CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 6 – EUROPEAN UNION LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Five candidates attempted the examination. Two of these failed, despite producing some material of threshold pass standard. This was at least in part because some questions which were attempted did not display any real knowledge or understanding and, in the case of problem questions, any understanding of what the problem issues were. The other three candidates passed, and all achieved commendation standard. They produced scripts which were consistent in terms of quality, demonstrated substantial relevant and focused knowledge and understanding and at least some attempt at evaluation and application of the law to the facts.

Clearly candidates need to be properly prepared and understand the extent of the knowledge and understanding which they should be able to deploy. It is never acceptable simply to copy over or paraphrase material from the treaties. Cases are required in order to explain and amplify what is in the treaties and secondary legislation. When addressing a problem question it is necessary to make sure that the legal implications of the facts are understood so that the relevant law can be applied and tenable conclusions reached.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1(a)

This was generally well answered. Some candidates included a lot of general material about Art 102 before focusing on the specific issue.

(b)

Again, candidates generally identified the issue and its significance, but sometimes lacked detailed consideration of the way in which different levels of market share were assessed.

(c)

Candidates did not necessarily focus on anti-competitive abuse as closely as they should. Predatory pricing was generally identified, if not precisely accurately explained. Some candidates omitted reference to abusive discounting which is a key factor in anti-competitive abuse.

Question 2

Candidates were able to explain the scope and purpose of Art 267. The weaker answer failed to get to grips with specific issues and the stronger answers were comprehensive, but stronger on knowledge and understanding and exposition event on the evaluative aspects, although these were addressed to some extent.

Question 3

While the weaker answer did identify the scope of the two groups of articles, it did not provide any depth and detail and made no reference to the relevant directive. The stronger answer did explore the relationship between the two groups of articles and considered how free movement it was articulated under current circumstances with reasonable reference to appropriate case law.

Question 4 (a) and (b)

The weaker answer consisted of little more than copying over and a very light paraphrasing of the relevant provisions of the treaties. The stronger answer contained relatively little material in relation to (a), although what was there was relevant. The procedures in (b) were well explained and there was effective evaluation of the effectiveness of the procedure.

SECTION B

Question 1(a)

Better answers identified this as Art110, while weaker answers missed this completely. Mario pointed very clearly at similar products and even one of the better answers missed this.

(b)

Answers were generally able to identify and explain the relevant law, although better answers were able to go into more detail and provide more authority. Weaker answers did not get to grips with the facts of the scenario and therefore were unable and to apply the law. Better answers achieved this.

Question 2 - No attempts

Question 3 (a)

Candidates were generally able to explain to some extent the law relevant to Art 101. Better ones did so more precisely and with more reference to authority. Weaker answers failed to identify the factual issues and apply the law to them. Even better answers only identified the concerted price increases as potentially infringement and did not address the apparently collusive tendering arrangements.

(b)

Those candidates who identified the leniency programme answered effectively. One candidate failed to do this and another failed to give it sufficient detailed coverage.

Question 4

Only one answer which was comprehensive as to the law and effectively applied it.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 6 – EUROPEAN UNION LAW

SECTION A

Question Number	Suggested Points for Responses	Max Marks
1(a)	**Cross elasticity of demand is an economic concept which seeks to establish whether two given products are in competition with each other.** To establish whether this is the case, **an actual or notional change in the price differential between the two products is examined**. If demand for one product falls as its price rises in relation to the other, this is evidence that the two products are regarded as interchangeable by consumers and therefore form part of the same product market. E.g. United Brands where the evidence was that the demand for bananas did not vary as their prices change over the year compared to those of other fruits. This indicated that there was a specific clientele for bananas which therefore constituted their own product market. The Commission has formalised this by using the **SSNIP test** whereby a small but significant (5 – 10%) non-transitory increase in price is used to effect the assessment. Art 102 addresses a situation where an undertaking is in a dominant position. **That dominant position does not exist in a vacuum but in the relevant market. One component of this is the relevant product market.** The **Commission will argue for the smallest possible product market** as the target undertaking is more likely to be dominant the fewer products are under consideration. In most circumstances **cross elasticity of demand appears to provide a reliable test, although in certain cases it can be subject to the so-called Cellophane fallacy** where a branded product may have high consumer loyalty.	**8**
1(b)	**Dominance was explained in United Brands as the ability to act autonomously and independently of ordinary market forces.** **One key metric for dominance is the market share enjoyed by the target undertaking.** An **actual monopoly**, e.g. where protected by intellectual property rights, and indeed a **very large market share of around 80% are sufficient to establish dominance**: Hoffman LaRoche. **A market share of less than approximately 40% is considered incompatible** with the type of market power necessary to enable an undertaking to act in a way which is consistent with dominance. **In the middle ground** between 40 and 80% market share it may be **necessary to consider other factors**. Many of these were considered in United Brands. They include the **overall structure of the market.** Where there is a single large undertaking in	**8**

