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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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CONTENTS PAGE

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INTRODUCTION

May – News from the EU Courts

There was a judicial vacation from 28 May to 1 June inclusive

The judgment in *Advocaten voor de Wereld* (C-303/05) was released in early May. This case concerned the Belgian implementation of the European Arrest Warrant (EAW) and its compatibility with the Treaty of the European Union. It was thought that the judgment may have implications for law-making under the third pillar of the Union as the EAW was introduced by a framework decision. The ECJ has ruled, however, that the use of a framework decision was appropriate and that it did not attempt to harmonise criminal law.

Opinions in two related cases in the field of employment law were passed down on 23 May. The Opinions in *International Transport Workers' Federation and the Finnish Seamen's Union v Viking Line*, and *Laval un Partneri v Svenska Byggnadsarbetareforbundet and others* (C-438/05 and C-341/05 respectively) received considerable media coverage on their release and will be significant to employment lawyers as they offer conditional backing to unions who take collective action against employers seeking to relocate under freedom of establishment laws.

Spanish judge Mr Santiago Soldevilla Fragoso was appointed judge at the Court of First Instance for six years from September 2007.

Coming up

Judgment in the case C-127/05 *Commission v UK* is due on 14 June 2007 and could have implications for UK health and safety at work legislation. The Commission believes that the UK has limited the scope of employers' obligations in its implementation of the Health and Safety at Work Directive (89/391).

Two significant cases will come to prominence in the last week of June. In *Ordre des barreaux francophones and germanophone and others* (C-305/05) the ECJ, in a case of great importance to practising solicitors, will examine the compatability of the second Money Laundering Directive with the right to a fair trial. While in *Commission v Council* (C-440/05) an Advocate General's Opinion will be given, which will touch on the issue of the competence of the Community in criminal law matters.

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 AUDIOVISUAL

1.1 Opinion in Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ÖRF) (C-195/06)

24 May 2007, Advocate General Colomer

TV without borders – Phone-in games – Teleshopping or advertising

Background
Further to recent controversies in the UK about various television programmes running phone-in competitions on premium rate phone numbers, the ECJ has been asked to examine some related Community law aspects. In particular the Austrian courts have asked it to determine how such phone-in games should be classified under the television without borders rules (Directives 89/552 and 97/36). KommAustria, the regulator, brought an action against ÖRF for broadcasting such phone-in competitions, determining that they were to be considered teleshopping because of the use of premium-rate phone numbers. The Austrian law implementing the Directives makes provision to allow advertisement segments during television programmes but does not permit teleshopping. The Court is asked to determine whether such games are to be considered advertising or teleshopping for the purposes of the Directive.

Opinion
The Advocate General concluded that the body making the preliminary reference – the Bundeskommunikationssenat – did not constitute a judicial body within the meaning of the Court's jurisprudence and recommended that the Court should refuse the request for a preliminary ruling. Nevertheless, the Advocate General went on to give his views on the case at hand, concluding that such phone-in games should be considered teleshopping, if their main aim is to "sell" the right to play the game – payment being made through the high cost calls. A number of criteria were set for the national court to assess this, such as what is the overall purpose of the programme, the economic value of the game, the time devoted to it and the number of viewers who participate. He also noted that phone numbers and instructions appearing on screen about the games were not to be considered as advertising

Link
Opinion

2 CIVIL LITIGATION

2.1 Judgment in Citymo SA v Commission (T-271/04)

8 May 2007, Enlarged Second Chamber

Damages action – Contractual and non-contractual liability of the Community – Terminated negotiations

Background
Community law provides for a specific regime that deals with the contractual and non-contractual liability of the European Community and its institutions. During 2003 the Commission was involved in negotiations with a subsidiary of the Fortis group for the lease of office space in Brussels. For various reasons, including the discovery of certain instances of fraud within the Commission, the finalisation of the lease was

initially delayed before the Commission informed the landlord of its intention not to enter into the lease. Fortis pursued the Commission for a range of costs and damages that had been incurred, including certain preparatory work to the interior of the building.

Opinion
The Court of First Instance rejected most of the claims for recompense made by the applicant. It did however find that the Commission was liable to pay damages in one respect. It took two months for the Commission to inform Fortis that it did not intend to take up the lease of the building, thus depriving Fortis of the opportunity to lease the premises to a third party. The Court awarded the applicant 10,000 euro damages, plus interest from the date of judgment, in respect of both months.

