3

Art 267 TFEU provides a mechanism whereby any court or tribunal in a Member State may make a reference to the Court of Justice for a ruling on the interpretation of any EU legal instrument and the validity of an act of the institutions. It also provides that such a reference is mandatory in the case of a court against which there is no further appeal in the national legal system. This has been interpreted as meaning a court against which no appeal is possible, so where an appeal may be made with leave from a particular court, the mandatory requirement does not apply: Lyckeskog (2002).

The principal reason for establishing this mechanism is to ensure that there is a single judicial body with the ultimate responsibility for interpreting EU legal instruments. Only a court established at EU level can make rulings which will be binding throughout the EU. If EU law were to be interpreted by national courts, there would inevitably be a process of fragmentation as different interpretations became applicable in the different member states.

The entitlement to submit a reference is that of the court or tribunal, and not of the parties, although any application by a party and the wishes of the parties generally will be an important factor in deciding whether or not to make a reference. The concept of a court is easily understood, but the addition of the phrase "or tribunal" is intended, essentially, to ensure that judicial bodies which form part of the legal system of each Member State are included, whatever their precise title. It must however be a permanently established body, independent of the executive (e.g. Syfait (2005)), applying rules of law, with compulsory jurisdiction and dealing with disputes inter partes (e.g. Standesamt Stadt Niebüll (2006)). These criteria have been stated on

numerous occasions, e.g. Dorsch Consult (1997)). A tribunal may be a subject of private law, provided it has been entrusted with the exercise of judicial functions of a public nature: Broekmeulen (1981). Commercial arbitration panels are excluded from the definition because they are not permanently constituted and are seen as purely private with a jurisdiction which is essentially voluntary: Nordsee (1982). However, in Merck Canada (2014) the Court held that an arbitral body which had compulsory jurisdiction pursuant to legislation of the Member State concerned could be regarded as a court or tribunal, while reiterating the established position that an ordinary commercial arbitral panel could not.

Since a court or tribunal from which there is an appeal under national law is under no obligation to make a preliminary reference, the factors which will influence it in exercising its discretion whether to do so will include whether the facts of the case are sufficiently established to provide the Court with adequate context for the reference, and whether any issues of national law remain to be determined. For example, where the issue in the case centres on the interpretation of national legislation in the context of a Directive, while the Court can give an authoritative interpretation of the Directive, this may prove to be unnecessary if the national legislation is authoritatively interpreted in a sense which is either clearly consistent with the Directive or renders the potential issue over the interpretation of the Directive moot. The Court has explained in CILFIT (1982) the circumstances in which a reference by a court of last instance will not in practice be mandatory despite the apparently peremptory words of Art 267.3. These also provide useful guidance for other courts when considering the exercise of their discretion.

The first factor is that a reference should only be made if the national court requires an answer to the questions posed in order to give judgment in the case before them. References have been rejected because the case has been confected artificially: Foglia v Novello (1981) or because the questions posed are of academic rather than practical concern: Meilicke (1992).

The second factor is that there is an existing decision of the Court which resolves the point. Here it must be borne in mind that the Court is not self-binding and can depart from previous rulings if these are considered to be inappropriate, e.g. Keck (1993). However, the court adheres to principles of jurisprudence constante, and will normally follow its earlier decisions. Indeed, in recent years, it has taken to citing those earlier decisions as the legal basis for legal propositions, rather than following its earlier practice of going back to the treaty articles or legislation. The concept that the availability of an earlier decision may empty the obligation to refer of its content goes back to Da Costa (1963), decided immediately after van Gend en Loos (1963), and which raised exactly the same point. Nevertheless, it is recognised that the context of the present case may be different, and interpretations given in one context may not be applicable to another. Courts are therefore permitted to make references, even where there is an earlier decision in point, although the Court Registry will, as a matter of routine, draw such cases to the attention of the referring court in case these had not previously come to their attention. This can itself prove problematic, as in Köbler (2004) where the Austrian courts wrongly concluded that a case so drawn to their attention did dispose of the matter, resulting in a claim under Member State Liability arising from the failure of the Supreme Court to refer the matter back to the Court. The claim only failed because the error of the Austrian court was seen as insufficiently egregious, having regard to the complex and technical nature of the subject matter of the dispute.

