

LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1(a)

The principle of direct effect permits reliance on EU law in proceedings before national courts. It explicitly applies to Regulations, and was extended to Treaty Articles which are clear, precise and unconditional by van Gend en Loos (1963). The Court accepted that the alternative of relying on the Commission to exercise its powers under what is now Art 258 TFEU did not sufficiently assure the rights which it held should be available to natural and legal persons as part of the new legal order. Coupled with the principle of supremacy of EU law articulated in Costa v ENEL (1964), direct effect empowered national courts to give judgment on the basis of EU rights to the exclusion of any inconsistent national legislation. Defrenne (No 2) (1976) confirmed that there could be horizontal direct effect as between natural and legal persons, as well as vertical direct effect as between the litigant and the state. Van Duyn (1975) extended direct effect to Directives, despite the fact that these were not intended to represent the substantive law, but were directions to the Member States to ensure that their law reflected the content of the Directive by the transposition date. However, prior to the transposition date, a Directive does not yet have binding force: Tullio Ratti (1979). Furthermore, the Court has repeatedly ruled that Directives can only have vertical direct effect: Faccini-Dori (1994).

Direct effect has been immensely valuable by providing a mechanism to ensure that EU law is applied. In practice there have been very many cases where there has been defective transposition of Directives, e.g. Marshall (1986). Indeed, it could be said that the modern law on equal treatment of men and women, and much law on equality issues derives from this principle. However, the increasing privatisation of functions formerly carried by the Member States has reduced its significance, and the difficulty of determining whether a particular entity is an 'emanation of the state' using the criteria in Foster v British Gas (1990) has led to much litigation.

1(b)

Art 4.3 TEU provides that 'The Member States shall 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.' In von Colson (1984) the Court utilised this provision to rule that Member States are obliged to interpret their own legislation consistently with the requirements of EU law in order to ensure an effective remedy. In Marleasing (1990) this was extended so the interpretive obligation applies to any national legal rule of whatever date and in whatever context, horizontal or vertical, so far as it is possible to do so. In the UK, this has been interpreted as imposing a special duty on the court on the basis that the overarching intention of Parliament is to legislate consistently with EU obligations which can prevail over the specific intention to enact the particular words in dispute: Pickstone v Freeman (1988); Litster v Forth Dry Dock (1989).

This principle has proved extremely useful to establish the indirect horizontal effect of Directives, particularly in the employment context where there had previously been a discrepancy between the rights of those employed in the public sector who could utilise vertical direct effect, and those in the private sector who could not. However, the principle can only be invoked where there is relevant national legislation which can be interpreted.

1(c)

This principle derives from the decision in Francovich (1991). The claim was a vertical one against Italy, but the provision in question was not clear precise and unconditional, and there was no relevant national legislation, so neither direct nor indirect effect availed. The court utilised Art 4.3 TEU to hold that Italy's failure to transpose the Directive in question constituted a breach which could be treated as breach of a non-contractual obligation (similar to a breach of statutory duty in national law), thus allowing a claim for damages. In Brasserie du Pêcheur (1996) the Court stated that this principle applied to all forms of breach of EU law by Member States subject to three conditions. The legal rule must exist for the benefit or protection of the claimant, causation must be established and the breach must be sufficiently serious. Certain breaches, such as complete non-transposition of a Directive are automatically serious, but in other cases seriousness must be evaluated against a range of criteria, including intention, whether the state was misled, the extent to which the state has disregarded the limits on its discretion etc.

This principle is undoubtedly useful in ensuring a remedy where there has been serious dereliction by the state, although the application of the seriousness criteria has been criticised as affording too great latitude to the state.

Question 2

The relevant market has always been a key feature of the regulation of abuse of dominant position under Art 102 TFEU. This is because dominance cannot exist in a vacuum and it is therefore necessary to determine what the appropriate market is. The concept has more recently also acquired considerable significance in the context of Art 101 TFEU. The benefit of the Notice on Agreements of Minor Importance (2014) and of many Block Exemption Regulations is available to undertakings whose share of the market does not exceed a specified percentage.

