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The Law Societies
JOINT BRUSSELS OFFICE

The Brussels Office Update Series:

Developments from the European Court of Justice

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INTRODUCTION

March – News from the EU Courts

A symposium was organised by the ECJ on 26 March in celebration of the fiftieth anniversary of the treaties of Rome. It ran under the title 'The influence of national law and the case-law of the courts of the Member States on the interpretation of Community law'. The European final of the Universities Mooting Competition also took place at the ECJ on 16 March.

Statistics concerning judicial activity in 2006 were published on 21 March showing a significant reduction in the duration of proceedings before the ECJ. The average duration of proceedings for a preliminary reference is now 19.8 months. A significant reduction in the number of cases pending is also shown, despite a 13.3% increase in new cases on the previous year.[1]

Judgments given by the Court this month condemned rules on the taxation of dividends in Germany (*Meilicke and Others* (C-292/04)) and aspects of the UK's previous tax rules on thin capitalisation - cross-border lending arrangements between companies in a group (*Test Claimants in the Thin Cap Group Litigation* (C-524/04)). Also the Advocate General gave his Opinion in the case of *JP Morgan* (C-363/05), which should clarify the application of VAT rules to various types of investment fund.

The Court ruled on the *Unibet* case (C-432/05), which concerns advertising rules for on-line gambling and the extent to which Member States' legal systems should provide for the effective judicial protection of Community law rights. The hearing in *Derouin* (C-103/06) took place, which could have an important impact on the social security liability of UK law firms in France.

Coming up

Judgment is due out next month in the competition case *Holcim (Deutschland) AG v Commission* (C-282/05 P) – a claim against the Commission for the repayment of bank charges for a bank guarantee, taken out when the company appealed against cartel fines. Opinion in *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* (C-2/06) will also be given next month; a case that asks whether a court's decision to review and amend a judgment in order that it conforms with Community law requires the defendant to have relied on Community law when contesting the decision.

Member States should also decide towards the end of April on the appointment of renewal of the mandates of judges at the Court of First Instance.

Case tracker

The case tracker in Annex I sets out timetables for the progress of individual cases of interest and provides links to relevant documents/further sources of information for some of the most interesting and important cases going through the Courts.

[1] http://www.curia.europa.eu/en/instit/presentationfr/index.htm

1 COMPANY LAW

1.1 Opinion in Ntionik Anonymi Etaireia Emporias I/Y, Logismikou kai Parochis Ypiresion Michanografisis ("Ntionik") and Ioannis Michail Pikoulas v Epitopi Kefalaiagoras (C-430/05)

8 March 2007, Advocate General Sharpston

Securities - Inaccurate listings - Competence to impose sanctions

Background
The Greek authorities imposed fines upon Ntionik, a public limited company, and Mr Pikoulas, one if its directors, for including inaccurate and misleading information in listings particulars. Neither Ntionik nor Mr Pikoulas were named in the listing as those "responsible for the listings particulars". The fines imposed by the Greek authorities were on the basis of Greek legislation implementing Article 21 of Directive 2001/34 (on the admission of securities to official stock exchange listing and on information to be published on those securities – since replaced by Directive 2003/71). It is not clear from Article 21, however, if fines can only be imposed on those expressly mentioned in the listing as responsible or also upon the issuer and members of its board of directors. It is this question which the Greek Council of State referred to the ECJ.

Opinion
Ntionik argued that Directive 2001/34 sets clear and precise limits on the discretion allowed to Member States i.e. that only those named as bearing responsibility for the listings particular could be fined. Advocate General Sharpston did not agree, despite this being the only possible conclusion from a literal reading of Article 21. Basing her opinion on the preamble to the Directive, which made it clear that the aim of the legislation is to set minimum standards, she concluded that the Directive did not preclude national legislators from laying down more stringent rules. Thus, Greece was entitled to impose fines on those not expressly stated as being responsible for the listings particulars and, in the Advocate General's Opinion, the fines imposed were valid.

Link
Opinion

1.2 Reference in Paul Chevassus-Marche v Groupe Danone SA, Kro beer brands SA (BKSA), Eaux minérales d'Evian SA (SAEME) (C-19/07)

Lodged 23 January 2007

Commercial agents - Entitlement to commission

Background
In this preliminary reference, the national court asks whether Article 7(2) of Directive 86/653 (relating to self-employed commercial agents) should be interpreted to mean that a commercial agent assigned a specific geographical region is entitled to commission from a commercial transaction between a third party representing his employer and a customer resident in that area. It also asks whether there should be a difference in the entitlement when the transaction has been concluded without any action, either direct or indirect, on the agent's part.

Link
Reference

2 CIVIL PROCEDURE

2.1 Reference in Ingenieurburo Michael Weiss und Partner GbR v Industrie und Handelskammer Berlin (C-14/07)

Lodged on 22 January 2007

Regulation 1348/2000 - Service of documents - Language

Background
Article 8 (1) of Regulation 1348/2000 (on the service of judicial and extrajudicial documents in civil or commercial matters) sets down the conditions under which service of a document can be refused on language grounds. The referring court asks if it can be interpreted as meaning that an addressee does not have the right to refuse to accept a document only because the annexes are not a) in the language of the Member State addressed or b) in a language of the Member State of transmission which he understands. In the latter case, the court also asks whether the addressee can be taken to understand such a language if he has previously agreed a contract stating that business correspondence was to be conducted in this language. Even if this is not so, it is asked whether the contractual agreement to use such a language would itself prevent the addressee from refusing service of the document by relying on Article 8(1).