The final circumstance relates to the concept of *acte clair.* By the 1980s, a generation of lawyers and judges had emerged within the Member States who had grown up with EU law. At the outset, it was essential to entrust all interpretation of EU instruments to the Court as national judges and lawyers had no expertise or training in EU law. CILFIT recognised that there were now certain straightforward points of interpretation which did not justify a reference as there could be no reasonable doubt as to the outcome. However, the Court issued a number of caveats. It was particularly important that autonomous concepts of EU law, such as "worker" and "court or tribunal" should be exclusively interpreted by the Court. While national courts could not be expected to be aware of all possible discrepancies between the different language versions of the instrument in question, all of which are equally authentic, if the national court was aware of any such discrepancy it would be inappropriate to proceed to deal with the matter. Where the issue was of any complexity, the Court had superior procedures for ensuring that the question of interpretation was fully considered. Details of references are transmitted automatically to all Member States and to the Commission and these can, and frequently do, make representations. This level of scrutiny is not available in national courts.

In general, national courts have recognised the importance of making references in appropriate cases, and the procedure has therefore largely fulfilled its function of maintaining uniform interpretation and application of EU law.

Much of the substantive jurisprudence of the Court arises from preliminary references. This applies to the concept of direct effect through such cases as van Gend, van Duyn (1975) and Marshall (No 1) (1986) and the supremacy of EU law: Costa v ENEL (1964). Indeed, the Court has often taken advantage of a reference to address issues other than those identified by the referring court. This applies to the doctrine of indirect effect, established in von Colson (1984) and developed in Marleasing (1990), and to the concept of Member State Liability as established in Francovich (1991).

Overall, this jurisdiction can be seen to have made a major contribution to the coherence of EU law. While national judges may have occasionally been annoyed or frustrated by what they considered to be inappropriate answers to the questions posed (e.g. Arsenal v Reed (2002)) the rulings of the Court have been applied. The decision of the German Constitutional Court in May 2020 not to apply a Court ruling on the Public Sector Procurement Program of the European Central Bank is a significant exception to this. The German Constitutional Court has consistently taken the view that it is ultimately answerable to the German Basic Law and that, in the very rare situations where EU institutions do not respect the limitations of their legal powers, a national court can rule on this. While this case does indicate that the consensus around Art 267 is not quite as monolithic as it is often thought to be, it should be noted that this case essentially concerned validity rather than interpretation, and focused on a very specific issue in relation to the competence of the ECB in matters of financial policy.

Question 4

In order to address this question, it is necessary to examine exactly what the mechanisms for governance of the EU are. It will be helpful to do this, at least initially, by reviewing the evolution of the EU. The Coal and Steel Community established by the Treaty of Paris was, in effect a transnational ministry of

basic resources. The governance of the ECSC adopted a "ministry model" with the Council of Ministers providing a political leadership and strategic direction. The revolving chair reflected the need for each Member State to be treated equally. The Treaty represented the primary legislation establishing the "ministry" and defining its competences. The High Authority (later the Commission) represented the civil service, responsible for administration of the rules set by the Council, research into new initiatives, and also for drafting the Regulations and Directives which constituted the secondary legislation. This was then formally approved and enacted by the Council. It was necessary to establish a specialised court, again comprising members from all Member States, as the ECSC was sui generis, and decisions relating to its legal functioning, and the interpretation of its legal instruments, required to be made by a court whose decisions would be followed in all the Member States to ensure consistency. Initially delegations of parliamentarians from the Member States fulfilled a function similar to that held by select committees in the UK system. They were entitled to receive information from the Council and Commission and to investigate issues of concern. Their role in relation to the secondary legislation was initially purely consultative. In order to respect the general assumption within the Member States that issues relating to taxation and public finances were, as a matter of democratic accountability, the particular concern of the legislature, the Parliamentary Assembly did, from the outset, have some responsibility for the approval and supervision of the ECSC budget, in conjunction with the Council and Commission.