There are three components to the concept, namely the product market, geographic market and temporal market. However, the latter is rarely found to

be relevant. The Commission Notice on the Definition of the Relevant Market (1997) is soft law, representing the approach taken by the Commission, but this is based on the jurisprudence of the Court.

The primary means of establishing whether different categories of goods form part of the same product market is cross elasticity of demand, typically measured by the SSNIP test (as modified in the Notice). Goods are seen as part of the same market if a small but permanent price increase (5-10%) in one results in a commensurate increase in demand for the other. Other factors are also considered, such as cross elasticity of supply, and the existence of barriers to market entry. The Commission will review the historic operation of the market, will consult interested parties, may carry out evaluation tests, and will generally consider all relevant evidence. It is generally in the interest of undertakings to argue for a broad market as this will dilute their share of it: United Brands (1978); Continental Can (1973). Conversely, it is usually in the interests of the Commission to argue for a narrow market.

When considering the geographic market, the nature of the product will be taken into account. Thus a bulky low value product will incur significant transport costs and the geographic market for a particular producer will be relatively small. Trading conditions may vary in different parts of the EU. In United Brands some states imported dollar bananas from Central America, but others imported bananas from former colonies and the nature of the trade was so different that they constituted separate geographic markets. The Commission will analyse trade flows, and consider whether historic local preferences or other distorting factors limit the geographic market. It should be noted that economic conditions in a very specific location nevertheless may be seen as constituting a separate geographic market which is potentially significant in terms of interstate trade. The port of Holyhead carries a significant proportion of exports from and imports to Ireland and was the subject of a Commission investigation and decision: Sealink/B & I - Holyhead (1992).

Once the relevant market has been established, market share can be calculated. In relation to Art 101, while a ruling that the market share exceeds the relevant percentage will deprive the undertakings of the benefit of the exceptions concerned, there will be no other adverse consequences. The legislation recognises that market shares can fluctuate, so there is provision for borderline cases in any event. In relation to Art 102 the stakes are higher, in that market share will be used to determine whether or not the undertaking is dominant and therefore within the scope of Art 102. There has been criticism that the Commission has tended to take a snapshot of the market at a particular time, and has not taken account of the operations of the market. Where a high market share is not sustained over a period, it is difficult to argue convincingly that there is dominance. The Commission commenced an investigation of Google in April 2016 on the basis that it was abusing a dominant position in relation to the smart phone and tablet app market as its Android operating system currently had an 80% market share. However, commentators observed that only a year or two previously it was assumed that Apple had achieved dominance in the same market. It is questionable whether the methodology adopted by the Commission sufficiently captures the dynamic nature of markets.

Question 3(a)

The Commission fulfils a number of functions. It has the sole responsibility for initiating the legislative process by preparing draft legislation, although it undertakes this on the basis of a programme of work established in consultation with the Council and European Parliament, and while the European Council does

not participate in the legislative process, it is responsible for the strategic direction of the EU. At a strategic level (e.g. migration and asylum policy, or dealing with the UK 'Brexit' referendum) the President plays a key role in formulation of policy in consultation with the European Council and its President, while the College of Commissioners takes responsibility for the various policy areas, grouped into sections of cognate areas under the Vice-Presidents. The Commission remains actively involved in the legislative process providing commentary on amendments proposed by the Parliament and any common position adopted by the Council. It also participates in the dialogues which underpin the conciliation procedure at third reading. There has been increasing criticism of the extent to which the Commission has thought it necessary to provide detailed regulation at EU level, and the President of the Commission, Mr Juncker, has acknowledged that there must be a reconsideration of the extent of regulation. The Commission is also the 'guardian of the treaties' (Art 17 TEU) with specific responsibility for ensuring that Member States comply with their obligations (pursuant to the duty of sincere cooperation: Art 4 TEU). Much of its work in this area is undertaken relatively informally using the EU Pilot electronic portal for a 'structured dialogue' concerning complaints received, and monitoring of transposition deadlines using a further electronic database. The Commission has also established transposition working groups for particular Directives to identify and resolve issues preventing timely and effective transposition. Some 75% of issues are resolved prior to the institution of formal administrative enquiries under Art 258 TFEU and a further 10% without the need for judicial proceedings. The Commission has also improved the transparency of its activities and reporting to complainants, although there is still criticism that the actual communications between Commission and Member State are treated as confidential. In addition, the Commission is responsible for the implementation of policy as the civil service of the EU. It has now moved definitively away from the detailed management of policy areas which characterised the early years of the EEC. It has sought to adopt a more strategic approach. For example, in competition law, the Commission focuses on the most important large-scale EU wide investigations, with national competition authorities taking responsibility for smaller scale investigations.

