



GCE

Law

Advanced Subsidiary GCE

Unit **G152:** Sources of Law

Mark Scheme for June 2013

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by examiners. It does not indicate the details of the discussions which took place at an examiners' meeting before marking commenced.

All examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the report on the examination.

OCR will not enter into any discussion or correspondence in connection with this mark scheme.















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Annotations

Annotation	Meaning
	Not Relevant or no response or response achieves no credit/page seen
	Not correct
	Point
	Developed point
	Developed point extended
	Link to the source
	Feature
	level 1
	level 2
	level 3
	level 4
	Case
	Correct
	Bald case/Definition
	Undeveloped case The highlight tool may also be used to draw attention to a word or phrase which means that the statement or reasoning is inaccurate

Question		Answer	Marks	Guidance										
1	(a)*	<p>Potential answers may:</p> <p>Assessment Objective 1 - Knowledge and understanding</p> <p>Describe the legislative process:</p> <ul style="list-style-type: none">Describe the way that ideas for new laws may come from a variety of sourcesDescribe the role of a Green Paper – a consultation document from which amendments may be made in the light of feedbackDescribe the role of a White Paper – a set of firm proposals drafted by parliamentary draftsmen in the form of a BillDescribe the different kinds of Bill (private, public and hybrid) although this is not a key part of the question. <p>Describe the stages involved in the passage of the Bill:</p> <ul style="list-style-type: none">A Bill may start in either the House of Commons or the House of Lords (except Money Bills etc)First Reading - a formality – the short title of the Bill is read out and an order for the Bill to be printed)Second Reading - this represents the main debate on the Bill. The Minister or MP responsible describes the aims of the Bill and will field questions. There is a formal debate conducted <i>via</i> the Speaker. They will usually focus on the larger principles as opposed to specific detail. At the end of the debate a vote will be taken and a majority will be required in order for the Bill to proceed)Committee Stage - this stage allows for the detailed scrutiny of the Bill for the first time. Most Bills are considered by small Committees of between 15 to 60 MP's known as Public Bill Committees. Membership of these committees is always roughly in proportion to the number of seats a Party holds in the Commons. Members will often be chosen because of expertise or interest in a particular field. A separate committee is formed for the consideration of each individual Bill. The committee are entitled to scrutinise every detail and make any amendments necessary for the Bill to reflect the intention discussed in second reading. Sometimes, if the Bill is an important one, the whole House will sit as a Committee (eg Finance Bills)	12	<table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table> <p>See guidance below.</p>	AO1 Levels	AO1 Marks	4	10–12	3	7–9	2	4–6	1	1–3
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		<ul style="list-style-type: none"> • Report Stage - after scrutiny by the Committee they will 'report' back to Parliament - to inform the House of any amendments (if there are no amendments at Committee Stage the Bill can go straight to the next stage). Amendments will be debated and voted on being either accepted or rejected. Further amendments may also be suggested from the House. This stage is often referred to as a safeguard against a small Committee 'hijacking' a Bill and amending it beyond recognition/original purpose. • Third Reading - if approved, the Bill will get its Third Reading. This gives the House a final chance to look at the Bill again as a whole, with all its amendments, and decide whether they want it to go further. The Bill cannot be changed substantially at this stage as it is, more or less, a formality. It will often go through without much attention at all (need 6 MP's for a debate). If there are no challenges to the general theme of the Bill, it will be passed to the other place to start the whole process again. • Repeat Process in the other place (House) - if the Bill started in the Commons, it will now pass to the Lords (and <i>vice versa</i>) for consideration and amendments and then passes back to the Commons to consider any amendments. • Possible 'ping-pong' between the Houses could arise at this stage which may be resolved through the use of the Parliament Acts 1911 & 1949 (eg War Crimes Act 1991; European Parliamentary Elections Act 1999; Sexual Offences (Amendment) Act 2000; Hunting Act 2004) • Royal Assent - this is where the Monarch of the day gives consent and the Bill finally becomes an Act of Parliament. This is very much a formality. The Monarch will not even have the text of the Bill's present when assenting. The short title will be read out and assent automatically given. Although the Monarch retains the theoretical power to withhold assent, no Monarch has done so since Queen Anne in 1707 with the Scottish Militia Bill. Her lack of assent was overridden. On the day assent is given, the Bill comes into force at midnight or the date of commencement if specified (except budget arrangements which may be made from time to time). <p>Make relevant reference to the source.</p>		