Link
Judgment

2.2 Opinion in Freeport PLC v Olle Arnoldsson (C-98/06)

24 May 2007, Advocate General Mengozzi

Forum-shopping - Special jurisdiction

Background
Mr Arnoldssen seeks the payment of a commission, in connection with the construction of a shopping centre project on a site in Sweden. Freeport AB, a Swedish company own the site; Freeport AB is in turn owned 100% by Freeport PLC, a UK company. Mr Arnoldssen is suing both Freeport AB and Freeport PLC, invoking Article 6(1) of Regulation 44/2001 (Brussels I). This allows 'connected' claims to be tried together, where the connection is 'of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.' Freeport PLC claims there is no risk of irreconcilable judgments, and suggests that suing Freeport AB is an abusive exercise of Article 6(1), to enable him to sue Freeport PLC in a Swedish court. The Högsta Domstolen (Supreme Court) in Sweden has asked the ECJ to determine whether Article 6(1) of Brussels I can apply. In particular, the Court is asked to determine whether there is an implied condition in 6(1), which would preclude jurisdiction where a defendant is sued purely for the purpose of bringing the matter into a court other than the court which would normally have jurisdiction.

Opinion
On the question of whether this was an 'abusive forum-shopping exercise', the Advocate General explicitly and repeatedly refused to be drawn. He concluded by suggesting that Article 6(1) of Brussels I should be interpreted to mean that it did not allow proceedings to be issued against a defendant domiciled in the same state as the court seised for the sole purpose of suing another defendant before a court other than that which would normally have jurisdiction.

Link
Opinion

2.3 Judgment in Color Drack GmbH v LEXX International Vertriebs GMBH (C-386/05)

3 May 2007, Fourth Chamber

Brussels I Convention - Sale of goods subject to contract – Jurisdiction of courts

Background
Color Drack is registered in Austria and Lexx is registered in Germany. Color Drack purchased sunglasses from Lexx, which in turn delivered them directly to customers in various parts of Austria. Color Drack returned unsold sunglasses to Lexx and asked for repayment of €9,291.56 plus interest and associated expenses, failing which Color Drack brought proceedings in the District Court in Austria. Through the various appeals, it has been disputed whether the Austrian courts have jurisdiction to hear such a case. Given that the deliveries were made to various places in Austria there is no single place of connection for the claim. It was argued that the case should be brought before a German court in Nuremburg, as that was the place of performance of the contract. The Austrian Supreme Court made a preliminary reference to the ECJ on the interpretation of Article 5(1)(b) of Regulation 44/2001 (Brussels I). This sets down that a person may be sued in the courts at the place of delivery. Given the jurisdiction of the local courts in Austria, at issue is whether the plaintiff can make a single claim in respect of all the deliveries before the court of one of the places of performance of the contract.

Judgment
The Court felt that Article 5(1)(b) of the Regulation is applicable when goods have been delivered to several places in a single Member State, as agreed by the parties. Thereafter it is for the law of the Member State of delivery (Austria) to determine whether the plaintiff may sue either in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the applicant may sue the defendant in the court of the place of delivery of his choice. The Court noted that the question referred cannot be answered by a mere reference to the wording of Article 5(1)(b) and that the objectives of the Regulation had to be taken into account. The Court held that the objectives centred on predictability and proximity. Therefore, the parties to a contract must be able to foresee reasonably which courts a dispute can be brought before: it does not mean they have to be able to identify the exact court. The question of proximity is irrelevant here as the deliveries were made within a single Member State.

Link
Judgment

3 COMPETITION

3.1 Judgment in SGL Carbon v Commission (C-328/05 P)

10 May 2007, Fourth Chamber

Cartel – Fining guidelines – Leniency – Non bis in idem

Background
This is an appeal against a cartel decision - the specialty graphite decision – taken by the Commission in 2002. In the US, in 2000 and 2001, while investigations

continued in the EU, criminal proceedings were brought against certain companies participating in the cartel. Amongst the various grounds on which SGL Carbon is challenging the Commission decision and the CFI's subsequent rejection of its appeal, is the argument that the CFI failed to respect the principle of *non bis in idem* by failing to take account of fines imposed previously in the US.

Judgment
The Court reiterated previous rulings on the question of *non bis in idem* stating that the principle does not apply to situations where legal systems and competition authorities of non-Member States pursue a case within their own jurisdiction. Such action is intended primarily to enforce the rules of competition law within that jurisdiction. The principle cannot therefore be applied where the Commission exercises its powers under competition law, despite the fact that penalties have been imposed in other jurisdictions. The Court went on to re-emphasise the discretion enjoyed by the Commission when it comes to setting fines and ensuring that they are fair and proportionate. Other grounds of appeal concerning the fairness of the levels of fines and the respect of rights of the defence were equally dismissed.

