LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

Question 1

The neutral phrase 'non-contractual liability' reflects the fact that the Member States have different concepts of tortious or delictual liability. However, both Member State Liability (MSL) and liability under Art 340 (EUL) are essentially types of tortious liability.

EUL has been part of the treaty framework from the outset. Article 340 TFEU provides that the European Union shall make good any damage caused by its institutions or by its servants.

Liability for servants might be characterised, in English law, as vicarious liability. It raises few real difficulties, although the scope of liability is less wide than would be the case in England. For instance what is deemed to be an action by an official in the course of duty is narrower: Sayag v Leduc (1969) and the level of fault required seems to be a little higher: Richez-Parise (1971).

Liability for the institutions is based on the administrative law of the original member states. Liability depends on causation, and also on the error being of a certain order of magnitude. The main difficulties have arisen where claims have been made arising from losses allegedly sustained as a result of the application of policy. This commonly arose under the Common Agricultural Policy when this involved the Commission in managing agricultural production and marketing.

The response was to create the Schöppenstedt (1971) formula, requiring a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual'. This was then restated as 'manifest and grave disregard for the limits of discretion' in HNL and Others v Council and Commission (1978). Here, the institutions were not liable for the consequences resulting from a regulation which had been held to be null and void on the grounds of impermissible

discrimination between undertakings. Inevitably when policies are made there will be some undertakings which gain and some which lose. It would be unusual to impose a duty to protect the interest of these parties; if there is any illegality involved in the operation of policy this should be redressed by judicial review as a matter of public law.

MSL, by contrast, has been created through the jurisprudence of the ECJ. Its basis is the obligation of the member states under Art 4.3 TEU 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'. It is broadly analogous to the tort of Breach of Statutory Duty in English law. The principle was first established in Francovich & Bonifaci (1993). This was a case of non-transposition of a Directive which was not clear, precise and unconditional. It required Italy to nominate a body to make payments to employees of insolvent employers, covering redundancy pay etc. There were several options, but Italy adopted none of them, despite a finding of default under Art 258 TFEU. The claimants asserted that, in default of a nomination, the Italian state should make the payments. The Court rejected this analysis, but ruled that, in principle, the state was in serious breach of its obligations, the measure in question was designed to benefit the claimants, and there was a causal link between the default and the loss, so Italy was liable under a claim for noncontractual damages. The measure of damages is of course the lost payments.

In Brasserie du Pêcheur/Factortame III (1996) the Court expanded and clarified the scope of the principle. Both cases concerned alleged breaches by the legislature – in the first case not amending inappropriate legislation, and in the second seeking to legislate inconsistently with EU principles. Each fell within the scope of MSL. The Court imposed three conditions for liability: the rule of law must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach and the damage. The test for a sufficiently serious breach is whether the Member State 'manifestly and gravely disregarded the limits on its discretion.' Given the wide range of circumstances to which MSL may apply, there are many factors which may be relevant. The Court identified these as 'the clarity and precision of the rule breached, the measure of discretion left to the national authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by an EU institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to EU law. A breach of EU law will be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter clearly establishing that the conduct in question constituted an infringement.

There is now a clear parallel between the basis of liability under Article 340 and Member State Liability. The seriousness criteria are explicitly the same: Bergaderm (2000). The Schöppenstedt (1971) formula specifically applies to Article 340, since claims are being brought on the basis of an infringement of the EU legal order by an EU institution, but "manifest and grave disregard of the limits of discretion" is the test applied in both. Claims under Article 340 are likely to be less frequent under current conditions. This is because the Commission is no longer actively managing the agricultural sector, and indeed is adopting a more strategic approach generally. As a result there are fewer situations where action by the Commission is likely to be capable of adversely affecting individuals or undertakings. However, MSL remains important to ensure that individuals are entitled to the benefits to which they are entitled under EU law in a wide range of

contexts, including failure to transpose Directives when neither vertical direct nor horizontal indirect effect applies, and extending even to failure by national supreme courts to make references under Art 267 TFEU: Köbler (2004).

Question 2

Prima facie Art 101 TFEU applies to all agreements between undertakings which may affect trade between Member States and have as their object or effect the prevention restriction or distortion of competition, and such agreements are void. Initially the Commission and the ECJ took a broad view as to what agreements could fall within this definition, in order to give the Commission power to regulate anti-competitive activity. A wide range of agreements were brought within its scope, and were subject either to individual exemption on application to the Commission or negative clearance on the basis of the preliminary examination.