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			Assessment Objective 3 - Communication and presentation Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.	3	<table><tr><th>AO1 Marks</th><th>AO3 Marks</th></tr><tr><td>9–12</td><td>3</td></tr><tr><td>5–8</td><td>2</td></tr><tr><td>1–4</td><td>1</td></tr></table>	AO1 Marks	AO3 Marks	9–12	3	5–8	2	1–4	1
AO1 Marks	AO3 Marks												
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		<p><i>Annotations to use:</i></p> <p>To indicate a point  Link to source  Not relevant or no response </p> <p><i>Application:</i> 1 point = 1 mark</p> <p>Points = Naming an appropriate stage (1) and describing an appropriate stage (1)</p> <p>It makes no difference how long the explanation of a stage is or how many points are made within that explanation – each explanation is worth 1 mark. However, an ‘explanation’ must ‘explain’ the stage – if it fails to explain the stage or it is wrong or it is too brief (see note re: bullet points) it will not count. A stage is any of the following:</p> <div style="display: flex; align-items: center;"> <div style="flex: 1;"> <p>A reference to things starting with an idea for a new law Green Paper (accept ‘consultation’) White Paper Bill (types)</p> <p>First Reading Second Reading Committee Stage Report Stage Third Reading ‘Other Place’ Royal Assent</p> </div> <div style="flex: 1; border: 1px solid black; padding: 5px; margin-left: 10px;"> <p>Only ‘essential’ to have something from the pre-legislative stages at level four</p> </div> </div> <div style="display: flex; align-items: center; margin-top: 10px;"> <div style="flex: 1;"> <p>First Reading Second Reading Committee Stage Report Stage Third Reading ‘Other Place’ Royal Assent</p> </div> <div style="flex: 1; border: 1px solid black; padding: 5px; margin-left: 10px;"> <p>The ‘essential’ stages – note correct order</p> </div> </div> <p>Do not credit things which may well be accurate but are not relevant to a stage in the process (eg the legislative programme is announced in the Queen’s Speech) with the exception of any description of the Parliament Acts which will carry 1 mark.</p>
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			<p>Marking:</p> <ul style="list-style-type: none"> • To access Level 4 a response requires: <ul style="list-style-type: none"> ○ 10-12 points  plus a link to the source  plus all 'essential' stages (FSCRTOR) present and explained in the correct order plus 'something' from the pre-legislative stages • To access Level 3 a response requires: <ul style="list-style-type: none"> ○ 7-9 points  plus no more than one missing 'essential' stage (FSCRTOR) and all remaining 'essential' stages present and in the correct order. Further, if all stages are present but they appear in the wrong order award up to 9 points. ○ (N.B Needs to be more than a bare/bulleted list) • To access Level 2 a response requires: <ul style="list-style-type: none"> ○ 4-6 points  (including bulleted lists) • To access Level 1 a response requires: <ul style="list-style-type: none"> ○ 1-3 points 
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	(b)		Potential answers may: Assessment Objective 2 - Analysis, evaluation and application (i) Recognise that the likely outcome is ‘substantive ultra vires for unreasonableness’ or simply ‘unreasonable’ (CP). Credit appropriate reasoning – that no reasonable council would make such an order. Credit recognition of similarity to any relevant case such as <i>Associated Picture Houses v Wednesbury Corporation (1948)</i> or <i>Strickland v Hayes (1896)</i>. Credit relevant reference to the source.	5	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td colspan="2">For each point i, ii, iii</td></tr><tr><td>4</td><td>5</td></tr><tr><td>3</td><td>4</td></tr><tr><td>2</td><td>3</td></tr><tr><td>1</td><td>1–2</td></tr></table> See guidance below.	AO2 Levels	AO2 Marks	For each point i, ii, iii		4	5	3	4	2	3	1	1–2
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		(ii)	Recognise that the most likely outcome is ‘substantive ultra vires’ (CP). Credit appropriate reasoning – that the Minister has used authorised powers given to her to deal with road traffic matters to make legislation on income tax which she is not authorised to do – thus going beyond her powers. Credit recognition of similarity to any relevant case such as <i>R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants (1996)</i> or <i>R v Home Secretary ex p Fire Brigades Union [1995]</i>. Credit relevant reference to the source.	5													
		(iii)	Recognise that the most likely outcome is ‘procedural ultra vires’ (CP). Credit appropriate reasoning – that the council has failed to follow a procedure laid down in the enabling legislation (ie to ‘consult’ local people). Credit recognition of similarity to any relevant case such as <i>Agricultural Training Board v Aylesbury Mushrooms (1972)</i> or <i>R v Secretary of State for Health, ex parte U. S. Tobacco International Inc (1992)</i>. Credit relevant reference to the source.	5													