Link
Judgment

3.2 Judgment in Der Grune Punkt – Duales System Deutschland GmbH v Commission (T-151/01)

24 May 2007, Court of First Instance (First Chamber)

Abuse of dominant position – Fees payable under trade mark agreement

Background
The German Government passed a law to reduce the environmental impact of waste packaging, which required manufacturers and distributors to recover sales packaging either by collecting it from the point of sale free of charge or collecting from the final consumer. Grune Punkt ("GP") was the only company to operate this latter system throughout Germany, although others did so regionally. GP contracted with manufacturers that they would affix GP's logo to their packaging and would be charged a fee for doing so. The fee to cover collecting, sorting and recovering the packaging was charged regardless of whether GP was the company who actually collected it. The Commission decided that GP had abused its dominant position by requiring payment of a fee for the total quantity of packaging bearing its logo put into circulation in Germany even though much would be collected by other systems. The Commission did not criticise the fact that GP's customers were required to affix the logo to all of their packaging, but it did object to the payment for the total quantity of packaging bearing the logo. GP attempted to have the decision annulled by the CFI, arguing that it was disproportionate and in any event the abuse could be remedied through the selective marking of packages depending on which scheme they would go through.

Judgment
The CFI dismissed GP's action. First, it did not consider the Commission's measures to be disproportionate – they merely required GP not to charge for the total amount of packaging bearing its logo where it could be shown that some of the packaging was collected using another system. GP would not be disproportionately affected as it would still be remunerated for the services it actually provided. GP's argument that selective marking could remedy the situation was also rejected. The CFI considered that this would be more expensive and difficult to manage than

limiting GP's remuneration to cover only the service they actually provided. Moreover, to allow a system of selective marking would be permitting GP to continue to abuse its dominant position as the practicalities and costs of implementing such measures would be likely to dissuade GP customers from using any other system for the collection of packaging.

Link
Judgment

3.3 Judgment in Der Grune Punkt – Duales System Deutschland GmbH v Commission (T-289/01)

24 May 2007, Court of First Instance (First Chamber)

Articles 81 and 82 TEC – Access to collection facilities

Background
For the general facts surrounding the case see above (Case T-151/01). Der Grune Punkt ("GP") contacted the Commission in September 1992 with a view to obtaining negative clearance or a decision granting exemption from Article 81 TEC. In March 1997 the Commission published a notice in the Office Journal stating its intention to take a favourable view. Following publication of the notice in the OJ the Commission received observations from various third parties, which, amongst other things, stated that GP did not allow them unimpeded access to collection facilities used by GP's contractual partners. One company, Vereinigung fur Werstoffrecycling ("VFW") lodged a complaint on this basis under Article 82 TEC. GP also brought a domestic action against VFW for attempting to use its facilities free of charge.

Against this background the Commission, in a letter to GP on 21 August 1997, indicated that conduct consisting of preventing third parties from using collection facilities of its contractual partners could fall within the scope of Article 82 and could have implications in terms of the exemption procedure. GP then gave a commitment to refrain from restricting use of the collection facilities in cases such as those involving VFW but indicated that it may pursue claims for information and settlement against those with whom it held a contractual relationship. On 17 September 2001 the Commission adopted Decision 2001/837 which included an exemption under Article 81(3) for the agreements between GP and its contractual collection partners but attached conditions to this to ensure unrestricted access to facilities for competitors. GP disputed this decision and the case came before the CFI.

Judgment
The CFI agreed with the Commission that the obligations attached to the exemption were justified. While various arguments and counter-arguments were referred to in the Court's judgment it appears that the decision hinged on the fact that it was considered economically and practically too difficult in many circumstances for competitors to duplicate GP's waste collection infrastructure.

Link
Judgment

3.4 Opinion in Centre d'exploitation du livre français (CELF), Ministre de la culture et de la communication v Société internationale de diffusion et d'édition (SIDE)

24 May 2007, Advocate General Mazak

State aid – Article 88(3) TEC - Recovery of non-notified aid

Background
CELF received State aid annually from 1980-2002 for the purpose of processing small orders from abroad for books written in French. The Commission was not given prior notice of the aid. SIDE, a smaller competitor, complained to the Commission in 1992 but the Commission decided at that time that the aid was compatible with the common market. This decision was partially annulled by the CFI in 1995 as the Commission failed to comply with its obligation to initiate the *inter partes* procedure provided for by Article 88(2) TEC. The Commission gave a second opinion in 1998 which stated that the aid granted to CELF was unlawful as the French Government had failed to notify the Commission, although the aid was "compatible aid" as it satisfied the conditions for derogation under Article 87(3)(d) TEC. Both the French Republic (in the ECJ) and SIDE (in the CFI) launched actions for annulment of this decision.

