LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW
SUGGESTED ANSWERS – JUNE 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 June 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 phrase 'court or tribunal' identifies the bodies which are entitled to submit a preliminary reference. Each Member State has at least one legal system, which vary considerably. It is normally clear which institutions constitute the courts proper, but "tribunal" is a somewhat more elastic concept. The CJEU has determined that it is an autonomous concept of EU law, so while the categorisation of a body in national law is a significant factor it is not conclusive: Politi v Italy (1971). In an appropriate case, the state may allocate responsibility of judicial nature to a private organisation, and this may constitute a tribunal for these purposes: Broekmeulen (1981).

The CJEU has on several occasions considered what characteristics it requires a body to possess in order to qualify as a tribunal. In Dorschconsult (1997) the key factors were said to be whether the body was established by law, whether it was permanent, whether it had a mandatory jurisdiction, whether it operated an inter partes procedure, whether it applied rules of law and whether it was independent of the executive. Inevitably some of these features will be more significant in any given case. Thus in Syfait (2005), where the preliminary reference was made by the Greek Competition Commission, the key question was whether this body was independent of the relevant Greek minister. Although it was accepted that the members of the Commission had significant operational independence, they had no security of tenure and the Minister could intervene to a significant extent in decisions. The Commission was held to lack the necessary degree of independence and therefore failed to qualify as a tribunal. It should also be noted that the status of the body may vary depending on the nature of the proceedings it is considering. In Standesamt Stadt Niebüll (2006) the court in question was a German Amtsgericht, which would normally fulfil the definition, but on this occasion was dealing with a matter which was classified as administrative rather

than involving the resolution of a dispute between parties, and so the reference was declared inadmissible.

Perhaps the most significant, and regrettable, exclusion is that of arbitral tribunals. The CJEU has argued that these are neither permanent, since they are usually established ad hoc pursuant to an arbitration agreement, nor do they exercise a compulsory jurisdiction; they are in fact an alternative to the ordinary courts: Nordsee (1982). Against this it may be argued that if a point of EU law does arise in arbitration proceedings, it is a waste of time and resources to compel the arbitrators to submit this point to a national court simply so that that court may make a reference. In Merck Canada (2015) the CJEU has acknowledged that certain arbitral tribunals, if permanently established and designated by the state, may satisfy the definition of tribunal.

1(b)

The preliminary reference procedure is a mechanism whereby the judicial authorities in the Member States can secure an authoritative ruling on the interpretation of EU law and the validity of acts of the institutions. It is therefore designed as a key element in ensuring the consistent and harmonious development of EU law, and preventing the development of diverging interpretations in the various Member States. Article 267 distinguishes between courts of last instance, (from which there is no appeal within the national legal system), which in principle are under an obligation to make preliminary references in appropriate cases, and all other courts and tribunals which have a discretion to make a reference.

It is now clearly established that a court of last instance is one from which there is no legal possibility of an appeal. Even if the appeal to a higher court requires leave from that higher court, the lower court still has a discretion: Lyckeskog (2002). It is also clear that the obligation to make a reference is not mandatory in all circumstances: CILFIT (1982). This case confirmed three circumstances in which a reference would not be mandatory. The first, applying Da Costa (1962) stated that if there was an existing ruling of the CJEU on the point at issue, the obligation to make a reference was deprived of its content. However, this does not mean that a reference cannot be made, if the referring court considers that the earlier decision may no longer be followed. For example, this could be because of the changing legal or economic circumstances, or where the decision is not completely in point and further clarification is needed. The second circumstance when the obligation to make a reference is not mandatory, is that the ruling sought is not necessary in order to enable the national court to give judgment. The CJEU has rejected references which it considers to be purely hypothetical Meilicke (1992) or abusively collusive Foglia v Novello (No 1) (1980). The third, perhaps most controversial, is that the answer to the question is so clear that the national court can determine the matter without reference to the CJEU. It is certainly the case that judges and lawyers, at least in the longer established Member States, now have decades of experience of handling EU law, and it is therefore unnecessary for simple and obvious points to be submitted to the CJEU. There are however factors which need to be considered, in particular that some legal concepts are autonomous concepts of EU law, such as "worker" and "court or tribunal" and the CJEU is therefore uniquely placed to deal with cases concerning them. Furthermore, EU legal instruments are generated in a multiplicity of languages, and a point which is crystal clear in one official language may not be so in another, or there may be discrepancies between different versions which need to be resolved. Therefore, the CJEU has urged national courts to resolve such cases only where there is nothing to indicate that

there is any doubt over the correct interpretation. The UK courts have interpreted this in such a way that if any of the judges hearing a case at any stage indicates that an alternative interpretation is at least arguable, the matter will not be treated as clear: RSPB (1997).

A check on abuse of the discretion given by CILFIT is provided by the ruling in Köbler (2004), that where a court of last instance has failed to make a reference which it ought to have made, and the error is "manifest", this will be a sufficiently serious breach of the obligations of the Member State concerned to give rise to Member State liability.

In general, the operation of the preliminary reference procedure appears to have been relatively efficient. However, there have been difficulties, particularly with lower tier court and tribunals, over the quality of references, with some being rejected because they do not identify a relevant issue or place it in an acceptable legal and factual context, e.g. Grau Gomis (1995).