3(b)

The Court has three principal jurisdictions. Under Art 258 TFEU it can determine whether Member States have failed to comply with their obligations under EU law. Under Art 267 TFEU it can make rulings on preliminary references submitted by national courts or tribunals on the interpretation of EU law and the validity of acts of the institutions. Under Art 263 TFEU it can determine actions of annulment. Decisions in all three areas have contributed to the development of the EU in various ways.

The Court in its early case law tended to give an expansive interpretation of the scope of treaty provisions. For instance, it defined 'agreement' in Art 101 TFEU so as to include informal agreements (ACF Chemiepharma (1970)) and 'measures having equivalent effect' to quantitative restrictions in Art 34 TFEU to include all measures having a direct or indirect, actual or potential effect on trade between Member States (Dassonville (1974)). This tended to expand the scope of regulation, thus allowing the Commission to act in a broad range of situations.

A number of fundamental principles of EU law derive from the case law. As well as the doctrine of direct effect declared in van Gend en Loos (1963) and the doctrine of supremacy of EU law declared in Costa (1964), there is the principle of indirect effect in von Colson (1984) and Marleasing (1990) and Member State liability in Francovich (1991). In the latter two cases the Court proactively

reformulated the issues in preliminary references in order to introduce new or broader principles.

The object of the preliminary reference procedure is to ensure consistent interpretation of EU law, particularly in relation to autonomous concepts of EU law, such as 'worker' or 'tribunal'. The Court has tried to strike a balance between acknowledging that Member State courts now have considerable expertise in matters of EU law and can therefore deal with straightforward cases, and ensuring that there is no divergence as a result of linguistic difference: CILFIT (1982). Also, the Court has acknowledged that while it does not establish self-binding precedents, national courts may choose to rely on existing decisions rather than slavishly making new references of the same issue: Da Costa (1963).

The action for annulment has been used in a number of cases of constitutional judicial review. The Court has ruled on issues relating to the relationship between the institutions over issues such as comitology, and the ability of the European Parliament to determine its own sitting arrangements.

In all these areas the Court has generally been activist and contributed proactively to the development of the EU. There have been occasions when it has perhaps overstepped the mark. In cases such as Martinez Sala (1998) it suggested that the status of EU citizen was destined to become the fundamental status, but in more recent cases such as Dano (2014) it has acknowledged that rights must be based on satisfying the conditions laid down in the legislation.

Question 4

Art 263 TFEU effectively brings together under one heading a number of conceptually distinct judicial functions. At one extreme, it is dealing with issues of constitutional judicial review concerning such matters as the relationship of the various institutions such as Chernobyl (1990), and at the other what amount to appeals against quasi-judicial decisions of the Commission in relation to competition law. The Member States and the principal institutions of the EU are fully privileged applicants, and are able to raise an action for annulment in relation to any act of the institutions. Natural and legal persons by contrast are non-privileged, and the original intention was to allow them to access the annulment procedure solely in relation to acts addressed to them, such as adverse competition law decisions by the Commission, or which were of direct and individual concern to them. Since the annulment procedure represents a convenient way of disputing the validity of secondary legislation, many attempts were made to establish that decisions of a general nature and EU Regulations were of direct and individual concern.

Direct concern has been interpreted to mean that it is the act complained of itself which must affect the claimant. Therefore, if the act gives discretion, e.g. to a Member State as to how it is to be applied, direct concern will not be established: Differdange (1984). Individual concern was defined in Plaumann (1963) as meaning that the applicant must be affected 'by reason of their individuality or of their special position'. In this case, the applicant was one of a fluctuating number of fruit traders affected by a decision addressed to Germany. No member of this shifting class could satisfy this definition. In practice, most successful claims have concerned members of a closed class, e.g. applicants for a licence at a specific time under the former detailed Common Agricultural Policy, as in Toepfer (1965). Interference with existing contractual relations may also satisfy the test: Piraiki-Patraiki (1985).