	competition with a large number of smaller ones with very limited market share this is more likely to bespeak dominance (e.g. British Airways) than where three or four undertakings of reasonable size but with one somewhat larger are involved. This is more likely to be seen as an oligopolistic market. Other factors include **vertical integration** and **limits on cross elasticity of supply**. Where there are significant technical or other barriers to entry into the market this is more likely to be consistent with dominance. **The Commission has been criticised for taking a snapshot view of the state of the market at a given time** rather than observing the evolution of the market over a period. Where there is effective competition a sizeable market share is vulnerable to that competition over a reasonable timescale.	
1(c)	Dominance is a neutral concept and it is abuse of a dominant position which is prohibited. **Anti-competitive abuse can be contrasted with exploitative abuse.** The latter is targeted at the consumer or end-user by extracting a monopoly rent or other unfair advantages. **Anti-competitive abuse is targeted at actual or potential residual competitors**. It may take the form of **predatory pricing** where the product is sold at less than the average variable cost of production. This is a price which the competitor is unlikely to be able to match and is likely to lead to their exit from the market: Akzo Chemie. Microsoft has twice fallen foul of anti-competitive abuse in relation to the bundling of its net browser and media player with its standard software thus significantly damaging the ability of producers of competing products to enter and remain in the market. **Price discounting** (falling short of predatory pricing) is a recognised and accepted commercial tactic. Discounts for quantity and in relation to regularity of supply are unlikely to be regarded as abusive, but other forms of discounting, such as **discounts for exclusivity (Intel) and cumulative discounts are likely to be seen as unfairly foreclosing the market against competitors:** Hoffmann LaRoche). It should be noted that the prohibited practices would be legitimate if practised by non-dominant undertakings. **There has been criticism that the Commission has been overly protective of the interests of smaller competitors** which may be struggling in the market because of their own deficiencies whereas the dominant undertaking has maximised its resources and is trading effectively. There also questions over the extent to which dominant undertakings are expected to demonstrate a duty of care towards competitors, and whether this is overall in the interest of the end user. As a result for the past decade the Commission has adopted a **policy of restraint** in relation to the investigation of anti-competitive abuse	**9**
	Question 1 Total:	**25 marks**

2	**The essential function of Art 267 is to constitute the CJEU as the sole authoritative interpreter of the treaties and EU legislation and to authorise it to rule on the validity of the latter.** The reason for this exclusive jurisdiction is to prevent national courts applying their own interpretations which would, inevitably, over a period, lead to divergence interpretations of EU law in the different Member States. The scope of this jurisdiction has expanded very considerably. At the outset, in addition to questions of validity, which are relatively rare, national courts were required to interpret and apply Regulations, but the **expansion of the doctrine of direct effect** to treaty articles (van Gend en Loos) and subsequently Directives insofar as they had vertical effect (van Duyn; Marshall), together with the doctrine of indirect effect (Marleasing) has greatly increased the need for preliminary rulings. Indeed, **many of the significant developments in the jurisprudence of the CJEU have arisen from preliminary references**, including all three of the cases above. To these can be added the development of the principle of member state liability (Francovich/Factortame III) and the view that EU citizenship was destined to be the primary identity of all citizens and therefore a source of rights for them (Martinez Sala, Grzelczyk), although this latter appears now to be of less significance (Dano, Alimanovic). In some of these cases, e.g. Marleasing; Francovich, the CJEU was even prepared **to reinterpret an inappropriately structured preliminary reference** in order to facilitate the development of EU law in a relatively activist manner. It is therefore clear that **rulings made under the preliminary reference procedure have contributed substantially** to fleshing out the legal framework of the EU in areas which had been left unresolved by the Treaties themselves. Direct and indirect effect, and the principle of member state liability have formed the essential framework for the application and enforcement of EU law within the member states over the past decades. **Preliminary references have also enabled the CJEU to develop a number of autonomous concepts of EU law**. Perhaps the most significant is the concept of "worker". The treaty definition required fleshing out, and this was again done in a relatively activist manner in a series of cases in the 1980s such as Lawrie-Blum, Kempf, Levin and Steymann. In addition to this the CJEU was also able to develop the concept of "court or tribunal" in Art 267 itself by developing the Dorsch Consult criteria for determining whether a given body qualified as a tribunal, namely independence from the executive, permanent constitution, operation inter partes and application of rules of law. **The CJEU has also, over the years, clarified its requirements for a reference, and the circumstances in which references are inappropriate or unnecessary**.	**25**

	Most Courts and Tribunals have a discretion as to whether to make a reference, and therefore it cannot be said that they are acting rightly or wrongly in choosing whether or not to do so. However the guidance is useful to indicate how they should exercise their discretion. More importantly, courts from which there is no appeal in the domestic system (which was interpreted in Lyckeskog as a court against which there was no possibility of appeal, as opposed to a court from which appeal lay only with leave, and which would therefore, if leave was refused be the last instance in the case) have been given **guidance as to when the apparently categoric obligation to make a reference will not apply.** The CJEU requires the referring court to set out the facts of the case and the issues of national law and then indicate what questions of EU law it requires to be answered in order to enable it to give judgment. The national court is unlikely to be able to do this before all the facts have been found or agreed. However, a trial court can itself make a reference if the facts are not in dispute. **The CJEU can and does reject references where the referring court has not clearly established the facts and issues** (e.g. Grau Gomis). It will also **not answer what it considers to be hypothetical questions** (Meilicke) and has rejected references where it considers that **the case in the national court has been artificially put together,** even though there may be an underlying issue of EU law (Foglia v Novello). These latter points reflect the fact that the answer to the question posed must be necessary in order to enable the court to give judgment in the national proceedings. There are two other considerations when deciding whether a reference is necessary. The first is existed from very early in the jurisprudence of the court. The case on the court's docket immediately after van Gend was Da Costa & Schaeke. This raised **exactly the same issue of direct effect in precisely the same context as the earlier case and as a result the CJEU said that the obligation to make a reference which existed in the case because the Dutch court was one of last instance was "emptied of its content" by the earlier decision**. It is clearly an inappropriate use of the courts resources to make multiple references on the same point. Even though the CJEU is not self binding it does have a strong and perhaps increasing tendency to follow its existing case law. However, the option remains to make a reference in circumstances where there is ground for believing that the court may be ready to reconsider an earlier decision. More complexity arises where the CJEU has interpreted a particular passage in the context of one Regulation or Directive and a question of its interpretation in the context of another instrument arises. It is by no means so clear-cut that the earlier interpretation will apply in the change context. **The practice of the registry of the court is to draw the attention of a referring court to earlier decisions which the court staff consider may be in point. While this is purely**	