The ECJ dismissed France's claim in 2000 and in 2002 the CFI annulled the part of the Commission's decision which held that the aid to CELF was compatible aid. The CFI based its decision on the Commission having made a manifest error of assessment when defining the market. Despite this the Commission made a third decision in 2004 acknowledging the unlawful nature of the aid but again finding that it was compatible with the common market. Annulment proceedings are pending in the CFI in respect of this decision.

The present case is before the ECJ as SIDE requested, following the decision of the CFI in 1995, that the French Minister for Culture and Communication cease giving aid to CELF and recover all aid given previously. The Minister refused and SIDE appealed the decision and the case eventually reached the Conseil d'Etat. It in turn asked the ECJ whether it is permissible for a state not to recover unlawful aid from an undertaking on the grounds that, after receiving a complaint from a third party, the Commission declared the aid to be compatible. If the aid must be repaid, it asks whether the period during which it was declared by the Commission to be compatible, before these decisions were annulled by the CFI, should be taken into account for calculating the sums to be repaid.

Opinion
In respect of the first question the Advocate General came to the view that any Member State which grants unlawful State aid must recover it, even where, as in the present situation, a final decision declares the aid to be compatible with the common market. In terms of the period for which the aid has to be repaid, the obligation was said to apply to any period prior to the adoption by the Commission of a final decision declaring the aid to be compatible with the common market following the *inter partes* procedure under Article 88. Final decision means a decision which has not been the subject of review proceedings under Article 230 TEC, or where its validity has been upheld by the Community Courts.

Link
Opinion

3.5 Reference in Motosikletistiki Omospondia Ellados (MOT.O.E) v Elliniko Dimosio (C-49/07)

Lodged 5 February 2007

Scope of Articles 82 and 86 TEC

Background
MOT.O.E is the Greek national representation of the International Motorcycling Federation and is a legal person. The first question asked of the Court is whether such an entity, which engages in economic activity including sponsorship, advertising and insurance contracts can be subject to competition law in the context of the organisation of motor sport events. If this first question is answered in the affirmative, the Court is also asked to determine whether it is compatible with competition law for MOT.O.E to be able to approve a decision of the Greek state to permit the organisation of a motor-vehicle competition, without this decision being subject to restriction or review.

Link
Reference

4. COMPANY LAW

4.1 Judgment in Iporgous Ikonomion, Priostamenos DOI Amfissas v Charilaos Georgakis (C-391/04)

10 May 2007, Third Chamber

Insider dealing – Meaning of insider information – Directive 89/592

Background
Mr Georgakis and certain members of his family ("the Georgakis group") were the main shareholders in a company "Parnassos" and its subsidiary "Syrios AVEE" held the majority of the shares in another company "Atemke". Members of the Georgakis group were directors of Parnsassos and Atemke and performed managerial functions in both companies. On the recommendation of financial advisers, the Georgakis group decided to support the price of Parnassos shares when they were under pressure and consequently undertook various transactions in Parnassos and Atemke shares which were carried out between themselves, Parnassos and a foreign investor. The Greek Capital Markets Commission decided that Mr Georgakis had effected transactions in transferable securities using inside information and fined him. This decision was confirmed by an administrative court of first instance but successfully appealed by Mr Georgakis. The Greek authorities further appealed on a point of law to the Council of State, which referred the matter to the ECJ to determine whether members of a group such as the Georgakis group, acting as they did, with the information they held, should be guilty of insider dealing in terms of Directive 89/592.

Judgment
In the present situation the members of the Georgakis group were deemed, for two main reasons, not to be guilty of insider dealing. First, the Georgakis group made the transaction on the advice of financial advisers. By doing so the group followed an expert recommendation to take certain steps rather than using their own insider knowledge, or insider information obtained from other parties. Moreover, the

purpose of Article 2 of the Directive is to ensure equality between parties in securities transactions. In the present situation the transactions were completed between the Georgakis group and they were all in possession of the same facts, thus any information ceased to be insider information.

Link
Judgment

5. CRIMINAL LAW

5.1 Judgment in Advocaten voor de Wereld VZW v Leden van de Ministerrad (C-303/05)

3 May 2007, Grand Chamber

European Arrest Warrant – Dual criminality – Principle of legality in criminal proceedings

Background
The European Arrest Warrant (EAW) entered into force on 1 January 2004 replacing the traditional extradition system within the EU with an arrest warrant that could be issued by Member State authorities, valid for the entire territory of the European Union. The EAW was introduced by a framework decision – a third pillar legislative instrument. The EAW works on the basis of mutual recognition whereby a judicial authority in one Member State will execute a judicial decision or order of another. In general, a test of "dual criminality" (i.e. that the act to which the warrant relates is an offence in both the issuing and executing states) is required, although for a list of thirty-two specific offences no such test is necessary.