	(b)	(i), (ii), (iii)	<p><i>Annotations to use:</i></p> <p>Level 1  Level 2  Level 3  Level 4  Not relevant or no response </p> <p><i>Application:</i> As response achieves a level (see below) use the above annotations</p> <ul style="list-style-type: none"> To access Level 4 a response requires: <ul style="list-style-type: none"> Level 3 plus something else – eg a relevant case (below) or an appropriate link to the source: <ul style="list-style-type: none"> (b)(i) <i>Associated Picture Houses v Wednesbury Corporation</i> - accept ‘the cinema case’ (b)(ii) <i>R v SoS for Education and Employment, ex parte NUT</i> – accept ‘the Teacher’s Union case’ (or others like the <i>Joint Welfare of Immigrants Case</i>) (b)(iii) <i>Agricultural Training Board v Aylesbury Mushrooms</i> – accept ‘the Mushroom case’ To access Level 3 a response requires: <ul style="list-style-type: none"> The correct outcome plus why: <ul style="list-style-type: none"> Because no reasonable council would make such a decision Because the minister has used powers she has been legitimately given to do one thing in order to do another thing Because the council failed to follow a procedure laid down (namely, consulting local people) To access Level 2 a response requires: <ul style="list-style-type: none"> The correct outcome: <ul style="list-style-type: none"> (b)(i) <i>ultra vires</i> for unreasonableness (b)(ii) substantive <i>ultra vires</i> (b)(iii) procedural <i>ultra vires</i> To access Level 1 a response requires: <ul style="list-style-type: none"> basic relevant point(s) <p><i>Things to note:</i></p> <ul style="list-style-type: none"> Must ‘layer up’ – i.e. cannot access points for cases or links to the source until Level 3 is established and cannot credit explanations ‘why’ until the outcome is established first Do not accept ‘will or will not’ be successful for outcome – needs appropriate head of review (as <i>per</i> the command in the question)
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Question			Answer	Marks	Guidance										
	(c)	(i)	<p>Potential answers may:</p> <p>Assessment Objective 1 - Knowledge and understanding</p> <p>Parliamentary controls</p> <p>The Enabling Act:</p> <ul style="list-style-type: none">• Enabling Acts lay down the nature and scope of the delegated powers• Enabling Acts may be repealed, revoked or amended at any time• Enabling Acts may set down strict procedures and limitations• Parliament may be required to vote its approval of the enabling legislation• Publication of all SIs is required under the Statutory Instruments Act 1946• Consultation with Government Ministers, those with relevant expertise (eg the police and local authorities) and the public is often a requirement of the enabling legislation. <p>Resolution Procedures:</p> <ul style="list-style-type: none">• Describe the 'negative resolution' procedure that allows any MP to put down a motion to annul the delegated legislation within a specific time period (usually 40 days)• Either House (or both) may object (except finance matters which are Commons only)• Most common form of control (eg all EU Regulations are passed this way)• Describe the 'affirmative resolution' where Parliament is required to vote its approval of the delegated legislation when delegated legislation is laid before one or both Houses, and becomes law only if a motion approving it is passed within a specified time (usually 28 or 40 days)• Approval of both Houses normally required so it is a stricter form of control although less delegated legislation is scrutinised this way• Describe the 'super-affirmative resolution' under the Legislative and Regulatory Reform Act 2006 which gives Ministers power to make any provision by order if it will remove or reduce a legislative burden. Such burdens might include a financial cost, an administrative inconvenience, an obstacle to efficiency, productivity or profitability or a sanction which affects the carrying on of any lawful activity. Ministers can even change Acts of Parliament.	15	<table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>13-15</td></tr><tr><td>3</td><td>9-12</td></tr><tr><td>2</td><td>5-8</td></tr><tr><td>1</td><td>1-4</td></tr></table> <p>See guidance below.</p>	AO1 Levels	AO1 Marks	4	13-15	3	9-12	2	5-8	1	1-4
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Question	Answer	Marks	Guidance
	<p>Scrutiny Committees Parliament has a number of committees that scrutinise delegated legislation</p> <ul style="list-style-type: none"> • The Joint Committee on Statutory Instruments is the main committee that scrutinises statutory instruments to ensure that they do not: impose a tax or charge (as only an elected body has such a right); appear to have retrospective effect which was not provided for by the enabling Act; appear to have gone beyond the powers given under the enabling legislation or makes some unusual or unexpected use of those powers or is unclear or defective in some way • The House of Lords Delegated Powers Scrutiny Committee - keeps under constant review the extent to which legislative powers are delegated by Parliament to government ministers, and examines all Bills with delegating powers which allow SIs to be made before they begin their passage through the House • The House of Lords Merits of Statutory Instruments Committee - examines the policy merits of any statutory instrument or regulations that are subject to parliamentary procedure • Other specialist committees include the Regulatory Reform Committee – who examine subordinate provisions to amend primary legislation as created under the Deregulation and Contracting Out Act 1994, amended by the Regulatory Reform Act 2001 and the LRA 2006. <p>Court Controls The courts can control delegated legislation through the doctrine of judicial review:</p> <ul style="list-style-type: none"> • This process takes place in a special Administrative Court within the Queen's Bench Divisional Court • Judicial Review is based on the doctrine of <i>ultra vires</i> which means 'beyond their powers' • The process allows parties to challenge the lawfulness of administrative decision-making • The court can determine whether a decision-maker has gone beyond their powers in four broad categories • Procedural <i>ultra vires</i> – is where an administrative person/body has failed to follow a procedure required under the legislation as in <i>Agricultural Training Board v Aylesbury Mushrooms (1972)</i> • Substantive <i>ultra vires</i> – is where an administrative person/body has used 		