	advisory, there is the possibility that a national court will incorrectly decide that the earlier case does provide the appropriate answer and withdraw the reference. This was at the root of the case of Köbler, where the Austrian court of first instance wrongly withdrew its reference in reliance on such an earlier decision, and the higher courts failed to correct the error, ultimately resulting in a decision by the CJEU that **an action for member state liability could in principle live against a court of last instance** which had failed to make a necessary reference. Finally there is the question of **whether all issues of interpretation must be referred to the CJEU, or whether national courts can be trusted to deal with simple issues that arise**. In CILFIT the CJEU gave guidance as to when national courts could take a decision for themselves. This was a time when lawyers and judges, at least in the original six member states had a professional career of dealing with EU law and could be assumed to be familiar with it. The CJEU indicated that a court of last instance would be **justified in not making a reference (and by extension any other court would have reason to exercise its discretion not to) where the point was entirely clear –** *acte clair* as the French administrative courts described the proposition. However there was considerable guidance as to the circumstances which might render it appropriate to make a reference. **Any question of interpretation of autonomous concepts of EU law was essentially for the CJEU**. While national courts could not be expected to explore the possibility of **linguistic inconsistencies between the various equally authentic versions of EU legal instruments, if there was evidence of any such discrepancy this clearly created an ambiguity or uncertainty.** The threshold for considering a point clear was a high one and in most jurisdictions, certainly in the United Kingdom before Brexit, if any of the judges dealing with the case adopted an alternative interpretation, or even indicated that such an alternative was viable, this would not have the necessary degree of clarity. **Overall this jurisdiction has contributed very substantially to the harmonious development of EU law and the existence of a coherent body of case law interpreting and establishing the meaning of key autonomous concepts.** It has also been used creatively by the CJEU and is the basis of many important cases which have established fundamental concepts that could not be derived directly from the Treaties.	
	Question 2 Total:	**25 marks**
3	The EEC, as established by the Treaty of Rome, had quite limited and primarily economic objectives. It was intended to create the framework of the Common Market (now the Single Internal Market). **The key feature of a Common Market is that it allows for the free movement of the four principal factor production goods, labour, services and capital. Art 45 TFEU replicates the equivalent provisions of the original EEC Treaty. It provides for free movement of workers in the sense that a worker who is a citizen**	**25**

	of an EEC state can move to another such state to take up an offer of work which he has received. While exercising this right he is entitled to equal treatment free from dissemination. It was also recognised that there were social implications. It would be necessary to provide the coordination of social security and pension arrangements so that those workers who exercised freedom of movement were not disadvantaged on their return to their home state, and also provision had to be made for workers to be accompanied or joined by their families with provisions for access to the housing market and to education, including vocational education for the workers themselves and general and vocational education for their children. It was also necessary to provide the option for such workers, on retirement, to remain in the host state rather than returning to the home state if that was their preference. Equivalent provisions were made by Art 49 for those who were providing services as independent professionals. Art 45 essentially applied to workers who were providing their labour to enterprises and were working under their instructions. **The European Union was brought into existence by the Maastricht Treaty and the concept of citizenship of the Union was created at the same time.** Initially the rights attached to this were largely political, including the right to stand for election and to vote in European elections in a host state. **The rights conferred by citizen status pursuant to Arts 20/21 TFEU now include, in addition to the political rights referred to above, the right to move and reside freely within the territory of the Member States subject to conditions to be laid down.** The two sets of rights now coexist and an attempt has been made to coordinate them within the framework of the Citizens Rights Directive 2004/38**. Under the Brexit Withdrawal agreement these rights are effectively preserved, but only for those who have exercised these rights before the end of the transition period on 31 December 2020.** After this date UK citizens can travel to the EU and vice versa for up to 90 days in any 180 with no visa requirements, but rights to reside for longer and to work are matters for the domestic rules of the state in question. **The Directive provides that all citizens and family members who are not citizens have the right of residence on the territory of another member state for a period up to 3 months** (Art 6). No formalities are attached to this other than possession of a valid identity document. This right can be enjoyed the purposes of tourism, family visits, medical treatment, conducting business or short-term employment or seeking long-term employment. **The right to longer term residence requires fulfilment of one of three sets of conditions (Art 7). If these conditions are satisfied for union citizen they will also apply to his family members, of whatever nationality.** **The simplest category is those who are capable of supporting themselves without recourse to public funds and have appropriate**	

