Caroline Bradley **SPRING SEMESTER 2005**

NOTES ON EUROPEAN COMMUNITY LAW EXAM

The question was based on the Food Supplements directive which was the first material assigned for the class. We talked about the directive in class at the beginning of the semester and I posted items about the directive on the weblog on 4 and 11 January. The blog posts specifically referred to the Alliance for Natural Health's challenge to the directive in the English courts.

1. This question was generally answered pretty well. We started the semester talking about the ideas of positive and negative integration and the question invites you to write about the relationship between the two. Answers that were more specific got better marks. Ideally I would have liked some discussion of the Sandoz case which dealt specifically with a Member State's power to regulate vitamins in foods, but any discussion of the free movement of goods cases was good, particularly where the answer focused on Arts 28 and 30 because these treaty provisions would be the ones which would deal with Member State regulation of vitamins similar to the regime in the directive. It was clearly not a mistake however to mention the rules on customs duties and internal taxes.

2. (25 points) When the UK adopted regulations to implement the Food Supplements Directive, a group called the Alliance for Natural Health (among others) challenged the UK regulations in the English High Court on a number of different grounds. The English High Court referred a number of questions to the ECJ under the preliminary rulings procedure of Art. 234. One of the questions related to the principle of proportionality. Advocate General Geelhoed delivered his opinion on the questions referred by the English Court in April 2005. In assessing the compatibility of the directive with the principle of proportionality the Advocate General expressed reservations about the directive's procedures for the inclusion of new substances in the positive list. His opinion includes the following paragraphs:

68. In its present form, Directive 2002/46 is seriously deficient in three respects…

– …The Directive…contains no standard for assessing whether the Commission has, in taking decisions concerning modifications of the positive list, remained within the limits of its legal powers;

– It is not clear whether the Directive allows private parties to submit substances for evaluation with a view to having them included in the positive lists. Recital 10 in the preamble to the Directive refers unambiguously to this possibility, yet Article 4(6)(b) of the Directive

would seem to suggest the contrary;

– On the supposition that private parties are indeed able to submit substances for an evaluation with a view to inclusion in the positive lists, there is no clear procedure for this purpose which provides minimum guarantees for protecting those parties' interests…

85. In short, this procedure, in so far as it may exist and in so far as it may deserve this title, has the transparency of a black box: no provision is made for parties to be heard, no time-limits apply in respect of decision-making; nor, indeed, is there any certainty that a final decision will be taken. The procedure therefore lacks essential guarantees for the protection of the interests of private applicants.

86. At the hearing, the representative of the Council, responding to a question, remarked that the decisions on the composition of the positive lists are of general application and that it was not necessary, therefore, to accord procedural rights to individual interested parties at the preparatory stage. That position, it would appear to me, is based on a misunderstanding. Even though decisions relating to the extension or the shortening of the positive lists have effect erga omnes,[1] plainly they may also affect the vital interests of individual parties. In order to ensure that these interests are taken into account in the decision-making process in a manner which is open to judicial scrutiny, the basic legislative act ought for that purpose to provide for the minimal guarantee of an adequate procedure…

87. The claimants in the main proceedings in this case observed, in both their written and their oral submissions, that preparing an 'admissible' application…is a costly matter and that the final decision – or the lack of such a decision – may have the consequence that the company concerned will have to cease (part of) its economic activities. These observations were not contradicted…The Directive does not comply with essential requirements of legal protection, of legal certainty and of sound administration, which are basic principles of Community law. Thus, lacking appropriate and transparent procedures for its application, the Directive infringes the principle of proportionality. It is, therefore, invalid.

88. …In a Community of law, such as the European Union…there are two aspects to a legislative act as an expression of the legislature's will. On the one hand, it is an instrument for pursuing and, if possible, achieving justified objectives of public interest. On the other hand, it constitutes a guarantee of citizens' rights in their dealings with public authority.

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[1] Towards all.

Qualitatively adequate legislation is characterised by a balance between both aspects. The wording and the structure of the legislative act must strike an acceptable balance between the powers granted to the implementing authorities and the guarantees granted to citizens. Directive 2002/46 does not comply with this essential quality requirement of proper legislation.

Are these paragraphs of the opinion consistent with the cases you have read in terms of the concern for "citizens' rights in their dealings with public authority" (para 88)? Would better procedures necessarily solve the problems associated with the positive list? Do you think that the ECJ should follow Advocate General Geelhoed's approach?

3. The question stated: "The Alliance for Natural Health waited until the UK adopted implementing regulations before **challenging** the directive in the English Courts. Could they have challenged the directive before that point? *Should* they have been able to **challenge** the directive before that point?"
Very many people insisted on writing not about how a person/organisation might challenge a directive but about how they might enforce a directive's provisions. Such answers clearly missed the point and missed out on points as a result. The exam instructions clearly asked that you read the questions carefully and think about your answers before beginning to write.

4. This question was pretty predictable given past exams.