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Question			Answer	Marks	Guidance
			<p>powers legitimately given to them for a particular reason for another unauthorised reason as in <i>R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants (1996)</i></p> <ul style="list-style-type: none"> • Unreasonableness – is where an administrative person/body has done something that no reasonable person/body in the same situation would do as in <i>Associated Picture Houses v Wednesbury Corporation (1948)</i> • Inconsistency with the Human Rights Act – is where an administrative person/body has used their legislative power in a way which is inconsistent with the Human Rights Act (1998) as in <i>R (Bono) v Harlow DC (2002)</i>. <p>Make relevant reference to the sources.</p>		

	(c)	(i)	<p><i>Annotations to use:</i></p> <p>To indicate a point  Link to source  Not relevant or no response </p> <p><i>Application:</i> 1 point = 1 mark</p> <p>Points = Naming an appropriate control (1) and describing an appropriate control (1) and citing an appropriate case (for heads of <i>ultra vires</i>)</p> <p>Each explanation is worth a maximum of 1 mark. Further, an ‘explanation’ must ‘explain’ the control – if it fails to explain the control or it is wrong or it is too brief (see not re: bullet points) it will not count</p> <ul style="list-style-type: none"> • To access Level 4 a response requires: <ul style="list-style-type: none"> ○ 13-15 points  plus a link to the source  plus it must cover both parliamentary and court controls • To access Level 3 a response requires: <ul style="list-style-type: none"> ○ 9-12 points  (N.B. needs to be more than a bare/bulleted list) • To access Level 2 a response requires: <ul style="list-style-type: none"> ○ 5-8 points  • To access Level 1 a response requires: <ul style="list-style-type: none"> ○ 1-4 points 
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Question		Answer	Marks	Guidance										
	(ii)*	<p>Potential answers may:</p> <p>Assessment Objective 2 - Analysis, evaluation and application</p> <p>Effectiveness of parliamentary controls:</p> <ul style="list-style-type: none">Parliament has the ‘ultimate’ control through revocation or amendment of the Parent Act which is consistent with doctrine of parliamentary supremacyThe sheer volume (3,500 – 4,000 p.a.) of DL means that Parliamentary powers are limited as there is little time for proper scrutinyParliamentary controls are affected by the parameters set by the Enabling Act – ie Parliament only delegates powers to bodies that are accountable to Parliament and places limitations on the powers delegatedThe affirmative resolution procedure does give Parliament a stronger role (than the negative procedure) but is very rarely used suggesting it is an ineffective form of controlThe negative resolution procedure offers little practical control and, in reality, is little more than a rubber stamping exerciseThe Scrutiny Committees have no power to alter the statutory instrument they can only refer it back to Parliament on certain technical matters. <p>Effectiveness of court controls:</p> <ul style="list-style-type: none">Courts have little control as Judicial Review relies on an individual starting a claim – ie the courts are powerless unless somebody brings a case and there is a lack of knowledge issueJudicial Review is rarely funded by legal aid and relies on individuals having the money, will and tenacity to pursue the caseClaimants wishing to use Judicial Review must pass stringent legal tests (<i>locus standi</i> and three month time limits) before bringing a case which can exclude someMany Enabling Acts give ministers very wide discretionary powers making it difficult for the court to reach a finding of ultra viresCourts can be reluctant to ‘stand up to government’ due to Supremacy of Parliament and Separation of Powers doctrines – although the new UK Supreme Court (where judicial review appeals could be heard) is adopting a more interventionist role consistent with a constitutional court	12	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table> <p>See guidance below.</p>	AO2 Levels	AO2 Marks	4	10–12	3	7–9	2	4–6	1	1–3
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			<ul style="list-style-type: none">Judicial Review <i>does</i> hold the Executive to account and government usually accepts the court's rulings. <p>Credit references to the sources (though it is not necessary for full marks).</p>											
			Assessment Objective 3 - Communication and presentation <p>Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.</p>	3	<table><tr><th>AO2 Marks</th><th>AO3 Mark</th></tr><tr><td>9–12</td><td>3</td></tr><tr><td>5–8</td><td>2</td></tr><tr><td>1–4</td><td>1</td></tr></table>		AO2 Marks	AO3 Mark	9–12	3	5–8	2	1–4	1
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		<p>Annotations to use:</p> <p>Point P Development of point DEV Expansion of the developed point E Not relevant or no response N</p> <p><i>Application: SEE APPENDIX C FOR EXEMPLAR SCRIPT</i></p> <ul style="list-style-type: none"> To access Level 4 (10-12) a response requires: <ul style="list-style-type: none"> 3 developed points DEV plus 1 expanded point E plus must cover both parliament and the courts at the bottom of Level 4 plus must also cover both effective and ineffective aspects of controls for top of Level 4 (No link to source required). To access Level 3 (7-9) a response requires: <ul style="list-style-type: none"> For 9 marks = 3 developed points DEV or 2 expanded points E For 8 marks = 2 developed points DEV plus range of points or 1 expanded point E plus range points P For 7 marks = 1 expanded point E or 2 developed points DEV To access Level 2 (4-6) a response requires: <ul style="list-style-type: none"> For 6 marks – 1 developed point DEV plus a range of points P (Range is a minimum of two) For 5 marks - 1 developed point DEV plus a point P For 4 marks - 1 developed point DEV or a range of points P To access Level 1 (1-3) a response requires: <ul style="list-style-type: none"> point(s) P <p><i>Things to note:</i></p> <ul style="list-style-type: none"> Simply stating that something is effective or ineffective is not a critical point.
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Question		Answer	Marks	Guidance											
2	(a)*	<p>Potential answers may:</p> <p>Assessment Objective 1 - Knowledge and understanding</p> <ul style="list-style-type: none">Describe the way Article 267 (formerly 234) enables the European Court of Justice (ECJ) to perform part of its supervisory roleExplain that according to Article 267 of the Treaty on the Functioning of the European Union (TFEU)Describe the way that the ECJ has the jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions (ie secondary EU Law)Describe the way that Article 267 allows for two kinds of appeal – one where any court or tribunal ‘may’ make a reference on a point of EU Law (called a discretionary referral); and one where a court or tribunal from whose decision there is no appeal is involved, a referral ‘must’ be made to the ECJ (called a mandatory referral)Demonstrate understanding of the two referral procedures by reference to appropriate examples of courts in the English legal system that would have to make a referral and one which may make a referralDescribe the guidelines on the use of the Article 267 referral procedure which were laid out by Lord Denning in <i>Bulmer v Bollinger</i> (1974) and developed in <i>Practice Direction (Reference to Court of Justice of the EC)</i> (1999)Describe the way that according to Lord Denning’s guidelines referrals should only be made if a ruling by the ECJ is necessary to enable the English court to give judgment in the case and necessary means that the ruling would be conclusive in the caseDescribe the <i>acte claire</i> doctrine – that there is no need to make a referral if the point of law is clear and free from doubt as in <i>CILFIT v Minister of Health</i> (1982)Describe the rule that there is no need to refer a point which has already been determined in a previous similar case as in <i>R v Secretary of State for Employment ex parte Equal Opportunities Commission</i> (1994)Describe the mechanics of the referral — proceedings are suspended in the national court until the ECJ has given its ruling	12	<table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table> <p>See guidance below.</p>	AO1 Levels	AO1 Marks	4	10–12	3	7–9	2	4–6	1	1–3	
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