	health insurance. This will include retirees (who will usually be entitled to enrol in the host state health insurance scheme on the basis of participation in their home state public health insurance scheme). There is no definition of what constitutes sufficient resources but it must not be set above the level at which citizens of the state concerned have access to social assistance or in the alternative the level of the minimum social security pension in that state. If the individual does become an unreasonable burden on the social assistance system of the host member state the right of residence may be lost, but occasional limited recourse to social assistance should not automatically trigger this: Brey. **The second category is students**, who must again be able to demonstrate they can support themselves and hold adequate health insurance. Again, limited recourse to public funds will not necessarily result in expulsion: Grzelczyk. **The final category is workers and self-employed persons.** There are quite elaborate provisions dealing with the continued rights of those who have been employed but have become involuntarily unemployed. The right is retained in case of inability to work through illness or accident and involuntary unemployment. However those who are involuntarily unemployed after working for more than 12 months retain the status indefinitely so long as they continue to register as unemployed, while those who had worked for less than that only retain the status for a minimum of six months. Furthermore there is additional protection provided by Art 14 which provides that they cannot be expelled. **This protection from expulsion also extends to those who entered the territory of a host member state to seek employment for so long as they can prove provide evidence that they are continuing to seek employment and have a genuine chance of being engaged.** In the case of Antonissen it was stated that a period of at least six months should be allowed before the jobseeker status could be called into question. **The Directive also contains extensive and complex provisions dealing with the variety of situations where the position changes** These are primarily targeted at family members who are not themselves EU citizens as they do not have rights under EU law otherwise than as such family members. **After five years residence those who exercise the right to free movement acquire the right of permanent residence** which, essentially makes them irremovable others around cogent grounds of public order. This is mirrored in the Withdrawal Agreement, where those with five years residence have a permanent right to reside, while those with less have a provisional right until they achieve five years. **Finally the Directive provides for grounds on which EU citizens and their family members may be refused admission or expelled (Art 27).** Where such measures are undertaken on public health grounds it must be within three months of the initial entry and only in	

	relation to serious transmissible diseases as notified by the WHO. In relation to public security and public policy measures must be based on the personal conduct of the individual and an assessment of the threat that he poses to the essential interests of society. Prior convictions as such do not qualify the level of protection increases with the length of residence both as a result of the requirement to take into account all the circumstances including the degree of integration and also formal criteria giving greater protection to those with permanent residence and still greater protection to those with over 10 years residence. **Recent case law such as Dano and Alimanovic has made clear that there is no general right to free movement or to have recourse to public funds.** Those who fall outside the categories laid down in the Directive cannot rely upon it or any other general EU right to free movement. Ms Dano had never worked and was living in the host state with her child and residing with her sister. She did not fall within any recognised category, and the other man family, while initially moving to Germany to work had become involuntarily unemployed within a 12 month period and therefore after six months had exhausted their entitlements as workers and could not assert any other right. This approach does seem to be rather less expensive than the initial one of the CJEU to rights attaching to citizenship. In cases such as Martinez Sala and Grzelczyk it was suggested that lawful residence was itself sufficient to trigger entitlements based on citizenship, but it is not clear how far such case law will be followed 20 years later. **It is clear that, while the original rights based on Art 45 and 49 remain important, and workers, self-employed persons and their families enjoy higher level of freedom of movement and protection of their interests while exercising those rights, other categories, namely those who are self-supporting and students, who are in no direct sense economically active and participating in the Single Internal Market also benefit from substantial entitlements**, while all EU citizens benefit from the general right to free movement for a three-month period. While the expansion through case law of the right to take up job offers already made to cover travelling in order to seek work could be readily justified in the conditions of the 1960s and 70s when information about available employment was usually only readily available at the workplace or labour exchanges in the vicinity, under modern conditions there would seem little need for additional protection for work seekers over and above the three-month free movement, which is generally available. This is mitigated by the fact that the host state is under no obligation to provide social assistance to work seekers as such, which indicates perhaps that one particular category is being singled out for favourable treatment.	
	Question 3 Total:	***25 marks***

4(a)	**This phrase refers to the obligation on the Commission to ensure that the Treaties are observed, primarily by the member states.** Art 4 TEU requires the member states to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. The duty of the Commission is in turn set out in Art 17 TEU which requires it to 'ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'. The Commission fulfils its obligations in a number of ways. **One particular issue is ensuring the timely and appropriate transposition of Directives**. The Commission maintains a database which tracks the transposition measures notified by each member state and enables the Commission to take action if a Directive has not been transposed. Recognising that member states may have difficulty in transposition, the Commission has facilitated a number of consultative bodies which enable representatives of the member states under the commission to discuss issues and difficulties with a view to resolving them complete non-transposition is a relatively simple matter to pursue. There are virtually no excuses, as internal political and constitutional difficulties are not accepted as an excuse and the transposition. **What is more complicated is where the member state has undertaken transposition but there is disagreement as to whether it has done so properly so as to give full effect to the requirements of the Directive.** This will be discussed further in due course. **The Commission has in place a system whereby anyone who considers that a member state is in default of its obligations can lodge a complaint.** This can be done relatively informally. The commission will review all complaints, but will make its own decision on whether or not a complaint should be pursued. Where a complaint appears to have some substance the Commission will initiate informal contact with the member state concerned. Many issues are resolved at this stage. In some cases this will be because the member state has failed to act appropriately and recognises this once the issue is drawn to its attention. In other cases the member state will be able to satisfy the Commission that the complaint is misconceived. **The Commission also has power to carry out its own investigations** which will typically be into matters arising in relation to a particular economic sector and may result in a conclusion that a member state or states is not complying with its obligations. In the three categories of case already discussed, namely disagreements as to the appropriateness of transposition measures, unresolved third-party complaints and issues arising from Commission investigations, **matters now proceed to the formal Art 258 procedure** the Commission has discretion whether to proceed to this and whether to pursue it through its various stages. There has been criticism that the Commission's procedures and decision-making process are not particularly transparent. In particular	**12**