It is acknowledged in Art 101.3 that there are agreements with anti-competitive elements which are nonetheless in the public interest. This would, for example, cover vertical agreements such as selective or exclusive distribution arrangements where the restrictions on intra-brand competition are mitigated by the existence of interbrand competition and the advantages for manufacturers of being able to utilise distributors with expertise in the relevant market. From the outset such arrangements were authorised, provided they did not contain unacceptable "hard-core" restrictions such as price maintenance or absolute territorial protection: Consten/Grundig (1966).

Subsequently a number of approaches have been articulated. One relates to agreements between undertakings which have a very limited market share and therefore a very limited impact on the operation of the market. The ECJ indicated in Volk v Vervaeke (1969) that such agreements could be seen as falling outside the scope of Art 101, and the Commission formalised this with a Notice on Agreements of Minor Importance in 2001 which confirmed that the commission would not regard certain agreements as being capable of affecting trade between member states, provided that they did not contain "hard-core" provisions. These agreements are those between undertakings with a market share below 15% where they are not in competition with each other, a market share of 10% when they are in competition and a market share of 5% in circumstances where there is a network of agreements, e.g. tied outlets in the licensed trade. The current edition of this notice was issued in 2014.

When administration and enforcement of Art 101 was modernised by Regulation 1/2003, the Commission moved away from direct regulation through individual exemption. Instead, a series of block exemptions were created and undertakings were placed under an obligation to assess their own agreements to ensure that they were compliant with the requirements of the Commission.

One important block exemption relates to vertical agreements, i.e. agreements between undertakings at different stages in the production process, typically manufacturers and distributors. Essentially Regulation 330/2010 excludes such vertical agreements, which are typically distribution agreements, from the prohibition in Art 101 provided they do not contain "hard-core" provisions such as price maintenance and absolute territorial protection, although protection against active selling into an exclusive area is acceptable. Furthermore "non-compete" provisions may not operate for a period in excess of five years or exist post-termination. The Regulation applies when the market share of the participants does not exceed 30%.

The Commission regards horizontal anti-competitive agreements as being essentially suspicious. The classic cartel is the quintessential horizontal anti-competitive agreement, allowing undertakings to manipulate the market to their own advantage and to the disadvantage of customers. Nevertheless, there are certain activities which are legitimate even between competitors, such as collaborative research and development. The argument here is that research and development is a costly activity, and some desirable development will not be undertaken unless undertakings are able to collaborate and share the costs. Regulation 1217/2010 legitimises such arrangements, provided that the total market share of the participating parties, where they are in competition, does not exceed 25%. The Regulation only relates to the research and development phase, and there is much less willingness to approve collaboration at the production stage.

The approach of the Commission has evolved significantly over time. In part this has been driven by the increase in geographic scope of the EU which has made it impracticable for the Commission to continue to monitor individual agreements on a routine basis. There is also a recognition that the focus of enforcement should be on those areas where anti-competitive agreements lack redeeming features and represent a significant distortion of the market to the advantage of the participants. Provided the undertakings who participate in agreements do not have a sufficiently large market share to constitute market power, there is now very considerable latitude to allow collaborative behaviour which either facilitates the distribution of products or contributes to technical development through collaborative research and technology transfer.

Question 3(a)

The EEC, and subsequently the EC and EU, have been constituted by treaties which lay down rules which are intended to be applicable in fields such as trade and competition. Each of the Member States has its own legal and constitutional framework in which the courts are obliged to give effect to national law. There is the potential for conflict where EU legal rules are incompatible with national rules. This creates a classic problem of double deontology, with two legal systems occupying the same space there needs to be clarity as to which prevails. In Costa v ENEL (1964) the ECJ clearly stated that EU law prevailed, but this was not readily accepted by all member states, and in Simmenthal II (1978) the ECJ was obliged to reiterate that it was incumbent on national authorities and courts to disapply national law which was inconsistent with EU law. This has proved particularly problematic for the legal systems of Germany and the United Kingdom. In Germany, the German constitutional court has repeatedly held that in the last analysis it is obliged to give effect to the German Basic Law, although in a series of cases it has been able to accommodate EU law alongside German law. Similarly in the United Kingdom the doctrine of Parliamentary sovereignty is in principle inconsistent with the principle of the supremacy of EU law. However, while a desire to escape from the supremacy of EU law and the pre-eminent jurisdiction of the ECJ is one of the objectives of the British government in pursuing Brexit, the doctrine of supremacy of EU law appears now to be entirely firmly established within the EU legal system.