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			<ul style="list-style-type: none">Describe the way that Article 267 referrals are not an appeal. A case may be decided without reference to the ruling but where it is considered it is binding and must be taken into account by the national court when reaching its verdictUse any relevant cases to illustrate: Examples of well-known legal principles emanating from referrals - <i>R v Secretary of State for Transport Ex p Factortame (No.2) (1991)</i>, <i>Marshall v Southampton and South West Hampshire AHA (1986)</i> or <i>Pickstone v Freemans plc (1988)</i>; status of tribunals able to refer – <i>Pretore di Salo v Persons Unknown (1989)</i> or <i>Dorsch Consult (1997)</i>; Mandatory referral – <i>Bulmer v Bollinger (1974)</i> or <i>Costa v ENEL (1964)</i>; Discretionary referral - <i>Torfaen Borough Council v B & Q (1990)</i>; and, first referral from UK - <i>Van Duyn v Home Office (1974)</i>. <p>Make relevant reference to the source.</p>										
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5–8	2												
1–4	1												

			<p><i>Annotations to use:</i></p> <p>To indicate a point  Link to source  Not relevant or no response </p> <p><i>Application:</i> 1 point = 1 mark</p> <p>Points = Who performs this function? (eg one of the key functions of the ECJ is ...) What is an Article 267 referral? (Article 267 allows courts in member states to ask the ECJ for guidance on a point of EU law) Any procedural point (eg UK case is suspended whilst referral is made) Explain there are two types of referral available (this point includes naming either/both) Explain a Discretionary referral Place discretionary in British context (eg in UK this could be any court including tribunals/mags ct) Give a case example of a discretionary (eg <i>B&Q</i>) Explain a Mandatory referral Place mandatory in British context (eg in UK this would be the <i>UKSC</i>) Give a case example of a mandatory (eg <i>Bulmer v Bollinger</i>) Make any relevant observation (the first referral was <i>Van Duyn</i>) State that there are guidelines on use (Denning in <i>Bulmer</i> &/or <i>Practice Direction</i>) Describe any of the guidelines Describe the <i>acte claire</i> doctrine (no need to refer a point that is already decided and clear) Give a case example of an <i>acte claire</i> (<i>CILFIT/E.O.C.</i>) Any reference to mechanics of referral (suspended national proceedings) Article 267 referrals are not an appeal – reference on a point of law which MS must then apply to the case in hand Article 267 referrals are binding and can be applied to other MS Article 267 referrals have been responsible for most major EU legal principles eg <i>R v Secretary of State for Transport Ex p Factortame (No.2) (1991)</i>, <i>Marshall v Southampton and South West Hampshire AHA (1986)</i> or <i>Pickstone v Freemans plc (1988)</i>; status of tribunals able to refer – <i>Pretore di Salo v Persons Unknown (1989)</i> or <i>Dorsch Consult (1997)</i>; Mandatory referral – <i>Bulmer v Bollinger (1974)</i> or <i>Costa v ENEL (1964)</i>; Discretionary referral - <i>Torfaen Borough Council v B & Q (1990)</i>; and, first referral from UK - <i>Van Duyn v Home Office (1974)</i>.</p>
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			<p>Marking:</p> <ul style="list-style-type: none"> • To access Level 4 a response requires: <ul style="list-style-type: none"> ○ 10-12 points  plus a link to the source  • To access Level 3 a response requires: <ul style="list-style-type: none"> ○ 7-9 points  (NB Needs to be more than a bare/bulleted list) • To access Level 2 a response requires: <ul style="list-style-type: none"> ○ 4-6 points  (including bulleted lists) • To access Level 1 a response requires: <ul style="list-style-type: none"> ○ 1-3 points 
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Mark Scheme