	complainants do not necessarily receive clear and timely information on the progress of their complaint. The Commission will issue a formal complaint after which there will be further dialogue and if agreement is not reached the Commission will issue a reasoned opinion which represents the formal statement of its case against the member state which will then be referred to the CJEU. The CJEU may uphold the case brought by the Commission or reject it. If it is upheld, the member states shall be required to take the necessary measures to comply the judgment of the court. If it fails to do so it may be brought back before the court and made subject to a lump-sum or penalty payment. There is a fast-track procedure whereby if the default is in failing to transpose a Directive the lump sum or penalty payment may be imposed at the first hearing without requiring further recourse to the Court (Art 260). **There have been complaints that the long drawnout nature of the proceedings coupled with the unwillingness of states to comply with rulings, either because of a lack of resources or otherwise means that this procedure does not provide a particularly effective remedy.** This was indeed recognised as long ago as van Gend, where the court rejected the argument of some member states that action by the Commission under Art 258 constituted an effective and available remedy which rendered it unnecessary to introduce the concept of direct effect.	
4(b)	The EU legislative process is an extremely complex one. **Pursuant to Art 17 TEU the Commission has the sole right to propose draft legislation.** However, the legislative programme is in practice drawn up in consultation between the European Council and the representatives of the European Parliament with the participation of the President of the Commission. The Commission will therefore have been tasked with initiating legislation in particular areas and in the context of the policy objectives of the other institutions. **Prior to the formal presentation of a draft instrument there will normally be extensive consultation**. The Commission may present a range of preparatory documentation including green papers, white papers, roadmap documents and preliminary drafts. There will be a range of opportunities for consultation with the member states and with various interested parties active in the sectors affected by the legislation. The resources which the Commission can devote to such legislation are limited and contributions from those with expertise in the sector are likely to be welcomed and may be acted on. There is an apocryphal story that the commission official in charge of the preparation of an early version of the distance selling legislation which was to apply to all sales conducted away from trade premises came from a southern Mediterranean area and was blissfully unaware that in northern climes it was quite normal for milk and other dairy products to be sold door-to-door and often left for the householder to collect. The original draft provided for an unconditional right to reject or return goods up to 7 days after the	**13**

	transaction which would of course have seriously undermined this business model. **Once a draft Regulation or Directive has been prepared, it will be submitted to the Council and to the Parliament.** The Parliament will conduct a detailed examination in a committee structure in which the various political factions are represented. The Parliament may approve the draft presented by the Commission but is more likely to introduce amendments. This amended version will then be considered by the Council which will adopt its common position. In the meantime, the Commission will have prepared documentation indicating its reaction to the Parliament amendments**. If the Council adopts the wording approved by the Parliament the measure will be adopted at first reading.** If the common position contains new elements this draft will go back to the Parliament which at this stage can approve it amend it or reject it. This is the first point at which the proposed measure can actually fall. If the measure is re-amended it goes back to the Council for a second reading. **If the council cannot accept the version approved by the Parliament at second reading the measure will then go into the conciliation procedure.** Formally this requires meetings between equal numbers of representatives of the Council and the Parliament but in practice much of the detailed negotiation and drafting is done in informal trial logs involving representatives Parliament Council and Commission. If an agreed text emerges from the conciliation process and is approved by both counsel and Parliament the measure will be enacted, but otherwise it will fail. It will be seen that the processes complicated and iterative and involves considerable input from the Commission in terms of commentary. In addition there will also have been throughout this period further representations being made by a range of interested parties by way of informal lobbying of key members of the Parliamentary committee responsible for detailed scrutiny of the measure and of relevant members of the Council. **There is also a parallel process whereby national parliaments are expected to scrutinise draft measures as they proceed and consider whether they approve them or are minded to object to them on grounds of subsidiarity and proportionality**. If sufficient national parliaments express objections these will have to be addressed before the measure can proceed. There can be no doubt that all stakeholders, namely the EU institutions, national parliaments and interest groups from civil society are able to contribute at the various stages. **The question of how effective these contributions are slightly more complicated**. The process is extremely complex and much of the legislation being considered is highly technical and therefore of limited interest to the public at large. This is one reason why the actions of the Parliament in particular are not widely reported and therefore the general population of the EU has little idea of what exactly is being undertaken on its behalf. There is also a question about the extent	

	to which national parliaments have taken their obligations of scrutiny seriously enough. There is no doubt that draft Regulations and Directives receive at least as much legislative scrutiny as primary legislation in the national systems and very significantly more than secondary legislation is likely to receive. **Bearing in mind much of what is being legislated would be classed as secondary legislation in a national system this suggests that there is more scrutiny rather than less, but the question still remains whether that scrutiny is sufficiently well informed and subject to wider democratic scrutiny**.	
	Question 4 Total:	***25 marks***

SECTION B

Question Number	Suggested Points for Responses	Max Marks
1(a)	**This is an allegation that provisions of Czech domestic tax law are in contravention of Art 110 TFEU.** Art 110 prohibits the imposition, directly or indirectly, of 'any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'. It also prohibits the imposition on the products of other member states of 'any internal taxation of such a nature as to afford indirect protection to other products'. **When considering whether products are similar for the purposes of the first prohibition the focus of the analysis is on the way in which products are used and evaluated by consumers**. Organoleptic properties are taken into consideration : John Walker. Many cases have concerned alcoholic beverages as these are typically subject to a specific excise duty or other taxation and consideration has been given to the circumstances and manner in which they are consumed. Grape based spirits such as brandy were considered similar to grain based spirits such as whisky and gin as they had similar alcoholic strengths, were produced by similar methods and appear to be consumed in similar circumstances: Commission v France (Taxation of Spirits). Conversely in John Walker whisky and fruit liqueurs were not considered similar as the method of production was very different, the alcoholic strength was different and the evidence was they were consumed in different situations by a different clientele. **On the facts given it appears likely that Merry Monk will be found to be similar to the spirit based tonic drinks in question, and if this is so, there would appear to be a clear breach**. There appears to be no basis for suggesting that there is some form of objectively justified graduated scale of taxation in operation. [Even if the two products are not found to be similar, it may well be that the different tax basis does confer indirect protection. This will require an analysis of what the impact of the differential taxation is. If there were a significant price differential after allowing for the tax element, there may be no breach: Commission v Sweden.]	**7**

