

Exam Skills for Success in EU Law



The challenges of EU law

This book provides a number of example questions on European Union (EU) law, fairly typical of those met on degree-level courses on EU law. The chapters open with a brief review of the general matters you need to be aware for the topics under investigation, followed by one or more key debates. Each chapter, apart from this one, consists of a number of questions containing points you need to take into account when answering and each suggested answer commences with a diagram or flow chart outlining the main aspects or elements to be considered.

Achieving success in EU law assessments

The suggested answers are designed to demonstrate how the particular questions should be answered to get a good mark, i.e. an upper-second or better. Note, however, that the writing and marking of law questions (EU law included) is not a simple arithmetic process whereby, once you have written a sufficient number of points, you automatically qualify for a particular grade. Whilst that is one of the elements taken into account, it is also a qualitative assessment of what has been written: in other words, how you have written what you have written. This in turn refers to the style and structure of your answer, the clarity and precision with which you express yourself and the accuracy of your statements and application of law to fact. If you are able to demonstrate wider reading in your arguments, some of which may feature in the 'Key debates' and 'Taking things further' features, this will help you achieve a better mark. So there are more factors taken into account than just writing a list of the points that arise and a simple answer to each. The presence of this extra quality will enhance your mark, so its absence will not allow you to obtain the higher marks. Some Universities will designate percentages they consider appropriate to each part to assist you in deciding how much you write for each part, whereas others will leave that to your discretion, which itself forms part of assessment of your knowledge, skills, and abilities in constructing excellent answers to questions. Note that the answers in this book are not model answers which can be learnt by heart and applied to answer any question on a particular topic, although I have often seen this attempted. It doesn't work because for the most part the person attempting the question simply fails to answer the question set. There is no harm, however, in being able to adapt parts of these answers to particular questions providing you are still answering the question. The answers have been designed with the idea in mind that they

are exam-type answers rather than answers for assessed course work, which would require far more detail. To assist in coursework, a short chapter has been added to the end of the book containing tips and advice on how to structure and answer coursework.

Please note though, this book is not a replacement for work, either for attendance at lectures, preparation for tutorials or seminars, or revision for the examination. If used carefully, it will help you prepare answers but will not help you learn the material in the first place. It does not present EU law in a systematic way but instead selects particular issues within questions on which to concentrate.

Using cases in EU law

The choice of example cases provided within some if not most of the answers is rather limited, especially in comparison with textbooks and cases and materials books and in particular when compared to common law subjects. This is deliberate because, for the most part, one case will be sufficient authority for the points of law you wish to convey and this is also a realistic approach bearing in mind that, in an examination, you will simply not have time to reproduce the numbers of cases in the books and by necessity must concentrate your attention on a smaller number of clearly relevant cases. In EU law, for the most part we are not seeking to distinguish, compare, or analogise cases. Unlike the common law subjects, there is far less concern with the facts of the case in that you can only apply a legal principle to a new case if the facts are sufficiently similar. In EU law, the facts are sometimes completely irrelevant, as in, for example, the leading case of *Costa v ENEL*. The facts concern the collection and payment of an outstanding electricity bill by the newly nationalised electricity company. The principle of law established in that case is that of the supremacy of EU law over national law. EU law cases can be one further level of abstraction away from a consideration in detail of the facts, for example, those in the **Article 267 TFEU** preliminary reference procedure where the facts are dealt with by the national courts and questions of EU law are the focus of attention and reason for the reference. Hence, then, it is far more often that the legal principle is the important factor. In some of the substantive law subjects, such as the free movement of goods or persons, the facts can play a more important role and in answering problem questions, you need to identify what the facts are because you still have to apply the law to the facts.

An example from the Free Movement of Persons chapter

We can look at whether part-time work is sufficient to satisfy the definition of the term 'worker'. This in turn is important because if you are a worker for the purposes of EU law, this gives not only the right to reside in the host state but the right to many more rights and benefits.

This is the example involving certain factual issues surrounding Wolfie, who was busking in the street and playing in a band but only for a limited time. The questions are whether these facts support the conclusion that he is a worker for the purposes of EU law.

Is he a worker as a busker? Fundamentally, to be a worker, the definition from *Hoekstra (75/63)* is that the person must be employed. The *Levin case (53/81)* also requires there to be a genuine economic activity. A busker does not seem to satisfy the criteria of a worker laid down in the case of *Lawrie Blum (66/85)*. His busking is not at the direction or remuneration of an employer and he receives donations only; therefore, on these facts, he is not a worker. Does the 80-hours' membership of the band and playing gigs qualify him as a worker? Although the case of *Raulin v Netherlands Ministry of Education and Science (C-357/89)* would seem to support this suggestion, again the criteria of *Lawrie Blum* seem not to be satisfied as he is not employed under a contract and the band split.

