Q6: How has this been resolved?

- Under what circumstances will it have direct effect?

    1) It meets the ***Van Gend En Loos*** criteria (***Van Duyn***)
    2) The implementation date has passed (***Ratti***) <u>and</u>
        - Not implemented at all (***Ratti***); or
        - Partially or incorrectly implemented (***VNO***); or
        - Correctly implemented but not applied in a way that achieves the result sought (***Marks & Spencer plc***)
    3) ***Marshall v Southampton and South-West Hampshire A.H.A.***
        - It may be relied upon against the State
            - 'vertical direct effect'
        - But <u>**NOT**</u> against a private individual
            - No 'horizontal direct effect'

Direct Effect, Indirect Effect and State Liability

EU Law

State Liability

Dillenkofer v Germany

- Germany failed to take any steps to implement a Directive
- Held:
  - The conditions in ***Francovich*** and ***Brasserie du Pêcheur*** are the same in substance.
  - Applied ***Brasserie du Pêcheur***

Q6: When will a discriminatory tax be permitted?

1) Direct Discrimination

Barnard, *The Substantive Law of the EU*

"less favourable treatment of the imported product on the ground of its origin."

Will not be permitted:

Commission v Italy ('***Regenerated Oil***')

Q6: When will a discriminatory tax be permitted?

2) Indirect discrimination

- **Barnard, *The Substantive Law of the EU***
  - on its face (in law), makes no reference to origin
  - but in reality (in fact), burdens imported goods
- ***Nádasdi and Németh***: "as a result of its effects"

Q6: When will a discriminatory tax be permitted?

When will indirect discrimination be permitted?

- ***Chemial Farmaceutici***

  i) Tax must differentiate between products on the basis of **OBJECTIVE CRITERIA**

  ii) Must pursue **ECONOMIC POLICY OBJECTIVES** compatible with EU law

  iii) **DETAILED RULES** must avoid discrimination

- Contrast:
  - ***Humblot- C had paid a large tax on a car with an engine size of 36cv. The french taxation system meant that tax for engine sizes up to 16cv rose in steady increments, however, above that, a high flat rate tax was applied to all bigger engines. As France didn't produce any cars with engine sizes bigger than 16CV, this = indirect tax discrimination.***

CJ held that this placed imported cars at a major disadvantage.

France attempted to fix the problem by making the tax on engines about 16CV graduated… however, it was still found to be indirectly discriminatory, because there was still a big leap between the tax paid for 16cv and anything above that

With

- ***Commission v Greece- Greek government imposed a higher tax on bigger cars, all of which were imported. However, the the increase in the rate of tax was gradual, and not hugely above the rate charged on similar cars. Also, the Greek government justified it on the grounds of pollution prevention.***

CJ held that they could not prove indirect discrimination, and the Greek tax was therefore lawful

(b):

There is a fee levied by HMRC to cover the administrative costs of inspections on consignments of talking dolls and other electrical dolls entering the United Kingdom to ensure that they are compliant with UK safety standards. The fee is not chargeable to UK producers of such doll.

- **Article 30 or Article 110?**
  - Article 30
- **Customs Duty?**
  - No
- **CEE?**
  - Is it:
    - Charge for crossing the frontier ('***Statistical Levy***' case)?

    Or

    - Payment for a service?
  - Inspection fee here analogous to:
    - ***Bresciani***

Part A: Questions

1. Explain the difference between quantitative restrictions and measures having equivalent effect to a quantitative restriction (MEQRs) under Article 34 TFEU.

2. When will either be lawful under Article 36 TFEU?

3. What impact has ***Cassis de Dijon*** had?

4. How can ***Cinetheque*** and ***Walter Rau*** be distinguished?

5. What is a selling arrangement?

6. How does the Court of Justice distinguish between a selling arrangement and an MEQR?

Q1:

Explain the difference between quantitative restrictions and measures having equivalent effect to a quantitative restriction (MEQRs) under Article 34 TFEU.