Link
Reference

3 COMPETITION LAW

3.1 Opinion in Britannia Alloys & Chemicals Ltd c Commission (C-76/06)

1 March 2007, Advocate General Bot

Cartel – Fining guidelines – Upper limits – Previous year's turnover

Background
Britannia has appealed against the judgment of the CFI (Case T-33/02) in relation to its challenge of a Commission decision fining Britannia for its participation in a cartel in the zinc phosphate sector. In particular, the company challenges the fact that, in calculating the fine and the upper limit to it, the Commission took account of the business' turnover in a year other than that which preceded the decision. It claims this is not permitted by Regulation 17 and runs counter to principles of legal certainty, proportionality and equal treatment. In the year preceding the fine, however, Britannia was not trading and had no turnover. As such it argues that a fine should not exceed the 1 million euro limit specified in Article 15(2) of Regulation 17.

Opinion
The Advocate General upheld the Commission's argument that it can use another business year as a reference for the purpose of calculating the upper limit to the fine to be imposed. In light of the purpose of imposing fines and its deterrent effect in

particular, he felt it vital that the Commission be able to base its calculations on a turnover that reflects the true financial situation of the company – the figure should represent a "complete year of normal economic activity". He cited specific examples of when this might be justified, such as when a company is restructured, possibly fraudulently to mitigate fines.

He did conclude, however, that the CFI had failed in its duty to state reasons, as set down in the Court's Statute, by not addressing a particular argument made by the appellant that its treatment was unequal to that afforded to Karageorgis in the *Greek Ferries* decision. As Karageorgis had withdrawn from the market in question and there was no turnover in the preceding year, the Commission imposed a 1 million euro fine in line with Article 15(2) of Regulation 17. The Advocate General dismissed the substance of this argument, stating that the Commission cannot be bound by its previous decisions, which can only give an indication as to when there is discrimination in subsequent cases. As such, no legitimate expectation was raised on the part of the appellant to be treated in the same way as Karageorgis. He recommended that the ECJ set aside the CFI's judgment on that point, but otherwise find that the appeal is unfounded and dismiss it.

Link
Opinion

3.2 Judgment in British Airways plc v Commission (C-95/04 P)

15 March 2007, Third Chamber

Anti-trust – Abuse of a dominant position – Appeal against a fine

Background
Virgin Atlantic had lodged a complaint with the Commission about agreements made between British Airways (BA) and travel agents, which granted financial incentives as a reward for the sale of BA tickets. BA adopted a new performance reward scheme in 1998 but Virgin lodged a second complaint. The Commission condemned the incentive schemes as an abuse of BA's dominant position on the UK market under Article 82 TEC and fined BA 6.8 million euro. The Commission said the reward scheme encouraged travel agents to maintain or increase sales in BA tickets over competitor airlines. The CFI dismissed an appeal by BA in December 2003 and BA lodged an appeal with the ECJ, alleging that the CFI applied the wrong test in assessing the exclusionary effects of the incentives. The CFI was alleged to have failed to determine a ''prejudice to consumers'' as is required by Article 82 TEC.

Judgment
The ECJ dismissed the appeal in its entirety, finding all pleas inadmissible or unfounded. The Court stated that it was not its function to substitute its own assessment of markets for that of the CFI. It also stated that the list of examples of abuses of a dominant position laid down in Article 82 TEC is not exhaustive. It thus follows that discounts and bonuses granted by undertakings in a dominant position may be contrary to Article 82 TEC even when they do not match the examples given therein. In order to determine whether a dominant undertaking has abused its position, the Court held that the rules set down in *Michelin* (C-322/81) should apply. This includes consideration of whether the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, whether it bars competitors' entry to the market, whether it applies dissimilar conditions to similar transactions and whether it strengthens a dominant position by distorting competition.

Link
Judgment

3.3 Reference in 02 Holdings Limited & 02 (UK) Limited v Hutchison 3G UK Limited (C-533/06)

Lodged 28 December 2006

Intellectual Property - Trade marks - Comparative Advertising

This reference by the Court of Appeal in England seeks to determine whether the use of a competitor's trade mark in comparative advertising in a way that does not cause confusion or jeopardise the essential function of the trade mark should still fall within Article 5 (a) or (b) of Directive 89/104 (the first trade mark directive) regarding a proprietor's exclusive rights to use the mark. The ECJ is also to consider whether use of a competitor's trade mark in comparative advertising must be "indispensable" in terms of Article 3 (a) of Directive 84/450 (on misleading advertising) and, if so, what criteria should indispensability be judged by? Finally, if an indispensability requirement exists the Court is asked to decide whether this precludes the use of a sign similar, but not identical, to the registered trade mark.

Link
Reference

4 CRIME

4.1 Opinion in Giovanni Dell'Orto (C-467/05)

8 March 2007, Advocate General Kokott

Definition of Victim – Confiscation of capital – Out of court settlements

Background
The case concerns the status of victims in the penal process in relation to Decision 2001/220 and Directive 2004/80 (on indemnity for the victims of crime) and asks whether confiscated money should be given back to a joint-stock company that suffered damages during criminal proceedings. Mr Dell'Orto was convicted of fraud. He was sentenced to eighteen months imprisonment and ordered to repay any capital gained as a result of falsifying information to SAIPEM SpA, his employer. Whilst the case was being heard, Mr. Dell'Orto transferred from a foreign account into Italy an amount of 1 064 069.78 euro, which the prosecutors decided was the property of SAIPEM and should be repaid. They took this money from the account, with the agreement of Mr Dell'Orto, as well as the amount already specified by the Italian court in the proceedings. The court then reopened proceedings to ask whether this was permissible. The ECJ was asked whether the Directive and Decision mentioned above could be applied when the victim is not an individual person, but rather a company. Neither contains a definition of 'victim'. The ECJ was also asked if compensation for the victim during criminal proceedings could be concluded amicably outside of court amongst the parties.