1(b)	**The Polish and Hungarian measures appear to fall within the definition of measures having equivalent effect to quantitative restrictions (MEQR).** These are regulated by Arts 34 – 36 TFEU. Art 34 prohibits quantitative restrictions and MEQR subject to the derogations contained in Art 36. Quantitative restrictions are prohibitions or restrictions on the volume of imports which may take place. There is no suggestion of any such here. **The original definition of MEQR was in Dassonville**, 'any trading rules which, actually or potentially, directly or indirectly interfere with interstate trade' which would otherwise take place. They have been **further subdivided**, originally by the now spent Directive 70/50 into **distinctly applicable MEQR** where rules apply only to the imported product and **indistinctly applicable MEQR** which on the face of it apply in the same way to domestic products and imports but which can be demonstrated to have a differential impact, e.g. by requiring imported products to conform to national rules which are not replicated elsewhere: Walter Rau. **Cassis de Dijon contributed substantially to the law relating to MEQR.** In the first place it established a so-called **rule of recognition**. This was to the effect that if a product was produced within a member state in accordance with all the rules and requirements applicable to it in that state there was a presumption that it was marketable throughout the Single Internal Market whether or not it complied with all the requirements of each other member state. The onus switched to a state which sought to deny recognition to demonstrate that there was a legitimate reason to do so. In addition, it also established a **rule of reason**. This was to the effect that if a member state could demonstrate that an indistinctly applicable MEQR was **necessary and proportionate in order to meet one of its mandatory requirements** it would be justified. The concept of what constituted a mandatory requirement was left open-ended. It certainly includes protection of health, although in this respected overlap somewhat confusingly with a similar derogation in Art 36 which potentially applies to any restriction or MEQR. Other categories which have been recognised include consumer protection, environmental issues, fairness of transactions and protection of fiscal supervision. **Application of the rule of reason enables the rule of recognition to be displaced where there is adequate evidence.** **A further subdivision was introduced in the Keck case**. Prior to this case indistinctly applicable MEQR could relate to **product characteristics** (rules relating to recipes, labelling and packaging of particular product groups) and to **selling arrangements** such as Sunday trading laws, other restrictions on opening hours, generic advertising restrictions, regulation of practices such as loss leading, and rules requiring products to be sold in particular outlets. Following this case it was considered that while **selling arrangements might impact on the overall volume and pattern of trade**, they would normally operate in the same way in law and in fact in relation to domestic and imported products **and would not therefore result in any distortion of trade**. It remained open to an undertaking to	**18**

	adduce evidence that this was not the case and there **was a differential impact. In such cases the national court would need to consider the measure as an indistinctly applicable MEQR** and apply the rule of recognition and the rule of reason accordingly. It should also be noted that in addition to the rule of reason which applied to indistinctly applicable MEQR, **the derogations in Art 36,** and in particular the derogation relating to the protection of health and life of humans, continue to apply to all MEQR provided that the state can demonstrate the conditions for derogation are met. Application: **the Polish measure appears to be a selling arrangement.** It appears to apply to a broad category of products and is therefore not a product characteristic MEQR in relation to Merry Monk itself. **Dirk can seek to adduce evidence that it is not operating in the same way in law and in fact.** However, he would have to demonstrate that there are products of Polish origin which are in competition with Merry Monk and are not subject to the same restriction to sailing pharmacies. Even if he could demonstrate this he **would still need to defeat arguments based on the rule of reason**. The mere fact that his advertising has been centred on the general health benefits of the product will not suffice, since **combating such potentially dubious health claims can be seen as a mandatory requirement in the areas of consumer safety and health.** Application: **the Hungarian measure appears to be an indistinctly applicable MEQR**. It is clearly a product characteristic as it relates to permitted ingredients. It must therefore be addressed in the light of Cassis. **Prima facie Merry Monk should benefit from the rule of recognition**. It contains ingredients which are recognised and approved in the Netherlands. On the other hand Hungarian consumers are used to products claiming health benefits containing ingredients from their own pharmacopoeia. We are not told how widely the ingredients in question are recognised as conferring health benefits, and whether there is clear scientific evidence to this effect. **Member states are entitled to use a precautionary principle when dealing with products for which claims are being mad**e and ingredients which are claimed to be safe when the evidence is not entirely compelling: Sandoz. It is arguable whether labelling to alert consumers to the fact that the product does not comply with the usual Hungarian norms would be adequate to protect them. **All will depend on the proportionality assessment made by the court.**	
	Question 1 Total:	**25 marks**
2	**A direct challenge can be mounted by way of an action for annulment under Art 263 TFEU**. **Roberta is a natural person and therefore a non-privileged applicant. She must therefore first demonstrate standing.** She may challenge an act addressed to her, an act which is of direct and individual concern, or a regulatory act of direct concern not entailing implementing measures. Neither the decision nor the Regulation is addressed to her.	**25**