Initial experience with the ECSC was so positive that, when the EEC was established some years later, this model of governance was replicated. Initially the three communities, ECSC, EEC and EURATOM, had separate institutions, but these were merged by the Merger Treaty of 1965. There had been, from the outset, an ambition to establish a directly elected Parliament. This came to pass in 1979, and since then the members of the Parliament have been directly elected and therefore represent the citizens of the Member States and constitute the directly democratic element of EU governance. The Council continues to represent the interests of the governments of the Member States. Since the Lisbon Treaty functions have been divided between the European Council, which is responsible for the strategic direction of the EU and broad policy initiatives, together with the long-term multiannual financial budgetary framework and external affairs, and the Council so called, which retains the legislative function and responsibility for policy at a more specific sectoral level.

The role of the Parliament has expanded very considerably. Progressively its role as co-legislator has expanded such that today the ordinary legislative procedure envisages the Parliament and Council as fully equal co-legislators. The Parliament elects the President of the Commission on the basis of a nomination by the European Council. This nomination must take account of the results of the most recent European Parliamentary elections. Prior to the 2014 election, the leading political groups in the Parliament asserted that this should be interpreted such that each group would nominate a lead candidate and that candidate would become the nominee for President of the Commission if the political grouping in question secured the largest number of seats. This resulted in the emergence of M. Juncker, and, despite reservations on the part of some Member States he was duly nominated and elected. In 2019, for a variety of reasons, none of the lead candidates were acceptable to the Member States, but the eventual nominee, Ursula von der Leyen, was from the political party with the largest number of MEPs. The Parliament must also approve the other nominees for Commissioner, and has

found some nominations unacceptable, with the result that the nominee has been withdrawn, or proposed for an alternative portfolio. It may also remove the entire Commission with a vote of no-confidence. The Parliament continues to exercise considerable influence over the budget, both on the multiannual and annual level.

As the scope of the EU has expanded, the work of the Commission has become more complex and extensive. It no longer engages in detailed management of any sector of the economy, since the current version of the Common Agricultural Policy does not involve specific intervention into the market for different commodities, but a financing model for agricultural producers which is largely devolved to national authorities in the member states. The same has become true in relation to competition, where the Commission concerns itself only with mergers and anti-competitive practices involving large transnational corporations which can be seen as having a strategic impact on the EU as a whole, while national competition authorities handle smaller scale potential infractions.

The Commission is also responsible for ensuring compliance by member states with their obligations, in particular by monitoring and investigating complaints under the informal and formal procedures envisaged by Art 258 TFEU. It also conducts the necessary negotiations in relation to agreements under the common external trade policy and related issues, pursuant to mandates approved by the European Council, as has been the case in respect of the Brexit negotiations.

The commission also has the sole responsibility for drafting secondary legislation. While the absence of the possibility for such legislation to be introduced by other means, equivalent to a UK private members bill, is asserted as a serious democratic deficit, the reality is somewhat different. First, the forward legislative programme is agreed between the European Council and the Commission with participation by the Parliament. This means that the programme reflects the priorities of the Member States collectively, influenced by the representatives of the electorate at EU level. Furthermore, the Parliament can, pursuant to Art 225 TFEU, request the Commission to produce a draft legislative act. The Commission is not obliged to do so but must explain its position if it declines to do so. Second, while the Commission proposes, it is the Council and Parliament which actually legislate. The Commission continues to fulfil the function of a national civil service by drafting what is essentially detailed and technical secondary legislation. The ordinary legislative procedure (Art 294 TFEU) requires the Parliament to consider the draft produced by the Commission. The initial Commission text as approved by Parliament, with any amendments, is then considered by the Council. If the two institutions agree on the text at this stage the measure is passed at first reading. Otherwise the measure is returned to the Parliament with the amendments made by the Council, together with the reasons behind the common position adopted by the Council. At this stage the Parliament can reject the measure overall, accept the text proposed by the Council or propose further amendments. If the amended text is not then approved by the Council, the conciliation stage is embarked on which involves face-to-face meetings between the Council and representatives of the Parliament. If an agreed text emerges from this process it will be adopted, otherwise the measure will lapse. It should be noted that throughout this process there is an intense process of discussion and explanation. The Commission remains involved, making its observations on the amendments at the various stages, and also participates in the informal trialogue part of the conciliation process, which is often seen

as more significant than the formal plenary conciliation hearings. Third, national parliaments now have an increasingly significant role to play. They are expected to scrutinise draft legislation, particularly with regard to subsidiarity and proportionality, and if a sufficient number of member state parliaments have objections, these must be addressed by the EU institutions.