The preliminary reference procedure has also been used by the CJEU in a more activist way. Many cardinal principles of EU law have been established in cases involving preliminary references, such as direct effect (van Gend en Loos (1962)), the supremacy of EU law (Costa v ENEL (1964)) and the rules of reason and recognition in the context of free movement of goods (Cassis de Dijon (1979)). In certain cases the CJEU has taken up an application for a preliminary reference which was misconceived in its terms and used it to develop EU law in a desired direction. Two examples are Marleasing (1990) where a preliminary reference actually asking whether a directive could have horizontal direct effect was transformed into a ruling on the scope of the interpretive obligation giving rise to indirect effect, and Francovich (1993) which established the concept of Member State liability.

Overall, the preliminary reference procedure has operated largely as it was intended to do, and has made a significant contribution to the harmonious interpretation and development of EU law. It has also been a fruitful source of cases allowing the CJEU to flesh out the overall framework of EU law in many key respects.

Question 2

Article 263 in formal terms provides for review of the legality of legislative acts and a range of other acts of the institutions which are designed to produce legal effects. It therefore does not apply to recommendations and opinions, or to preparatory measures: IBM (1981). When analysing the scope of the Article, it becomes clear that it actually seeks to cover a number of distinct types of challenge. At one extreme, the Article constitutes the CJEU as a "constitutional" court entitled to rule on the "constitutionality" of measures within the overall EU legal framework constituted by the Treaties. This includes cases such as Roquette Frères (1980) on what effective consultation of the European Parliament means in relation to proposed legislative acts, and the series of cases concerning the division of the activities of the European Parliament between Brussels and Strasbourg. There is then a much larger body of cases concerning a more orthodox judicial review function focusing on vires and procedural requirements. One example is UK v Council (Working Time Directive) (1996) where the UK argued, largely unsuccessfully, that the directive in question should have been made under the social chapter (which did not apply to the UK) rather than under treaty provisions relating to health and safety (which did so apply). In relation to these two classes of case, annulment proceedings appear to

provide an effective means of ensuring that the institutions do not overstep their powers substantively, and that appropriate instruments and procedures are utilised. It can sometimes be frustrating when a measure which is desirable in itself is frustrated or delayed because of procedural objections. This occurred when the European Parliament challenged the directive regulating free movement rights for students on the grounds that it had been introduced on an incorrect legal basis. As a result the implementation of these enhanced rights was delayed while equivalent rights for retirees and other persons of independent means went through on the original timescale. The replacement directive was substantively identical but based on unobjectionable legal bases.

At the other extreme, the action for annulment applies to acts, principally decisions, which are in effect administrative or quasi-judicial determinations of the legal position of individuals in contexts such as infringement of competition law. The Article is structured such that privileged applicants, namely the principal EU institutions and the Member States may challenge any relevant legislative or other act. The lesser EU institutions have a quasi-privileged status which allows them to challenge in areas directly relevant to their functions. Natural and legal persons are included to a more limited extent, and this has caused considerable difficulty in terms of the availability of the action for annulment to them.

Nevertheless, the action for annulment of decisions is seen as an effective remedy, and litigants therefore seek to utilise it as much as possible. There is no doubt that a nonprivileged applicant can challenge a decision which is addressed to it. An undertaking found in breach of competition law can apply for annulment of the decision. This is in effect an appeal on the merits, although the grounds for annulment do not readily equate to this. As is often the case with anti-dumping investigations, a group of decisions are presented in a rolled up form as a Regulation, where the resulting Regulation will contain an analysis of the evidence demonstrating dumping together with an evaluation of the extent to which each participant has obtained unfair advantage which must be met with a countervailing duty. It has been accepted that this is in reality a series of decisions and the addressees have the right to seek annulment.

A non-addressee, (a person other than the one to whom a decision is addressed), has to establish both direct and individual concern in most cases. Direct concern means that the act complained of itself affects the position of the applicant. There must be no discretion vested in the Member State: UNICME (1978), or the Member State must have already indicated how it will exercise the discretion: Bock (1971).

Individual concern was interpreted in Plaumann (1963) as meaning that the individual is affected by reason of attributes peculiar to them or circumstances which distinguish them individually just as in the case of the person addressed. This is a highly restrictive definition. In Plaumann, the applicant was an importer of clementines who was affected by a decision addressed to Germany which changed the terms of trade. Since anyone could enter or leave this particular trade at any time it was held that there was no individual concern. This interpretation of individual concern will apply even when there is only one undertaking actually engaged in the activity in question: Spijker Kwasten (1983); Jégo-Quéré (2002). Close association with the proceedings may constitute individual concern, so the complainant in a competition case may have individual concern: Metro (1977). Membership of a closed class, e.g. of applicants for a particular licence at a particular time may also suffice: Toepfer (1965). Other exceptions have been held to exist where the applicant has

intellectual property rights which are affected: Codorniu (1994) or specific contractual obligations: Piraiki-Patraiki (1985).

One particular reason for seeking to use the annulment procedure was that in certain Member States there is no provision for seeking declaratory relief. Jégo-Quéré concerned a Regulation restricting the ability of the applicant to use fishing nets appropriate for the fish it was seeking to catch, because of the need to protect another species. There was no procedure available to challenge the legality of this Regulation in the French courts, other than by defying it and waiting for enforcement action. This meant that the alternative means provided for nonprivileged applicants, namely raising a plea of illegality in national proceedings under Art 277 TFEU which could then be the subject of a reference under Art 267 was not available. It was argued that this constituted a denial of an appropriate legal remedy. The CJEU disagreed, arguing that any deficiency in the legal systems of the Member States was irrelevant.

To some extent, the deficiencies identified in cases such as Jégo-Quéré have now been addressed. Art 263 was amended by the Lisbon Treaty and now provides that where there is a regulatory act not entailing implementing measures, only direct concern need be shown. This is specifically designed to address the situation which arose in Jégo-Quéré. It has now been established that regulatory acts include decisions of general application, such as listings of approved chemicals: Microban (2011) and Regulations made by the Commission under delegated powers and not by a legislative process: Inuit Tapariit Kanatami (2014).