(b)

The traditional view of organisations created on an intergovernmental basis by treaties between states has been that they create obligations and rights in public international law at the level of the High Contracting Parties. This view of the EEC was challenged in the case of van Gend en Loos (1962). Treaty provisions, now spent, relating to the transitional period for the creation of the internal market

and common customs tariff prohibited the creation of new national customs duties. The Dutch customs authorities changed the categorisation of certain products within their national tariff system, imposing a higher level of duty. The logistics company responsible for paying the duty challenged the legality of this. The Dutch tax tribunal indicated that it was obliged to apply the Dutch regulations, but the ECJ, following a preliminary reference, ruled that the EEC Treaty had created a new legal order. It did not simply operate as a traditional treaty, but created rights and obligations for natural and legal persons, both where these were specifically provided for in the treaty, and where they were necessary by implication. Direct effect should be given to such rights and obligations, where they were sufficiently clear precise and unconditional. In this case the logistics company could rely on the treaty provision as directly effective as against the Dutch legislation. The alternative would have been for the commission to pursue an investigation of the conduct of the Dutch authorities, but this was not seen as being an adequate protection of the rights of those concerned. This is arguably the single most significant decision of the ECJ, and direct effect is now given both horizontally and vertically to treaty articles, including rights such as the right of free movement (Art 20 TFEU), and vertically to directives: van Duyn (1974); Marshall (No 1) (1986). This principle has contributed substantially to ensuring that EU legal rights and obligations are effective.

(c)

The principle of direct effect already discussed is subject to limitations. The first is that it only applies where provisions are clear precise and unconditional. The second is that, since Directives are addressed to member states, they can only have vertical direct effect as against the state or an emanation of the state as explained in Foster v British Gas (1990). The ECJ initially articulated the concept of indirect effect in cases such as von Colson (1984). In this case the court ruled that it was incumbent on a member state to ensure that there was an effective remedy in relation to a breach of EU law. This was part of the obligation of the state to comply with its EU obligations under Art 4.3 TEU. In Marleasing (1990) the ECJ ruled that this principle required a member state to interpret its own legislation consistently with any relevant EU legislation, for example a Directive in a horizontal context, so far as it was possible to do so. In Wagner Miret (1993) the ECJ confirmed that this did not extend to interpreting national law *contra legem.* This principle has proved highly influential. In the United Kingdom the interpretive obligation has been implemented in such a way that a much more purposive approach to statutory interpretation is possible. The traditional approaches which require respect for the semantic content of the domestic legislation have been superseded, and the individual piece of legislation will be interpreted having regard to the overarching intention of Parliament to comply with its EU obligations: Litster v Forth Dry Dock (1988).

Question 4

This Article provides a mechanism whereby the ECJ can annul any act of the institutions of the EU, including Directives Regulations and Decisions. Privileged applicants, namely the principal institutions of the EU and the Member States, may seek the annulment of any such act, provided they act within two months of its promulgation. In this context, the Article appears to provide for a form of constitutional judicial review of the legality of acts of the institutions. However, it also fulfils another function. Certain acts, in particular Decisions, are addressed to a specific natural or legal person. The prescribed mechanism for challenging these is by way of an action for annulment, although this is more in the nature of an appeal. One example is decisions in respect of anti-competitive behaviour by

undertakings. While it would have been entirely possible to deal with such "appeals" in a separate Article, the two procedures are, in effect, run together. Art 263 provides for non-privileged applicants, namely natural and legal persons, to apply for annulment, but only in limited circumstances.

An applicant may always challenge an act which is addressed to it. This allows the subject of a competition ruling to challenge it by way of annulment. Problems have however arisen over the extent to which annulment is available beyond this. According to the Article a non-privileged applicant may challenge an act which is "of direct and individual concern" to it and a "regulatory act which is of direct concern … and does not entail implementing measures".

Direct concern has been consistently interpreted as meaning that the act in question operates on the applicant as such, without any exercise of discretion, e.g. by a Member State: UNICME (1978).