It can thus be seen that the overall strategic direction of the EU is still very much in the hands of the Member States, representing the fact that the EU is ultimately an agreement between states. All treaty amendments are agreed at an Intergovernmental Conference. The legislative process is largely in the hands of the Member States through the Council and the citizens of the EU through the Parliament. While it is true that the Commission, with the exception of the President, are not elected, the vast majority of their work is that of the civil service implementing policy and drafting detailed secondary legislation. While the Commission does have a policy function and is responsible for developing the detail of policy, it is within a framework agreed by the European Council. It is no doubt true that the institutions and operation of the EU are often seen as remote, and the electorate has little awareness of, or interest in what happens in the Parliament. This is an information deficit rather than a democratic one, and that is perhaps a fairer way of identifying the deficiencies in governance. A further deficiency is that an elite group of European functionaries has emerged. These can be found in the Parliament, in the upper ranks of the Commission and in the administrations of the Member States as they interact with the EU institutions. From their perspective, the advantages of further development and expansion of the EU along the lines of the past 50 years is self-evidently a good thing, and they have perhaps become somewhat detached from, and indifferent to, public opinion at the grassroots in the member states. This is again, rather a failure in terms of the calibre and vision of those involved, than a failure of the governance structures involved.

SECTION B

Question 1

Art 101 is one of the two principal substantive articles dealing with the competition policy of the EU. It prohibits agreements between undertakings, and concerted practices, with the object or effect of preventing distorting or restricting competition. It is concerned with anti-competitive effects in the internal market as a whole, rather than situations only affecting competition within a Member State. This is subject to the provisions of Art 101.3 which permits such agreements to the extent that their beneficial effects, in terms of improving distribution, technical progress or otherwise, outweigh the anti-competitive impact.

An undertaking is an entity, whatever its precise legal form, engaged in commercial activity: Höfner & Elser (1991). However, although the companies within a group are normally regarded as separate legal entities, they are regarded as a single economic unit if the subsidiaries are in practice completely subject to the direction of the holding company and as a result Art 101 does not apply to their internal arrangements: Viho (1995). On the face of it, this would apply to the arrangements between Gannet and the German subsidiary.

The initial approach of the Commission and Court was that Art 101 applied equally to agreements at the horizontal level, such as traditional cartels, and

to vertical agreements such as exclusive and selective distribution arrangements. It was feared that these would maintain the compartmentalisation of the market along national lines which the introduction of the common market was intended to dismantle, as discussed in Consten & Grundig (1966). However, it was eventually recognised that exclusive and selective distribution agreements as such represented an ordinary and rational means of distribution of goods. While these might result in a reduction in intra-brand competition as an exclusive distributor would be likely to offer similar terms to all retail outlets, and selective distribution impacted on the number of retail outlets, this could be mitigated to a substantial extent by interbrand competition which would mean that the availability of alternative similar products would limit the scope for excessive prices and other unacceptable practices. Eventually, the current Vertical Agreements Block Exemption Regulation (VABER) (330/2010) provides in Part 2 that, pursuant to Art 101.3, and subject to the provisions of VABER, Art 101.1 "shall not apply to vertical agreements".

VABER will apply where the market share in the contract goods does not exceed 30%, in the case of the supplier, of the relevant market where it sells the contract goods, and in the case of the buyer the relevant market on which it purchases the goods. So, if the supplier is operating on a Europewide basis, its market will be the EU as a whole, and if the buyer is operating within a particular Member State, its market will be that State. It is effectively unnecessary to consider the impact of the Notice on Agreements of Minor Importance (2014) as this applies to undertakings with much lower market share. Where the VABER market shares are exceeded, as in the case of Raamat, it does not follow that the agreement will fall foul of Art 101, but an individual assessment will be required to see whether it benefits from Art 101.3, having regard to the greater impact of arrangements affecting such a significant part of the market for the goods.