This amendment does address a specific complaint, but perhaps does not fully resolve the question of whether the boundaries for the use of the annulment procedure by nonprivileged applicants have been established with full regard to all the circumstances.

The annulment procedure has, in its constitutional judicial review aspect, facilitated the development of the relationship between the institutions, and achieved clarity as to the boundaries of EU competence. By contrast, the restrictive approach to the availability of annulment to non-privileged applicants, while technically justified, has led to criticism that the principle of effective remedy has not been fully respected. The Lisbon amendment has addressed much, but not quite all, of this concern.

Question 3(a)

Art 102 TFEU applies to undertakings which occupy a dominant position. This was defined in United Brands (1978) as a position of economic strength enabling an undertaking to prevent effective competition by giving it the power to behave to an appreciable extent independently of its competitors, customers and consumers. The first point to note is that this position must be in a defined market. Once the parameters of that market have been determined, the extent of the market share of the undertaking in question can be determined, and a decision reached as to whether or not it is dominant. There are therefore two stages to assessing whether or not a dominant position exists. The Commission and the CJEU approach the issue of the parameters of the market by considering three aspects, namely the relevant product market, the relevant geographic market and (albeit only in limited circumstances) the relevant temporal market. Once the relevant market has been established, then it must be determined whether the undertaking is dominant in that market.

The relevant product market comprises all goods which satisfy the same consumer needs, whether in terms of finished products or constituent parts (ICI (1974)). In United Brands it was determined that bananas constituted a market separate and distinct from other fresh fruit. Although there was some evidence that banana prices were depressed, and demand for bananas weakened to some extent, during periods when other fresh fruit was readily available, the overall structure of the market for bananas, in particular year-round availability and the special characteristics of bananas were enough to constitute a separate market. This was an essentially qualitative evaluation of the available data. Subsequently the Commission has adopted a more quantitative approach using the SSNIP test to establish whether a small but significant (approximately 10%) relative change in price will lead to a change in demand. If so the two products form part of the same market because there is cross elasticity of demand. This approach is set out in the 1997 Notice on the Definition of the Relevant Market.

Other factors may be taken into account, such as the 'must fit' nature of the market for spare parts for particular equipment: Hugin Kassaregister (1979). In some cases there can be cross elasticity of supply. The 1997 Notice gives the example of paper. Different grades of paper are required for different uses. There is limited cross elasticity of demand between them. However, paper producers can relatively readily adjust their machinery to produce different grades of paper which are in demand. The CJEU held in Continental Can (1973) that the Commission had been wrong to regard light metal containers as constituting a distinct market in the absence of analysis as to whether manufacturers of other types of container could readily enter the market for those goods normally packed in light metal containers.

The default position is that the relevant geographic market is the whole of the EU. However, if it can be shown that market conditions are different in certain areas, only those areas which demonstrate the same characteristics will be taken into consideration. This was again an issue in United Brands, where some Member States acquired bananas from former colonies under colonial preference, while others acquired bananas on the open or dollar market. As United Brands were producers of dollar bananas, only dollar bananas states were included in the investigation and analysis. Art 102 is only concerned with situations which may affect trade between member states. It is for the individual Member States to deal with issues which have a purely national significance, but events in a single geographic location may affect international trade. In Sealink (1991) the Commission investigated alleged abuses of a dominant position at the port of Holyhead. As this is the principal freight port for goods in transit between the UK and Ireland (and which may of course originate in or be destined for other Member States), this activity could affect trade between Member States and was therefore a fit subject for investigation.

Once the market and the market share have been determined, it must then be established whether or not this equates to dominance. A market share in excess of 70% is in itself conclusive evidence of dominance: Microsoft (2007); Hoffmann-La Roche (1977); Hilti (1991). A market share of less than approximately 30% is considered incompatible with market power and therefore with dominance. Where the market share lies between these two parameters, the Commission and CJEU will conduct an analysis of the structure of the market. In United Brands the relevant market share was around 40%, but this was significantly larger than that of the next largest competitor, and United Brands benefited from not only economies of scale but also substantial vertical integration. This was sufficient to support a finding of dominance. This market

share would not in all likelihood equate to dominance if there were two competitors who shared the remaining 60% of the market more or less equally.

One criticism of the approach taken by the Commission has been that it relies on a snapshot of the market at a particular time and therefore does not take sufficient account of the dynamics of the market. Dominance is only a significant issue if it is persistent, and the ordinary rules of competition dictate that competitors will target a dominant undertaking as it represents a clear market opportunity. Another criticism which has been mounted is that the SSNIP test does not fully allow for the so-called "cellophane fallacy", which arises where the allegedly dominant undertaking is already charging a premium price; in such a situation adding in a further increase may bring into the equation products which now become attractive but would not normally be seen as potentially competitive. See the US anti-trust case US v DuPont (1956). This is referred to in para 19 of the 1997 Notice, but only in general terms. In any event there has been little, if any, case law in the area in recent years.

3(b)

It is not dominance that is prohibited, but abuse of the dominant position. Abuse can take a number of forms, some of which are at the expense of customers and consumers, so-called exploitative abuses, while others are at the expense of actual or potential competitors, so-called anti-competitive abuses.

The most obvious example of the first type of abuse is the charging of excessive prices, thus extracting a monopoly rent over and above the cost of production and sale and a fair commercial profit, such that the price has no reasonable relation to the economic value of the products supplied: United Brands. Here the company was also acting abusively by charging differential prices to customers in different Member States depending on "what the market would bear". In addition to this, tying in the supply of spare parts or consumables may also be exploitative: Hilti.

