
Examiner's report 2009

2660024 EU law Zone A

Introduction

The questions are generally based on the subject guide and on the study pack: the latter contains extracts from Articles and from a considerable number of cases before the European courts. Some of the questions are very general and can be approached from different angles and this report sets out a number of points for guidance, which are not exhaustive, and mentions only a selected number of cases. It is, however, assumed that candidates will have done wider reading and referred to the set books, essential reading and other recommended and referenced literature, both books and articles.

Most answers were satisfactory.

General remarks

Candidates should take care to read the questions carefully, both in the initial period allotted to them, when they should, if possible, make their selection and stick to it, and then again when tackling the questions. It still happens too often that a candidate ignores part of the question, or chooses to give an answer which is partly, or wholly, irrelevant to it.

Candidates sometimes repeat more or less verbatim parts of answers already given to the earlier questions. The examination question will never be drafted to allow this, and it should be avoided at all cost.

Specific comments on questions

Question 1

'The development of the role of the European Parliament has been greater over the years than that of any of the other European Institutions. This development has affected the role of the Council in particular.'

Discuss with reference both to the legislative role of the Parliament and its standing before the European Court of Justice.

This question asked for discussion of the relationship between two of the most important institutions, referring mainly to the legislative procedures which originally mainly involved the Council with minimum consultation of the Parliament, to co-decision, where Parliament has the right to veto.

The answers should then move on to discuss the development of Parliament's standing before the European Court of Justice, and the development of no standing at all under Article 230 EC to fully

privileged standing under Treaty of Nice. Case law ranging from *Roquette* to *Chernobyl*.

See on this the extensive answers in the subject guide p.62

Question 2

'The European Court of Justice has full jurisdiction in direct actions before it by institutional actors, Member States and individuals. However, these actors do not all have the same standing before the ECJ.'

Discuss, considering the relevant case law, with particular emphasis on actions by individuals.

Answers should refer briefly to direct actions by institutions (Chapter 8 and Article 226) and Chapter 9 (Articles 230, 232 and 241) and the question of privileged and semi-privileged standing (pp.149 and 150) and then concentrate on non-privileged applicants: individuals (Article 230(4), pp.151–160, 9.4–9.6 and possible reference to pp.161–163).

The most important case is still that of *Plaumann* (9.2.5), giving the definition which is still valid, and reference made to *Piraiki-Patraiki* (subject guide), *Toepfer* etc. as well as the distinction between direct and individual concern. Answers should then have gone on to refer to the attempts to change the *Plaumann* formula e.g. in *Codorniu*, *Jégo Quéré* widened by the CFI, reversed by the ECJ, and the Advocate General's Opinion attempting to widen the definition not followed by the Court in *UPA*.

Good answers referred to the (slight) improvement in the Lisbon Treaty and the reasons for the ECJ's reluctance to change the restrictive *Plaumann* rules. The wide use of preliminary reference through use of the doctrine of direct and indirect effect and state liability for breach of Community law (*Francovich*).

Question 3

'The doctrine of direct effect, first developed by the ECJ in 1963, is still as relevant today as it was then.'

Outline the development of the doctrine to the present day and consider whether this statement is accurate.

This is a standard question, discussed mainly under 6.1 and 6.2 of the subject guide (pp.97–103). Students should also refer to (e.g. Chapter 7 in the essential reading in Horspool and Humphreys).

The case of *van Gend en Loos* should always be discussed, which established direct effect of **Treaty articles**, followed by other cases establishing direct effect for Regulations and, in particular, Directives. A surprising number of answers do not distinguish between the different types of legislation – this is essential as is the discussion of horizontal and vertical direct effect of Directives (*van Duyn*, *Marshall* on p.100 and study pack), and on indirect effect.

The case of *Mangold* was also addressed in the better answers.