VABER contains a number of exclusions and qualifications. As we are dealing here with agreements between a manufacturer and distributors, the most relevant are the hard-core restrictions listed in Art 4. Any restriction of the buyer's ability to determine its sale price (other than a maximum price) is prohibited, although the supplier can issue a suggested list of prices as long as it is clear that this is not a disguised way of establishing a fixed or minimum price. A provision which has the effect of restricting the territory into which a buyer may sell the contract goods or services is prohibited with the exception of a restriction of active sales into a territory reserved to the supplier or to another buyer. A prohibition of passive sales is a hard-core restriction. This prohibition on passive sales is a direct consequence of Consten & Grundig. In Art 5 a non-compete obligation which is indefinite or exceeds a term of five years is prohibited.

In relation to Knihe, it would appear that the market share criteria for the application of VABER are met. It should be noted that pursuant to Art 7, VABER may continue to apply for up to 2 years if Gannet's market share moves above 30%. Clause (i) is not objectionable. It essentially defines the agreement as one which creates an exclusive distributorship. Clause (ii) constitutes a non-compete obligation. This is not objectionable in principle, but pursuant to Art 5 must be limited to a period not exceeding five years. Clause (iii) is potentially a hard-core restriction on the ability of the buyer to determine its sale price. The current language is somewhat ambiguous. It refers to a "suggested retail price structure and price increases", and there is no prohibition on recommendations, but it further provides that the buyer

"shall comply" which indicates an obligation which would amount to a hard-core restriction. The clause should be redrafted to make it clear that any guidance on prices is guidance and that there is no pressure or incentive to comply, thus creating a hard-core restriction. Clause (iv) contains two distinct elements. The first, prohibiting active sales outside the defined area, falls within the derogation contained in Art 4 (b) (i), and is acceptable. The second, requiring enquiries to be passed on, appears to amount to an unacceptable attempt to restrict passive sales outside the assigned area and would constitute a hard-core restriction.

It is therefore clear that, as currently proposed, elements of these provisions would fall foul of the requirements of VABER. They should therefore be redrafted in accordance with the recommendations above.

VABER will not apply to the agreement with Raamat. However, if similar redrafting were to take place, the agreement would be an entirely standard exclusive distribution agreement, and the rationale for the block exemption on the grounds that such agreements overall have more beneficial than objectionable elements and thus benefit from Art 101.3 would appear to apply with equal force, although the agreement would in principle be subject to specific evaluation by the national competition authorities in Estonia, Latvia and Lithuania acting in collaboration.

Question 2(a)

This appears to be a nontariff barrier to trade which potentially falls within the scope of Art 34 TFEU. This prohibits quantitative restrictions on imports and measures having equivalent effect (MEQR). Quantitative restrictions were explained in Geddo (1973) as being any total or partial restraint on the total amount of goods being imported, however the restraint is calculated. There is no evidence that Portugal is seeking to restrict the importation of wine as such, so there is no question of a quantitative restriction.

MEQR were defined in Dassonville (1974) as 'any trading rules which were capable of hindering, directly or indirectly, actually or potentially intra-community trade'. Subsequently a number of distinctions have been drawn. One important distinction is between MEQR which are distinctly applicable, i.e. apply only to the imported product, and those which are indistinctly applicable as applying to products irrespective of origin. The former will always require specific justification under Art 36. In many cases rules which are of general application will not create any hindrance. In effect, indistinctly applicable MEQR are those rules which do have such an effect, as in Walter Rau (1983) where Belgian rules requiring margarine to be packed in square section containers had a differential impact on importers, who would normally use the oblong section containers which were the norm in other countries, as compared to Belgian manufacturers who were free to export their square section containers to other Member States. The importers would have to set up a separate production line with different equipment to enter the Belgian market. A further distinction was drawn in Keck (1993) between product characteristics, i.e. rules relating to the composition, labelling, packaging and other characteristics of the product and selling arrangements which were general rules relating to such matters as shop opening times and permissibility of trading practices such as loss leading which might have a generalised effect on trade, but could be presumed to have the same effect in law and in fact on domestic and imported products and were thus excluded from consideration in the absence of evidence to the contrary.