Tying in can also be anti-competitive, as in Microsoft, where tying in the Windows Media player to the standard Windows operating system had the effect of depressing demand for alternative audio modules produced by competitors. There are various forms of unfair pricing which are anti-competitive, including predatory pricing which involves sale at below average variable costs, normally to drive out potential competitors: Akzo Chemie (1991). Some forms of discounting are regarded as acceptable, such as discounts for quantity. Fidelity discounts, which obligate the customer to obtain all or most of their requirements from the dominant undertaking are regarded as abusive because they deprive the customer of the freedom to place orders with other suppliers, and necessarily interfere with the ability of those suppliers to compete in the market: Hoffmann-La Roche. Similar considerations apply to target discounts, particularly where they contain retrospective increases, since they produce a situation where the customer has no reason to look elsewhere, even though other suppliers are offering superior terms for current requirements: Hoffmann-La Roche.

The Commission has been accused of holding dominant undertakings to higher standards. It is argued that they have become dominant by virtue of their ability to conduct business efficiently, and that their actual or potential competitors may be failing to penetrate the market because they lack the necessary attributes and do not deserve protection. In particular there are actions, such as discounting policies, which are treated as normal business strategies and should not be

penalised simply because they're being undertaken by those who are dominant. The commission has acknowledged that it should adjust its approach and has issued Guidance on Enforcement Priorities under Art 102 (2009), in which it indicates that it will focus on those cases where there is exploitative abuse rather than those where it is merely anti-competitive.

Question 4

The EU is an organisation which has no true parallels. In formal terms it is an intergovernmental organisation constituted by the founding treaties. However, the scope of the EU, extending as it does to the single market (essentially the former European Community) together with competences in justice and home affairs, including the Schengen acquis and the common foreign and Security policy mean that there is a requirement for institutions to manage its operation by formulating detailed policy, drafting and approving legislation and administering policies.

The original structure of the European Coal and Steel Community was in essence that of a transnational ministry of basic resources. The ECSC treaty constituted the legislation establishing and regulating this entity. A Council of Ministers with a rotating chair reproduced on a transnational level the role of the responsible minister in a national context. The High Authority, subsequently the Commission, constituted the civil service, with its responsibility for researching and formulating detailed policy, drafting the necessary subordinate legislation in the form of Regulations and Directives and administering the policy laid down by the Council. Democratic oversight was provided by the Parliamentary Assembly, comprised of members of national parliaments and a role largely limited to holding the Commission and Council to account, but with significant responsibility for approval of budgetary matters and some consultation in relation to draft legislation. A dedicated court was necessary to ensure consistent and harmonious interpretation and application of ECSC law in a way that would be valid in all states.

This model operated effectively and was adopted when the ECSC was expanded to cover the wider economic integration represented by the European Economic Community. While all the institutions have developed in the intervening period, this underlying 'ministry model' is still clearly apparent in the current structures of the EU. There have been two substantial institutional changes. The European Parliament is now directly elected and is co-legislator with the Council under the ordinary legislative procedure which accounts for the vast majority of secondary legislation. The Parliament now has significantly greater control over the nominations to the Commission and possible sanctions. It is also required to participate in major non-legislative decisions, such as the adoption of significant treaty obligations (which will include in due course ratification of the treaty or treaties governing Brexit). The Council of Ministers continues to exercise its original function as co-legislator and policymaker in defined policy areas within the framework of the revolving presidency. In addition, there is now a European Council with its own elected President, the membership of which consists of the heads of government of the Member States together with the President of the Commission and which now represents the ultimate policy-making and political decision-making body of the EU. It should be noted that this body brings together the Member States and this confirms that the ultimate source of political and institutional power within the EU remains with the Member States.

The fundamental principle on which the EU operates is that of conferral (Art 5 TEU). The EU and its institutions can only operate within the framework of the

treaties and any competences not conferred on the EU remain with the Member States (Art 4 and 5 TEU). Except for the limited number of exclusive competences, namely the customs union, competition rules at the EU level, monetary policy for the Eurozone, conservation of marine biological resources and the common commercial policy (Art 3 TFEU), the EU can only exercise its competences where action at the EU level is necessary and appropriate having regard to the principle of subsidiarity (Art 5 TEU). This principle requires that action should be taken at the lowest level consistent with effective implementation. The parliaments of the Member States are given specific responsibility for examining proposed legislation for compliance with the principle of subsidiarity (Art 12 TEU and Protocols 1 and 2 attached to the Treaties by the Treaty of Lisbon).

Governance covers a number of different activities. Three key ones are the process of drafting and scrutinising legislation, monitoring the performance of key executive actors, in particular the Commission and the Member States and scrutiny of proposed new treaty obligations of the EU.

While the Commission has the sole right to produce draft legislation, the legislative programme is established in consultation with the Member States acting through the European Council and Council with participation by the Parliament. The Parliament can indeed request the Commission to introduce a legislative proposal although the request is not binding (Art 225 TFEU). In practice, the legislative procedure involves very extensive consultation and dialogue, initially between the Commission and interested parties through the production of preliminary draft documents and explanatory material such as roadmap documents, and subsequently through the iterative process of successive readings of the draft in the Parliament and the Council. The Commission has a significant role in facilitating this dialogue. The Member States' parliaments also participate in this scrutiny and dialogue. The result is intended to be that the final agreed text which becomes a legislative instrument has achieved substantial consensus. The Parliament can specifically reject a proposed measure at second reading (Art 294.7 TFEU). A measure subject to the ordinary procedure can only be adopted if the Parliament and Council ultimately agree on a common text. If a sufficient number of Member State Parliaments object to a measure, a reconsideration must take place.

