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EUROPEAN COMMUNITY LAW

NOTES AND COMMENTS ON THE ESSAY ASSIGNMENT

General Comment: It is a good idea to answer the question you are asked rather than another question (**read the question carefully**).The question specifically asked you to:

EXPLAIN:
1. the **differences** between the Advocate General's and the ECJ's approaches to this issue [raised in para 68 of the AG's opinion];
2. **giving reasons for your answer**, whether you think that the Advocate General's approach or the ECJ's approach to the issue is preferable.

This is a clearly defined question focusing on a comparison and evaluation of the AG's and ECJ's analysis of particular legal issues. An evaluation of how they dealt with other issues in the case is **beyond the scope of the question (i.e. won't get points)**. In particular, as both agree that a positive list is in principle acceptable, it is inappropriate to discuss whether a positive list or a negative list system would be preferable. And answer the question - don't just treat it as a jumping off point to discuss the issues that most bother you about the class.

In analyzing the issues you should give enough information about the arguments to make it clear that you understand what the AG and ECJ were saying, but there's an analytical component too. Ideally you would do more than describing what the AG said and what the ECJ said.

FORM

I set a 4 page length limit and did not set any criteria for margins etc. Some people responded by being creative with footnotes in tiny fonts or by setting their page margins to be very narrow. I liked the creative manipulation of the 4 page criterion much better than the papers which did not use up all of the 4 pages, even with wide margins and double spacing.

I have some comments about use of language. Not all lawyers are good writers (even judges sometimes use language sloppily), but the best lawyers are good writers. Employers care about writing, so it is a good idea to focus on becoming a good legal writer.

Legal writing is different from other writing. When you write about law it is very important to be clear and organized. It is a good idea to avoid excessively casual language. Many people think that it is a good idea to use simpler words rather than less simple words. For example, use is a really good, clear word and there is no need to use utilize in its place. If you want to refer to something, you should use the word refer rather than the word reference (as a verb). It is particularly important to avoid using long words incorrectly.

It's stands for "it is" and not for the possessive of it (belonging to it). This is a bit

counter-intuitive as we usually designate the possessive with ‘s, and it is a common mistake, but it is still a mistake. It’s a good idea to use prepositions appropriately and omit them where they are not appropriate. For example the word infringe means break or breach. You do not infringe on a principle you infringe it. The word preferable is a comparative term - you do not need, and should not put “more” in front of it (or most). Singular subjects should have singular verbs and plural subjects need plural verbs.

If you were writing an essay for an English class it might be a good idea to vary the words you use to express your ideas. In legal writing it is more important to write clearly than to write interesting prose, so you should use the same words to describe the same things. This is particularly important in drafting contracts. For example, if you had defined the term “expense” but used the (undefined) word “cost” in another part of the contract (where you meant to refer to the defined concept of expense) it would be unclear how the contract should be interpreted.

Shorter sentences are usually clearer than longer sentences. If a sentence constitutes a paragraph it is likely that your reader will get lost somewhere in the middle. As a writer you want to try to make sure that your reader doesn’t have to guess what you mean. For example, if you use the word this, as in “this idea”, be very sure that your reader will understand which idea you mean. It is also sometimes unclear what a particular pronoun is being used to stand in for. It may be better to use somewhat clunky repetitions (“the Court” rather than “it”) than to risk a failure to communicate effectively.

Some of the papers show a failure to notice missing words or extra words. This problem might have been avoided by a careful re-reading of the paper before submission. Even in an exam it is a good idea to read over your answers (if you have time) but in the context of an essay like this or a draft memo or brief for a law firm it is really important.

SUBSTANCE

The question has two parts: an analysis of the Advocate General’s (AG’s) opinion and the judgment of the ECJ and your reasons for preferring one approach or the other.

The quotation from the AG’s opinion identifies his three reasons for arguing that the directive does not meet the requirements of proportionality (usually defined to mean that a measure must not go further than necessary to achieve its objective). The three reasons are: 1. The directive does not set a standard for inclusion of new substances in the positive list; 2. The directive does not state clearly whether private parties may apply to have new substances considered for inclusion in the positive list; and 3. The directive does not establish a clear procedure with minimum guarantees for individual rights. In describing these reasons I have not used exactly the same words as the AG. This is probably a good idea so as to make clear that you understand what he is saying. However, if he used a term that was intended to have a very specific meaning and which could not easily be paraphrased, that would be an argument for copying the AG’s language.