Opinion
The Advocate General was of the opinion that within both Directive 2004/80 and Decision 2001/220 the word 'victim' applies exclusively to physical persons and not legal entities. In coming to this conclusion, he agreed with the Commission that the

Communication preceding the Directive, upon which it was based, expressly excluded legal entities as victims. He also cited specific articles of the Directive, which could only apply to people such as Article 1 on damage to a person's "physical or mental integrity, a mental anguish or a material loss". He argued these demonstrate that the Directive was only ever intended to apply to individuals. Article 9 (1) of Decision 2001/220 does not preclude an amicable out of court settlement between the parties in negotiating compensation for the victim of a crime.

Link
Opinion – Case not available in English

5. EMPLOYMENT

5.1 Opinion in Sari Kiiski v Tampereen kaupunki (C-116/06)

15 March 2007, Advocate General Kokott

Equal treatment of men and women – Pregnant workers – Parental leave

Background
Mrs Kiiski is a professor in a college in Tampere in Finland. On her request, the director of the college granted her parental leave for the period from 11 August 2004 to 4 June 2005. This was to take care of her first child, born on 24 August 2003. Before she took leave, Mrs Kiiski learned that she was pregnant for a second time. She thus informed the director on 1 July 2004, that she did not intend to take leave until 22 December 2004 and requested that the director modify her leave. In the absence of what he viewed as a legitimate reason the director refused this application. The Court is asked whether this refusal is contrary to Article 2 of Directive 76/207 (regarding equal treatment in work). Her husband's application for parental leave was also rejected as in Finland, according to legislation applicable to civil servants, only one parent at a time can be on parental leave. A premature return of Mrs Kiiski would have, the town of Tampere alleges, created difficulties for her employer as he had already appointed her substitute for the duration of the parental leave and it would therefore have been necessary to continue to pay wages to the substitute. The Court is asked if Directive 92/85 concerning the improvement of the health of pregnant women is applicable and, if so, is the behaviour of the employer contrary to Articles 8 and 11 where this pregnant worker lost the wage advantages of maternity leave.

Opinion
Advocate General Kokott was of the opinion that a national regulation which allows an employer to refuse, for justifiable reasons related to the operation of his company, to grant a worker's request to cut short authorised parental leave, requested when informing her employer of a new pregnancy, is not discriminatory in terms of Directive 76/207. Neither did the national legislation contravene Articles 8 and 11 of Directive 92/85, even if as a result, the worker loses some financial benefits linked to maternity leave.

Link
Opinion

5.2 Opinion in Mohamed Jouini and others v Princess Personal Service GmbH (PPS) (C-458/05)

22 March 2007, Advocate General Yves Bot

Transfer of undertaking – Directive 2001/23 – Concept of economic entity

Background
This preliminary reference from the Austrian courts seeks to determine whether a group of workers comprised of administrative staff and temporary staff transferred to a temporary work agency falls within the scope of Directive 2001/23 on safeguarding employees' rights in the event of transfer of undertakings. A temporary work agency (Mayer) sent about a third of its temporary workers to one company – Industrie Logistik Linz GmbH (ILL). On encountering financial problems, Mayer's directors agreed to create a new agency (PPS) with ILL to satisfy its staffing needs. ILL broke off links with Mayer and PPS took on 40 of the previous 60 staff sent to ILL from Mayer. Much of Mayer's management staff was also transferred. Mayer went into bankruptcy owing wages to a number of former employees. Those employees have brought an action again PPS, claiming that part of Mayer's business was transferred to it.

Opinion
In examining whether the workers in question could constitute an economic entity within the sense of the Directive, the Advocate General reviewed the Court's case law. He noted the Court has ruled that in sectors where the activity in question depends mainly on the workforce, a lasting group of workers can constitute an economic entity. Indeed in relation to this case, the Advocate General confirmed that this was the case. Equally, in determining whether the economic entity has maintained its identity, in such a sector, it sufficed to examine whether a significant part of the workforce had been taken on and whether there was similarity in their work. Again, this was the case. In relation to the third test – whether there was a legal transfer of the business – again the Advocate General concluded that there was. He noted the coincidence of the bankruptcy of Mayer and the re-engagement of certain employees by PPS, viewing this is a deliberate attempt to circumvent certain employee rights. He concluded that the situation described by the Austrian court should fall within the scope of the Directive.

Link
Opinion

5.3 Opinion in Office national des Pensions v Jonkman (C-231/06), Vercheval (C-232/06) and Permesaen (C-233/06)

29 March 2007, Advocate General Kokott

Pensions - Equal treatment – Retroactive contributions

Background
Following on in the tradition of the EU's jurisprudence on equal treatment for men and women (such as Defrenne), this case concerns air stewards in Belgium. It centres on a procedure, which was aimed at redressing inequalities in the employer's pension schemes that had been found previously to be discriminatory. This provides that the employee has to make "regularisation" contributions, which amount to a single global payment to which an annual interest rate of 10% is applied in respect of each year after the end of the affiliation to the scheme. The question for the Court is

whether this scheme actually deprives the principle of equal treatment of useful effect.