This question is one of the most frequently answered by students and concerns one of the most important parts of Union law. There were some outstanding answers. However, quite a few answers still did not address basics, such as: what constitutes direct effect, differences in direct effect of Treaty Articles, Regulations and Directives, the shortcomings of the doctrine, leading to a search for alternative

solutions such as indirect effect and state liability for breach of Community law (*Francovich*). As the development took place entirely through case law, it is important to refer to the basic cases.

Question 4

'Articles 23 to 25 of the EC Treaty on the one hand, and Article 90 on the other hand, are mutually exclusive'.

Discuss, using case law to demonstrate the differences between the Articles and the difficulties which arise with this distinction.

This question refers to the two types of taxation of goods, Articles 23–25, on the importation of goods, (customers' duties), Article 90 on internal taxation of goods once they have entered a Member State. This is covered by Chapter 10 of the subject guide. Articles 23–25 are covered by 10.2 (10.1 is a general introduction), and Article 90 which allows taxation, but which does not allow **discriminatory** taxation, is covered by 10.3. Most students who tackled this question, identified the differences between the two. Both types are taxation, therefore to be distinguished from quantitative restrictions dealt with under Articles 29 and 30, (see 10.4 of the subject guide).

The definition of a pecuniary charge in *Diamantarbeiders* applies. There are virtually no defences on customs duties (Articles 23–25), see for example the *Cadsky*, *Ford España* cases.

Article 90(1) dealing with similar goods and Article 90(2) dealing with competing goods. *Commission v UK (wine and beer)*, *Commission v France (tobacco)* – many more cases in the set books (essential reading).

The distinction between direct and indirect indiscriminate should also be addressed. The best answers dealt with all these points. A good point to make was that, under Article 90, Member States still have a large amount of discretion to make taxation policy.

Question 5

George is a fully qualified English structural engineer who decides to take advantage of the free movement rules of the EU to find a good job elsewhere in the EU. He decides to move to a country where much new commercial building work is going on and to try his luck in Latvia. He applies for a job at a major building project in the Latvian capital, Riga, but encounters the following problems;

- (a) he is told that his English engineering qualifications are not recognised in Latvia and consequently he can only apply for a junior position as a builder's assistant;
- (b) he is told that he also needs a certificate confirming he has enough money to support himself in Latvia, as the job will not pay him enough money to allow for minimum subsistence.

Advise George as to his rights under EU law and as to the action he can take to allow him to overcome the above obstacles.

- a. This question concerns first of all mutual recognition of qualifications. Directive 2005/36 replaces earlier directives, both 'sectoral' and general directives on mutual recognition (89/48 and 92/51) no need to know numbers. Allowing him to be no more than a 'builder's assistant' is certainly not enough: see Articles 1–4 and recital to Directive 2005/36, (in Statute book, to be taken into exam). Cases: *Vlassopoulou*, *Heylens*. See 13.2.7 of the subject guide.

- b. See Directive 2004/38 (Chapter 12 of the subject guide). Is George a worker? Students must set out conditions for a worker under Articles 39 with cases such as Levin, Lawrie-Blum, Kempff. Re permit see Royer, Pieck, *Martinez Sala* etc. All now clarified by Chapter 3, Directive 2004/38. See Chapter 12 of the subject guide and especially 12.2.2. This situation is now dealt with by Directive 2004/38 – see 12.7. This Directive covers much previous case law which is still relevant. The rights under the Directive now extend to ‘citizens’, *Martinez Sala* and 12.5.2 and *Grzelczyk* (12.5.3).

George has rights under both Directives (clearer under (b) than under (a) and case law, and pursuant to Article 39 EC).

Many students tackled this question. It is important to identify the relevant legislation applying to each part of the question. A general answer just dealing with rights of workers and residence rights as a citizen is not sufficient. The part that was most often missed out was the mutual recognition of qualifications.

The question also asked what action George could take. This is part of the question which must also be answered.