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Question			Answer	Marks	Guidance												
	(b)		Potential answers may :														
		(i)	<p>Assessment Objective 2 - Analysis, evaluation and application</p> <p>Recognise that the Court ‘may’ make a referral (accept also would make a discretionary referral or they have a ‘power’ to make a referral) (CP). Explain the reasoning – that a magistrates’ court would be ‘any court or tribunal’ according to Article 267. Further, credit any reference to cases which have determined that courts very low in the hierarchy of a member state still constitute ‘a court or tribunal’ - <i>Pretore di Salo v Persons Unknown</i> (1989) or <i>Dorsch Consult</i> (1997). Credit any relevant discretionary referral case - <i>Torfaen Borough Council v B & Q</i> (1990). Credit reference to the source.</p>	5	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td colspan="2">For each point i, ii, iii</td></tr><tr><td>4</td><td>5</td></tr><tr><td>3</td><td>4</td></tr><tr><td>2</td><td>3</td></tr><tr><td>1</td><td>1–2</td></tr></table> <p>See guidance below.</p>	AO2 Levels	AO2 Marks	For each point i, ii, iii		4	5	3	4	2	3	1	1–2
AO2 Levels	AO2 Marks																
For each point i, ii, iii																	
4	5																
3	4																
2	3																
1	1–2																
		(ii)	Recognise that the UK Supreme Court (UKSC) ‘ must ’ make a referral (accept also would make a mandatory referral or they have a ‘duty’ to make a referral) (CP). Explain the reasoning – that the UKSC is a court ‘from whose decision there is no appeal’ and therefore an Article 267 referral must be made. Recognise the similarity to <i>R v Secretary of State for Transport Ex p Factortame (No.2)</i> (1991). Credit any other mandatory referral case <i>Bulmer v Bollinger</i> (1974) or <i>Costa v ENEL</i> (1964). Credit reference to the source.	5													
		(iii)	Recognise that there is no need to make a referral (CP). Discuss the reasons why – because the issue has already been decided by a preceding case <i>R v Secretary of State for Employment ex parte Smith</i> (do not credit as a case as it is in the source). Recognise the similarity to <i>R v Secretary of State for Employment ex parte Equal Opportunities Commission</i> (1994). Credit any other relevant case. Credit reference to the source.	5													

	(b)	(i), (ii), (iii)	<p><i>Annotations to use:</i></p> <p>Level 1  Level 2  Level 3  Level 4  Not relevant or no response </p> <p><i>Application:</i> As response achieves a level (see below) use the above annotations</p> <ul style="list-style-type: none"> To access Level 4 a response requires: <ul style="list-style-type: none"> Level 3 plus something else – eg a relevant case (below) or an appropriate link to the source: <ul style="list-style-type: none"> (b)(i) Torfaen Borough Council v B&Q (accept ‘the B&Q case’) (b)(ii) Bulmer v Bollinger (accept ‘Bulmers’ or the Champagne case) (b)(iii) R v Secretary of State for Employment ex parte Smith or R v Secretary of State for Employment ex parte Equal Opportunities Commission (1994) To access Level 3 a response requires: <ul style="list-style-type: none"> The correct outcome plus why: <ul style="list-style-type: none"> (b)(i) Because any court or tribunal has the discretion to make a referral and this would include a magistrates’ court (as stated in Article 267) (b)(ii) Because the case is before the UKSC and there is no judicial remedy (right of appeal) from their decision (as stated in Article 267) (b)(iii) Because there is no need to refer a point which has already been decided and is clear and free from doubt (as stated in Article 267) To access Level 2 a response requires: <ul style="list-style-type: none"> The correct outcome: <ul style="list-style-type: none"> (b)(i) a discretionary referral is appropriate (b)(ii) a mandatory referral is appropriate (b)(iii) no referral necessary (because an acte claire situation exists here) To access Level 1 a response requires: <ul style="list-style-type: none"> basic relevant point(s) <p><i>Things to note:</i></p> <ul style="list-style-type: none"> Must ‘layer up’ – i.e. cannot access points for cases or links to the source until Level 3 is established and cannot credit explanations ‘why’ until the outcome is established first Do not accept ‘can or cannot refer’ for outcome – needs appropriate referral type (although we will accept similar wording like choose to refer or must refer and, for (b)(iii), no referral is acceptable)
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Question			Answer	Marks	Guidance										
	(c)	(i)	<p>Potential answers may:</p> <p>Assessment Objective 1 - Knowledge and understanding</p> <ul style="list-style-type: none">Explain that some provisions of EU Law such as treaty Articles and regulations are directly applicable which means that they take effect in the legal systems of member states without any further action by the member stateDescribe the way that other provisions of EU Law such as directives need to be given legal effect by the member state before they can be relied uponDescribe the way that where the purpose of a directive is to give rights to individuals and the member state has failed to give it legal effect or not done so in time or has done so in time but incorrectly then it may still be possible for an individual to rely on the directiveExplain that this is due to the concept of direct effect which refers to provisions of EU Law which give rise to rights or obligations on which individuals may rely before their national courts. <p>Describe the fact that there are two kinds of direct effect:</p> <p>Horizontal direct effect (HDE):</p> <ul style="list-style-type: none">Describe the way that HDE allows individuals to rely on measures of EU Law against another individual and that whilst Treaty Articles, regulations and implemented directives can have HDE, unincorporated (or incorrectly incorporated) directives cannot have HDE (<i>Defrenne v SABENA Airlines (1979)</i>)Use any relevant case to illustrate, eg <i>Duke v GEC Reliance Ltd (1988)</i>. <p>Vertical direct effect (VDE):</p> <ul style="list-style-type: none">Describe the way that VDE allows an individual to rely on a provision of EU Law against the state (provided those measures give rights to individuals)Explain that Treaty Articles, regulations and implemented directives (through the domestic enacting legislation) are capable of giving rise to VDE (<i>Van Gend en Loos (1963)</i>)Describe the way that the ECJ has enforced VDE for an unincorporated (or incorrectly incorporated) directive against the state or an emanation of the state (<i>Marshall v Southampton & SW Hants Area Health Authority (1986)</i>)	15	<table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>13–15</td></tr><tr><td>3</td><td>9–12</td></tr><tr><td>2</td><td>5–8</td></tr><tr><td>1</td><td>1–4</td></tr></table> <p>See guidance below.</p>	AO1 Levels	AO1 Marks	4	13–15	3	9–12	2	5–8	1	1–4
AO1 Levels	AO1 Marks														
4	13–15														
3	9–12														
2	5–8														
1	1–4														