Opinion
The Advocate General concluded that in principle a national scheme aimed at allowing female workers to be put into the position they should have been, had they not been discriminated against, was not incompatible with Directive 79/7 (the principle of equal treatment for men and women in matters of social security). As such, neither the requirement to make contributions nor that to make interest payments was incompatible. That said, however, the Advocate General thought such a scheme was incompatible with the Directive if such a global payment made the regularisation excessively difficult or practically impossible. Failing this, the Advocate General suggested that the scheme should permit monthly payments, which were limited in such a way as to bring some benefit to those concerned.

Link
Opinion

5.4 Reference in Maria María Robledillo Núñez v Fondo de Garantía Salarial (C-498/06)

Lodged 7 December 2006

Compensation for dismissal – Employers' insolvency

Background
The Court is asked whether compensation for dismissal, which is payable to an employee pursuant to extra-judicial conciliation, is included in the scope of Directive 80/987 (regarding the protection of employees in the event of employers' insolvency).

Link
Reference

5.5 Reference in Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG (C-506/06)

Lodged 14 December 2006

Definition of pregnant – IVF treatment – Protection of pregnant workers

Background
A female employee who undergoes *in vitro* fertilisation (IVF) is protected under Directive 92/85 on the protection of pregnant or breastfeeding women. However, the Court is asked to clarify the definition of ''pregnant by IVF''. In this case a female employee was made redundant before her fertilized ovum was implanted. The ova had been fertilised and thus *in vitro* embryos existed, but it is asked whether this situation is protected under Directive 92/85.

Link
Reference

5.7 Reference in Stringer and others v HM Revenue and Customs (C-520/06)

Lodged 20 December 2006

Sick leave benefits – Working time – Termination of employment

Background
The Court is asked two questions regarding annual paid leave. The House of Lords has asked whether Article 7 of Directive 2003/88 (the Working Time Directive) means that a worker on indefinite sick leave is entitled not only to designate a future period as paid annual leave but also whether he can take paid annual leave at all during a period that would otherwise be classified as sick leave. Also asked is whether Article 7(2) of the Working Time Directive imposes any requirements upon a Member State, if it replaces the minimum period of paid annual leave with an allowance in lieu on the termination of employment, when the employee has been on sick leave for all or part of the year.

Link
Reference

6 ENVIRONMENT

6.1 Judgment in Commission v UK (C-139/06)

1 March 2007, Sixth Chamber

Waste electrical equipment – Infringement action

Background
The UK was alleged to have failed to implement the provisions necessary to give effect to Directives 2002/96 (on waste electrical equipment) and 2003/108 amending this. The UK admitted that the necessary measures had not been implemented within the set time period. The UK also stated that it was in the process of transposing the measures at the time of the proceedings.

Judgment
The Court noted that it was undisputed that the UK had failed to transpose the Community legislation before the expiry of the implementation deadline. The Court therefore held in favour of the Commission.

Link
Judgment

7 FREE MOVEMENT

7.1 Judgment in Italy v Massimiliano Placanica, Christian Palazzeese and Angelo Sorricchio (C-338/04, C-359/04, C-360/04)

6 March 2007, Grand Chamber

Betting – Restrictions on establishment – Remote gambling outlets

Background
Stanley International is a Liverpool-based company that is involved in bookmaking within the UK. The company wanted to set up offices in Italy. Under Italian legislation in place at the time, it was unable to apply for the licence necessary to operate as it was a group quoted on regulated markets and such bodies were ineligible for such licence. Stanley therefore concluded contracts with those being prosecuted in the current case to provide remote gambling outlets where clients gambled online from Italy with the UK-based company. The defendants applied for registration with the Italian police, as required, but no response was received. The Italian state launched criminal proceedings against the three defendants for their failure to obtain a licence, police registration and thus not having the right to operate gambling facilities. The national court referred the case to the ECJ asking whether the Italian legislation was compatible with Article 43 and 49 TEC (the freedom of establishment and freedom to provide cross-border services).

Judgment
The Court held that the national legislation did restrict the freedom of establishment. The Court regretted that it did not have enough facts before it to decide whether the limitation set on the number of licences granted annually was a restriction on trade. It therefore left it to the national court to rule on that issue. The Court noted that the defendants were ready to obtain the police registration needed but could not do so because a licence had not been granted to Stanley. The fact that Stanley could not obtain a licence, simply because it was quoted on a regulated market, was found to be a restriction on the freedom of establishment.

Link
Judgment

7.2 Judgment in Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern (C-432/05)

13 March 2007, Grand Chamber

On-line gambling – Advertising

Background
Unibet (London) Ltd and Unibet (International) Ltd are two companies established in the UK and Malta, respectively, and authorised by these countries to provide gaming activities (much of which are on-line) to clients resident in these, and other, countries. Unibet (International) Ltd paid for advertising space in several Swedish newspapers. The Swedish authorities launched criminal proceedings against these newspapers for the publication of an advert for a foreign gambling company, which was banned in Sweden. Unibet launched an application based on Article 49 TEC seeking to dis-apply the ban on advertising.

The case was declared inadmissible by the national court and was appealed. A subsequent action for interim protection was made, to allow Unibet to continue marketing its services. This new application was rejected by the court as it had not been shown that the advertising ban conflicted with Community law. The Supreme Court in Sweden referred a number of questions to the ECJ in order to clarify the duties on a Member State to provide effective remedies such as the possibility of declaring the invalidity of a national law and the provision of interim protection.