The facts were important but only for that individual case.

For the most part I have sought to use as example cases the leading and more popular cases in EU law. Don't worry, however, if these do not coincide with the cases you have read, learnt, or been referred to in your course on EU law. As long as they cover the same legal issue or point, they are perfectly acceptable alternatives in an examination. It is the legal point at issue and not necessarily the particular case authority although there are certain leading and classic cases which should be cited, such as *Van Gend en Loos* in relation to direct effects.

The structure and approach to problem questions

As an internal and external examiner for more than 20 Universities now in EU law, I have seen a number of variations on a simple way to remember how to approach problem questions, including IRAC (Identify the issues, Relevant law, Apply the law, and Conclusions), FLAC (Facts, Law, Application, and Conclusions), and ILAC (Issues, Law, Application, and Conclusions). Whichever one you encounter in your own University, they are all aimed at the same thing, which is to provide an easy to remember acronym which in turn sets out the matrix or blueprint for your answer. You will come across IRAC throughout the series of Q&A books. The facts or factual issues are the ones you must identify and are usually in the form of a scenario or series of events clearly within one of the areas of law covered by the chapters. The law, obviously relevant law, can come in a variety of forms, more so in EU law: Treaty law, secondary EU Law, principles of EU Law, national law (often in conflict), or case law (both EU and national case law). The application is, of course, the working part of your answer where you apply the laws you have identified to your facts and which allow you to reach your conclusions, the final part of your answer.

EU terminology

A brief mention will be made here in respect of the terms EU and European Community (EC). Although these have been unified now, following the entry into force of the **Lisbon Treaty**, as the European Union, both will be found in older textbooks and in previous case law. The term European Union was brought in by the **Treaty on European Union (TEU) (also known and referred to as the Maastricht Treaty)** and describes the extension by the Member States into additional policies and areas of cooperation. Following the entry into force of the 2007 **Lisbon Treaty** in 2009, it is correct to refer only to the European Union.

Case citation in EU law

It is assumed that you are familiar with the statutory provisions of Union law and the case law of the CoJ so that references to a case by one name or by a short title will be enough for you to identify the case. Therefore, in order to avoid cluttering up the text, the references to cases will be to the name of the case and the case docket number as given to it by the Court of Justice of the European Union (CJEU but most commonly abbreviated CoJ) (beginning with C) or the General Court (previously the Court of First Instance) (beginning with T). For example, *Van Gend (26/62)*. This number identifies a case uniquely, although it is not often used to identify cases for the purposes of examinations. However, by adopting this method it does allow you to look the case up in either the alphabetical or case number numerical case lists in textbooks for further details. Please note though that some textbooks only list the cases by name only and sometimes, because case names are often complicated and can be known by different names, finding them can be very difficult. Oxford University Press textbooks on EU law all, as far as I know, have name and number lists. This book, not being a textbook, makes an exception

because you will be working directly from the text of this book, i.e. you will be reading each question and answer as a complete whole, hence you will be unlikely to enter the book via the case references, and so it was considered appropriate only to include one set of case tables. Given that some cases are often known by more than one name or the case names can commence with different words and letters, it seems safer to offer the numeric list, especially as these identify the case uniquely and are also contained in the text.

The citation for cases has been revised by the adoption of the European Case-Law Identifier (ECLI) system, which will apply to national cases also concerned with EU law, which will carry the ECLI prefix. The system was adopted to make electronic tagging of cases and thus access both uniform and easier and works as follows as far as EU Court of Justice cases are concerned: The case name and number in the Court Register are retained but to these are added additional elements as demonstrated by the example provided by the Court of Justice.

The ECLI of the judgment of the Court of Justice of 12 July 2005 in Case C-403/03 Schempp is the following: 'EU:C:2005:446'.

It is broken down as follows:

- 'EU' indicates that it is a decision delivered by an EU Court or Tribunal (for decisions of national courts, the code corresponding to the relevant Member State appears in the place of 'EU');
- 'C' indicates that this decision was delivered by the Court of Justice. Decisions delivered by the General Court are indicated by the letter 'T' and those of the Civil Service Tribunal by 'F';
- '2005' indicates that the decision was delivered during 2005;
- '446' indicates that it is the 446th ECLI attributed in respect of that year.

The new system is being backdated to all cases from 1954 and has been used by the Court of Justice as from 2014.