In the case of Regulations, even administrative Regulations made by the Commission under delegated powers, there was a further complication, in that an application could be made only if the Regulation could be treated as in reality a decision or a bundle of decisions. This argument succeeded in relation to Regulations in relation to anti-dumping, which were viewed as a linked series of decisions in relation to each participant bundled together for convenience, as much of the general part of the recitals and reasoning applied to all.

Around the turn of the century efforts were made to challenge this interpretation. These received some support from the opinion of Advocate-General Jacobs in Union de Pequeños Agricultores (2002) and the Court of First Instance in Jégo-Quéré (2002) the argument was that in certain states the preferred alternative of commencing proceedings in the national court, seeking a preliminary reference and raising a plea of illegality before the Court of Justice was inadequate, since in some Member States there was no convenient mechanism to obtain pre-emptive or declaratory relief. This meant that the affected party would have to defy the law, await enforcement action and then seek to raise the plea of illegality. This was argued to result in a deficiency in terms of legal remedies. However, the Court of Justice in Jégo-Quéré (2004) firmly rejected this and reaffirmed the original Plaumann test, and a restrictive approach to which Regulations could be challenged. Any deficiencies were ascribed to failure on the part of Member States to put in place appropriate mechanisms.

The relevant provisions were modified by the Lisbon Treaty. In addition to acts addressed to the applicant or of direct and individual concern, 'regulatory acts' of direct concern and not entailing implementing measures can also be challenged. This addressed one of the issues in Jégo-Quéré, where the act in question was an administrative Regulation on fishing net mesh sizes. Regulations not made by legislative process fall within the definition: Inuit Tapiriit Kanatami (2013), as do decisions of general application: Microban (2011). However, a legislative act must still be of direct and individual concern which will be almost impossible to establish, and where a specific decision is not addressed to the applicant direct and individual concern in the traditional sense will still need to be shown. Also, if a regulatory act entails implementing measures, these must still be challenged in national proceedings: Telefonica (2013).

The amendment has significantly improved the position of non-privileged applicants in relation to regulatory acts. It has not done so in other respects. Whether this is a serious deficiency depends on whether the alternative route to a remedy via national proceedings and a preliminary reference is regarded as unnecessarily complex.

SECTION B

Question 1

Rights of free movement are governed in part by Art 20 TFEU which gives all EU citizens a qualified right to move freely within the EU and reside in any Member State, and in part by Art 45 TFEU which guarantees free movement for workers and Art 49 TFEU which allows a right of establishment for self-employed persons. More detailed provisions are contained in Directive 2004/38/EC.

All EU citizens, and their immediate family of any nationality, are entitled to travel to and reside in another Member State for up to three months for any purpose without formality other than proof of identity and status (Dir Art 6), but without becoming an unreasonable burden on the social assistance system (Dir Art 14). Residence beyond the three-month period is assured only for specific categories, the relevant one for this situation being a worker and his family (Dir

Art 7). The status of worker is retained if the individual is temporarily unable to work as a result of illness or accident, has become involuntarily unemployed after more than 12 months' employment, or has become involuntarily unemployed after a shorter period, but in this case the status may be withdrawn after not less than six months, and in any event there is a requirement to register as a jobseeker. (Dir Art 7).

In Dano (2014) the Court held that only those whose residence was in accordance with the Directive were entitled to rely on the Directive. In particular Art 24 which provided for equality of treatment with nationals of the Member State was not applicable to economically inactive persons falling outside Art 7. In Alimanovic (2015) the court further held that there was no entitlement to social assistance for jobseekers who had not been employed for a continuous period of 12 months, beyond the six-month period provided for in Art 14. Both these cases concerned the German social assistance system.

