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NOTES ON EUROPEAN COMMUNITY LAW EXAM

GENERAL COMMENTS

i. **It is a good idea to read the question carefully.** For example, if there is a proposed regulation in a hypothetical (but no directive) it makes little sense to refer in your answer to the "directive". Even if much of your analysis would be relevant to a regulation as well as a directive the reference to the "directive" suggests that you are just writing down whatever you can remember (outline dump) rather than addressing the question asked.

One of the most important lawyering skills you need to learn if you don't have it already is the ability to read texts very closely and carefully rather than just getting a general feeling for what the text is about. In legal practice you will need to read and draft contracts, to read proposed regulations and proposed and newly enacted statutes and advise clients about what they mean and even comment on the proposals. Careful reading is the first step in being able to serve your clients.

ii. **I'm mainly looking for analysis rather than for outline dump** (see i. above), and the more detailed the analysis the better. So, for the essay question, the more closely tailored your examples are to the question I actually asked, the better. This illustrates one of the payoffs of close reading. For the hypothetical, rather than just saying "this is like the X case" which could be evidence of guesswork as much as of understanding, please explain what it is about the facts of the hypo which makes the X case seem relevant and also what about the hypo is different from the X case. Or, if there isn't enough information in the hypo to allow you to do this, say what would make a difference to the outcome. I'll give credit for mentioning the X case if it is relevant to the issue but I will give more credit for more detailed analysis of how the X case is relevant.

SECTION A

1. The ECJ as an activist court

The question asked :"Critically assess the ECJ's approach to interpreting the EC Treaty on the basis of the materials you studied during this semester. Do you consider that the ECJ behaves as an "activist" court in interpreting the Treaty? Would it be appropriate for the ECJ to behave as an activist court? Please give reasons for your views and illustrate your argument with examples."

First, it is worth considering what the term "activist" means when applied to courts. The quote from Schüssel in the question implies that the questioner thinks that

activism here means systematically expanding European competencies even where there is no European Community law. This is perhaps a little different from the way the term tends to be used in the US where it tends to mean pushing social/political agendas rather than the original intent of the drafters of texts. Some people wrote about teleological interpretation in contrast to original intent and this is clearly relevant. Note that the Treaties do not expressly require the ECJ to apply a teleological interpretation.

The best answers gave detailed examples of the cases we studied during the semester and explained how the cases showed the ECJ's approach to its role. There is scope for different views on the substance here - one could take the view that the ECJ is activist and wrongly so, or activist and right to have this approach. Or one could say it isn't really activist and this is a good thing or it isn't and it really should be activist. I don't really mind.

However, although different views of the cases are possible, I do think that making any of these arguments by emphasizing some of the materials we covered and not others is not ideal as a response to this question - the question doesn't seem to me to be saying pick a viewpoint and advocate for that viewpoint. I think we looked at some cases where the ECJ's approach seems to be the opposite of activist (e.g. the Art 230 standing cases). And we saw other cases where the ECJ's approach pushes the boundaries of interpretation of the Treaty. I think good examples of this would be *Defrenne* (interpretation of the Treaty which seems to conflict with the wording of the provision based on the importance of the provision), *Francovich* (damages inherent in the Treaty though not expressly provided for and not thought to be inherent until this decision), *Brasserie du Pecheur* and *Factortame* (expanding *Francovich*), *Marleasing* (interpretive obligation requiring impacts of Community law on national law which no-one expected before that case), *Factortame* (supremacy conflicting with fundamental constitutional principles in domestic legal systems (also *Costa*)). The identification by the ECJ of general principles of law would be another good example. Schüssel probably has in mind in particular the jurisprudence surrounding supremacy which impinges most on the national governments. Of course you wouldn't have time to deal with all of these cases in detail, even if you remembered all of the cases in the exam.

I don't think that I would see the cases on Art 95 as a legal basis as the <u>best</u> examples of judicial activism here as they show the Court usually going along with the majority of the Member States' (in terms of votes) views and I think critiques based on activism would tend to refer to pushing the law forward in ways contrary to majority views. On the other hand, the Treaties have to be amended by unanimity rather than by majority so if the ECJ is colluding in an interpretation of the majority that conflicts with the real meaning of the Treaty this could also be seen as activism.

Comparisons with the situation in the US were sometimes made and I think in general helped the answers. The ECJ is interpreting a document much like a Constitution with terms that are sometimes ambiguous or arguably ambiguous.

I think that some analysis of the sort of cases the ECJ gets to decide might have worked here too: challenges to EU acts, enforcement actions and preliminary references are the types of case we read, and I think that the ECJ's approach often looks more activist when it is acting in the context of enforcing Community law against the Member States than against the other EU institutions.