There is a lot to cover here so this is why it is not a good idea to spend much of

your 4 pages on the background to the directive and the litigation, including issues raised in the litigation which are not the subject matter of the question. There are both sides of the three issues to consider, and the discussion of which approach is better, which would suggest a division of the paper into 7 sections if you only consider the issues raised directly by the question. This means that you only have just over half a page for each section. If you didn't use the full 4 pages you probably did not include enough detail in your description and analysis of the issues.

The standards point. The AG says that the directive does not contain standards to for assessing whether the Commission acted within its powers. This is a statement about the lack of criteria in the body of the directive for deciding whether a substance is appropriate for inclusion in the positive list. The lack of criteria is significant for vitamin manufacturers and for the Commission, but it is also significant for a court which is responsible for reviewing the Commission's decisions. In contrast the ECJ, relying on the recitals to the directive, says that the criteria or standards clearly relate to safety (para. 86:"the relevant criteria for the purposes of the positive lists and the application of the procedure for modification of those lists can, as conceived by the Community legislature, relate only to grounds of human-health protection").

The AG's approach and that of the ECJ are quite different. The AG wants to see standards established in the operative part of the directive, whereas the ECJ is satisfied that the relevant standards (or criteria) are clear from the directive as a whole. From the perspective of a person who wants to apply for the inclusion of a particular substance or to challenge a decision on a particular substance it would be important to know what the criteria are.

Note: A number of people wrote that the Comitology decision answers this standards point. This is incorrect. The substantive norm issue is about what criteria are applied in determining whether a substance should be added to the positive list **and not** what procedure should be used in making the determination. Comitology is about a procedure, not about standards.

The application point.

Although recital 10 suggests that individuals may have a right to apply for amendment of the positive list, the operative provisions of the directive do not establish any such right. Art 4(6) suggests that in relation to substances which are already allowed within a Member State the Member State may submit a dossier for consideration, but Art. 4(5), which states that the positive list may be amended using the comitology procedure, does not address the issue of who may apply for such an amendment. The ECJ's consideration of the process point assumes that individuals may apply for modification of the positive list.

The process point.

The AG argues that, if individuals are able to apply for modification of the positive list, the directive provides no procedural protections for their interests. He is

very critical of the process envisaged by the directive (e.g. it has all the transparency of a black box). He notes that the Commission has published administrative guidance about the process.

The ECJ also notes that process is important in para. 73: “Such a procedure must be accessible in the sense that it must be expressly mentioned in a measure of general application which is binding on the authorities concerned. It must be capable of being completed within a reasonable time. An application to have a substance included on a list of authorised substances may be refused by the competent authorities only on the basis of a full assessment of the risk posed to public health by the substance, established on the basis of the most reliable scientific data available and the most recent results of international research. If the procedure results in a refusal, the refusal must be open to challenge before the courts..”

The ECJ states that Art. 4(5) does provide for such a process by referring to the comitology decision. The ECJ decides not to consider Art 4(6) which does not refer to a particular process because it is outside the scope of the questions before the Court. The comitology process addresses how the Commission and expert committees co-operate in the development of rules, and the ECJ describes the characteristics of the process. The ECJ notes that the comitology decision does not provide for the Commission to inform people who submit a dossier about what happens before the time when the matter is brought before the EFSA. The ECJ suggests that it is for the Commission to address this issue (para. 82: “It is none the less the responsibility of the Commission, by virtue of the implementing powers conferred on it by Directive 2002/46 concerning, inter alia, the way the procedure is operated, to adopt and make accessible to interested parties, in accordance with the principle of sound administration, the measures necessary to ensure generally that the consultation stage with the European Food Safety Authority is carried out transparently and within a reasonable time.”) The ECJ states that the process ensures that an application can only be rejected by a binding legal act which can be subject to judicial review.