There is an additional category of family members outside the immediate nuclear family who do not enjoy the absolute right to accompany or join an EU citizen, but in respect of whom the Member State must facilitate entry and residence and justify any decision to refuse this. This includes those who were in the country of origin dependents or resident in the household of the EU citizen (Dir Art 3).

A Member State may only exclude or expel a person entitled to reside pursuant to the Directive on the grounds set out in Art 27. A measure taken on grounds of public policy or security must be proportionate, based on the conduct of the individual, and not considerations such as general deterrence, and must represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.

In relation to Olga, while her right of residence is dependent on that of Frank, as she is not herself an EU citizen, the justification given by the German authorities for expelling her does not appear to comply with Art 27. It appears to be a blanket prohibition based on a former status, and there has been no evaluation of what, if any, threat she currently presents to public order or security in Germany. Olga should be advised that she is entitled to challenge the decision before the national courts, and if necessary request a preliminary reference.

Sasha is not a member of the immediate family entitled to accompany Frank, although the fact that her relationship is with Olga is immaterial. She was residing in their household in England. She therefore falls within the additional category whose entry and residence should be facilitated, and any refusal requires specific and appropriate justification. The fact that she is not Olga's daughter is not in itself a legitimate reason not to facilitate residence.

Frank's addiction to recreational drugs is unlikely to be characterised as an illness or accident. He is no longer a worker, and it appears that he has not taken the steps necessary to qualify as a jobseeker. He could remedy this by registering with the appropriate agency. However, while he would then be entitled to continue to reside for at least six months and would retain the status of worker during that period, thus entitling him to social assistance, on the basis of Alimanovic, he can thereafter be denied benefits. At present, he can be denied benefits on the basis that he is economically inactive on the basis of Dano.

Question 2(a)

This question concerns free movement of goods, one of the four freedoms which constitute the single internal market. Art 34 TFEU prohibits quantitative restrictions on imports and measures having equivalent effect (MEQR). Art 110 TFEU prohibits discriminatory internal taxation.

(i) Quantitative restrictions comprise prohibitions and quotas restricting the amount or value of goods which may be imported: Geddo (1973). There is no suggestion of this in this scenario. MEQR were defined in broad terms in Dassonville (1974) as trading rules capable of affecting, actually or potentially, directly or indirectly trade between member states. They are subdivided into distinctly applicable MEQR, where specific requirements are imposed on imports which are not imposed on domestic production, and indistinctly applicable MEQR where requirements are imposed without distinction of origin, but have a differential impact on the imported product. In Cassis de Dijon (1979) the Court established the 'rule of recognition', pursuant to which there was a presumption that goods produced in a Member State in accordance with the local regulatory requirements should be freely marketable throughout the EU. So if recipe laws apply, the imported product could not be excluded simply because it did not comply with the local regulations. The Court also established a 'rule of reason'. Indistinctly applicable MEQR could be justified as a proportionate means of achieving a 'mandatory requirement' of the state. These include consumer protection, fairness of transactions, health and environmental issues.

Subsequently, in Keck & Mithouard (1993) the Court refined the definition of MEQR to distinguish between product characteristics, such as recipe, packaging and labelling requirements relating to the specific commodity, which remained MEQR, and 'selling arrangements' which were trading rules focused on the nature of commercial activity, such as restrictions on opening hours, regulation of advertising and regulation of practices such as loss leading. So long as these operate in the same way in law and in fact in relation to imported and domestic products, they fell outside the definition. If it could be established that there was a differential impact, they felt to be treated as indistinctly applicable MEQR in the usual way.

The Czech rule restricting the use of the word 'vino' to wine produced from grapes is an indistinctly applicable product requirement and therefore an MEQR. It will undoubtedly have an impact on Marco, as he would have to devise an alternative name and packaging. The Czech authorities may be able to demonstrate that consumers associate 'vino' exclusively with wine, and that to allow this different product onto the market would cause confusion and lead to consumers mistaking VF for 'normal' wine. In that case, the regulation in question may well satisfy the rule of reason as a proportionate means of achieving a mandatory requirement.