Judgment
The Court ruled against Unibet. It found that effective judicial protection of an individual's rights does not require national legislation to provide for separate actions to verify whether national legislation is compatible with Community law when such a question will be treated as a preliminary matter in an action for damages. National procedures should not be less favourable to the exercise of Community law rights, compared to similar domestic rights. Under Community law and in line with the principle of effective judicial protection of an individual's rights, it must be possible for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law. National rather than Community law rules on interim protection should be applied to such cases. Community law does not require the availability of interim protection measures where the main claim is deemed inadmissible.

Link
Judgment

7.3 Opinion in Rhiannon Morgan & Iris Bucher (C-11/06 and C-12/06)

20 March 2007, Advocate General Dámaso Ruiz-Jarabo Colomer

Student grants – Citizenship – Free movement of students

Background
Ms Morgan and Ms Bucher are German nationals. Ms Morgan moved to the UK and worked as an au pair before she applied to University there in 2003. Ms Bucher applied to University in the Netherlands in 2004 and attended classes whilst living in a border village in Germany. Both applied for student grants but were refused by the German authorities as they did not fall into the specified categories of persons studying abroad. Under German legislation nationals can avail themselves of training grants when studying abroad provided they travel daily to University in another country, or at least one year of the course is spent within Germany. The grant is also provided if they set up a permanent residence in a foreign country and then study there. Moving country merely to commence study is not seen as taking up a permanent residence. Ms Morgan and Ms Bucher launched separate claims against this national legislation. The national court referred the case to the ECJ asking whether the rights of EU citizenship (Articles 17 and 18 TEC) preclude this.

Opinion
Advocate General Dámaso Ruiz-Jarabo took the view that the German provisions did impede the free movement of students since they had a deterrent effect and imposed conditions, which were excessive in relation to the aims pursued. Article 18 TEC should be interpreted to mean that it precludes a national law which grants educational aid only to courses that provide one year's study in the home country or stipulates where a student must live in order to qualify. The denial of grants to cross-border students on the grounds that their place of residence is not 'habitual', as in Ms Morgan's case, is an infringement of the freedom of movement. In the case of Ms Bucher, the Advocate General also rejected the requirement that her residence should be 'permanent'. Her habitual residence, both at the start of her studies and throughout the period of study, was in Germany. The Advocate General felt that adjusting grants on the basis of academic performance would be less restrictive on freedom of movement.

Link
Opinion

7.4 Derouin v Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris (C-103/06)

7 March 2007, Third Chamber

Social security – Law firm – Foreign income

Background
The hearing took place in March in this case, which could have consequences for law firms that generate income in different Member States. The ECJ has been asked to rule on social security contributions payable on income generated in a country other than the country of residence of a worker and the application of Regulation 1408/71 (on the application of social security schemes to employed or self-employed persons and their families moving within the Community). The case concerns a law firm based in Paris with the French authorities asserting that they should take account of income generated in the UK for the purposes of levying social security contributions. The defendant is arguing that the contributions under discussion (general social contribution and social debt repayment contribution) are in fact taxes rather than social security and are therefore within the scope of the UK/France Taxation Convention of 1968.

Link
Reference

7.5 Reference in Malina Klöppel v Tiroler Gebietskrankenkasse (C-507/06)

Lodged 13 December 2006

Childcare benefits – Cross border entitlement –Regulation 1408/71

Background
The case concerns Regulation 1408/71 on the application of social security schemes to employed or self-employed persons and their families moving within the Community. In particular it asks whether a period during which benefits were received in one Member State, in this case child care from Germany, should be treated equally as entitlement to a benefit in another Member State (Austria). As such, the court asks whether the receipt of this benefit should actually be treated as though it were a domestic payment of the benefit in the second Member State (Austria).

Link
Reference

8 TAX

8.1 Judgment in Rewe Zentralfinanz eG, (as universal legal successor of ITS Reisen GmbH) v Finanzamt Koln-Mitte (C-347/04)

29 March 2007, Second Chamber

Deduction of subsidiary's losses –Non-national entities

Background
A German company, ITS Reisen, is the owner of a subsidiary in the Netherlands. It made write-downs in respect of its shareholding in the foreign subsidiary, which it then wished to take into account in calculating its taxable profits in Germany. This was disallowed by the German tax authorities and Rewe Zentralfinanz eG, successor to ITS, brought an action before the German Financial Court in Köln which subsequently referred the matter to the ECJ.

Judgment
The ECJ ruled that since domestic legislation applied a different tax treatment to resident and non-resident subsidiaries of German parent companies this constituted a restriction on the freedom of establishment. The rule acts to discourage companies from creating subsidiaries in other Member States. The German Government argued, amongst other things, that the legislation prevented losses incurred abroad being taken into account twice. The Court rejected this on the basis that the losses were incurred once by the foreign subsidiary and once by the parent, thus the restriction on freedom of establishment was not justified.

