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INTRODUCTION

June – News from the EU Courts

The end of the month saw judgments being released in various important and interesting cases.

Two cases were particularly important for lawyers. In *Ordre des barreaux francophones and germanophone and others* (C-305/05) the ECJ decided that obligations placed upon lawyers by the second Money Laundering Directive to inform the authorities of money laundering suspicions were compatible with the right to a fair trial. In *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (joined cases T-125/03 and T-253/03) a hearing took place on 28 June. This case should help to clarify the extent to which legal professional privilege should attach to in-house counsel.

In *Commission v UK* (C-127/05) the UK's health and safety legislation was questioned by the Commission but the Court held that the legislation's requirement on employers to do only what was "reasonably practicable" was sufficient to ensure the safety of workers.

Commission v Council (C-440/05) was an important opinion regarding the Community's competence in criminal matters. Advocate General Mazak came to the opinion that while the Community had competence to require Member States to institute criminal offences to ensure the effective enforcement of Community legislation, it could not specify the type or level of sanctions.

For the beer lovers, the brewer of original Czech Budweiser "Budvar" was unsuccessful in its action to prevent the American giant "Bud" obtaining a trade mark to use the logo "Budweiser" on items such as clothing and stationery. Bud did, however, drop its bid to register the logo for use on beer. See *Budejovicky Budvar v OHIM & Anheuser-Busch, Inc v OHIM* (Joined cases T-53/04 to T-56/04, T-58/04 and T-59-04, T-57/04 and T-71/04 and T-60/04 to T-64/04).

Coming up

The Court will go on its annual summer judicial vacation from 16 July, however there remain a few cases before then. Most notably, the judgment in *Ntionik and Pikoulas* (C-430/05) is expected on 5 July. The ECJ is expected to confirm the opinion of Advocate General Sharpston on the scope of Directive 2001/34 as concerns those responsible for listings particulars and who can be fined for inaccuracies therein.

Two Advocate General's Opinions will be given on 10 July in relation to applications by the UK to annul regulations passed by the Council of Ministers. Both of these concern the Shengen Protocol which established the borderless area of continental Europe. Despite the UK not being part of the Shengen area it is still entitled to have a say in decisions made under the Protocol, but was denied the opportunity in these two cases, which concern the EU External Borders Agency and the use of biometrics in passports.

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 COMPETITION

1.1 Judgment in Britannia Alloys & Chemicals Ltd v Commission (C-76/06)

7 June 2007, Fourth Chamber

Antitrust – Calculation of fines – Turnover – Preceding business year

Background
Britannia has appealed against the judgment of the CFI (Case T-33/02) in relation to its challenge of a Commission decision imposing fines 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 (10% of the previous year's annual turnover), 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 no longer trading and had no turnover. The Commission instead used figures from the last year for which figures reflecting an entire year of normal economic activity were available. Britannia argued that a fine should not exceed the 1 million euro limit specified in Article 15(2) of Regulation 17.

Judgment
The Court upheld the CFI's view that another business year could be used as a reference for the purpose of calculating the upper limit to the fine to be imposed. It found it important that the Commission be able to base its calculations on a turnover that reflected the true financial situation of the company – the figure should represent a "complete year of normal economic activity". Therefore in setting fines, if no turnover figures are available in relation to the company's preceding financial year, the Commission may make reference to another business year to assess the company's financial resources. The Court emphasised that the Commission had to be able to set fines that fit the penalty to the individual conduct and the characteristics of the company at hand in order to ensure the competition rules are fully effective. The company's pleadings on the principles of equal treatment and legal certainty were likewise rejected by the Court and so the appeal was dismissed in its entirety.

Link
Judgment

1.2 Reference in Arcor AG & Co. KG v Germany (C-152/07)

Lodged 20 March 2007

Telecommunications – Fees for local-loop unbundling

Background
Arcor is a German telecommunications company which was forced to pay the market-dominant operator of the local network a contribution for access to the local loop. The question asked of the ECJ is whether Directives 90/388 and 97/33 in this area prevent the national telecommunications regulatory authority from imposing such contributions on operators such as Arcor. As a secondary point, if the first question is answered in the affirmative, the ECJ is asked whether the national court should take this incompatibility into account in proceedings concerning the approval of a contribution by the interconnected network operator.