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Question			Answer	Marks	Guidance
			<ul style="list-style-type: none"> Describe the way that the ECJ has dealt with defining what amounts to an emanation of the state (<i>Foster v British Gas</i> (1991)) - credit any reference to the <i>Foster</i> criteria. <p>Use any relevant case to illustrate, eg <i>Defrenne v SABENA Airlines</i> (1979); <i>Van Gend en Loos</i> (1963); <i>Marshall v Southampton and South West Hampshire Area Authority</i> (1986); <i>Foster v British Gas</i> (1991); <i>Griffin v South West Water</i> (1995); <i>Duke v GEC Reliance</i> (1988); <i>Doughty v Rolls Royce</i> (1992);</p> <p>Credit any references to indirect effect although not strictly within remit of the question.</p> <p>Credit any reference to the emerging doctrine of horizontal direct effect since the case of <i>Kücükdeveci</i> [2010].</p> <p>Make relevant reference to the source.</p>		

		<p><i>Annotations to use:</i></p> <p>To indicate a point from the additional points pot  explanation of VDE or HDE  explanation of VDE or HDE </p> <p>use of a case to illustrate Level 2 and/or Level 3  Link to source  Not relevant or no response </p> <p><i>Application:</i></p> <p>To access Level 4 a response requires Level 3 plus additional points to a maximum of 15 plus a link to the source </p> <p>To access Level 3 a response requires both VDE and HDE explained (9) plus any additional point(s) (whether a case or additional point) up to a maximum of 12</p> <p>To access Level 2 a response requires either VDE or HDE explained (5) plus a relevant case (6) plus 1 additional point (7) or two additional points (8) or three additional points if no case</p> <p>To access Level 1 a response requires 1-4 basic points</p> <p>Possible additional points = Explain the various sources of EU law (primary and secondary) Explain that Article 288 allows institutions to make 5 types of secondary legislation including Directives Explain direct applicability Explain that Treaty Articles and Regulations have direct applicability but Directives do not Explain that, consequently, further action on Directives (by member states) is required Explain that in the UK Directives might be incorporated through Acts of Parliament, Orders in Council or Statutory Instruments Explain that member states have discretion (time and form) in incorporation Explain that rights contained in a Directive then become available to individuals through domestic legislation Explain the concept of direct effect – that an individual can rely on a provision of EU law before the courts of his/her MS Explain that when a member state fails to incorporate a Directive the rights contained in that Directive may still be made available through the doctrine of direct effect Treat the point that Articles and Regulations have both vertical and horizontal direct effect as an additional point (and any relevant cases given in support) Credit references to the extension of the state to include an arm of the state (1), how the ECJ determines an arm of the state (1) and any relevant cases (Foster) (1) Credit any references to indirect effect/state liability although not strictly within remit of the question so max 1 mark Credit any reference to the emerging doctrine of horizontal direct effect since the case of <i>Kücükdeveci</i> [2010] (point for mere mention, point for explanation & point for case)</p>
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		<p>Level 2/3 Horizontal direct effect (HDE):</p> <ul style="list-style-type: none"> Describe the way that HDE allows individuals to rely on measures of EU Law against another individual and that whilst Treaty Articles, regulations and implemented directives can have HDE, unincorporated (or incorrectly incorporated) directives cannot have HDE (<i>Defrenne v SABENA Airlines (1979)</i>) Use any relevant case to illustrate, eg <i>Duke v GEC Reliance Ltd (1988)</i>. <p>Level 2/3 Vertical direct effect (VDE):</p> <ul style="list-style-type: none"> Describe the way that VDE allows an individual to rely on a provision of EU Law against the state (provided those measures give rights to individuals) Explain that Treaty Articles, regulations and implemented directives (through the domestic enacting legislation) are capable of giving rise to VDE (<i>Van Gend en Loos (1963)</i>) Describe the way that the ECJ has enforced VDE for an unincorporated (or incorrectly incorporated) directive against the state or an emanation of the state (<i>Marshall v Southampton & SW Hants Area Health Authority (1986)</i>) Describe the way that the ECJ has dealt with defining what amounts to an emanation of the state (<i>Foster v British Gas (1991)</i>) - credit any reference to the <i>Foster</i> criteria. <p>Use any relevant case to illustrate, eg <i>Defrenne v SABENA Airlines (1979)</i>; <i>Van Gend en Loos (1963)</i>; <i>Marshall v Southampton and South West Hampshire Area Authority (1986)</i>; <i>Foster v British Gas (1991)</i>; <i>Griffin v South West Water (1995)</i>; <i>Duke v GEC Reliance (1988)</i>; <i>Doughty v Rolls Royce (1992)</i>;</p>
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Question		Answer	Marks	Guidance										
	(ii)*	<p>Potential answers may:</p> <p>Assessment Objective 2 - Analysis, evaluation and application</p> <ul style="list-style-type: none">• Discuss the problems that have arisen where Member States have not implemented a directive within the time stipulated – ie individuals unable to rely on rights in their member state which other EU citizens enjoy in their member state simply because of the state's failure• Discuss the way that the European Court of Justice has applied the concept of 'vertical direct effect' to cover situations where the directive is not implemented in time or where it is defective• Discuss the unfairness of the concepts of horizontal and vertical effect in that they give rights to individuals in some cases and not others• Explain that in an employment case the availability of a remedy may depend on the incidental issue of who the employer is – state or private• Explain that the doctrine requires a distinction to be made between state and private employers – an issue that is not always straightforward• Discuss the inequalities that can result – the difficulties for employers and the difficulties for employees such as Mrs Duke in <i>Duke v GEC Reliance Ltd (1988)</i>• Discuss the problems of identifying what is an 'arm of the state' and the application of the <i>Foster</i> criteria• Discuss how the ECJ has liberally interpreted 'arm of the state' and what conclusions may be drawn from the cases• Discuss the way the ECJ has tried to create alternative remedies for employees who are denied rights due to this distinction• Discuss the relevance of the <i>Francovich</i> principle or state liability• Discuss the limitations of the <i>Francovich</i> principle - if a member state refused to pay compensation to an aggrieved party – the European Court of Justice has no mechanism for enforcing its judgements• Describe the criteria that needs to be met for a claim to compensation resulting from failure to implement a directive• Discuss the <i>Von Colson</i> principle• Discuss other emerging principles developed by the CJEU such as the doctrine of horizontal direct effect since the case of <i>Kücükdeveci (2010)</i>.	12	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table> <p>See guidance below.</p>	AO2 Levels	AO2 Marks	4	10–12	3	7–9	2	4–6	1	1–3
AO2 Levels	AO2 Marks													
4	10–12													
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Mark Scheme
