Link
Judgment

8.2 Judgment in Raffaele Talotta v Etat Belge (C-383/05)

22 March 2007, First Chamber

Income Tax - Treatment of non-residents - Article 43 TEC

Background
Mr Talotta is a resident of Luxembourg who runs a restaurant in Belgium. He is taxable in Belgium solely in respect of income earned there. In 1992 he was late submitting his Belgian tax return. The authorities informed him that, pursuant to domestic tax law, as he was a non-resident, they would be taxing him on the basis of his turnover and size of workforce by reference to a table of minimum taxable profits, which for those in the hospitality sector could not be less than 400,000 Belgian Francs. Mr Talotta complained against the charge and the case reached the Belgian Cour de Cassation, which in turn made a reference to the ECJ. It asked whether Article 43 TEC (on the freedom of establishment) could be interpreted as prohibiting a national provision which applied minimum tax bases only to non-residents.

Judgment
While the court accepted that, in relation to direct taxation, the situation of resident and non-resident persons are not generally comparable, it referred to previous decisions where it had made it clear that in the case of a tax advantage which is not available to a non-resident, a difference in treatment may constitute discrimination. Examination of the Belgian Income Tax Code of 1992 showed that where evidence regarding profits or earnings has not been provided, the treatment of residents and non-residents was different. Residents could be taxed by using analogies with three similar tax payers, or by using a flat-rate method, whereas non-residents were taxed by applying the minimum tax bases. The Court then considered whether this discrimination could be justified. While acknowledging the Belgian Government's arguments that the different treatment was proportional due to the need to ensure effective fiscal supervision, it decided that the practical difficulties faced by the authorities were the same in respect of residents and non-residents. It followed that the discrimination was not justified and the section of Belgian Income Tax Code

laying down minimum tax bases only for non-residents was incompatible with Article 43 TEC.

Link
Judgment

8.3 Judgment in Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue (C-524/04)

13 March 2007, Grand Chamber

Thin capitalisation regime – Foreign lending company - Remedies

Background
Between 1994 and 2004, the UK regarded the repayment of interest paid by a UK company on a loan from a related non-UK lender (e.g. a parent company) as a non-deductible dividend (i.e. a distribution of profits) to the extent that the interest paid exceeded that which would have been paid on an arm's length basis. The repayment of loans is normally deductible from taxable profits, but thin capitalisation was being used as a way to avoid the less advantageous rules for dividend payments, taxable under advanced corporation tax. These restrictions on deductibility did not apply if the lender was a UK company. The question arose as to whether this regime amounted to differential treatment contrary to TEC?

A number of claimants brought proceedings against the Commissioners of Inland Revenue following the ECJ's decision in Lankhorst-Hohrst (C-324/00). Test cases to be referred to the ECJ were selected, representing different company structures.

A number of questions were referred to the ECJ, including whether it is contrary to Article 43 TEC (on the right of establishment) to keep in force and to apply provisions which impose restrictions upon the ability of a company resident in that Member State ("the Borrowing Company") to deduct for tax purposes interest on loan finance granted by a direct or indirect parent company resident in another Member State if the Borrowing Company would not be subject to such restrictions if the parent company was resident in that same Member State. The same question was posed in relation to selected test cases, with different company structures.

Judgment
The Court confirmed that the UK rules did in fact constitute a restriction to the freedom of establishment as set down in the Treaty. The Court then examined whether such a measure could be justified, stating that the prevention of thin capitalisation was a justified objective but that it had to meet two tests to be considered a proportionate response. First a taxpayer should be given the opportunity to provide evidence that there were legitimate commercial reasons to enter into such an arrangement. Second the Court stated that the treatment of the interest paid as a dividend should be limited to that proportion which exceeds what would have been paid in an arm's length transaction.

The UK legislation in place between 1995 and 2004 met this second condition, whereas it did not between 1998 and 1995. The national court has been left to decide whether the legislation satisfied the first condition set. The Court also clarified the extent to which companies are entitled to reimbursement, stating that they are not entitled under Community law to repayment of expenditure that is not linked directly to the tax but rather to decisions taken by the company. National

courts are to determine what losses suffered are due to the Member States' breach of Community law in line with the jurisprudence on Member State liability.

Link
Judgment

8.4 Judgment in Wienand Meilicke, Heidi Christa Weyde, Marina Stöffler v Finanzamt Bonn- Innenstadt (C-292/04)

6 March 2007, Grand Chamber

Company dividends – Income tax – Free movement of capital

Background
This reference from the German courts seeks to establish whether the German legislation on the taxation of dividends is compatible with the Treaty provisions on the free movement of capital in so far as they only apply tax credits to dividends that are paid out by German companies. Until a change in the law that came into effect in 2001, Germany granted a tax credit to individuals in respect of dividends paid to them by German companies. This was intended to avoid a double imposition of taxation on profits, as the company paying the dividend was equally liable to pay tax on it. The same rule, however, did not apply to dividends that were paid from companies situated outside Germany. Therefore a challenge was mounted against the rules for violating the non-discrimination provisions of the EC Treaty (TEC?) on the free movement of capital (Articles 56 and 58).

Judgment
The Court noted that the ruling in *Mannien* (C-319/02) was decided after the reference was made by the German Court. The Court held that tax legislation such as that at issue in the main proceedings constituted a restriction on the free movement of capital within the meaning of Articles 56 and 58 TEC. There is a restrictive effect on raising capital in Germany by companies. Since dividends of non-German origin receive less favourable tax treatment than dividends paid out by companies established in Germany, investors residing there are more likely to buy shares in companies that hold their seat in Germany. Cases such as *Test Claimants in the FII Group Litigation* (C-446/04) and *Verkooijen* (C-35/98) are cited. As concerns the temporal effects of the case, the German Government had presented arguments about the potential liability it could face if all the affected tax payers were to lodge appeals. The Court did not find that sufficient proof of a risk of "serious economic repercussions" had been presented and held therefore that it was not appropriate to limit the temporal effects of its judgment.