This complex system of dialogue and consensus seeking is reflected in other aspects of the governance of the EU. The Parliament scrutinises the work of the Commission and both the Commission and Council may address the Parliament. The most important formal powers exercised by the Parliament in relation to the Commission are in relation to its appointment. While the Parliament must elect the President of the Commission, the European Council must nominate a candidate taking into account the result of the European Parliamentary elections. This is currently understood as meaning that it must nominate the candidate proposed by that political faction which has secured the largest number of seats. The Parliament must approve the list of Commissioners proposed by the Council as a whole, but this does not preclude the raising of objections to individual nominees, which may result in them being withdrawn or allocated to a different portfolio (Art 17 TEU). The Parliament may also pass a vote of censure on the Commission as a whole, which will result in the resignation of the Commissioners. Although this is something of a blunt instrument, it has been effectively threatened, leading to the voluntary resignation of the Santer Commission in relation to the Cresson affair.

In turn the Commission scrutinises the compliance of Member States with their duty to ensure fulfilment of their obligations arising out of the Treaties (Art 4.3 TEU) pursuant to Art 17 TEU and Art 258 TFEU. This entails monitoring progress towards transposition of Directives, including facilitating dialogue over potential problematic aspects, investigating complaints and pursuing own initiative investigations in areas where there is evidence that problems may exist. The great majority of such compliance action is undertaken and resolved informally. If this is not possible, the Commission proceeds to issue a formal statement identifying the alleged non-compliance, and if the matter cannot then be resolved, will proceed to issue a reasoned opinion requiring the Member State in question to take specified action. If the State fails to do so, the Commission can bring the matter before the CJEU and if the contravention is upheld sanctions may be imposed. The Commission has over the past decade significantly improved the efficiency of its procedures for dealing with complaints, including notifying complainants of the progress of the investigation, but there is still some lack of transparency, in that the Commission does not publish the results of investigations, except insofar as these result in reasoned opinions and/or proceedings before the court.

One highly topical aspect of governance is the procedure for ratification of new treaty obligations. In summary, the consent of the Parliament is required for most such treaties, and ratification can only take place if all member states have approved this in accordance with their own constitutional requirements. In states with a federal structure, such as Belgium, this may entail consent by a number of regional legislatures. While this procedure is designed to ensure that all relevant interests have been taken into account, it creates a highly complicated negotiating forum. This was demonstrated in the autumn of 2016, when objections by the Belgian region of Wallonia to certain provisions of the EU trade agreement with Canada (CETA) led to a delay in the conclusion of the agreement.

Overall, the effectiveness of governance is conditioned by the complexities of the EU decision-making process. Where one institution is charged with carrying out a defined task, such as the Commission's role in oversight of the Member States, this can be done with relative efficiency. In other areas, many commentators find the complexity involved in the search for consensus to be frustrating, and it certainly prevents rapid responses, although by contrast it probably promotes more considered responses. It is however inevitable that this complexity exists, given that there are so many interests at stake, often involving economic factors as well as the institutions of the EU and the Member States.

SECTION B

Question 1(a)

In principle, 101 TFEU prohibits all agreements between undertakings which may affect trade between member states and have as their object or effect prevention restriction or distortion of competition within the single market. However there is an exception for agreements which contribute to improving the production or distribution of goods, while allowing consumers a fair share of the resulting benefit and which do not impose unnecessary restrictions.

Collaboration in research and development can be seen as limiting or controlling technical development, which is one of the types of behaviour specifically referred to in Art 101 as potentially prohibited. It involves agreement on a horizontal level between undertakings which are at the same level in the

production process. This type of agreement is often regarded with more suspicion as it may allow the undertakings concerned to coordinate their behavioural collaborate in a range of ways.

It is however accepted that they may be situations where the cost of research and development is beyond the resources of a particular undertaking, and can only be conducted collaboratively. In Vacuum Interrupters (1977) the Commission acknowledged this and granted negative clearance in respect of a joint agreement for research and development.

Subsequently it has been decided that certain categories of research and development agreement can benefit from a Block Exemption. The current version of this is Regulation 1217/2010. The Regulation provides that the prohibition contained in Art 101 shall not apply to such an agreement provided it extends only to research and development, and the exploitation of any resulting intellectual property rights. A distinction is drawn between agreements between competing undertakings and those between noncompeting undertakings. If the young undertakings are not competing, that is to say they otherwise operate in different markets, the exemption applies to the period during which the research and development is carried out, unless the results are jointly exploited in which case it may last for a further seven years. Where the undertakings are competing, their combined market share may not exceed 25% of the relevant market (Art 4). The exemption does not cover hard-core restrictions, which in this context are restrictions on other research and development activities and limitation of output or sales, fixing of prices for the sale of products incorporating the results of the research and development or licensing of intellectual property, and territorial restrictions other than those arising in the context of a specialisation agreement (Art 5).

Here we know that sausage and haggis are not part of the same product market. There is therefore nothing to prevent O'Pork and McSheep entering into an agreement to collaborate on research and development, provided the conditions of the Block Exemption are respected. Given what we are told about the market share of O'Pork and Vorsti, there is no objection to Vorsti participating in the collaborative arrangement.