Individual concern was initially interpreted in Plaumann (1963) as affecting them by virtue of their attributes or circumstances which distinguish them individually just as in the case of the person addressed. This is a difficult test to satisfy. Plaumann was an importer of clementines, affected by a decision addressed to the German authorities on the tax treatment of the product. This was not sufficient to constitute individual concern, as any undertaking could choose to participate in this market. Individual concern has been found where a decision applied to a closed class, e.g. those who had applied for a particular licence at a particular time: Toepfer (1965), or those who had entered into contracts affected by the measure: Piraiki-Patraiki (1985). Other categories include those whose intellectual property rights are affected: Codorniú (1994), or complainants in competition cases; Metro (1977). An unsuccessful attempt to redefine individual concern took place in cases such as Jégo-Quéré (2005). The ECJ made it clear that there were alternative routes for challenging acts using the plea of illegality under Art 277 TFEU in the context of a preliminary reference under Art 267 TFEU.

However, it was recognised that there were limited circumstances where this was not appropriate, and as a result Art 263 was amended by the Treaty of Lisbon to provide an additional basis of challenge. It has now been established that a regulatory act includes a decision of general significance, e.g. modifying a list of chemicals authorised in certain circumstances: Microban (2011) and also a regulation made under delegated powers and not by a legislative procedure: Inuit Tapariit Kanatami (2014). Such a regulatory act can be challenged if it is of direct concern and does not involve implementing measures. This was in fact the position in Jégo-Quéré. The amendment has thus resolved the specific problem created in that case.

Art 263 has always operated effectively in relation to those who wish to challenge decisions or other acts addressed to them. While the restrictive definition of individual concern has been problematic for certain litigants, and the alternative remedies which the ECJ has indicated should be pursued are not always readily available (for example because the national legislation does not permit applications for declaratory relief), it must be accepted that the action for annulment is not necessarily the primary remedy for those who wish to challenge the legality of regulations or decisions of general application. The article in its current form arguably strikes the correct balance.

SECTION B

Question 1

Art 102 prohibits the abuse of a dominant position within the EU. In order to establish whether TE occupies a dominant position, it is necessary to establish the relevant market. There is nothing to indicate that there is any subdivision of the market so the geographic market will be the EU as a whole. There is equally nothing to suggest that there are any temporal factors which need to be taken into consideration. It is therefore necessary to focus on the relevant product market. The relevant product market comprises those products which are in direct competition in the sense that they are regarded as interchangeable or substitutable by the consumer by reason of their characteristics, prices and intended use (Commission Notice on relevant market (1997)). The principal mechanism used by the Commission pursuant to this Notice is analysis of a hypothetical small (5 to 10%) but significant permanent relative price increase in one product (the SSNIP test). A dominant position is not a monopoly, but it is consistent with a substantial market share. A market share of 70 to 80% is likely to be seen as demonstrating dominance: Hilti (1991), although this will depend also on the duration of the state of affairs: Hoffmann-La Roche (1978). Dominance may exist with a lower market share, although a closer analysis of the structure of the market will be necessary. In United Brands (1978) a market share of 40 to 45% equated to dominance where the undertaking in question was substantially larger than its nearest competitor in an otherwise fragmented market.

TE will no doubt argue that the relevant product market is probiotic dairy products generally. This is a large market in which they have a limited share, and are unlikely to be held to be dominant. However there is clear evidence that there is no cross elasticity of demand between Camphail and probiotic yoghurt products, so it would appear that the relevant product market is a narrower one comprising Camphail and Kefir. TE has a market share of 60% in this market, so unless Kefir is produced by one or two large producers, it is highly likely that TE will be found to be dominant.

Dominance as such is not prohibited, but abuse of a dominant position is. Abuse may take the form of exploitation of the end user, e.g. by taking a monopoly rent. It may also be exclusionary, foreclosing the market by excluding competitors in order to strengthen the position of the dominant undertaking. Predatory pricing, which is selling at below average variable cost of production is regarded as a form of foreclosing abuse, and selling at below average total costs may be viewed in the same light if there is evidence that it is part of a campaign aimed at eliminating competition: Akzo Chemie (1991).

In this case the wholesale price increase in an area where TE enjoys a very substantial share of the relevant product market clearly constitutes taking a monopoly rent, or directly imposing unfair selling prices, which is prohibited by Art 102. Providing refrigerated display units on condition that the competing product is not sold again appears to be an abuse. It limits markets to the prejudice of consumers. Insofar as the discounts take the price of the product below average variable cost of production they constitute predatory pricing which is an abuse, but further analysis will be necessary to determine whether discounts falling below average total cost of production constitute part of a targeted campaign, although it appears likely that this is the case.