Link
Judgment

8.5 Opinion in JP Morgan Fleming Claverhouse Investment Trust plc & The Association of Investment Trust Companies v Commissioners of HM Revenue and Customs (C-363/05)

1 March 2007, Opinion of Advocate General Kokott

VAT - "Special investment funds"- Member State discretion

Background
This is a preliminary reference from the VAT and Duties Tribunal in London and concerns the interpretation of Article 13B (d) (6) of the Sixth VAT Directive (Directive 77/388). The Tribunal asked the Court to examine whether "special investment funds", referred to in Article 13B (d) (6) of the Directive, are capable of including closed-ended investment funds, such as investment trust companies ("ITCs"). The UK legislation implementing the Directive exempts the supplies of management services to authorised unit trusts and open-ended investment companies. JP Morgan seeks to extend this to be applicable to the supply of management services to ITCs. The Tribunal has also queried whether "as defined by Member States" which also appears in Article 13B (d) (6) of the Directive allows Member States to select certain "special investment funds" within their jurisdiction to benefit from the exemption of the supply of management services and exclude others, or whether the benefit of this exemption should extend to all such funds. More generally, the Court is asked to consider how the principles of fiscal neutrality, equal treatment and the prevention of distortion of competition affect the exercise of that discretion.

Opinion
The Advocate General considered that “special investment funds” could include closed-ended investment funds such as investment trust companies. It was also noted that while Member States do have the power to determine which funds may benefit from the exemption, in exercising this discretion they must have regard to the wording and objectives of the provision, as well as the general principle of fiscal neutrality.

Link
Opinion

8.6 Reference in D.M.M.A Arens-Sikken v Staatssecretaris van Financien (C-43/07)

Lodged on 2 February 2007

Inheritance Tax - Immovable Property - Overendowment debts

Background
The ECJ is asked whether Articles 56 and 58 TEC (on the free movement of capital) must be interpreted as precluding a Member State from imposing inheritance tax on immovable property situated in that Member State, but forming part of the estate of a resident of another Member State, on the basis of the value of the property without taking into account overendowment debts owed by the inheritor. If this is the case then the court is also asked to determine how such debts should be taken into account in order to comply with the relevant Treaty provisions.

Link
Reference

ANNEX I: CASE TRACKER

"C" indicates a case before the ECJ, whereas "T" indicates the CFI.

Topic	Case	Hearing	Opinion	Judgment
Company				
Inaccurate listings particular	Ntionik and Pikoulas C-430/05		8 March 2007	
Competition				
Privilege of in-house lawyers under EC competition	Akzo Nobel T-253/03 R T-125/03 R			
Unlawful antitrust fines	Holcim C-282/05		11 January 2007	19 April 2007
Constitutional				
Review of final administrative decision, interpretation of EU law, conditions	Willy Kempter KG v Hauptzollamt Hamburg-Jonas Ausfuhrerstattung C-2/06			
Employment				
Equal pay and Working time for men and women	Ursula Voβ v Land Berlin C-300/06			
Discrimination on grounds of disability	S. Coleman v Attridge Law, Steve Law C-303/06			
Minimum daily and weekly rest periods	R v Secretary of State for the Home Department C-294/06			
Employee rights in transfer of undertaking	Jouini and Others C-458/05		22 March 2007	
Retirement rights of employees	Félix Palacios de la Villa v Cortefiel Servicios SA, José María Sanz Corral and Martin Tebar Less C-411/05		15 February 2007	
Social security for migrant workers	Derouin C-103/06	7 March 2007		
UK's Health and Safety at work legislation	Commission v UK C-127/05		18 January 2007	
Family				
Jurisdiction in child welfare cases	Applicant C C-435/06			

Professional Practice				
Second Money Laundering Directive, compatibility with right to a fair trial	Ordre des barreaux francophones et germanophones e.a. C-305/05	12 September 2006	14 December 2006	
Taxation				
Taxation of loans between companies in a group	Thin Cap Group Litigation v Commissioner of Inland Revenue C-524/04		29 June 2006	13 March 2007
Special investment funds and closed ended investment funds	J.P. Morgan Fleming Claverhouse Investment Trust plc C-363/05	13 December 2006	1 March 2007	
Contributions to occupation pension scheme	Commission v Belgium C-522/04		3 October 2006	
UK Corporate tax regime – UK parent and foreign subsidiary	Finanzamt Hamburg-Am Tierpark v Burda Verlagsbeteiligunge n GmbH C-284/06			
Autonomous regional tax policies conflicting with national tax law	Unión General de Trabajadores de la Rioja C-428/06			

ANNEX II: OVERVIEW OF THE EUROPEAN COURT OF JUSTICE

This update is a monthly publication summarising the main cases that are being heard by the EU Courts and which are of importance and interest to practising solicitors in the UK and other legal practitioners.

The European Court institution comprises the European Court of Justice (ECJ), the Court of First Instance (CFI) and the Civil Service Tribunal, recently established to deal with staff cases. This update shall only cover the case law of the ECJ and CFI.

The ECJ was established in 1952 under the ECSC Treaty and its competence was later expanded to ensure that the then EEC legislation was interpreted and applied consistently throughout the Member States. While subsequent treaty amendments have further extended the Court's jurisdiction to new areas of EU competence, the Court has also been instrumental, through its judgments and rulings, in furthering the process of European integration. Articles 7, 68, 88, 95, 220-245, 256, 288, 290, 298, and 300 of the Treaty of the EC set down the composition, role and jurisdiction of the Court.