In this case the Belgian court of arbitration (Arbitragehof) asked the Court for advice on the legality of the EAW. Two issues were raised, the first of which centred on the legal base of the Framework Decision, asking whether the correct legislative instrument had been chosen. The second question asked whether the principle of the prohibition on dual criminality was compatible with the principles of legality and equality in criminal proceedings.

Judgment
After considering how the TEU created a new legal instrument in the field of police and judicial co-operation, as well as taking into account the obligation on the EU institutions to achieve the objectives laid down in the Treaty, the Court agreed with the Advocate General in concluding that a framework decision was the appropriate instrument to legislate with and Article 34(2)(b) TEU was therefore the correct legal base for this initiative.

The Court was of the opinion that the Framework Decision cannot and does not attempt to harmonise criminal law and it is not, therefore, its aim to give precise classifications of the categories of offences. The definitions of the 32 offences it lists and the penalties applicable must be determined by the Member States. It was pointed out that all of the categories of offences feature among the most serious in criminal law by reason of their prison term (over 3 years) or their inherent nature. The Court claimed the seriousness of these types of offence, in terms of adversely affecting public order and public safety, adequately justified the lack of verification of double criminality as set out in Article 2(2) of the Framework Decision. Moreover, on the question of the waiving of the dual criminality requirement, the Court stated that

Article 2(2) neither contravened the principle of legality in criminal proceedings nor the principle of equality.

Link
Judgment

6. EMPLOYMENT

6.1 Opinion in the International Transport Workers' Federation (ITF) and the Finnish Seamen's Union (FSU) v Viking Line ABP and OÜ Viking Line Eesti (C-438/05)

23 May 2007, Advocate General Poiares Maduro

Company transfer of seat – Free movement - Right to strike

Background
Although a preliminary reference from the English Court of Appeal, it concerns a Finnish ferry company (Viking Line) that operates services between Helsinki and Tallin. The ferry concerned, the Rosella, sails under a Finnish flag and is crewed by members of the FSU, which is affiliated to ITF. Viking Line wanted to change its place of establishment and re-flag the ferry from Finland to Estonia to take advantage of lower wages but the unions threatened strike action if wage levels were not maintained. As part of a campaign against flags of convenience, the ITF believes that the union in the country where beneficial ownership of the ship is should have the right to conclude agreements in relation to the vessel. As such it instructed affiliates in other countries not to negotiate with Viking Line, with threats of sanctions, effectively removing the possibility for Viking Line to enter discussions with the Estonian union.

After a couple of years, Viking Line sought again to re-flag after the expiry of its manning agreement in 2005 and sought declaratory and injunctive relief in London against ITF to have it withdraw its circular instructing members not to deal with Viking Line. The Court of Appeal has referred a number of questions relating to the company's right of free movement (right of establishment and freedom to provide services) and the union's right to collective action, focussing in particular on Article 43 TEC (freedom of establishment) and Regulation 4055/86 on the freedom to provide maritime services between Member States.

Opinion
The Advocate General stated first of all that the exercise of rights falling within the social policy provisions of the Treaty does not render the provisions on free movement inapplicable. In line with the Court's case law, any restrictions on free movement cannot go beyond what is necessary to protect the fundamental right in question. Likewise he suggested to the Court that the Regulation and Treaty articles in question should have horizontal effect i.e. that individuals should be able to rely on them against other private entities in domestic legal proceedings.

Then the Advocate General went on to make a distinction between industrial action aimed at protecting workers' interests and action that is intended to prevent a company from providing services once relocated abroad – the latter being incompatible with Community law. The former should be seen as compatible with Community rules, even if it restricts the right of establishment, if such action is compatible with domestic legislation and is treated similarly to cases of relocation within a Member State. Finally he noted that in the absence of choice on the part of

the unions to participate in such Community-wide collective action, in effect such action could lead to the protection of the bargaining power of certain national unions and thus partition labour markets along national lines – again a breach of the free movement rules.

Link
Opinion

6.2 Opinion in Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others (C-341/05)

23 May 2007, Advocate General Mengozzi

Posting of workers – Direct horizontal effect – Collective action

Background
This case referred from the courts in Sweden has received much media attention over the last year or two. Similar to the case reported above, it concerns the compatibility of social rights – the right to collective action – with the Treaty rights of free movement, and the treatment of "social dumping" within the EU. A Latvian company, Laval, posted a number of workers from Latvia to Sweden to work on building sites of its subsidiary Baltic Bygg. Some of its sites were the subject of public works contracts, under which the parties agreed to apply Swedish collective agreements, although this was point contested by Laval.