TE should be advised that it is highly likely that they will be found to be dominant in a market comprising Camphail and Kefir, and that their marketing practices will be considered to be abusive as set out above. TE is therefore likely to be in breach of Article 102.

Question 2

This case concerns issues relating to the free movement of goods, which is one of the four freedoms constituting the single market. The measures in relation to the toys and the packaging of the drinks do not involve any fiscal or tariff barriers, but must be considered in the context of non-tariff barriers, quantitative restrictions or measures having equivalent effect (MEQR) which are regulated by Arts 34-36 TFEU. The measure relating to the alcohol duty imposed on the drink appear to relate to German internal taxation and must be scrutinised to see whether they are compliant with Art 110 TFEU.

Quantitative restrictions involve prohibitions or quotas (Geddo (1973)) and there is no suggestion of any such here. The concept of MEQR has been articulated by the ECJ in a number of cases. For a period its scope was indicated by Directive 70/50. That Directive is now spent, but references are still made to its terms as they are a convenient reference point. Importantly, the Directive distinguished between distinctly applicable MEQR which are only applied to imported products, and indistinctly applicable MEQR which are rules of general application but which may be objectionable because they have a differential impact on imported products. Initially MEQR were broadly defined under the Dassonville (1974) formula as any trading rules capable of affecting interstate trade directly or indirectly actually or potentially. Subsequently, in Keck (1993) a distinction was drawn between trading rules directly affecting products, or product characteristics, which remained within the definition of MEQR, and selling arrangements, rules affecting the way in which trade was conducted, but not regulating individual products, which were excluded from the scope of the prohibition on MEQR insofar as they were indistinctly applicable and operated in the same way in law and in fact on imported and domestic products.

The third key case is Cassis de Dijon (1979) in which the ECJ established a rule of recognition to the effect that products lawfully produced in a Member State according to the legal requirements of that State could, to the extent that there was no existing EU harmonisation, be marketed throughout the EU, unless there were specific legitimate objections. In the same case the Court also established a rule of reason which provided that a state could justify the imposition of indistinctly applicable MEQR where these constituted a proportionate means of achieving one of the mandatory requirements of the state. These were not exhaustively defined, but include defence of the consumer, fairness of transactions and health and safety considerations.

Regulation of advertising has been established as one of the selling arrangements covered by the Keck derogation. In cases such as KO v de Agostini (1996) it was held that where it could be shown that such regulation did not operate in the same way in law and in fact, for example because imported products relied more heavily on advertising to secure market share, the national authorities would have to investigate whether the measure was nevertheless justified on the grounds that it constituted a proportionate means of meeting a mandatory requirement.

Restrictions on permissible packaging are clearly product characteristics, and even if indistinctly applicable may have a differential impact as importers will have to modify their packaging in order to participate in this market: Rau v de

Smedt (1982). In addition to potentially benefiting from the rule of reason, the German authorities may seek to invoke the permitted derogation under Art 36 TFEU in relation to the protection of health, on the grounds that they wish to protect consumers against the inadvertent consumption of alcohol. Any such measure must not be a disguised restriction on trade or indirect protection of national producers, although it seems unlikely that this would be the case here.

These advertising restrictions appear to be selling arrangements which are indistinctly applicable in law, and therefore benefit from the Keck derogation unless Louise can demonstrate that there is a differential impact in fact. If so the rationale behind the regulations and the evidence in support of it will have to be assessed to see whether it is a proportionate means of achieving a legitimate objective. Protection of children (and parents) from inappropriately intrusive advertising may be considered as a legitimate mandatory requirement. There is no prohibition of other forms of promotion and advertising, and no suggestion of any ulterior motive. It is therefore arguably a legitimate exercise of the rule of reason.

In Cassis a total prohibition on a product on the grounds that its formulation might confuse consumers into believing that it represented a better bargain than was the case was considered disproportionate, on the basis that clear labelling would adequately protect consumers. The issue here is arguably more significant. A product containing alcohol is significantly different one which does not. Many consumers avoid alcohol, and virtually all parents would wish to prevent their children inadvertently consuming alcohol. If there is a clearly established practice of not packaging alcoholic beverages in cardboard cartons its maintenance may be a proportionate means of achieving a range of mandatory requirements relating to the protection of the consumer, and arguably health.