Currently there are 27 Judges (one from each Member State) and 8 Advocates General who are appointed by Member States for a renewable term of six years. The Advocates General assist the Court by delivering, in open court and with complete impartiality and independence, Opinions in all cases, save as otherwise decided by the Court where a case does not raise any new points of law.

The ECJ has competence to hear actions by Member States or the EU institutions against other Member States or institutions – either enforcement actions against Member States for failing to meet obligations (such as implementing EU legislation) or challenges by Member States and institutions to EU legal acts (such as challenging the validity of legislation) – although some jurisdiction for the latter has now passed to the CFI. The ECJ also hears preliminary references from the courts in the Member States, in which national courts refer questions on the interpretation of EU law to the ECJ. The ECJ normally gives an interpretative ruling, which is then sent back to the national court for it to reach a judgment.

The CFI was set up in 1989, creating a second tier of the ECJ. All cases heard by the CFI may be subject to appeal to the ECJ on questions of law. The CFI deals primarily with actions brought by individuals and undertakings against decisions of the Community institutions (such as appeals against European Commission decisions in competition cases or regulatory decisions, such as in the field of intellectual property).

For more detail please refer to the Glossary of Terms at Annex III of this update and the Court's website: http://curia.europa.eu/en/index.htm

ANNEX III: GLOSSARY OF TERMS AND ACRONYMS

THE INSTITUTIONS	
ECJ	European Court of Justice The Court of Justice may sit as a full Court, in a Grand Chamber (13 Judges) or in chambers of three or five Judges. It sits in a Grand Chamber when a Member State or a Community institution that is a party to the proceedings so requests, or in particularly complex or important cases. Other cases are heard by a chamber of three or five Judges. The Presidents of the chambers of five Judges are elected for three years, the Presidents of the chambers of three Judges for one year. The Court sits as a full Court in the very exceptional cases exhaustively provided for by the Treaty (for instance, where it must compulsorily retire the European Ombudsman or a Member of the European Commission who has failed to fulfil his obligations) and where the Court considers that a case is of exceptional importance. The quorum for the full Court is 15.
CFI	Court of First Instance The Court of First Instance sits in chambers composed of three or five Judges or, in certain cases, may be constituted by a single Judge. It may also sit in a Grand Chamber or as a full court in particularly important cases.
Community institutions	The three main political institutions are the European Parliament, the Council of Ministers (comprising Member States) and the European Commission. The ECJ and the Court of Auditors are also Community institutions.
JURISDICTION OF COURTS	
Reference for a preliminary ruling **Article 234 TEC**	As certain provisions of the Treaties and indeed much secondary legislation confers individual rights on nationals of Member States which must be upheld by national courts, national courts may and sometimes must ask the ECJ to clarify a point of interpretation of Community law (for example whether national legislation complies with Community law). The ECJ's response takes the form of a ruling which binds the national court that referred the question and other courts in the EU faced with the same problem. The national court then proceeds to give its judgment in the case, based on the ECJ's interpretation. Only national courts may make a preliminary reference, but all parties involved in the proceedings before the national court, the Commission and the Member States may take part in the proceedings before the ECJ.
Action for failure to fulfil an obligation **Articles 226 & 227 TEC**	Usually the Commission, although also another Member State (very rare in practice) can bring an action at the ECJ for another Member States' breach of Community law. The ECJ can order the Member State to remedy the breach and failing that can impose a financial penalty. Most commonly this concerns a Member State's failure to properly implement a directive.

Action for annulment **Article 230 TEC**	The applicant (Member State, Community institution, an individual who can demonstrate direct and individual concern) may seek the annulment of a measure adopted by an institution. Grounds for annulment are limited to: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or of any rule of law relating to its application; and misuse of powers.
Action for failure to act **Article 232 TEC**	Either the ECJ or CFI can review the legality of a Community institution's failure to act after the institution has been called to act and not done so. These actions are rarely successful.
Appeals	Appeal on points of law only against judgments of the CFI may be brought before the ECJ.
PROCEDURE	
Written Procedure	Any direct action or reference for a preliminary ruling before the ECJ must follow a specific written procedure. Actions brought before the CFI follow a "written phase".
Hearing	Where a case is argued orally in open court before the ECJ. In the CFI there is an "oral phase" (which can follow on from an initial "written phase") where a case may be argued openly in court.
Opinion of the Advocate General	In open court an Advocate General will deliver his Opinion which will analyse the legal aspects of the case and propose a solution. This often indicates the outcome of a case but the judges are not bound to follow the Opinion.
Judgment/Rulings	Judgments and rulings in both the CFI and ECJ are delivered in open court. No dissenting opinions are ever delivered.
Reasoned order	Where a question referred to the ECJ for a Preliminary Ruling is either identical to a question on which the ECJ has already ruled or where the answer to the question admits no reasonable doubt or may be deduced from existing case law the ECJ may give its ruling in the form of an Order citing previous judgments
TREATIES	
TEC	The Treaty establishing the European Community
TEU	The Treaty on the European Union
ECHR	European Convention on Human Rights

Further information can be found in the "texts governing procedure" section of the ECJ website: http://curia.europa.eu/en/index.htm

EU legislation can be found on the Eur-lex web-site: http://eur-lex.europa.eu/en/index.htm