Cassis de Dijon (1979) established two important principles in relation to MEQR. The rule of recognition provided that products produced in a Member State in accordance with that State's regulations were presumed to be available to be marketed throughout the EU and did not need to comply with the equivalent regulations in states into which they were imported. The rule of reason, by contrast, provided that Member States could use indistinctly applicable MEQR in order to achieve their mandatory requirements as long as this was done in a proportionate manner. Mandatory requirements were not defined, and there is no exhaustive list. They are however important objectives in the public interest and include public health, the protection of fiscal integrity, consumer protection and information and environmental issues. The requirement of proportionality means that the measure adopted must go no further than is strictly required to achieve the objective. For example, prohibiting the sale of a product on the grounds it contains ingredients other than those common in the member state will be likely to be found to be disproportionate, whereas labelling requirements are more likely to be proportionate: Commission v Germany (Beer Purity) (1987). The onus is on the Member State to demonstrate that there are grounds to invoke the mandatory requirement based on sound evidence.

In this case, the rule requiring wine to be packed in cases of 12 bottles appears to be a product characteristic relating to packaging and is therefore capable of amounting to an indistinctly applicable MEQR. There is nothing to suggest that it is not applied to wine of all origins. While the evidence appears to suggest that the vast majority of wine producers can readily comply, there is clearly a minority for whom compliance is onerous, including Balkan Wines, by analogy with the Walter Rau case. The apparent justification does not seem to fall within the exhaustive list of permitted derogations under Art 36, but may potentially benefit from the rule of reason.

The problem identified by the Portuguese authorities is that consumers will fail to appreciate that 10 bottle cases contain less product, and are cheaper for this reason, rather than because they are inherently better value for money. This is not dissimilar to the issue in Cassis, where it was said that consumers were failing to appreciate that imported fruit liqueurs had a lower alcohol content and were cheaper for this reason. There does therefore appear to be a relevant mandatory requirement in relation to the fairness of transactions/defence of the consumer. However, the proportionality of the measure must also be assessed. Would less restrictive measures, for example a requirement to label 10 bottle cases prominently to this effect be sufficient to achieve the objective? If so, the insistence on 12 bottle cases would appear to be disproportionate. Given that labelling has been regarded as appropriate as a solution in many cases involving recipe requirements, there seems no reason not to deploy it here.

2(b)

This legislation appears to form part of the internal taxation system in France as explained in Denkavit (1988) and therefore falls to be considered under Art 110 TFEU. This provides that no Member State 'shall impose, directly or indirectly, any internal taxation on imported goods in excess of that imposed directly or indirectly on similar domestic products'. Similarity is assessed by reference to the use made of the product by consumers. There have been a number of cases involving various forms of alcoholic beverage. From these one can deduce that the focus will be on the way in which the product is

perceived and used by consumers. Strong spirits have been regarded as similar, even though produced from different raw materials, and, here, all the products which are referred to appear to be wine, with the only difference being the level of alcohol by volume. There is no basis for arguing that these products are not similar. Even if a distinction could be drawn between standard strength winds and low alcohol wines, there is no doubt that wine which is half the standard strength would be regarded as similar to wine which is very slightly weaker than that. On the face of it the taxation system does not discriminate since the criterion for imposing a particular level of duty is the objective one of alcohol by volume. There is no doubt that a progressive, graduated system of taxation based on objective criteria is permissible: Commission v Greece (Car Tax) (1990), however it is possible for what is ostensibly such a system to be manipulated so as to impose an excessive burden on similar products as in Humblot (1985), where the imposition of a much higher rate of taxation on motor vehicles applying only to imported vehicles, including ones which would otherwise have been regarded as closely similar to domestic ones, was considered to lack objective justification and constitute indirect differential taxation.