Member States are free to impose internal taxation, and nearly all impose specific duties on products to re-such as alcohol. Art 110 provides that there may be no internal taxation on imports from other member states in excess of that imposed directly or indirectly on similar domestic products. It also provides that internal taxation may not be such as to afford indirect protection to other products.

Similarity is assessed on a case-by-case basis having regard to the characteristics of the respective products and whether they are perceived by the consumer as equivalent, being used on similar occasions in similar ways: John Walker (1986).

Indirect protection applies to products which, although not similar in this sense, might be in competition (such as beer and table wine): Commission v UK (Excise Duties on Wine) (1978). In that case it was held that the higher tax burden on wine did indirectly protect beer. It protected traditional preferences and thus inhibited market penetration by the less familiar product. Art 110.2 will not apply if the difference in price irrespective of the impact of taxation is sufficiently large, so that the tax cannot be seen as a decisive factor: Commission v Sweden (2008).

We are not told whether there are German products equivalent to SuperJuce. They would clearly be similar, but appear to be taxed similarly. Whether this fruit-based alcoholic drink would be regarded as similar to wine and beer will depend on a detailed analysis of characteristics and consumer behaviour. If so, the differential tax is prima facie unlawful, and there is no suggestion of any objective justification on policy grounds. If not, the impact of the differential duty

will need to be analysed to see whether it constitutes indirect protection, or whether the pricing structure is so different that the taxation is immaterial.

Question 3(a)

In order for the Tribunal to make a preliminary reference it must fall within the definition of "court or tribunal" in Art 267 TFEU. This is an autonomous EU definition which has been developed by the jurisprudence of the ECJ, so the characterisation of the Tribunal in Croatian law is strictly irrelevant: Dorsch Consult (1997). In this case the Court indicated that it would take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. The interpretation of the Directive would be an appropriate subject for a preliminary reference.

On the facts given, there are two potential objections to categorising the Tribunal as falling within the EU definition. Firstly its membership is appointed by the executive for relatively short periods, although these are renewable. The ECJ may conclude that the Tribunal is therefore not "independent", cf Syfait (2004). It is also far from clear that the Tribunal applies rules of law. The mere fact that the procedure is a written one does not prevent it being inter partes. Overall, it is unlikely that the Tribunal will meet the EU definition.

(b)

As the Croatian High Court is clearly a court, and one from which there is an appeal available in the national legal system, it has a discretion to make a reference. It is a matter for the court whether or not to make the reference, although it will consider any application or submission by the parties. The ECJ has issued guidance in the shape of a document containing recommendations to national courts. The current version is dated 2012. Paragraph 19 indicates that it is desirable for the reference to be made once the national court has defined the "legal and factual context of the case" (see also Irish Creamery Milk (1981)). Since, in this case, the issue is the interpretation of the Directive, it would seem appropriate for there to be a definitive ruling on the interpretation of the (Croatian) Alarm Sytems Decree. Without this, it is difficult to see how the scope of any question concerning the interpretation of the directive can be formulated.

Although the reference is discretionary, guidance as to whether or not it is necessary may be obtained from the CILFIT (1982) criteria for mandatory references. A reference should only be made where an answer to the question posed is necessary to enable the national court to give judgment. In other words it should not be hypothetical or otherwise unrelated to the issues in the case. Although the ECJ does not apply the doctrine of precedent, it has a practice of following its earlier rulings, and therefore a reference may be unnecessary if a ruling has already been made on the point in question: Da Costa (1962). However, a reference may nevertheless be made if there is any doubt either as to the applicability of the earlier ruling to the circumstances of the present case, or as to whether the ECJ might choose to depart from its earlier ruling on the grounds of changes in social or economic circumstances. Finally, a reference is not necessary where the point of EU law is sufficiently clear that there can be no doubt in the matter. The Croatian High Court may identify a clear issue, but would be acting perfectly properly if it declined to make a reference and deferred the matter to consideration by a higher instance. National courts should be circumspect in determining whether or not the issue is clear, bearing in mind that there are many autonomous concepts of EU law which should ideally be

interpreted by the ECJ, and also that EU law exists in numerous language versions, and what is clear in one language may not be clear in all.

