



THE LAW SOCIETY OF SCOTLAND
INTRA UK TRANSFER TEST

PAPER III
EUROPEAN UNION LAW AND INSTITUTIONS

6 November 2018
1000-1200

Please read the following instructions carefully

The examination is of two hours' duration. Candidates are required to answer **FOUR** questions; **ONE** question must be answered from **Section A** and **ONE** question from **Section B**. The **third** and **fourth** questions can be answered from anywhere in the paper. All four questions are of equal value. Answers must be fully reasoned and supported by authority where appropriate. Candidates need to take care to **read the questions carefully and to answer what is asked.**

PART A

Candidates *MUST* answer at least ONE question from this part

Question 1

"It is more than two years since the British people voted to leave the European Union on an unambiguous and categorical promise that if they did so they would be taking back control of their democracy.

Brexit should be about opportunity and hope. It should be a chance to do things differently, to be more nimble and dynamic, and to maximise the particular advantages of the UK as an open, outward-looking global economy.

That dream is dying, suffocated by needless self-doubt.

[W]e appear to be heading for a semi-Brexit, with large parts of the economy still locked in the EU system, but with no UK control over that system."

- Boris Johnston MP
9 July 2018

Is Mr Johnston's description the present situation in which we find ourselves as regards Brexit accurate? Has the government betrayed 'the will of the people'?

Question 2

'The issue of the primacy of Community law was settled long before the UK joined the Communities in 1973. This much was recognised by the House of Lords in *Factortame* (1991). But without the advantages of a core written constitution, it was always going to present difficulties in British constitutional law adapting to it.'

Consider how the issue of the primacy of Community/Union law is addressed in

- the European Communities Act 1972
- the European Union Act 2011
- the European Union (Withdrawal) Act 2018

and the manner in which the British courts have dealt with it.

Question 3

The following are all terms relevant to the Union's legislative procedures:

- Commission proposal
- European citizens' initiative
- consultation
- consent
- QMV
- ordinary legislative procedure
- conciliation
- special legislative procedure.

What does each mean?

Question 4

In September in a reclaiming motion in a petition for declarator, *Andy Wightman MSP and ors v Secretary of State for Exiting the European Union*, the Inner House of the Court of Session acceded to the petitioners' request to make a reference to the Court of Justice under Article 267 TFEU in the following terms:

“Where, in accordance with Article 50 of the TEU, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the EU?”.

In light of the urgency of the issue, the Inner House has requested that the case be heard by ‘expedited procedure’.

- a) Was the Inner House obliged to make the reference?
- b) In the Outer House the Lord Ordinary declined to make the reference because it was, he found, a hypothetical case which disclosed no real dispute between the parties. Was he right, or is the Inner House right? Is the Court of Justice obliged to answer the question?
- c) Is the Court likely to adopt the expedited procedure?
- d) On the substance, this is a wholly new issue in EU law. How do you think the Court of Justice should answer?

END OF PART A

PART B

Candidates MUST answer at least ONE question from this part

Question 5

"With its judgment in [*Keck & Mithouard*] the Court of Justice has completed its case law on free movement of goods."

- European Commission communication (1993)

What is this case law and how does *Keck* complete it? Is the Court's judgment in *Keck* wholly without criticism?

Question 6

- a) Rees-Mogg and Redwood are two old Tory buffers who meet occasionally for drinks at the Garrick Club in London. One evening Redwood says something mildly critical of Mrs May the prime minister. Rees-Mogg feels the lady's honour is slighted, and challenges Redwood to a duel, saying 'I must request that you will meet me with pistols and give me the satisfaction of defending the honour of the lady'.

A barrister sitting nearby applauds this rather outdated chivalry, but informs Rees-Mogg and Redwood that duelling has been outlawed in England since the 1840s and is now a serious criminal offence, of murder if one of the duellists dies or of 'unlawful and malicious wounding' and 'assault occasioning actual bodily harm' contrary to the Offences against the Person Act 1861 if both survive.

However, the barrister goes on, there is a long established martial tradition in Poland, and duelling there is quite legal. Rees-Mogg and Redwood therefore fly to Warsaw, book into a local hotel, dine agreeably, meet at dawn the following morning in Łazienkowski Park with their seconds, and Rees-Mogg shoots Redwood dead.

Upon his return to London, Rees-Mogg is arrested and charged with Redwood's murder. (English courts having jurisdiction because the victim and the accused are British citizens.)

Does EU law provide Rees-Mogg with any defence to the charge?

And:

[Please turn over]

- b) There is a museum at Auschwitz-Birkenau which is owned by and operates under the authority of the Polish Ministry of Culture. Under a decree adopted by the Ministry, guides working at the museum must be Polish nationals, so as to ensure the history of the camp is presented correctly and is not distorted.

Is the decree compatible with EU law?

Question 7

Discuss the manner in which EU competition law might apply to the following events.

- a) Determined to leave the UK in disappointment at Brexit, Nigel has just purchased a large country house sitting in 25 acres in Co Donegal, just across the border from Derry (Northern Ireland). The house and grounds need much work, so Nigel has hired locals to work on the property doing clearing, fencing, stonework, masonry, joinery and general labouring.

At the local pub on a Saturday evening Nigel is taken aside by a group of his new neighbours. They are furious at the wages he has been paying his workforce, which they claim to be far too generous, and so distort wages in the local job market. They insist Nigel pay no more than €9.55 per hour, the national minimum wage. Nigel did not agree to this, but after thinking about it he decides it would be unwise to antagonise his new neighbours, so decides to comply.

And:

- b) There is a small but enthusiastic market across Europe for the purchasing of Nazi memorabilia: helmets, swords, uniforms, medals, badges, flags, and so on.

Morag finds in the attic of her house, which she inherited last year when his parents died, a copy of *Mein Kampf*, printed in 1940 and signed by Adolf Hitler. The last signed copy of *Mein Kampf* to be sold openly went for \$35,000 in an auction in New York. Morag wishes to sell her copy, but when she approaches Sotheby's and Christie's, between them accounting for 85 percent of auction sales in the UK, both refuse to put it up for auction. Looking further afield, Morag finds that legislation in France and Germany make the sale of Nazi memorabilia illegal, so she cannot sell the book there.

Question 8

"There was always a narrow gap in the interpretation of Article 101(1) in which an American-inspired 'rule of reason' took root, even though Article 101(3) made it unnecessary. With its judgment in Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (2002) the Court of Justice opened the gap much wider. It is a good thing too, for it renders Article 101 adaptable to a variety of social imperatives. But it makes for an uncomfortable relationship with Article 101(3)."

Discuss.

END OF PART B

END OF QUESTION PAPER