(ii) These Swedish excise duties clearly form part of their internal taxation system. Art 110 has two limbs. Under the first limb imported products may not be subjected to taxation in excess of that imposed on similar domestic products, unless this can be justified on social or other grounds. Similarity is ascertained by considering how consumers perceive and use the product. Thus spirits produced from wine are regarded as similar to those produced from grain or cider: Commission v France (Taxation of Spirits) (1980). Alcoholic strength, and the typical occasions of consumption are also factors to be considered: John Walker v Ministeriet for Skatter (1986).

The second limb prohibits internal taxation which provides indirect protection to domestic products. These are therefore products which are not similar, but are potentially in competition. In Commission v UK (Wine and Beer) (1980) it was held that, while wine and beer were not similar, in that they were produced by different means and had different alcoholic strengths, they were at least potentially in competition in relation to certain opportunities for consumption so the taxation system should not favour domestically produced beer over imported wine so as to provide indirect protection. However, in Commission v Sweden (2008) it was held that the differential in taxation should be seen in the context of the overall price differential. In that case imported wine was much more expensive than domestic beer even when the tax differential was discounted, so the taxation element did not on the facts provide indirect protection.

There is no information concerning any possible social justification. The first question to determine is whether VF can be considered similar to the Swedish fruit cordials. Although the source of the alcohol is different, they are of similar strength, and evidence would be needed as to whether they are consumed in the same way and seen as interchangeable by consumers. If so, they are likely to be seen as similar, and as a result the higher rate of taxation appears to infringe Art 110. If they are not similar, they are at least potentially in competition. If the differential taxation is a substantial part of the price differential, this may constitute indirect protection, but if there is a substantial price differential after discounting the taxation element, this is unlikely to be the case.

2(b)

Marco can make a complaint to the Commission. The Commission is not obliged to investigate all complaints, but it will normally investigate a complaint which appears to be substantial. This may result in the Member State in question accepting that it is in breach of EU law and making the necessary amendments. However, if it is necessary to invoke the formal administrative and judicial procedure (under Art 258 TFEU), this may take a significant amount of time, and even if the end result is a ruling against the Member State this does not in itself guarantee a specific remedy for Marco. An alternative is to commence proceedings in the relevant national court challenging the legality of the national measures in question by reference to EU law. Under the principle of supremacy (Costa (1964)), the national court should apply EU law.

Question 3(a)

Art 101 TFEU prohibits agreements between undertakings and concerted practices which are anti-competitive. An undertaking is any entity engaged in trade in goods or services: Höfner & Elser (1991). Agreement is broadly defined to include informal understandings as well as formal contracts: ACF Chemiapharma (1970). A concerted practice arises where, without positive evidence of an actual agreement, the participants 'knowingly substitute practical cooperation ... for the risks of competition': ICI v Commission (1972). The principal difficulty in these cases is to determine whether, particularly in an oligopolistic market, equivalent changes made by the different participants reflect an independent but necessarily similar reaction to similar external stimuli, or indicate concertation. The investigation will inevitably be very fact and context specific and require detailed analysis.

The behaviour complained of must be capable of affecting trade between member states and have either the object or effect of interfering with competition. The former requirement is easily satisfied since it simply means that it is capable of influencing, actually or potentially, directly or indirectly the

pattern of trade between Member States: Maschinenbau Ulm (1966). A number of forms of prevention, restriction or distortion of competition are set out in a non-exhaustive list in Art 101. These include price-fixing and limiting, controlling or sharing markets. Since the undertakings concerned operate at the same economic level, this is a horizontal agreement or concerted practice, and would constitute a classic cartel if its existence could be proved.

There does not at this stage appear to be any substantial evidence of an actual agreement. There is the potential for there to be a concerted practice in two respects. The first respect is in relation to the series of similar price increases at similar times. However, it is clear that all four undertakings are dependent on a single source of supply of a key ingredient, and the suspicious price increases may be justified because of the increase in the cost of this essential ingredient.

The second respect is in relation to the apparent partitioning of the market. It will be necessary to examine whether there are any objectively justifiable reasons why Caledonian Lubricants is the only available supplier in relation to the North Sea, and does not appear to be active in other markets. One explanation is that the four undertakings have partitioned the market in this way, but others may be that by reason of geographical location Caledonian Lubricants can undercut the prices offered by the other undertakings to such an extent that it is uneconomical for them to compete, and/or Caledonian Lubricants lacks production capacity to compete on other markets than the North Sea.