On the facts given, much will depend on whether it is clear at this stage in the proceedings that there is a significant issue as to the interpretation of the Directive and that this must be resolved in order to enable the Croatian court to give judgment irrespective of the issues of national law, which the ECJ has no jurisdiction to rule on. If so it would be entirely proper for a reference to be made, but the Croatian High Court cannot be compelled to make a reference.

(c)

In Köbler (2004) the ECJ determined that where there had been a ruling by a court of last instance which had failed to make a reference to the ECJ an action for Member State Liability could be brought, since the court constituted part of the state and was therefore subject to a duty to comply with EU law pursuant to Art 4.3 TEU. This was not seen as being inconsistent with the principle of judicial independence or that of res judicata. However, liability would only attach to a sufficiently serious breach, which in this case was characterised as a "manifest infringement".

Giovanni will therefore need to demonstrate that there has been such a manifest infringement which has caused him harm. The question states that the decision was "clearly inconsistent with existing case law of the ECJ" which would seem to be amply sufficient for a finding of manifest infringement.

Question 4

The EU is based on a single market which entails free movement of goods, services, labour and capital. However, free movement of people now has a more complex legal basis. Art 45 TFEU gives the right to workers to move within the EU to take up employment, which has been interpreted in case law to extend to a right to travel to seek employment. However, Art 20 TFEU which creates the concept of citizenship of the Union confers on citizens of the Union "the right to move and reside freely within the territory of the Member States". This right is however exercisable in accordance with conditions and limits laid down in the Treaties and measures adopted to give them effect: Art 21 TFEU.

Directive 2004/38 on Union citizens' free movement rights gives effect to the right of free movement for all categories, including workers and their families. While every Union citizen has the right to move and reside for up to 3 months in any Member State without formality other than proof of identity and status, residence for an extended period is limited to defined categories: Art 7. These include those who are workers or self-employed persons in the host Member State and family members accompanying or joining a Union citizen who is *inter alia* a worker.

A Union citizen who is no longer a worker shall retain the status of worker in certain circumstances which include where the citizen has become involuntarily unemployed during the first 12 months and is registered as a jobseeker. In this case the status of worker shall be retained for no less than six months: Art 7.3 (c).

Family members include registered partners on the basis of the legislation of a Member State if the legislation of the host Member State treats such partnerships as equivalent to marriage: Art 2.2 (b). Furthermore, a partner, not falling within the above definition, but with whom the Union citizen has a durable

relationship, falls within the category of beneficiaries whose entry and residence should be facilitated, and any denial of entry or residence must be justified: Art 3.2 (b).

Freedom of movement for Union citizens and their family members may be restricted on grounds of public policy, public security or public health: Art 27. Such measures must be based exclusively on the personal conduct of the individual concerned and comply with the principle of proportionality. Previous convictions in themselves do not justify such measures. The personal conduct of the individual concerned must represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Any decision to exclude or expel must be notified in writing and carry a right of appeal: Art 30 and 31.

In this case James is a Union citizen. When he moved to Sweden to take up employment he had the status of worker. As indicated above, even though he is now unemployed, he retains this status for a minimum of six months, i.e. until October 2018, provided he is duly registered as unemployed. In principle, therefore, his family members, as defined in Art 2 are entitled to join him.

The facts do not make clear where the civil partnership was contracted. Strictly speaking, it must be a registered partnership entered into in a Member State and recognised as equivalent to marriage in Swedish law. If the civil partnership was entered into in Canada, it would not qualify. However, Ivan would still be a partner, provided that there is sufficient evidence of a durable relationship, and as such the Swedish authorities should facilitate his entry, and must justify any refusal to permit his entry.

The mere fact that Ivan has a criminal record will not in itself justify excluding him. However, his most recent conviction is for conspiracy to export drugs to Sweden. The Swedish authorities may conclude, following an appropriate assessment of the available evidence, that he continues to represent a serious threat to society, on the basis that he continues to pose a threat in relation to the importation of prohibited drugs. The previous convictions, in particular the most recent one, may well be admissible evidence of a continuing threat: Santillo (1980).

Ivan should be advised that, while James does have the right under EU law to be joined by his family members and a conditional right to be joined by a partner, since he retains the status of worker at the present time, there are serious grounds for concern that the Swedish authorities can justifiably refuse to admit Ivan on the grounds that his recent criminal activity constitutes evidence that he represents a present and sufficiently serious threat to society that his exclusion is justifiable under Art 27 of the Directive.