In this case, the graduated excise duty on wine appears justifiable. The particularly low rate for low alcohol wine can in principle be justified by reason to the health considerations asserted, and this is reinforced by the similar treatment of beer. In the absence of any evidence that there is an international or generally accepted upper limit for low alcohol wine exceeding 5%, it may be difficult to argue that there is anything untoward. It may be the case that French producers elect to produce wine benefiting from the lower excise duty, but it is not clear to what extent other international producers also adopt this strength. Furthermore, it is not clear whether there is any particular reason why Balkan Wines cannot adjust the strength of their product. In the absence of any cogent evidence that the level at which the lower rate of excise duty is charged has been manipulated in order to benefit French producers, the current French system is likely to be regarded as in conformity with Art 110.

Question 3(a)

Vera, as an Irish citizen, is also an EU citizen. As such she has, in principle, the right to move to and reside in another EU state. This right has two legal bases. Firstly, if she is a worker, she has the right to take up employment pursuant to Art 45 TFEU and to move and reside for that purpose. Furthermore, pursuant to Arts 20/21 she has in principle a right to move and reside as a citizen, although this is subject to the conditions set out in the Citizens Rights Directive 2004/38. In exercising these rights she is entitled to be accompanied by her family members of whatever nationality.

The post as a personal trainer in Barcelona appears to satisfy the criteria for Vera to be considered a worker. These are that "for a certain period of time a person performed services of some economic value for and under the direction of another person in return for which he received remuneration": Lawrie-Blum (1986).
Family members are defined in Art 2 of the Directive as including spouses, registered partners and direct descendants who are under 21 of the EU citizen and/or spouse/partner. In addition, Art 3 requires member states to facilitate entry and residence for partners with whom the EU citizen has a durable relationship.

So far as Vera is concerned, there is nothing to stop her exercising her right to free movement. Assuming she takes up the offered employment, she will have the benefit of Art 45, and of Regulation 492/2011 which provides further guarantees of equal and non-discriminatory treatment. In addition to exercising the right to move and reside for up to 3 months available to all EU citizens pursuant to Art 6 of the Directive, she falls within Art 7, which provides an open-ended right of residence for workers.

So far as Isaac is concerned, he does not appear to qualify as a family member as defined in Art 2. It is not clear when the relationship commenced, but if it can be described as durable, his entry and residence with Vera should be facilitated, and the Spanish authorities will have to justify any denial of entry or residence. It does not appear that Mercy qualifies as a family member under Art 2 although she may qualify as a dependant or member of the household of Vera under Art 3. If Vera and Isaac were to marry, the situation will change significantly. Isaac would have a right of entry and residence as Vera's spouse, and Mercy as a direct descendent under the age of 21. Both would be entitled to take up employment: Art 23 of the Directive.

There is a further complication in relation to Isaac. A Member State is entitled, pursuant to Art 27 of the Directive to restrict his freedom of movement on grounds of public policy or public security. Past criminal convictions do not in themselves constitute such grounds, and Isaac's personal conduct 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. The facts suggest that Isaac has remained politically active in the Zimbabwean context, although there is nothing to suggest that he is currently engaged in any activities that could be regarded as a threat to Spanish society, and exclusion on the basis of political activity could be regarded as disproportionate.

3(b)

Art 47 TFEU provides for the regulation of mutual recognition of qualifications by means of directives in order to facilitate the right to pursue a profession in an employed or self-employed capacity. Directive 2005/36 now provides a range of mechanisms for such recognition. Personal trainer is not a profession specifically regulated by the Directive, but Vera can apply to the Irish authorities for a European Professional Card verifying her Irish qualifications. She can also, pursuant to Art 12 of the Directive, expect equal treatment of her Irish qualifications. The precise mechanism for ensuring recognition of her qualifications is complex, but in essence full faith and credit must be given to her Irish qualifications, even if they do not mirror precisely the Spanish equivalent. Specifically, the certification in relation to the first-aid component should be assessed on the basis of its substantive content. The Spanish authorities must look at the substance of the qualification. Only if there is a significant lacuna can the Spanish authorities require Vera to take an aptitude test or undergo an adaptation period: Art 14 of the Directive.