Local trade unions subsequently tried unsuccessfully to get Laval to agree to apply collective agreements to its workforce. The Swedish legislation implementing Directive 96/71 on the posting of workers was silent however as to whether collective agreements on wages should be extended to such posted workers. After Laval concluded two collective agreements with the relevant trade union in Latvia, Swedish unions took collective action against the company – a blockade of the sites in question. As a result the subsidiary, Baltic Bygg, went into liquidation and the Latvian workers returned home. In the meantime, Laval challenged the legality of the industrial action in the Swedish courts.

Opinion
The Advocate General advised the Court to find that such forms of industrial action do fall within the scope of the Treaty rules on the freedom to provide services (Article 49 TEC). He went on to state that the Swedish legislation is not inadequate in the way it implements the Directive. Leaving it to collective bargaining to determine such terms and conditions and allowing collective action to enforce this process should be considered proper implementation. As such, collective action aimed at forcing a company to adhere to rates of pay found in collective agreements in the sector cannot be prevented, provided such action pursues public-interest objectives and is proportionate. In other words, the national court should have regard to the terms and conditions to be applied to the posted workers in question in order to determine whether a real advantage is being sought and to ensure there would not simply be a duplication of terms and conditions applied to them in their home jurisdiction.

Link
Opinion

7 ENVIRONMENT

7.1 Opinion in Land Oberösterreich and Republic of Austria v Commission (Joined Cases C-439/05 P and C-454/05)

15 May 2007, Advocate General Sharpston

Appeal – Creation of a GM-free farming zone

Background
The attempt by Land Oberösterreich (upper Austria) to create a GM-free farming zone by introducing a general ban on GM crops and animals was initially rejected by the Commission, which authorises their planting or release on a case by case basis. The subsequent challenge by Austria and Land Oberösterreich was dismissed by the CFI. Both have now appealed, on the basis that the CFI had disregarded the fact that Austria had not been able to respond to an opinion by the European Food Safety Authority; had not given proper consideration to the number of small holders and organic farmers in Austria, and thereby failed to give proper reasons for its decision; and failed to give weight to the precautionary principle.

Opinion
Advocate General Sharpston outlined the roles of the Commission, the Court and the CFI, in her preliminary remarks. She was of the view that none of these roles properly involves any decision as to what is, and what is not, appropriate environmental policy. She explicitly stated that 'It is not for this or any other court to determine proper national or Community environmental policy' - these policy concerns should be dealt with in political fora. She agreed that the CFI judgment was in breach of the right to be heard, and recommended that the judgment be set aside. But she did not find any new scientific evidence or any newly-arisen problem, and suggested that the precautionary principle did not apply. She recommended the dismissal of both the applications in these cases.

Link
Opinion

7.2 Reference in Société Arcelor Atlantique et Lorraine, et al v Premier Ministre, Ministre de l'Economie, des Finances et de l'Industrie, Ministre de l'Ecologie et du Développement durable (C-127/07)

Lodged 5 March 2007

Emissions – Equal treatment of steel, aluminium and plastics sectors

Background
The ECJ is asked to rule on whether Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading is valid in light of the principle of equal treatment given that it applies the scheme to installations in the steel sector but not those in the aluminium and plastic industries.

Link
Reference

7.3 Judgment in the Queen on the application of Thames Water Utilities Ltd. v The South East London Division, Bromley Magistrates' Court, Interested party: Environment Agency (C-252/05)

10 May 2007, Second Chamber

Sewage – Concept of waste – Directive 75/442

Background
Sewage escaped from the Thames Water network on 11 occasions between February and April 2003 and was discharged onto land in Kent. The company was subsequently prosecuted for illegally depositing waste. Thames Water disputes whether sewage which escapes is caught by the definition of "waste". The Court was asked to take a position on the relationship between waste law and sewage (waste-water) law and on whether waste water could be regarded as "waste" and thus governed by the Waste Directive (75/442). The Court also asked to what extent the provisions of the Urban Waste Water Directive (91/271) take precedence, thus disapplying the Waste Directive.

Judgment
The Court held that untreated waste water which escapes from a collecting system constitutes waste within the meaning of Article 1(1) of the Waste Directive and Q 16 of the categories listed in its Annex I. The application of Directive 91/271 would exclude the application of the Waste Directive to the escape of waste water onto land from a collecting system. This is not the case however in relation to the escape of untreated waste water. Neither are there specific rules in Directive 91/271 on escaped waste water that would supersede those in the Waste Directive. The fact that the waste water escaped from a sewerage network does not affect its character as waste and the fact that this happened accidentally does not alter the outcome.

