
Examiner's report 2009

2660024 EU law Zone B

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 as well as to 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 one European Institution has sometimes been to the detriment of another.'

Consider the development of at least TWO Institutions in the light of this statement.

See Chapters 3 and 4 of the subject guide.

The discussions should start by listing the five institutions, before making a choice to focus on two of the Institutions.

Page 62 of the subject guide gives extensive answers to the relationship between different institutions. Most students discussed the European Parliament and its relationship with the Council; far fewer looked at the relationship between Council and Commission, or between Parliament

and Commission. Few addressed the relationship between the European Court of Justice and any of the other institutions.

The points to note are:

- Legislative procedures, voting (changes from unanimity to qualified majority), budgetary procedure (briefly)
- Parliament's standing before the ECJ, the Commission's role as guardian of the Treaties, initiator of legislation, its powers to legislate, acting for the Union where it has exclusive competence, exercising powers in such fields as competition and state aid.

If dealing with the ECJ, you should refer to direct actions between the institutions (see p.56 and Chapter 9); the best answers to planned changes in the Lisbon Treaty (see e.g. p.48 for the Commission and pp.50 and 51 for the Council) and dealt specifically with the relationship between two Institutions, not just listing what they do.

Question 2

'Direct actions before the European Court of Justice are easier to bring for Institutions than for other actors.'

Consider the accuracy of this statement with reference to case law of the ECJ, 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), *Toepler* 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*).

Quite a few students still appear to be confused between direct actions, where the Court of Justice has full jurisdiction and preliminary rulings (Article 234), not to be addressed here, where the ECJ gives an interpretation of Community law.

Question 3

The development of the doctrine of supremacy of EC law over national law was first developed by the ECJ in 1964.

Discuss the development of the doctrine to the present day.

This is a standard question, dealt with in sections 6.5 to 6.6 of the subject guide. The two cases which always need to be referred to here are *van Gend & Loos* and *Costa v ENEL*; *Simmmenthal* is also important.

After having defined supremacy, students then needed to turn to the view of supremacy in the different Member States, where the UK (*Factortame*) and Germany (*Internationale Handelsgesellschaft*) are particularly important. See in particular Question 3 on p.114 of the subject guide.

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, Article 23–25, on the importation of goods, (customs 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 indiscriminatory 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

Samantha is a fully qualified English primary school teacher who decides to take advantage of the free movement rules of the EU to find a good job elsewhere in the EU. She decides to move to Finland, a country where she has heard there is a shortage of primary school teachers. She applies for a job at a large primary school in Finland, but encounters the following problems, she is told that:

- (a) her English qualifications are not recognised in Finland and consequently she can only apply for a junior position as a teaching assistant.
- (b) she needs a certificate confirming she has enough funds to keep herself in Finland, as the job will not pay her enough to allow for minimum subsistence.
- (c) she will be put on a waiting list, as priority is given to teaching assistants who speak Finnish.

Advise Samantha as to her rights under EU law and as to the action she can take to allow her to overcome the above obstacles.

This question concerns mutual recognition of qualifications (a), residence (b) and nationality discrimination (c).

This concerns Directive 2005/36 which replaces earlier directives, both sectoral and general directives on mutual recognition (89/48 and 92/51): no need to know numbers.

Samantha's junior position offered to her as a teaching assistant is probably discriminatory as no qualifications are needed for this. See Articles 1–4 and the recital to Directive 2005/36 (in Statute book, to be taken into exam). See 13.2.7 of the subject guide. Cases: *Vlassopolou*, *Heylens*. Samantha is a worker, so students must set out the conditions for a worker under Article 39, with cases such as *Levin*, *Lawrie Blum*, *Kempf* etc. See Chapter 12 and especially 12.2.2

This situation is now dealt with by Directive 2004/38 – see 12. This Directive covers much previous case law which is still relevant. The rights under Directive 2004/38 now extend to 'citizens'. See *Martinez Sala* and 12.5.2 and *Grzelczyk* (12.5.3). Discrimination as to nationality is not permitted (Article 12 EC), but sometimes language requirements are permitted as in *Groener* (see 12.3.1).

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 Samantha could take. This is part of the question which must also be answered.

If Samantha's job is given to her by the state of Finland (quite possible), she could try and rely on the Directives in her national court (possible direct effect); otherwise she might take action against the state for breach of Community law in the national Finnish Court (*Francovich*).

Question 6

Industries in most of the European Union are experiencing difficulties because of the unfavourable economic situation. In Austria there are particular problems for the cuckoo clock manufacturing industry which depends heavily on the dwindling tourist trade for its sales. Moreover, there are cheap imports of cuckoo clocks arriving into the country from both Switzerland and Slovenia. The Austrian government decides to take the following measures;

- (a) it sets up a fund to which all importers of cuckoo clocks are asked to contribute 10% of the value of the goods they import. This fund is intended to promote the manufacturing quality of souvenirs 'made in Austria'.
- (b) Austrian cuckoo clock manufacturers are asked to employ Austrian workers only and to use Austrian wood only in their manufacturing process. The use of Austrian wood is preferred as it ensures it has been sourced in an environmentally friendly way and is of good quality.

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 Switzerland may be treated differently as it is not an EU country. This was missed by many, but the question specifically referred to Switzerland (not a Member State) and

Slovenia (which is a Member State) in order to ask students to make this distinction.

- b. This is straightforward discrimination as to nationality. See Chapters 12 and 13 and Directive 2004/38, Articles 27–33 and case law of the subject guide. Regarding use of Austrian wood: this is a quota provision prohibited under Article 28 EC. See cases under 10.4.4. Economic considerations may not be used, see generally 10.4.3.

Question 7

'High prices, caused by the anti-competitive behaviour of undertakings, form a barrier to the freedom of trade in the European Union.'

Comment, with reference to case law in respect of both Articles 81 and 82 EC.

See Chapter 11 of the subject guide. This question requires a general approach, as restrictive practices generally lead to high prices. A general analysis of the Articles 81 and 82 is required:

Article 81: What is a concerted practice, examples of such practices and reference to the Commission's guidelines (11.2.7 p.215) Cases: *Consten & Grundig*, *Metro*. Mention of *de minimis* rule. Article 82 (11.4 subject guide) Analysis of dominant position and abuse. Relevant geographic and product markets (11.4.1. and 11.4.2) – cases: *United Brands* and others, and types of dominance.

Question 8

Article 13 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).