	Direct concern is established when the act itself alters the legal position of the applicant, because it does not give any discretion or rely on decisions made by a third party: Differdange. **Individual concern was explained in Plaumann as arising where the act affects the applicant in the same way as if he were addressed by virtue of individual characteristics particular to him**. Membership of an open class of indeterminate size does not count, but membership of a class closed and determined in advance may (Toepfer), as may being affected by virtual of a particular legal status (Piraiki-Patraiki; Codorniú). It is very difficult to establish individual concern and attempts by Advocate General Jacobs and the Court of Fiirst Instance were rejected by the CJEU in Jégo-Quéré. This in turn led to the insertion in Art 263 in the Lisbon Treaty of the new category of **regulatory acts. This concept is not defined, but has been interpreted as applying to Decisions which are of general application**, as in Microban, which concerned a Decision adding a chemical to a list of chemicals authorised for particular purposes within the EU, and also to **secondary regulations, not made by a legislative process:** Inuit Taparii Kanatami. The Decision is clearly addressed to Italy. **It appears to leave Italy no discretion, so would appear to be of direct concern to Roberta**, but it appears to apply to all actions taken by Italy of a similar nature and there is **nothing to suggest any of the factors referred to above which might give Roberta individual concern**. Even if it were possible to demonstrate that the measure constitutes the misuse of powers because the Commission had wrongly assessed Roberta's operation as being agricultural rather than a diversification, she would not have standing. **Turning to the Regulation, this appears to satisfy the definition of a regulatory act.** It appears to create direct concern and does not require further implementation. Roberta is therefore qualified to bring an action for annulment, but will still need to demonstrate substantive grounds for challenge. **Even if the applicant can establish standing under the preceding rule, it must still be demonstrated that the measure in question should be annulled. The grounds for annulment set out in Art 263 are not particularly clearly articulated and overlap to a significant extent**. Lack of competence relates primarily to an act which is undertaken ultra vires, breach of an essential procedural requirement includes failure to give adequate reasons (Part 296 TFEU) and misuse of powers can include taking action on the basis of inadequate or incorrect information and assessment of the circumstances. Challenges based on lack of competence can be made purely in order to preserve the integrity of the EU legal process. We do not have the information to pursue this aspect.	

	Turning to indirect means of challenging the Decision, Roberta could firstly **invite the Italian authorities to bring an action for annulment** as privileged applicants. Alternatively Roberta could wait until there is a demand for repayment and **resist it in the Italian courts using the plea of illegality** to argue that the Decision constitutes a misuse of powers or is otherwise ill founded by reason of failing to correctly distinguish between agriculture and diversification in the context of the Directive. The CJEU has full power to rule on the validity of the Decision in this jurisdiction. It may even be the case that **Italian law permits an application for a declaration that it would be unlawful for Italy to act on the Decision** which would enable the matter to be legislated before Roberta is put in the position of having to defy the enforcement measures taken by Italy.	
	Question 2 Total:	**25 marks**
3(a)	**Art 101 deals with collaborative anti-competitive practices**. Specifically it prohibits, inter-alia 'agreements between undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. **The undertakings in question do not need to be established in the EU, so Trenchcoat as a UK undertaking is subject to Art 101 to the extent that it trades in the single market**, which it clearly does on the facts given. **An agreement for the purposes of Art 101 can be informal**: Quinine. **A concerted practice may be found to exist where, in the absence of actual evidence of an agreement, the behaviour of the undertakings in question can only be properly explained by the fact that they have adopted a practice of coordination of behaviour** which 'without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition': Dyestuffs. This usually has to be judged by behaviour and parallelism in the sense of parallel price rises is often regarded as key evidence. However account must also be taken of other factors such as the constraints of an oligopolistic market and also **situations where the undertaking suspected of concerted practice are merely responding to a common exterior factor** such as increased prices of raw materials. Art 101 does give examples of behaviour which will be regarded as anti-competitive which includes directly or indirectly fixing selling prices are other trading conditions and sharing markets or sources of supply. **There is little doubt that whatever arrangements may exist may affect trade between member states as there is evidence that they operate across northern Europe which contains a number of member states** and, having regard to the nature of the product, includes most of those where there is likely be a market for it. **Application: the changing behaviour in relation to the tendering process is strongly suggestive of some form of collaborative behaviour.** Even in the absence of evidence of a formal agreement, the	**18**

	arrangement whereby there is one clearly favoured tenderer suggests that there is some arrangement to share the market and this enables prices to be fixed also. **The parallel increases in prices quoted to builders merchants over a period of several years are also strongly suggestive of conscious parallelism and therefore at the very least a concerted practice**. However it may be that these increases are as a result of price increases charged by the single supplier of the essential raw material. If that is the case it may not be possible to establish to the necessary degree of probability that these increases are indeed the result of an agreement or concerted practice.	
3(b)	Where undertakings are engaged in an anti-competitive agreement which in this case would constitute a classic cartel, being an agreement between producers to share markets and fix prices, they are well aware that what they are doing is unlawful and therefore take considerable pains to conceal the evidence pointing to the agreement. Although the investigation of concerted practices involves an examination of behaviour rather than searching for documentation or other evidence to support an actual agreement, it is nevertheless complex and time-consuming and requires the elimination of the other possible explanations before there is a real prospect of a successful ruling by the Commission and in due course the general court and possibly the CJEU. **As a result the Commission has instituted, as of 2006 a leniency policy which is set out in the Commission Notice on Immunity from fines and reduction of fines in cartel cases**. This recites the problems with identifying and investigating cartels set out above. The Commission will grant if unity from fines to the first undertaking which enables the Commission to carry out a targeted inspection in connection with the alleged cartel or find an infringement of Art 101 in relation thereto. In order to benefit from this immunity the undertaking must provide a detailed description of the cartel as set out in paragraph 9 (a) of the Notice. This includes full details of the aims activities and functioning of the cartel the products concerned the geographic scope and duration and market volumes affected details of the participants in the various contacts which brought about or contributed to the operation of the cartel. Other members of the cartel may obtain some remission of fines if they provide additional information to supplement that provided by the original informant. Clearly if Trenchcoat has been participating in a cartel and is aware that the "net is closing" it would be in the interests of the undertaking to act as informant as set out above and secure the benefit of full immunity. **Art 101 is directly effective.** Trenchcoat should be aware that **as a victim of the cartel Swedcoat could bring a civil action** (Courage v Crehan). Trenchcoat will need to consider assembling evidence to rebut allegations that Swedcoat has suffered loss.	**7**
	Question 3 Total:	***25 marks***