1(b)

Vertical agreements between manufacturers and producers fall within the scope of Art 101. It is however recognised that manufacturers wish in many cases to create a distribution network. Exclusive distribution networks have advantages, in that the distributor is likely to have better knowledge of local market conditions and existing relationships with undertakings at the next level of distribution and/or end users. The grant of exclusivity is necessary in order to guarantee that the distributor is not frustrated by the activities of free riders taking advantage of work that the distributor has done to develop the market the product in question.

Originally, the approach of the Commission and the CJEU was to regulate such distribution agreements, while recognising their utility. A particular concern at this stage was that exclusive arrangements would serve to perpetuate the compartmentalisation of the market which predated the EEC, and the Commission was particularly anxious to ensure that there could be no absolute territorial protection, thus preventing the possibility of parallel imports. The commission was also concerned to ensure that exclusive distribution agreements did not act as a cover for price maintenance. The CJEU generally endorsed the

approach of the Commission in cases such as Consten and Grundig (1966). Subsequently the Commission articulated a Block Exemption for vertical agreements. The current version is Regulation 330/2010. This contains a very broad exemption, to the effect that Art 101 "shall not apply to vertical agreements" (Art 2.1). There are however a number of prohibited provisions. These include any fixing of prices. The manufacturer may specify a maximum price, and may issue guidelines on price, but these must clearly be optional. In general the buyer of the goods under the agreement must be free to resell without restriction as to where or to whom, although there are qualifications to this, such as the possibility of excluding active sales into a territory or to a group of customers exclusively reserved to the supplier or another buyer. Active sales are those which are deliberately initiated by the party and are contrasted with passive sales where the initiative comes from the customer (Art 4). Furthermore, where the buyer enters into a so-called non-compete obligation, namely not to deal in other goods similar to those of the supplier, this agreement cannot be for a period of greater than five years. The Block Exemption will only apply where the market share of each of the parties does not exceed 30% of the relevant product market (Art 3).

The Commission has indicated it is not concerned with those agreements which are on such a small scale that they are in principle not capable of appreciably affecting trade between Member States. In pursuance of this it has issued a Notice on Agreements of Minor Importance (2014). This specifies that agreements will be considered as not appreciably affecting trade between Member States and therefore outside the scope of Art 101 where the aggregate market share does not exceed 10% of the relevant market where the parties are competitors or 15% where they are not. The Notice will not apply where the agreements contain hard-core provisions equivalent to those set out above in relation to the Block Exemption.

The proposed agreements with potential distributors will probably not benefit from the Notice on Agreements of Minor Importance as O'Pork has a market share of 18%. This is subject to a caveat that it may have a share less than this and be dealing with a distributor with a share less than this in some of the markets, provided they are treated as separate. However, as this market share is less than the 30% threshold provided for in the Block Exemption, this will apply, unless the distributor has a market share of greater than 30%. In either case we need to consider whether the specific stipulations proposed are permissible, and this would be the same whichever regime applies.

The proposal to appoint exclusive distributors for specific geographic areas, but to reserve certain classes of customer to the supplier is in principle acceptable as this type of restriction does not fall within the hard-core category. However the territorial protection cannot extend to the prohibition of passive sales, as this would be a hard-core restriction. A non-compete clause is acceptable in principle, but as stated above must not be for a period in excess of five years. Price-fixing is a hard-core restriction, and therefore O'Pork cannot insist that the distributors adhere to its price guidelines. It may issue guidelines, but these must not be a disguised form of price maintenance.

Question 2(a)

Directives are a form of secondary legislation not designed to produce legal effect in themselves. As a result they are not directly applicable. They take the form of directions to the Member States to ensure that by the designated transposition date the municipal law of each state achieves a specified result, but

the choice of form and method to achieve this is left to the Member States (Art 288 TFEU). Typically the Member State will achieve this by enacting new primary or secondary legislation or amending the existing legislation. There may be instances where no change is necessary as national law already covers the prescribed ground. Where appropriate, a Member State can make the necessary adjustments by administrative means rather than legislative ones, although this is relatively uncommon. In principle, once transposition has occurred, the Directive should in effect disappear into the background, and rights and liabilities will be regulated by the national law.

Situations have however arisen where it is alleged that the state has not complied with its obligations. Cases of complete non-implementation do occur, but are usually relatively straightforward to identify. What is often more complicated is where the state purports to transpose a directive, but it is then alleged that the transposition is deficient, because the wording of the national legislation does not faithfully transpose the substance of the directive in question. The TFEU provides a mechanism whereby the accuracy of transposition can be challenged by the Commission by informal or formal administrative investigation, and where necessary subject a dispute to the adjudication of the CJEU (Art 258 TFEU). The Commission also facilitates working groups to examine any issues which arise in the transposition process. A significant issue such as the one with tamperproof packaging ought to have been raised by the industry during the legislative process, or at least in the transposition working group.

In this case, the transposition is questionable. The issue in relation to tamperproof packaging does not appear to relate to the technical practicability of ensuring that paper and plastic are separable, but that there are reasons why this should not be undertaken. We are not informed whether this issue was raised during the procedure for adopting the directive or with what result. If there is merit in the objection, the Commission may acknowledge this, refrain from taking action, and possibly introduce an amending directive. If the Commission is not satisfied that there is a legitimate issue it can insist that the UK comply, if necessary by implementing the Art 258 procedure to the extent necessary. The CJEU is likely to conclude that the wording of the transposition does not cover the requirements of the directive.

The issue with relation to recycling facilities is more straightforward. The UK appears to have concluded that existing arrangements comply with the requirements of the directive, but the requirement for separate collection of different categories of recyclable items appears to be clear, and even if most, or indeed all UK facilities actually provide for this, the fact that it is not mandatory would appear to suggest that there is not complete compliance. The commission again has a discretion as to whether to pursue the matter but would be likely to be successful if it does.