Link
Judgment

8 EQUAL TREATMENT

8.1 Reference in Angelo Molinari v Agenzia Entrate Ufficio Latina (C-128/07)

Lodged 5 March 2007

Sex discrimination – Ages for voluntary retirement – Tax benefits

Background
This is one of four Italian cases (see also C-129/07, C-130/07 and C-131/07) referred to the ECJ which have come about as a result of an earlier judgment (C-207/04). C-207/04 concerned Italian legislation which offered voluntary redundancy tax benefits to men at 55 and women at 50. This piece of legislation was deemed to be contrary to the principle of equal treatment contained in Directive 76/207 (the Equal Treatment Directive). The present case(s) asks four separate questions of the ECJ. First, whether the judgment in C-207/04 means that the Italian legislature should have extended to men the age-limit applicable to women. Second, whether the redundancy tax benefits should now be applied to sums received by men who have passed the age of 50. Third, as income tax does not form part of one's salary as it is not paid by the employer in respect of employment and amounts paid by employers as incentives are not "pay", whether it is consistent with Community law to rule that

the applications of different age limits for men and women is contrary to Community law even although Directive 79/7 permits the preservation of different pension ages. Lastly the court is asked whether the Equal Treatment Directive should be interpreted as precluding national rules such as those in existence in Italy and thus rendering the Italian legislation as incompatible with Community law.

Link
Reference

9 FREE MOVEMENT

9.1 Judgment in Commission v Portugal (C-43/06)

24 May 2007, Sixth Chamber

Failure to implement directive – Mutual recognition of diplomas – Architects

Background
The Commission brought infringement proceedings against Portugal for failure to implement Directive 85/384 on the mutual recognition of diplomas, certificates and other formal qualifications in architecture. Although Portugal had implemented the Directive in 1990 it introduced a subsequent piece of legislation in 1998 requiring architects trained in another Member State but not registered with the professional body in that Member State, to pass an admission test. The Commission's argument was that the Directive does not draw a distinction between academic qualifications and membership of the relevant professional body – the recognition of the architecture qualification should be sufficient to allow an architect to practise in another Member State.

Judgment
The Court agreed with the Commission that Portuguese legislation requiring architects not registered with the relevant professional body in their home state to sit an admission test was not compatible with Directive 85/384. The Directive provides that architectural qualifications obtained in one Member State should be recognised in another and should allow individuals to practise as an architect in a Member State other than their own. There is no requirement in the Directive for architects to be registered with the relevant professional body in their home state.

Link
Judgment

9.2 Reference in Commission v Greece (C-84/07)

Lodged 15 February 2007

Failure of state to fulfil obligations – Opticians – Recognition of diplomas

Background
The Commission claims that Greece has not fulfilled its obligations under Directive 92/51 (on a second general system for the recognition of professional education and training) by refusing to recognise certain optical diplomas issued by an Italian educational establishment on the basis of a franchise agreement concluded with a Greek educational establishment. Rather than assessing whether or not the Italian-obtained diplomas are sufficient to give access to the profession, the Greek

authorities have been concerning themselves with whether or not the diploma has been issued under a franchise agreement. Moreover holders of the Italian diploma are being required to undergo a conversion course in Greece.

Link
Reference

9.3 Reference in Rosa Mendez Lopez v Instituto Nacional de Empleo (INEM); Instituto Nacional de la Seguridad Social (INSS) (C-97/07)

Lodged 20 February 2007

Social Security – Unemployment allowances – Contributions

Background
The question referred by the Galician "Tribunal Superior de Justicia" concerns Council Regulation 1408/71 on the application of social security schemes to persons who move within the Community. Article 71 of the Regulation states that individuals should "receive benefits in accordance with the legislation of that state as if he had last been employed there." The question at issue is whether this provision should be interpreted as meaning that the requirement set out in Article 215.1 of Spanish social security law of "having exhausted entitlement to contributory unemployment benefit" for the purposes of entitlement to Spanish non-contributory unemployment benefit, is fulfilled if German contributory benefit has been exhausted instead.

Link
Reference

9.4 Reference in Commission v Germany (C-141/07)

Lodged 9 March 2007

Article 28 TEC – Cross border provision of medicinal products

Background
German law on pharmacies allows hospitals to use external providers rather than setting up their own. However, certain duties are placed on external providers which make it practically impossible for pharmaceutical services to be provided by pharmacies outwith the vicinity of the hospital, meaning that pharmacies from other Member States would be unable to supply German hospitals. Article 28 TEC prohibits all measures hindering intra-Community trade, thus the Commission has sought to declare that the German legislation constitutes a failure to fulfil its obligations. While restrictions on trade can be justified by over-riding public-interest grounds, the Commission will argue that those in force in Germany are not suitable, necessary nor proportionate.