2) **Measures having Equivalent Effect to Quantitative Restrictions (MEQRs)**

- Definition:

"All trading rules… capable of hindering, directly or indirectly, actually or potentially, intra-community trade" (***Dassonville***)

- Examples:
  - Inspections (***Denkavit***)
  - Preference to domestic goods (the '***Buy Irish***' and '***Irish Souvenirs***' cases)
  - Restricting importation channels (***Dassonville*** — certificate of origin)

Q6:

How does the Court of Justice distinguish between a selling arrangement and an MEQR?

Keck:

- MEQR:
  - Obstacles resulting from requirements to be met by imports

    e.g. designation, form, size, weight, composition, presentation, labelling, packaging [i.e. **product requirements and characteristics**]
- Selling Arrangements:
  - Not MEQRs

    So long as
    - apply to all relevant traders in national territory and
    - affect in the same manner, in law and in fact, domestic and imported products.

Issues

a) The UK Government's advertising campaign: 'British goods are good for the planet'.

b) The ban on any shaving products being given away as free gifts.

c) The ban on the Decimator.

a) The UK Government's advertising campaign: 'British goods are good for the planet'

- Fiscal or non-fiscal?
    - Non-Fiscal
- QR?
    - No:
        - Not a direct restraint on quantity of imports (see ***Geddo*** test)**.**
- MEQR?
    - Yes:
        - Capable of hindering, directly or indirectly, actually or potentially, intra-community trade (***Dassonville***)
        - The '***Buy Irish***' case
- Justifiable?......

Entry into UK and Residence: Status on Entry

- **Entry governed by:**
  - Directive 2004/38
- **Categories of people covered by the Directive:**
  - Article 2(1):
    - UNION CITIZEN =
      - National of a Member State
    - FAMILY MEMBERS =
      - The spouse
      - Registered partner
      - Direct descendants (under 21 or a dependent)
      - Dependent direct relatives in the ascending line

Entry into UK and Residence: Status on Entry

- **Maria**
  - Portuguese citizen

    ∴ Is a **UNION CITIZEN**
- **Carlos**
  - Brazilian citizen

    ∴ not a Union citizen
  - But is spouse of Maria

    ∴ **FAMILY MEMBER**
- **Sebastian**
  - Portuguese citizen?

    ∴ if so, is a **UNION CITIZEN**
  - Direct descendant under 21

    ∴ **FAMILY MEMBER IN ANY EVENT**

Maria (Promotion) and Sebastian (Hospital)

What is prohibited? (continued)

3) Indistinctly applicable obstacles

- See:
  - ***Kraus***
  - ***Bosman***
- Must affect market access
- Can be justified by
  - derogation under Art. 45(3) TFEU
  - or other overriding public interest reason

Sebastian: Vocational school?

- **Article 7(3) of Regulation 492/2011**
    - Equal access for non-national workers to training in vocational schools and retraining centres
- ***Brown v Secretary of State for Scotland***
    - Defined ‘vocational schools’
    - Does not include universities
- Will not include further education college

  ∴ Not available to Sebastian

Question 2

To what extent, if at all, has the introduction of the concept of Union citizenship transformed the Free Movement of Persons?

Issue 1: Spanish branch

- **Article 49:** Freedom of establishment
    - Has direct effect (***Reyners***)
- **Concept of Establishment**
    - Very broad (***Gebhard***)
    - Permanent basis or without foreseeable limit to its duration (***Steymann***)
    - Stable and continuous basis (***Gebhard***)

Issue 1: Spanish branch

Matters falling outside Article 49

2) Official authority exemption

- **Article 51**

  Where connected, even occasionally, with the exercise of official authority

- ***Reyners***
  - A.G. Mayras: implies
    - power of enjoying the prerogatives outside the general law
    - privileges of official power
    - powers of coercion over citizens
  - Court of Justice
    - Must have direct and specific connection to official authority
- Exemption applicable to Gerrard Enterprises Plc?
  - No

Issue (a): Requirement to lodge a foreign bank guarantee

Justifying the restriction (continued)

2) By derogation

- **Art. 52(1)**:
  - public policy,
  - public security or
  - public health
- Bank guarantee requirement?
  - Public health
    - ***Commission v Italy*** (‘***Pharmacies***’)

      Health and life of humans rank foremost
  - Proportionate?
    - No:

      Insurance is less restrictive

Q6: *Kohll v Union des Caisses de Maladie*

- **Subsequent cases**
  - ***Geraets-Smits- medical treatment in another MS must be paid***
  - ***Watts- Could be reimbursed- but need to balance***

Q1: How is an agreement such as this classified?