Since the Commission enjoys substantial investigative powers under Regulation 1/2003, including powers of entry and search, it may be appropriate to commence an investigation to ascertain whether suspicions of concerted practice can be confirmed.

(3b)

This disclosure clearly establishes the existence of a cartel. The Commission has a well-established leniency policy, which is set out in the Commission Leniency Notice (2006). Assuming that the existence of the cartel has not yet been established by the Commission, Rheinöl may qualify for total immunity. In order to do so it must provide sufficient evidence to prove the existence of the cartel, collaborate fully with the Commission and cease and desist from participation forthwith. Other participants may qualify for partial immunity if they provide additional valuable material. The Commission undertakes to maintain confidentiality in relation to the disclosure, and will not release the contents of its file in relation to other proceedings, for example damages claims by victims of the cartel.

Question 4

This question requires consideration of the nature of the EU legislative procedure, and the opportunities for lobbying and influencing the process. While the Commission has the legal responsibility for initiating the process and producing a draft Directive, it is the Council and European Parliament which are responsible for enacting the legislation. Assuming that the ordinary legislative procedure applies, this is governed by Art 289 TFEU. In addition, national parliaments also have a role in the scrutiny of EU draft legislation under the first and second protocols to the TFEU. The second protocol entitles a national parliament to issue a reasoned opinion as to why the draft legislation does not respect the principles of subsidiarity and proportionality. The legislators must take account of these opinions. If sufficient opinions are issued the Commission must respond and justify continuing with the draft legislation.

It is important to understand that the functioning of the EU is based on an intense network of formal and informal discussions and negotiations. These are designed to ensure that, so far as possible, the final form which is taken by legislation represents a consensus, and takes account of all relevant opinions.

An interested party such as Rubber Industry Association (RIA) will have an opportunity to influence the thinking of the Commission at an early stage. Normally the Commission will invite representations right at the outset of its development of draft legislation. Depending on the significance of the measure, it may produce preliminary proposals. These were previously known as green and white papers, reflecting the extent to which the Commission had already formed a provisional view on the preferred way forward, although more recently the term 'roadmap' has been used to describe preliminary documentation. The Commission has relatively limited resources, and will normally welcome input from the industry sector concerned, particularly where scientific and technical issues are involved.

Once the draft Directive has been finalised and officially submitted to the Parliament and Council, the focus of representations will move. The Parliament is the first to consider the draft at first reading. A Parliamentary committee comprising representatives of the various parties represented in the Parliament will consider the draft in detail, and one member of the committee will act as rapporteur. Representations can be made to the various parties which will consider their position in relation to the draft prior to it being debated in plenary session. Representations may also be made to national governments in order to influence the approach they take to the discussion of the proposal in Council, and particularly in the preliminary discussions involving their diplomatic permanent representatives (COREPER). This process will continue throughout the legislative cycle. Since the Commission will continue to maintain a close interest, it may also be appropriate to continue to make representations to the relevant officials. The lobbying process may also involve attempting to mobilise public opinion, or at least the wider motor industry, to increase the pressure on the various legislators.

At the same time, the draft will have been circulated to national parliaments, and representations can be made to individual members, or to political parties, particularly if there are any issues of subsidiarity.

Although it is possible that the draft will not be enacted, either because the Parliament rejects the Council's common position at second reading, or because it is not possible to find an agreed text in the conciliation proceeding at third reading, it is likely that a substantive Directive will be the result. A Member State can utilise the annulment procedure under Art 263 TFEU to challenge the validity of the Directive. It is unlikely that the RIA itself can utilise this procedure, as it is a non-privileged applicant, but it may be possible to challenge unacceptable provisions of the Directive in national proceedings by inviting the national court to make a preliminary reference and submitting a plea of illegality under Art 277 TFEU.

The RIA should be advised that there are multiple opportunities to seek to influence the content of the Directive, and the legislative procedure is predicated on the assumption that interested parties will take advantage of this.