2. Legal harmonization and the internal market

The question set out excerpts from Articles 3 and 95 of the Treaty and asked: "With examples from the materials we studied during the semester, discuss why, what, and how much approximation (or harmonization) of national laws is necessary for the functioning of the internal market. Your answer should address both (a) at least one example of how the EU's institutions have justified a harmonization initiative and (b) whether you think the EU institutions go far enough or too far in trying to harmonize Member States' laws."

Although we discussed positive and negative integration (and saw them as two aspects of a move to a single market), the term harmonization (and approximation) is used to refer to positive integration measures rather than to negative integration. And Art. 95 provides the legal basis for positive integration for the internal market. The excerpt from Art 3 was about approximation rather than the free movement of goods etc.

So, the best answers focused on harmonization through positive integration, and the food supplements directive was a good example of a harmonization measure we studied at some length. A number of people mentioned chocolate!

Discussions of free movement of goods are relevant here if they make it clear that there is an important connection with harmonization. Harmonization is sometimes necessary precisely because of negative integration, or to make negative integration more palatable.

On the question of whether the EU goes too far one could mention subsidiarity (with its defects) and proportionality and discuss how Member States and others can (or cannot in practice) challenge harmonization measures. We read some cases where directives were challenged on the basis that Art. 95 did not provide a proper legal basis, and these would have been relevant to an answer to this question. These legal basis cases show the ECJ defining the limits of Art 95 and thus the EU's powers to harmonize law for the internal market.

Harmonization (in particular the way the EU tends to do this) does have the disadvantage that it may limit the scope for innovation for the future (cf Food Supplements).

SECTION B

The question asked: “Discuss the issues of European Community law raised by these facts.” Although the paragraph immediately before this statement referred to the wishes of various entities to challenge the proposed regulation, there are other issues embedded in the facts of the hypothetical too. An answer which only addressed the issues relating to the proposed regulation would ignore some of the legal issues in the question.

ISSUES:

1 **Free Movement of Goods Issues**

These issues involve Arts. 28 and 30 of the Treaty. Art 28 is directly effective (not discussed in the cases we read but assumed) and we have seen some challenges to national rules that illustrate this. If you wanted to set out the rules for direct effect this is the place to do it. Suits against AFA and Arcadia and against Ruritania would be in the courts in Arcadia and Ruritania. People with directly effective rights would have standing to go to court in the Member States to enforce those rights.

A. **The AFA’s strict approach to regulating health claims about food products** (contrasting with the relaxed approach of FSC in Ruritania).

AFA, an Arcadian Governmental agency, regulates health claims strictly. In particular the question states: “the AFA’s criteria for low fat and fat free foods and for low sugar and sugar free foods are more stringent than those of any other Member State in the EU.” The question also states that: “Rurifoods (RF), a large Ruritanian food manufacturer which imports some food products into Arcadia... would import more products if the AFA’s rules were not so strict”. We are told that Ruritania has a relaxed approach to these issues.

If there are no relevant EU rules, the Member States have some powers to regulate food. However, under Art 28 the Member States must not impose rules which have the effect of impeding the free movement of food products unless the rules are justified. *Dassonville* defined a measure having equivalent effect to a quantitative restriction very broadly. Art. 28 seems to produce vertical direct effect (i.e. a person can

challenge actions by the Member State) but not horizontal direct effect (a person cannot challenge actions of a non-state actor under Art. 28 (see, e.g., *Buy Irish*). The AFA, as a governmental agency, is subject to being sued under Art. 28.

The AFA's rules do not seem on their face to discriminate against imports. Instead they look like indistinctly applicable rules under *Cassis de Dijon* infringing the general principle that goods lawfully put on the market in one Member State should be able to be sold throughout the EU. The AFA rules relate to characteristics of the product (which includes labeling requirements (e.g. if the rules just affected what the product labels could state) rather than to possible selling arrangements under *Keck*. Therefore they are only valid if justified by either mandatory requirements or justifications listed in Art. 30. Health is the obvious possibility here ("[t]he Arcadian Government was concerned about the poor health of the Arcadian population, which it blamed on bad eating habits") but it will only work if the rules satisfy proportionality (no less restrictive alternative which would achieve the same objective) (cf *Chewing Gum case*). Perhaps it could be argued that health education would be an appropriate less restrictive alternative.