If George’s job with the building firm is state-related, he could try and rely on the Directives in his national court (possible direct effect); otherwise he might take action against the state for breach of Community law in the national Latvian court (*Francovich*).

Question 6

The European Union is experiencing a painful economic downturn. The government of Slovakia is concerned about one of its main manufacturing industries, roller skates, which has been affected by a fall in domestic demand and by imports of cheaper roller skates from both Greece and Turkey. The Slovakian government takes the following measures to bolster its domestic roller skate industry.

- (a) It sets up a fund to which all importers of roller skates are asked to contribute 5% of the value of the goods they import. This fund is to benefit the technological development of better and safer roller skates in Slovakia.
- (b) Slovakian roller skate manufacturers are asked to employ Slovakian workers only and to use Slovakian steel only in their manufacturing process.

Consider the lawfulness under EU law of the above measures.

- a. This concerns import duties under Article 25 EC (see 10.2), which are rarely justified – this is not a fund set up under an EU obligation. The aim of the fund is irrelevant – see *Diamantarbeiders*, *Cadsky* etc. However, imports from Turkey may be treated differently as it is not an EU country. This was missed by many, but the question specifically referred to Turkey (not a Member State) and Greece (which is a Member State) in order to ask students to make this distinction.
- b. This is straightforward discrimination of workers as to nationality (Article 39 and see Chapter 12 of the subject guide) which is always prohibited. Exceptions under 39(3) and Directive 2004/38 Articles 27–33, and case law would not apply here. As regards the use of Slovakian steel, this falls under the quota prohibition, Article 28. See

Geddo. It is a state measure. There can be no derogation under Article 30. Economic considerations may not be used. See generally 10.4.3 and cases under 10.4.4 of the subject guide.

Question 7

- (a) Describe the origins and the development of the *de minimis* rule which provides for exemption from the application of Article 81 EC and explain its importance for small businesses.
- (b) 'The application of Article 82 EC is a problem area of EC competition law and has so far not been part of the modernisation process. This may be due to the controversial nature of the case law of the ECJ.'

Discuss.

- a. The development and origins of the *de minimis* rule, see 11.2.8 of the subject guide and *Volk* case, must be preceded by a general introduction to Article 81, a discussion of what is a concerted practice, and what would contribute a breach (11.2.5–11.2.7) *Consten and Grundig* etc. Students should also point out this rule only applies to Article 81.
- b. This part of the question asks for a general description of the objectives of Article 82 and a discussion of some of the main cases, see 11.4 and following of the subject guide (pp.224–230). Students would be expected to present only a brief discussion, but show they know the essentials: relevant product and geographic market (11.4.1 and 11.4.2), what constitutes dominance (*United Brands* and 11.4.3) and what constitutes abuse (11.4.6 and 11.4.7).

This question produced some good answers by those who dealt with all or most of the above points and showed why there have been problems.

Question 8

Article 13 EC was inserted by the Treaty of Amsterdam to extend the principle of equal treatment to further forms of discrimination, in addition to those covered in Articles 12 and 141 EC.

Compare and contrast the three Articles and consider their effectiveness from the point of view of legislation and case law.

This question concerns non-discrimination as a possible general principle, see Chapter 14. A general discussion of this was asked for, in particular, as referred to in *Mangold v Helm*, (see 14.3.2 and more extensive discussion in essential reading in text books).

Most students then went on to discuss mainly Article 141, which has the most case law, generally discussed reasonably well (*Defrenne v Sabena*, *Barber*, *Dekker*, *Hertz*, etc, pregnancy cases and directives).

The best answers, however, also dealt with the other Articles (12 and 13). Nationality discrimination has case law across the board (persons, services, and goods). The best answers dealt with the contrast between the strong prohibitions of discrimination: Articles 12 and 141 EC which are directly effective and the 'enabling' Article 13, which instructs Member States to take 'appropriate measures' and thus there was a need for Directives (Directives 2000/43 and 2000/78).