



THE LAW SOCIETY OF SCOTLAND
QUALIFIED LAWYERS ASSESSMENT

EUROPEAN LAW AND INSTITUTIONS

4 November 2020

1500 – 1600
(One hour)

Candidates are required to answer TWO out of four questions.

The paper is divided into two sections, reflecting heads 1-5 and 6-8 of the syllabus. Candidates will be required to answer ONE question from section A, and ONE question from section B.

SECTION A

Question 1

At the time of writing it appears that no agreement will be reached between the EU and the UK on a future relationship. On 31 December the implementation period provided by the European Union (Withdrawal Agreement) Act 2020 will come to an end.

How did we get to this point? What legal changes occurred on 31 January last and which will occur on 1 January coming? What is the 'specific and limited' breach of international law proposed in the Internal Market Bill now before the House of Lords?

For the remainder of the exam note that EU law continues to apply fully in the UK

Question 2

Last month the European Parliament and Council adopted Regulation 1234/2020 on the release into the atmosphere of toxic mercury compounds. The Regulation requires that all industrial producers of identified mercury compounds take specified action to control their escape into the atmosphere. The most stringent controls apply to producers of mercuric cyanide ($\text{Hg}(\text{CN})_2$), who are required to fit scrubbers to their effluent outlets within a one-month period. National environmental authorities are required to inspect all such facilities immediately thereafter and close down any operation not complying with the Regulation. Producers of other mercury compounds are required to adopt less stringent measures, even though some such compounds (mercurous cyanide, cianurina, methyl mercury) are more toxic than mercuric cyanide. It transpires that the *rappporteur* of the Environment, Public Health and Food Safety committee in the Parliament, who piloted the draft regulation through the legislative procedure, was responsible for the watering down of mercurous cyanide, cianurina and methyl mercury effluent control, for her family has significant financial investments in those sectors. The Regulation was adopted by authority of Article 192 TFEU on environmental policy.

In fact, mercuric cyanide is a by-product of only one process, a gas produced in the manufacture of certain electronic micro processing chips. There are only four manufacturers of these microchips within the EU, one of which is Fission Chips Ltd. in Livingston. The Fission Chips board is warned by its technical department that buying and fitting the scrubbers necessary to comply with Regulation 1234/2020 will cost in the region of £600,000. Fearful of an impending inspection by the Scottish Environment Protection Agency, Fission Chips has gone ahead with the work.

The legal department has now suggested that Fission Chips ought to challenge the legality of Regulation 1234/2020. Advise Fission Chips as to how it should go about doing so, the grounds it might put forward and the likelihood of success. If Fission Chips succeeds, how could it go about recovering the £600,000 it spent on scrubbers, and is it likely to succeed?

END OF SECTION A

SECTION B

Question 3

Discuss the circumstances in which the Treaties permit a member state to derogate from Treaty rules on the free movement of goods, persons, services and capital. Are they uniform across the four freedoms?

Question 4

Note that just before the lockdown, the U.K. Competition and Markets Authority (CMA) found a concerted practice, contrary to Article 101 TFEU, in the exchange of competitively sensitive strategic information on pricing, volumes, timing of supplies and entry plans in relation to the supply of antidepressant tablets in the U.K., a breach 'by object' which resulted in both price fixing and market sharing, and imposed penalties totalling £3,4 million and an agreed obligation to reimburse the NHS £1 million. (CMA, Case 50507.2 (*Nortriptyline Tablets*), decision of 4 March 2020).

Three weeks later the UK government (in common with others) called upon private producers, distributors, wholesalers and retailers to coordinate production, deliveries and sales quotas in order to ensure the availability of essential goods and services during the Covid-19 lockdown. The CMA published a communiqué saying it was

'conscious of concerns that competition law enforcement could impede necessary cooperation between businesses to deal with the current crisis and ensure security of supplies of essential products and services',

but

'understands that this may involve coordination between competing businesses. It wants to provide reassurance that, provided that any such coordination is undertaken solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary, the CMA will not take action against it. But we shall in no circumstance tolerate profiteering.'

In Germany, Dr Andreas Mundt, President of the German *Bundeskartellamt*, said at the same time:

'Competition law permits extensive cooperation between undertakings if there are—as in the present situation—good reasons for it.'

Discuss the possible application of Articles 101 and 102 to the response to Covid-19. Is the confidence of the CMA and Dr Mundt that EU competition law presents no impediments to these measures justified? (Please note you are *not* invited to consider the EU rules on state aid.)

END OF SECTION B

END OF QUESTION PAPER