- It is a **VERTICAL AGREEMENT**

  = between undertakings at different levels of trade or industry

- It is an **EXCLUSIVE DISTRIBUTION AGREEMENT**

  = supplier agrees to sell his products only to one distributor in a territory

Q4:

Why would the Commission probably not be overly concerned about this particular agreement (at least initially)?

***De Minimis*:**

- Piddles' market = limited, specialist and very small in UK
- ***Völk***
- **Commission, *NoAMI***
  - **Horizontal agreements**:
    - **AGGREGATE MARKET SHARE** of parties
    - Must not exceed **10%** of relevant markets
  - **Vertical agreements:**
    - Market share of **EACH PARTY**
    - Must not exceed **15%** of relevant markets

Questions: Part B

Now examine the market in which this agreement operates and its relevant law.

5. What criteria does the Commission normally take into account in deciding a market? What is the source of this?

6. Is there anything about the market in this particular case which may actually cause the Commission to have concerns about this agreement after all?

7. If so which Treaty article(s) might this infringe?

8. Where might the agreement find a 'safe harbour' provided for such agreements as this?

9. Which secondary legislation also covers this? Be prepared to outline all relevant aspects?

Availability of Block Exemptions for the Terms

1. Piddles Brewery Plc will not appoint any other business to sell the beer in France and Germany.

2. La Chat Noir SA and Hexenbrau GmbH will not sell to any customers outside their own respective French and German territories.

3. La Chat Noir SA and Hexenbrau GmbH will reroute to one another customers ordering over their respective websites whose addresses reveal them to be buying outside of the allocated national territories.

4. La Chat Noir SA and Hexenbrau GmbH will sell beer at the prices to be fixed by Piddles Brewery Plc.

TERM 2:

La Chat Noir SA and Hexenbrau GmbH will not sell to any customers outside their own respective French and German territories.

- **Primarily a restriction on active sales**
- **Art. 4(b) of Reg 330/2010**
  - Block exemption unless it also prevents **PASSIVE** selling

TERM 3:

La Chat Noir and Hexenbrau will reroute customers whose addresses reveal them to be buying outside of the allocated national territories.

- **Primarily restriction on passive sales**
- **Art. 4(b) of Reg 330/2010**
  - No block exemption
  - Restriction on **ACTIVE** selling would be okay

Article 102

- Breaks down into the following:
  1) There is at least one undertaking in a dominant position
     - What is the relevant market?
     - Is the undertaking dominant in that market?
  2) It is abusing that position
  3) This may affect trade between member states

Relevant Product Market: Supply Substitution

- Supply substitution =

  How easy it is for rival manufacturers to produce competing goods?

- **Notice on the Definition of the Relevant Market**

  = suppliers can switch production in the short term without incurring significant additional costs or risks in response to small and permanent changes in prices.

- Examples:
  - ***Continental Can***
  - ***Michelin I***
  - ***Microsoft***

Dominant Position in the Market

- Factors include:
    - MARKET SHARE: ***Tetrapak*** (91.8%); ***AKZO*** (50%+ = dominant); ***United Brands*** (40-45% but nearest rival 17%)
    - INTELLECTUAL PROPERTY RIGHTS: ***Hugin***; ***Michelin***; ***Tetra Pak***
    - SUPERIOR TECHNOLOGY: ***Hoffmann-La Roche***
    - FINANCIAL RESOURCES: ***AKZO***
    - VERTICAL INTEGRATION: ***United Brands***
    - SOPHISTICATED DISTRIBUTION SYSTEMS: ***Hoffmann-La Roche***
    - BRAND IDENTIFICATION: ***United Brands***