B. **FSC's advertising campaign**

In response to a request by RF, one of its members, the FSC has begun "a massive advertising campaign in Ruritania urging Ruritanian consumers to boycott Arcadian food products because of unfair treatment of Ruritanian businesses in Arcadia". If Ruritania were to carry on such a campaign it would violate Art. 28 as an attempt to encourage Ruritanian consumers to discriminate against Arcadian products (*Buy Irish*). *Buy Irish* involved a private company but there was significant government involvement. In the hypothetical we are not given enough facts to know whether there is similar involvement (it might make sense to identify the governmental involvement in *Buy Irish* to show what facts might be relevant). In this case it does appear that within Ruritania it is the FSC which is responsible for setting standards for food products so we could argue that there has been the sort of governmental delegation that should mean that FSC's actions should be attributed to Ruritania (not clear how this would play out before the ECJ if there were a preliminary reference under Art 234 on this issue). Slinky should sue Ruritania rather than FSC.

Ruritanian citizens responded to the advertising campaign by boycotting Arcadian foods and defacing billboards and threatening store managers. Slinky could sue Ruritania for damages on the basis that its losses were caused by Ruritania's failure to enforce the law resulting in interference with free movement of goods (cf. *Spanish Fruits and Vegetables*). A comparison with France's actions in relation to the

Spanish produce imports would be relevant: here the impediments seem to have been going on for a much shorter time, although they would seem to involve breaches of the law (as in that case). It would be relevant to compare *International Traders Ferry*. Slinky might want to claim damages under *Francovich* and *Brasserie du Pecheur* but might have a difficulty with establishing the sufficiently serious breach part of the test.

2. **The proposed regulation**

The question states that: "The FSC and Rurifoods wish to challenge the proposed Regulation because they believe it is too restrictive. The AFA and Slinky wish to challenge the proposed Regulation because it does not go far enough."

i. **This is a <u>proposed</u> regulation**.

In order for anyone to be able to challenge an act under Art. 230 it has to produce legal effects - the regulation can only be challenged if it is adopted. Before it is adopted the interested parties can seek to lobby their own governments (although the common position suggests that the measure is likely to be adopted eventually). If you wanted to raise subsidiarity as an issue it really belongs in this part of the process as a political (rather than legal) issue.

ii. **If the regulation is adopted then it may be possible to challenge it under Art 230**.

This requires consideration of standing. The Member States can challenge the measures under Art 230 (some people discussed the idea that the AFA should be identified with the state for these purposes, which was an interesting idea but really it is an issue of Arcadian law who has the power to decide that Arcadia should sue under Art 230 and we don't know what the answer is here).

As far as the non-state entities go they can only sue under Art. 230 if they are directly and individually concerned by the measure. We know from cases like *Jégo-Quéré* (fishing nets) and *Union de Pequeños Agricultores* (Olive Oil) that the ECJ defines these terms restrictively. Carrying on an economic activity affected by the measure is not enough. You could mention *Plaumann* and *Codorniù* here also. **Because this is a regulation and not a directive** the issue here will be about individual concern rather than direct concern (regulations are directly applicable - there is no intervening act).

Many people wrote that the relevant test was direct effect and individual concern, reciting the test for direct effect. But the test for standing is direct and individual concern which is not the same as direct effect.

Note that if it is possible to challenge the regulation under Art 230 (if there is standing) the case will be heard by the CFI/ECJ. This is not the sort of case that would be heard in national court (Art. 230 gives jurisdiction to the ECJ and CFI, not to national courts). When we discussed directives we saw that when the directive was implemented within the national legal systems there could be an opportunity to challenge the directive indirectly, challenging the implementing measure and the directive on which it was based (e.g. *Food Supplements Case*). However, regulations are as a general matter directly applicable and we know nothing about this regulation from the question to suggest that there will be Member State implementation. If there were national implementation or national enforcement action (e.g. national authorities fining firms for making health claims barred by the regulation) it would be possible to sue in national court (cf. discussion in *Jégo-Quéré*). If there are only acts of EU institutions in question they would be reviewed in the ECJ/CFI and not in national court.

At some point in the future there could be an act of an EU institution, such as the Commission, under the regulation - e.g. a Decision denying approval of a particular health claim - that would be of direct and individual concern to a particular food manufacturer/distributor and which could be challenged under Art 230. The question refers to this possibility.

iii. **You could discuss which aspects of the proposed regulation look problematic** (eg by comparing what you are told about it to the Food Supplements Directive). Given the decision on the food supplements directive it is unlikely that any challenge to this regulation would succeed.

Iv. **It would be appropriate to consider what difference the adoption of the regulation would make to the free movement of goods issues** in Arcadia and Ruritania if the regulation were found to be valid.