Discussion

The drafters of the directive did not try to establish a clear procedure for amendment of the positive list. The differences between Art 4(5) and 4(6) are striking. However, the directive assumes that amendments to the positive list may be made by the Commission from time to time in the exercise of its rule-making functions. The directive does not seem to imply a process which involves firms applying for approval of their own new substance and having the Commission adjudicate the application. The positive list is a measure of general application, not one addressed only to certain manufacturers, and changes to the list should have the same characteristics of general application. Had the directive been absolutely clear that what it envisaged was a regulatory rather than adjudicatory approach to amendments to the positive list I think the ECJ’s judgment would clearly be right. However, I do not think that the directive is not absolutely clear, which raises some interesting issues.

The idea that individuals/firms might be able to apply for amendments to the list does also imply adjudication. This distinction is complicated in the EU because it is much easier for a person to challenge a decision addressed to him/her resulting from

an adjudication than a general legislative measure. And a failure to issue a general legislative measure is even harder to challenge. It does seem to be possible under the directive for a person to ask for a substance to be included in the positive list and never receive a decision which he/she may challenge in court - the lack of specificity with respect to who may apply and to what procedure applies produce this possible result.

The AG's and ECJ's approaches seem to reflect different views of what is required of EU legislation. The AG is concerned with form whereas the ECJ seems to be satisfied that in substance the directive meets the requirements of European Community law. I think there is scope for different views on this issue. One might think that the ECJ's approach is appropriately deferential to the legislature (not invalidating legislation unless there is some very real reason to do so). Or one might think that the AG's concern for the protection of individual rights is important in a Union where the rule of law is often argued to be important. But given how formalistic the ECJ is with respect to its role in answering the national court's questions it seems a bit surprising that it tolerates such a lack of respect for formalities by the EU's legislators.

Part of the ECJ's satisfaction with the substance is based on how the Commission was in fact behaving under the directive. In practice the Commission was accepting applications for modification, and the ECJ instructs the Commission to make the process appropriately transparent. Is this adequate? Consider the ECJ's statement about process requirements in para 73. of its judgment quoted above. What happens if the Commission does not provide transparency? What happens if the Commission decides not to propose an amendment to the EFSA ? Does the Commission need to issue a decision to the applicant? The directive does not say so. Again there seem to be rule of law issues here. In particular the directive does not seem to provide much legal certainty for people whose interests are affected by it.

The ECJ's lack of concern with the individual rights of manufacturers in this context does, I think, contrast with its approach to the rights of businesses against the Member States. And the AG's concern for individual rights mirrors the concern for individual rights vis-à-a vis the Member States.

Specific Comments on Analysis

1. Argument: the Advocate General was much too focused on the wording of the directive itself. I think that it is appropriate for a court to focus on the precise wording of legal texts. If we were to assume that the choice of wording in a statute or a contract were accidental it would change how we thought about statutes or contracts, wouldn't it? And there might be cases where we would be very concerned about courts rewriting statutes (or contracts). The case the question deals with may or may not be such a case.

2 Argument: the ECJ if it had followed the AG's opinion would have been acting as a legislature. I'm not sure I'm convinced about this. It seems to be one thing for a court to say that where a legislature doesn't act coherently so what it is trying to do (which has an impact on peoples' rights) is unclear and uncertain, that the legislature should try to do the job again and better and another to invent its own ideas of process etc where the legislature hasn't addressed them.

3. The positive list approach is the wrong approach to the issue. Some answers spent a

lot of page space on some variation of this argument. Given the way the question was drafted I think such arguments are irrelevant. Neither the AG nor the ECJ had a problem with the basic idea of establishing a positive list. I think it's pretty clear from the directive that the list was only supposed to be amended to include safe ingredients. Arguing that the effect of the choice of a positive list approach would discourage innovation etc is not relevant to the question asked.

4. Argument: it really doesn't matter whether standards are referred to in the preamble or set out in the operative part of the directive. Because the directive is treated as having an operative part (what appears after the preamble) and a part that is not operative, the preamble isn't normally regarded as being the basis for legal rights except by being used to help elucidate the meaning of rights granted in the operative part. So this is a bit like saying the Council and Parliament didn't tell you what the standards are in the legally binding part of the measure but it doesn't matter because we can tell you what they are. Not helpful from the perspective of **legal** certainty.