Range of topics in EU law

As far as the choice of topics included in the book is concerned, this is becoming slightly more difficult as EU law extends its scope and degree courses change to reflect this or to reflect the particular topics of interest to those teaching and/or examining the course. There is, however, an irreducible minimum largely because EU Law is presently still a core subject for the Law Society and the Bar. So, whilst the subject matters contained in this volume cover all of the now reduced and more general Law Society and Bar Council requirements, this book may not cover all the topics on your particular course or, indeed, the particular approach taken.

Treaty references

The Treaties are abbreviated to the TEU and TFEU and to avoid confusion these will always be employed after the Article number, and where appropriate the predecessor European Community (EC) and European Economic Community (EEC) Treaties may be referred to using those abbreviations. As previously with the entry into force of the Treaty of Amsterdam on 1 May 1999, the original Treaties have been renumbered following the Lisbon Treaty. Although new numbering now applies, it is necessary to be aware of the old numbering as previous case law will refer to old numbering only and, as some cases take up to 13 years or even longer to final judgment on appeal before the CoJ, the problem will remain a current one for a while yet. The policy adopted in this book is to refer predominantly but not exclusively to the new numbers only and occasionally, where this is relevant, to include the

old numbers in brackets, e.g. Art 267 TFEU (ex 234 EC), and very occasionally back to the old EEC Treaty (ex 177 EEC). For the most part, even when referring to pre-Lisbon or Amsterdam case law or legislative provisions, the new number will be given first, although this may not be technically correct. Occasionally, when close attention to the old numbers and content of provision is essential, the old numbers will be retained but this will be made clear, e.g. old Art 12 EC (now 18 TFEU). It is hoped confusion may be avoided. Similarly, the terms 'Union' and 'EU' will be employed unless discussing old case law where the court itself, of course, used the terms then valid of Community and EC law. In those instances the new terms will normally be placed in brackets. Quotes will use the terms current at the time without adding the new terms afterwards. I realise this may give rise to some confusion but this is the consequence of the changes agreed by the Member States and we just have to live with it and through it, until the years bring some familiarity and stability with the new numbering and terms (by which time, they will probably go and change it again).

The use of statutory materials in EU law examinations

Most institutions allow reference to statutory materials during the examination. One real advantage is that there is no need to concentrate too heavily on memorising statutory provisions whilst revising. It leaves you more time to consider the application and interpretation, rather than having to waste time on the regurgitation of particular provisions. It also makes it pointless to reproduce the whole of a legislative provision in an answer if the examiner knows that you have it in front of you during the examination. Indeed, there is no need for the reproduction even if statutory materials are not allowed to be used in the examination. However, to ignore completely the legislative provisions prior to the examination means you will be unfamiliar with them and will probably waste time finding the relevant provisions; e.g. some candidates, when provided with material, seem to spend an inordinate amount of time browsing or flicking through them during the examination. If you can, try to treat these materials as a last resort or a mental crutch to which you can refer should your memory fail you. There is no compulsion to look at them at all, but you may still need to cite specific parts of provisions to support your answer.

Open-book examinations

Open-book examinations, where you are able to take in other materials as well, are less common and vary considerably as to the materials that the candidate is allowed to use during the examination and the time allowed to complete the examination. You still have to revise and prepare thoroughly for the examination and not try to rely on finding the information whilst in the exam hall. They are a hybrid between the closed-book examination and assessed work in the form of extended essays or dissertations, but still require a structured answer at the end of the day.

To end this chapter on general information, tips, and advice, I'd like to make two points, which may be repeated in some of the chapters following. First, many of the questions, whether essay or problem type, contain fictitious Directives and Regulations; some, though, use actual ones. It is possible that only actual legislation is used on your particular course, which may resemble the fictitious ones used in a question. Whichever are used, these are designed to test your knowledge of the principles learned in your studies and the answer method suggested here remains the same.

Secondly, be aware of dates. When you see dates in a problem, this should set alarm bells ringing; they are not put into a question by chance or to signify my birthday. It means some sort of deadline or period may have or has expired, the consequences of which may affect the outcome of the solution.

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The OUP Q&A series Online Resource Centre: www.oxfordtextbooks.co.uk/orc/qanda/ will contain links to EU portal web pages and further useful information.

The latest edition of Blackstone's EU Treaties & Legislation contains the consolidated versions of the EU and TFEU Treaties as revised and amended by the 2007 Lisbon Treaty and a collection of useful secondary EU legislation.

Finally, and I hope this advice is not too late, the best preparation for an examination is to have worked consistently over the period of your course. If you have, some of the questions and answers suggested here might actually make sense to you and not be the first time you have come across the issues, cases, or law involved. Apart from that, I wish you 'all the best' in the examination.