Link
Reference

9.5 Reference in Jacqueline Forster v IB-Groep (C-158/07)

Lodged 22 March 2007

Article 12 TEC – Students – Right to remain

Background
The Dutch court in the present case asks several questions of the ECJ. Firstly, it is asked whether Regulation 1251/70 (on the rights of workers to remain in a Member State after having worked there) also applies to persons who initially came to a Member State to study, and were employed initially on a limited scale but have now ceased to work. Further concerning students, it is asked whether Directive 93/96 (on residence rights for students) precludes students from relying on Article 12 TEC (prohibiting discrimination on the grounds of nationality) to claim full study finance. There are also several other questions concerning the interpretation of Article 12, the rights it gives to EU citizens and its scope.

Link
Reference

10 TAX

10.1 Judgment in Winfried L. Holbock v Finanzamt Salzburg-Land (C-157/05)

24 May 2007, Fourth Chamber

Distribution of dividends – Income from capital originating outside EU

Background
Mr Holbock is the manager of an Austrian cosmetics company of whom the sole shareholder is a Swiss company in which he holds two thirds of the share capital. Mr Holbock received dividends from these shares which, as income from capital, were taxable in Austria at full rate. As there seemed to be some doubt over whether the tax would be paid the Finanzamt Salzburg-Land (the Salzburg regional finance directorate) ordered that the tax owed by Mr Holbock be secured against his assets. Mr Holbock appealed, claiming that cross-border payment of dividends from a company in Switzerland to an Austrian shareholder fell within the scope of Article 56 TEC. This prohibits the restriction of movement of capital including between Member States and non-Member States. Under Austrian legislation, dividends paid by companies established in Austria are taxed at half-rate, while foreign dividends, such as those received by Mr Holbock, are taxed at full-rate. Mr Holbock argued that this constituted unequal treatment for which there was no justification.

Judgment
While the Court accepted the generality of Mr Holbock's argument, it referred to the exception to Article 56 contained in Article 57(1) which states that Article 56 is without prejudice to the application to non-Member States of any domestic legislation in existence on 31 December 1993 in respect of direct investment, establishment, provision of financial services or the admission of securities to capital markets. Mr Holbock's stake in the Swiss company was held to be a "direct investment" as defined in the nomenclature of capital movements set out in Annex I to Directive 88/361 and further explained in the *Test Claimants in the FII Group Litigation* (C-446/04) case. As the Austrian law was adopted in 1988 and not amended substantially in reforms made post-1993, the exception laid down on Article 57(1) applied and Austria was entitled to tax Mr Holbock's dividends at full rate.

Link
Judgment

10.2 Reference in N.V. Lammers & Van Cleeff v Belgische Staat (C-105/07)

Lodged 22 February 2007

Interest payments – Classed as dividends for foreign director

Background
The question referred is whether it is permissible for Belgian law not to treat interest payments made to directors, which are Belgian companies, as dividends (thereby avoiding tax) but to class the same payments made to directors, which are foreign companies, as dividends and thus taxable.

Link
Reference

10.3 Reference in JCM Beheer BV v Statssecretaris van Financien (C-124/07)

Lodged 2 March 2007

Insurance brokers - VAT

Background
The Dutch Hoge Raad has asked the ECJ to rule on whether the provisions of Article 13 (B)(a) of the Sixth VAT Directive (77/388) extend to cover the activities of a legal person that acts as an insurance broker and agent, where negotiations are carried out in the name of another insurance broker or agent in connection with the arrangement of insurance transactions.

Link
Reference

10.4 Reference in Ecotrade SpA v Agenzia Entrate Ufficio Genoa 3 (C-95/07)

Lodged 20 February 2007

Deduction of VAT – Reverse charge system – Imposition of time limits

Background
A Genoa court has referred two questions relating to the Sixth VAT Directive (77/388). First, the ECJ is asked whether a correct interpretation of the Directive precludes Italian VAT rules from imposing a two-year time limit for deduction, with particular reference to cases where the liability to VAT stems from the reverse charge procedure, which allows the tax authorities a longer period (four years under Italian law) to demand payment than the period allowed to the trader for deduction. Second, the Court is asked whether it follows that a Member State may not make (solely to the detriment of the taxpayer) the exercise of the right to deduct VAT conditional upon compliance with a time limit.

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			
Constitutional				
Community competence in criminal law matters	Commission v Council C-440/05		28 June 2007	
Review of final administrative decision, interpretation of EU law, conditions	Willy Kempter KG v Hauptzollamt Hamburg-Jonas Ausfuhrerstattung C-2/06		24 April 2007	
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	14 June 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	26 June 2007
Taxation				
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 Verlagsbeteiligungen 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