3(c)

It is not entirely clear why the discrepancy in salary exists. If it is on the basis that Vera is an EU migrant worker it will be prohibited by Art 7 of Regulation 492/2011. Art 157 TFEU provides that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'. If the difference in salary between Vera and the male coaches can be attributed to gender, it will be unlawful. The precise

mechanism for pursuing this will be contained in the relevant Spanish legislation implementing the requirements of Art 157 and the supporting Directives, in particular Directive 2006/54. If it is suggested that the work of the male coaches should be treated as of a higher value, a formal job evaluation can be undertaken so that appropriate weighting is given to the different requirements. Factors to be taken into consideration would include the level of qualification required, the extent to which there is a managerial function and the level of responsibility, e.g. for the physical safety of others.

Question 4

This question requires us to consider the potential availability of the direct effect of the Directive, the indirect effect of the Directive and potential Member State Liability.

The concept of direct effect of EU law derives from van Gend en Loos (1963) in which the Court ruled that the then EEC created a new legal order which did not simply operate as an international treaty between the Member States at the public international law level, but was capable of creating rights, and imposing liability in natural and legal persons. The case concerned Treaty articles, and the Court stated that these could create direct effect to the extent that they were clear precise and unconditional. Subsequently in van Duyn (1975) it was accepted that in principle the provisions of a directive could create direct effect under the same conditions, although in Marshall (No 1) (1981) it was made clear that because directives were addressed to the Member States they could only have vertical direct effect. In other words, an individual could rely on the direct effect of a directive as against a Member State. This vertical direct effect can apply in relation to any emanation of the state. This includes all the formal organs of the state, but has been extended, most recently in Farrell v Whitty (2017) to include all entities which "must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers".

A Directive can only have vertical effect after the date for its transposition has passed: Tullio Ratti (1979), but we are told that the transposition date was 31 December 2018, so provided the matters complained of arise after that date, this will not be an issue. The principal problem for Fatima in this respect is that any claim she has is against her employer, and there is nothing to suggest any connection between the employer and the state to constitute an emanation. We can therefore exclude direct effect in her case.

The hospital which employs Ernie would appear to fall squarely within the concept of an emanation of the state. It is subject to the authority or control of a public body, namely the Ministry of Health. It is therefore necessary to consider whether the other criteria for direct effect are met. While it would be necessary to review the specific provisions of the Directive to be absolutely categoric, the provisions in question, namely a list of relevant chemicals, and a list of required personal protective equipment, including technical specifications, do appear to be clear, precise and unconditional. It is therefore likely that Ernie will be able to rely on the Directive to pursue a claim. This means that his rights will be established by reference to the Directive and any national provisions will be disregarded.

The concept of indirect effect was developed by the Court in a series of cases in the 1980s and 1990s. In von Colson (1984) the Court derived from what is now Art 4.3 TEU, namely the obligation of Member States to comply with their obligations under EU law, an obligation to interpret national legislation consistently with the requirements of EU law. This was extended in Marleasing (1990) to an obligation to interpret all national law, whether pre-or post-dating the relevant EU legislation so as to be compatible with the EU legislation so far as it was possible to do so. This does not, however, require an interpretation to be adopted which is contra legem, or incompatible with any legitimate process of interpretation: Wagner Miret (1992). In particular, a national court is obliged, as being itself an emanation of the state, to interpret national law in proceedings between natural and legal persons compatibly with the requirements of EU law.

This may benefit Fatima. We are informed that the Irish Regulations do not specify what personal protective equipment is required, and it is therefore likely that it can be interpreted as including a requirement for safety goggles. However, Fatima's claim is not based on the absence of goggles, but on their non-compliance with the specific technical criteria. The crucial question is therefore whether the doctrine of indirect effect requires these criteria to be included in the interpretive exercise. It can be argued that, as the provisions of Annexe B are not in any way inconsistent with the Irish legislation that such an interpretation is entirely possible. By contrast, any attempt to include within the scope of the Irish legislation chemicals listed in Annexe A but not in the legislation could be seen as *contra legem*.

Alternatively, if indirect effect does not avail her, Fatima could pursue a claim on the basis of Member State Liability. She must demonstrate that the measure in question is intended to confer protection on her, that there has been a sufficiently serious breach, and that the breach has caused her harm: Factortame (No 3) (1993). It appears clear that the measure is intended to protect workers and the causal link appears to be established. Dillenkofer (1995) is authority for the proposition that a failure to transpose a directive automatically satisfies the seriousness criterion.