2(b)

Art 258 was originally considered to be the sole prescribed mechanism for pursuing complaints of mis-transposition. However, attempts were made by those aggrieved by the alleged failure of the state to transpose or otherwise operate in accordance with the requirements of directives to raise these issues before national courts. In van Duyn (1974) the CJEU ruled that as against the state a directive could have direct effect, provided the conditions laid down in van Gend en Loos (1962) were satisfied, namely that the provision in question should be clear, precise and unconditional. For these purposes, the state is given a broad definition, which includes the various elements of national administration

such as a local authority. In contrast, horizontal direct effect against a nonstate entity has been rejected on the grounds that such entities are not addressees of the directive: Faccini-Dori (1994).

In cases where direct effect is not possible the CJEU has developed a principle of indirect effect. This arises from the obligation of the state to comply with its duties under EU law (Art 4.3 TEU) and takes the form of an interpretive obligation whereby national legislation must be interpreted so as to be consistent with relevant EU legislation, including directives, "so far as it possible to do so": Marleasing (1990). The UK courts have interpreted this as meaning that they must go further than simply utilising an interpretation of the legislation which is semantically possible and consistent with the EU requirement, but can modify the statutory words to bring them into alignment provided that this does not constitute the introduction of a substantial body of additional material, and provided that this does not contradict the intended purpose of the legislation: Ghaidin v Godin-Mendoza (2004). This is a case on the interpretation of legislation in the context of ECHR rights, but the principle is exactly the same as that where EU legislation is concerned.

Here, Casterford City Council is clearly a part of the state for these purposes. It must therefore comply with the law as stated in the Directive, and cannot simply claim to be complying with the UK legislation. The requirement of the Directive for separate facilities appears to be clear precise and unconditional.

There is nothing to suggest that Wellington plc is in any sense an emanation of the state. The Directive will therefore not be directly effective in relation to its activities. It is obliged to comply with the UK legislation. It will therefore be necessary to consider whether that legislation can be interpreted so as to give effect to the requirements of the Directive. This cannot be done by ordinary principles of statutory interpretation, since the UK legislation clearly introduces an exception which is not provided for in the Directive. A UK court might seek to use the interpretive obligation, but it is at least arguable that the discrepancy is intentional so reading it down would amount to 'vandalising' the UK legislation which is outside the special interpretive power: R (Anderson) v Home Secretary (2003). Again this is an ECHR case but it is applying the same principle.

Question 3

Free movement of goods is one of the four freedoms which collectively constitute the single internal market. Title II of Part Three TFEU includes a prohibition on customs duties and charges having equivalent effect which are inconsistent with the customs union which forms an element of the single market. It is however unnecessary to consider this aspect, since none of the three issues concerns such a duty or charge. Chapter 3 of this Title deals with quantitative restrictions on the free movement of goods and measures having equivalent effect (MEQR). These are prohibited, subject to a derogation for a limited number of defined reasons (Art 36).

There do not appear to be any quantitative restrictions as such, but MEQR have been broadly defined and it is necessary to consider this definition. Originally, the CJEU defined MEQR as including all trading rules which could actually or potentially, directly or indirectly affect trade between Member States: Dassonville (1974). This will include distinctly applicable measures which are applied only to imported goods and not to domestic products, and also indistinctly applicable measures which apply to all goods, but which have a differential impact on imports. This was originally set out in Directive 70/50. This is now spent, but is

still referred to, as the terminology used remains relevant. Furthermore a distinction is now made between those trading rules which regulate selling arrangements, in other words the way in which trade is conducted, including restrictions on certain types of activity such as loss leading, restrictions on trading hours et cetera, and those, known as product requirements, which apply to the product itself such as recipe, packaging and labelling rules: Keck & Mithouard (1993). In this case it was held that while MEQR which were product requirements continue to be subject to the existing legal rules, selling arrangements would be treated as falling outside the scope to the extent that they applied in the same way in law and in fact to imported and domestic products. However, if a differential impact could be demonstrated, they would fall to be treated as indistinctly applicable MEQR.

Somewhat earlier, in Cassis de Dijon (1979), the CJEU laid down two important principles. The first was that in general, where goods were produced in a Member State in accordance with the regulations applicable there, there would be a presumption that those goods could be lawfully marketed throughout the EU. This would be the case even if they did not comply in all respects with the equivalent regulations in the place where they were being marketed, since it could be presumed that either set of regulations would achieve the required objective of protecting the public. This is the so-called "rule of recognition". The second was that in the case of indistinctly applicable MEQR, the state could justify a restriction on the basis that it was a proportionate means of achieving one of the mandatory requirements of the state. The list of these has been expanded from time to time, and covers public health, consumer protection and certain environmental issues. This is the so-called "Cassis rule of reason".

The Swedish advertising restriction would appear to constitute a selling arrangement. It is therefore prima facie outside the scope of Title II. However it may be that Hans can demonstrate that it does have a differential impact. There have been similar cases where importers have argued that advertising restrictions have a disproportionate effect on them since they rely on advertising to bring their product to the attention of the public whereas established local manufacturers already have a reputation and public recognition: De Agostini (1996). Initially the onus will be on Hans to demonstrate such a differential impact. If he can do so, the onus will then shift to the Swedish authorities to demonstrate that the measure is nevertheless a proportionate means of achieving a legitimate objective.