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Question			Answer	Marks	Guidance								
			<p>Use any relevant cases to illustrate, eg <i>Marshall v Southampton and South West Hampshire Area Authority</i> (1986), <i>Duke v GEC Reliance Ltd</i> (1988), <i>Foster v British Gas plc</i> (1990) and <i>Griffin v South West Water Services</i> (1994).</p> <p>Make relevant reference to the source.</p>										
			<p>Assessment Objective 3 - Communication and presentation</p> <p>Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.</p>	3	<table><tr><th>AO2 Marks</th><th>AO3 Marks</th></tr><tr><td>9–12</td><td>3</td></tr><tr><td>5–8</td><td>2</td></tr><tr><td>1-4</td><td>1</td></tr></table>	AO2 Marks	AO3 Marks	9–12	3	5–8	2	1-4	1
AO2 Marks	AO3 Marks												
9–12	3												
5–8	2												
1-4	1												

Annotations to use:

Point  Development of point  Expansion of the developed point  Not relevant or no response 

*Application: **SEE APPENDIX A FOR EXEMPLAR SCRIPT***

- To access level 4 (10-12) a response requires:
 - 3 developed points  plus 1 expanded point 
- To access level 3 (7-9) a response requires:
 - For 9 marks = 3 developed points  or 2 expanded points 
 - For 8 marks = 2 developed points  plus range of points or 1 expanded point  plus range points
 - For 7 marks = 1 expanded point  or 2 developed points 
- To access Level 2 (4-6) a response requires:
 - For 6 marks – 1 developed point  plus a range of points  (Range is a minimum of two)
 - For 5 marks - 1 developed point  plus a point 
 - For 4 marks - 1 developed point  or a range of points 
- To access level 1 (1-3) a response requires:
 - point(s) 

AS GCE Law Levels of Assessment

There are **four** levels of assessment of AOs 1 and 2 in the AS units. Level 4 is the highest level that can reasonably be expected from a candidate at the end of the first year of study of an Advanced GCE course. Similarly, there are **three** levels of assessment of AO3 in the AS units.

Level	Assessment Objective 1	Assessment Objective 2	Assessment Objective 3 (includes QWC)
4	Good, well-developed knowledge with a clear understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate by good citation to relevant statutes and case-law.	Ability to identify and analyse issues central to the question showing some understanding of current debate and proposals for reform or identify most of the relevant points of law in issue. Ability to develop clear arguments or apply points of law clearly to a given factual situation and reach a sensible and informed conclusion.	
3	Adequate knowledge showing reasonable understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate with some citation of relevant statutes and case-law.	Ability to analyse most of the more obvious points central to the question or identify the main points of law in issue. Ability to develop arguments or apply points of law mechanically to a given factual situation, and reach a conclusion.	A good ability to present logical and coherent arguments and communicates relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
2	Limited knowledge showing general understanding of the relevant concepts and principles. There will be some elaboration of the principles, and where appropriate with limited reference to relevant statutes and case-law.	Ability to explain some of the more obvious points central to the question or identify some of the points of law in issue. A limited ability to produce arguments based on their material or limited ability to apply points of law to a given factual situation but without a clear focus or conclusion.	An adequate ability to present logical and coherent arguments and communicates relevant material in a reasonably clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
1	Very limited knowledge of the basic concepts and principles. There will be limited points of detail, but accurate citation of relevant statutes and case-law will not be expected.	Ability to explain at least one of the simpler points central to the question or identify at least one of the points of law in issue. The approach may be uncritical and/or unselective.	A limited attempt to present logical and coherent arguments and communicates relevant material in a limited manner using some appropriate legal terminology. Reward grammar, spelling and punctuation.

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