4	**This question requires consideration of the potential direct and indirect effect of the Directive and potential member state liability.** **The principle of direct effect is largely a creature of the CJEU. In van Gend en Loos it established that treaty articles could create directly effective rights and liabilities for legal and natural persons provided that the provisions of the articles were clear precise and unconditional. This concept was extended to Directives in van Duyn.** Subsequent case law has clarified exactly how far direct effect extends in the case of Directives. It must be recalled that the original structure of the EEC required member states to transpose Directives international law which would thereafter be applicable and the Directive would fade into the background. However, this did not always occur. In some cases member states completely failed to transpose Directives, and in other cases did so effectively. **Marshall established that because Directives were only addressed to the member states they could only have vertical direct effect as against the state and not horizontal effect.** This limitation did not apply to treaty articles which imposed obligations, for example on employers: Defrenne. It was also established that **under normal circumstances a directive could not create direct effect prior to its transposition date as it was not intended to have legal effect before then:** Tullio Ratti. With the various member states outsourcing activities traditionally carried on by the central organs of the state itself it has been necessary to identify what constitutes an emanation of the state for the purposes of vertical direct effect. The most recent articulation of this by the CJEU is in Farrell v Whitty. **The entity must be a legal person of public law, or be subject to the authority or control of a public body, or be responsible for performing a task in the public interest on behalf of such a body and with special powers for the purpose.** **Indirect effect is in essence an interpretive obligation imposed upon states to ensure that their own law is interpreted consistently with relevant EU law.** It originally derived from cases such as von Colson, which involved interpretation of German law so as to ensure an effective remedy but its full scope was established in Marleasing where it was held that all national law, whether procedural substantive should be interpreted consistently with relevant EU law so far as it was possible to do so. This recognises that there will be situations where the national law is so clear and categorical that it cannot be reinterpreted consistently. This is particularly useful when dealing with horizontal effect, but does require there to be national legislation which is capable of being interpreted. **Member state liability is also a creation of the CJEU**. It originated in the case of Francovich which concerned the persistent failure of Italy to transpose a Directive. The relevant provisions were not clear precise and unconditional, so did not generate direct effect and there was no relevant Italian legislation to be interpreted for the purposes of indirect effect. The CJEU held that the failure of Italy to put in place the required measures to	**25**

	ensure that there was a body responsible for paying out to the applicants the holiday and redundancy payments which their insolvent employer could not pay **constituted a breach of a noncontractual duty by Italy for which they were entitled to compensation** by where damages which were calculated by reference to the payments which had not been made. As this was a clear example of a prolonged failure by Italy to take appropriate action the court did not feel the need to discuss issues such as the seriousness of the breach. **Subsequently in Brasserie du Pêcheur/ Factortame III the court determined that the potential scope of liability was much wider, covering not nearly the non-transposition of a directive, but also failure to remedy illegalities which had been identified, introducing legislation which was incompatible with the EU law rights of the individuals in question, and a range of other failures to comply with obligations**. This could cover defective transposition, and allowing inappropriate administrative practices to persist. It was however necessary **to establish that these breaches crossed a threshold of seriousness** (although nontransposition will always be treated as sufficiently serious: Dillenkofer), as well as being causally linked to the losses sustained. Member state liability has been equiparated to the noncontractual liability of the EU itself under Art 340 TFEU. Application: Sean – **it seems likely that his employer will be regarded as an emanation of the state**. It is responsible to the Ministry of Health and is providing services which are defined in statute. What is not clear is whether the transposition date of the Directive has yet passed. The typical period allowed for transposition is two years, so it is likely that the date has passed, but it will be necessary to establish whether or not this is the case. **If so Sean is entitled to rely on the terms of the Directive** which specifically require the provision of both shower facilities and secure cycle parking in his case. There is no real argument but that these provisions are clear precise and unconditional. Application: Rory – if the directive has not reached its transposition date he will not be able to rely on it anyway. It appears **highly unlikely that he will benefit from the vertical direct effect**, as there is no basis for suggesting that his employer is an emanation of the state. It may be possible to rely on the indirect effect of the Directive. The Irish Regulations refer in fairly general terms to appropriate facilities for washing and changing and storing of clothing. The Directive is more specific and goes beyond washing to showering, but **having regard to the need to interpret the Irish Regulations consistently with the Directive so far as is possible to do so it would not seem too difficult for an Irish court to interpret washing and changing to include showering**. **The provision of cycle storage facilities is more difficult. There is nothing directly comparable in the Regulations.** **In relation to the cycle storage facilities, and if there is any difficulty with regard to the provision of compatible interpretation in relation to the**	

	showering facilities, Rory may be able to rely on member state liability. This appears to be a non-transposition, which is automatically sufficiently serious, rather than a failed transposition where the court has to consider the nature of the failure. The measures were clearly introduced for the benefit of those in the position of Rory and there is a causal link between the breach and his loss in the sense of not having secure storage facilities for his valuable bicycle. The seriousness element appears to be automatically satisfied.	
	Question 4 Total:	**25 marks**