The Danish prohibition of the ingredient appears to be a product requirement. It appears that this is indistinctly applicable, since the ingredient is prohibited in all cases. The Danish authorities may seek to justify either on the grounds of protection of human health under Art 36 or under the rule of reason. It is unlikely that the application of Art 36 can be challenged on the basis that this amounts to arbitrary discrimination or a disguised restriction on trade, given the nature of the prohibition. The Danish authorities must produce sufficient scientific evidence to demonstrate that the prohibition relates to a genuine health risk: Sandoz (1983). It may appear implausible that only one state takes exception to an ingredient, but it is essentially a matter for the technical evidence.

Further provision to eliminate fiscal barriers to free movement of goods is contained in Chapter 2 of Title VII of Part Three TFEU. Art 110 provides that member states shall not impose, directly or indirectly, internal taxation in excess of that imposed directly or indirectly on similar domestic products on the products of other Member States or impose on those products any internal

taxation of such a nature as to afford indirect protection to other products. It is this provision which is relevant to the Belgian measure.

The first question is to determine what constitutes a 'similar product'. In John Walker (1986) it was said that the essential question was whether the two products were capable of meeting the same needs from the point of view of consumers. Similar products are likely to share characteristics such as the circumstances in which they are used or consumed. Much of the case law concerned alcoholic beverages, and factors such as alcohol content seen as germane to similarity. Grape and grain spirits were treated as similar in Commission v France (Taxation of Spirits) (1980).

For there to be indirect protection, the two categories of goods, while clearly not similar, must at least potentially be in competition. In Commission v UK (Taxation of Wine) (1980) table wine and beer were considered to be at least potentially in competition for certain sectors of the market for alcoholic beverages. However, if the price differential between the products is sufficiently high in the absence of the taxation, this will not constitute indirect protection: Commission v Sweden (Taxation of Beer) (2008).

In this case we are considering jelly sweets and chocolates. Clearly both fall within the general category of confectionery. An analysis of the extent to which the products are seen as similar by consumers will be necessary. If the two products are held to be similar, the differential taxation clearly falls foul of the first limb of Art 110. Even if the products are not similar they are clearly at least partially in competition with each other, and so a further analysis of the extent to which the differential taxation provides indirect protection will be necessary. Without full information on the rates of taxation and the price differential in the absence of tax, it is not possible to give a categorical answer.

Question 4

At the inception of the EEC, free movement of people was incorporated in the context of the movement of labour as one of the factors of production as part of the common market (now the single internal market). Art 45 TFEU establishes freedom of movement for workers, including the right to accept offers of employment actually made and to move freely and reside within any Member State for employment purposes. Art 49 TFEU gives the right to freedom of establishment which includes taking up and pursuing activities as a self-employed person. EU law recognises that workers will not in practice be prepared to relocate unless they can be accompanied by their family if they so choose. Furthermore, the Maastricht Treaty introduced the concept of EU citizenship. Art 20 TFEU provides that all citizens of a Member State are also citizens of the Union and as such have the right to move and reside freely within the territory of the Member States. However, this right is not unconditional.

Detailed provision in relation to free movement is currently contained in Directive 2004/38. All citizens of the Union are entitled to move to and reside in another Member State for a maximum of three months without formality other than proof of identity and status (Art 6). Longer term residence is dependent on satisfying further criteria (Art 7). For the purposes of this question, the relevant criterion is that a citizen of the Union is entitled to reside on a long-term basis if he is employed or self-employed in the Member State in question. This right also extends to the citizen's immediate family, including a spouse and the direct descendants of the citizen or spouse who are under 21 or dependants (Art 2). These family members need not be nationals of a Member State, provided the

citizen of the Union is employed or self-employed (Art 7). Non-national family members must apply for and be issued with a residence card (Art 9). They can also take up employment or self-employment (Art 23).

A Member State may restrict the freedom of movement and residence of Union citizens and their family members on grounds of public policy, public security or public health (Art 27). Public health only relates to epidemic diseases as defined by the World Health Organisation (Art 29); it is incapable of applying to psychiatric illness.

Measures taken on grounds of public policy or public security must be proportionate and based on the personal conduct of the individual. Previous criminal convictions in themselves do not constitute grounds for taking such measures. The Member State must be able to demonstrate that the personal conduct of the individual concerned represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Recent criminal convictions of a serious nature can provide evidence of such a threat: Orfanopoulos & Oliveri (2004).

In this case, James is a citizen of the Union. He therefore has the right to relocate to Germany to take up the offer of employment that has actually been made. A worker does not need to be employed on a full-time basis as long as the employment is genuine and substantial: Kempf (1986). In any event, the facts indicate that James has resources to support the family for 18 months. It is immaterial that he proposes to work as a worker part-time and engage in a self-employed activity part-time. In principle his spouse and the two children, both of whom are under 21 are entitled to accompany or join him.

The German authorities may however raise objections to Larry relocating to Germany. They cannot do so on grounds of public health, but may do so on the grounds that his convictions for arson, together with the diagnosis of a psychotic disorder mean that he constitutes a sufficiently serious threat to public security or order.

Kate is in principle entitled, pursuant to Art 23, to take up employment or self-employment in Germany. However, the question of whether her qualification is recognised is a separate one. Directive 2005/36 deals with the recognition of professional qualifications. In this case Kate holds a diploma certifying successful completion of post-secondary training at university level of more than one year but less than three years. This is an Art 11 level (c) qualification. In principle it should be recognised in Germany under Art 13, but if the training covers substantially different matters than those covered by the German qualification, Kate may be required to undertake an adaptation period of not more than three years or an aptitude test (Art 14). Alternatively, Kate could take advantage of the Morgenbesser (2003) ruling that where a partial qualification is held, only the deficiencies need to be made good.