Link
Reference

2 CRIMINAL LAW

2.1 Opinion in Commission v Council (C-440/05)

28 June 2007, Advocate General Mazak

Framework Decision – Community competence in criminal matters

Background
The Council adopted a framework decision (2005/667/JHA) on 12 July 2005 on the basis of Title VI of the Treaty on European Union (TEU) to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution. The Commission is seeking annulment of this framework decision on the basis that, as measures contained therein provide for an approximation of the laws of the Member States in criminal matters, the decision should have been adopted on the basis of the EC Treaty (TEC) rather than on the basis of Title VI of the TEU. The case is a follow up to case C-176/03 in which Council Framework Decision 2003/80/JHA was annulled as it required Member States to adopt criminal penalties, which should have properly been done under Article 175 TEC. The Commission and Parliament have interpreted this decision broadly in terms of the competence of the Community in criminal law matters. The Member States believe that the case relates exclusively to environmental policy and that it is outside the competence of the Community to define the type and levels of criminal sanctions to be imposed by Member States.

Opinion
The Advocate General took the view that case C-176/03 allowed the Community legislature to provide for criminal penalties where such penalties were necessary to ensure that the rules which it lays down are fully effective and where the criminal measures were essential. He then clarified this point by stating that while the Community can require the imposition of criminal penalties and require that they be effective, proportionate and dissuasive, the determination of their type and level must be left to Member States. He concluded that the whole framework decision should be annulled because it is indivisible as an instrument. It was further indicated that the framework decision could not simply be re-adopted as a first-pillar measure as certain of its provisions would require to be adopted under the third pillar.

Link
Opinion

2.2 Judgment in Giovanni Dell'Orto (joined party Saipem SpA) (C-467/05)

28 June 2007, Third Chamber

Framework Decision – Concept of victim in criminal proceedings

Background
Criminal proceedings were brought against Mr Dell'Orto and others for false accounting and embezzlement. Saipem SpA was one of the companies affected by the crime and joined the proceedings as a civil party. The sum that Mr Dell'Orto was alleged to have embezzled from Saipem was held by the Italian courts pending the outcome of the trial, although upon his conviction the judge made no decision on what should be done with the money. Saipem applied to the same judge who then

made an order to return the sum to them, but this was overturned by a higher court as, having made no decision in the original conviction, the criminal court did not have the power to do this. It was then unclear as to which court, if any, had the power to give the money to Saipem. It was in this context that the criminal court referred the question to the ECJ of whether Framework Decision 2001/220/JHA (on the protection of victims in criminal proceedings), which provides for the compensation of victims. could apply to legal as well as natural persons, and could thus be used to return the money to Saipem.

Judgment
Initially there was significant debate over whether the reference was admissible. Several Member States, including the UK, argued that it was inadmissible as it was based on Article 234 TEC whereas the interpretation sought concerned a framework decision – an act adopted under Title VI of the EU Treaty, and thus the reference should be based on Article 35(1) TEU. The Court admitted the reference, however, holding that the system under Article 234 could be applied to the Court's jurisdiction to give preliminary rulings under Article 35. On the substantive point, it was argued that Article 1(a) of the Framework Decision, which referred only to "natural persons", could be extended to cover legal persons, such as Saipem, but this was rejected.

Link
Judgment

2.3 Judgment in Commission v The Netherlands (C-50/06)

7 June 2007, Third Chamber

Criminal convictions – Expulsion on grounds of public policy

Background
A number of EU citizens who were sentenced to imprisonment in the Netherlands complained to the Commission that the Dutch authorities had declared them undesirable on public policy grounds. The Commission argued that the Dutch legislation relating to foreign nationals, which was equally applicable to nationals of other Member States, established a systematic and automatic connection between a criminal conviction and a measure ordering expulsion from the territory. It was argued that this was contrary to EU law, as it is not consistent with Directive 64/221.

Judgment
The Court agreed with the Commission. Under Article 18(1) TEC, every citizen of the Union has the right to move and reside freely within the territory of the Member States. The Court pointed out that that right was not unconditional. Among the limitations and conditions laid down or authorised by Community law, Directive 64/221 permitted Member States to expel nationals of other Member States from their territory on grounds of public policy or public security, subject to compliance with the substantive and procedural safeguards laid down by that directive and with the general principles of Community law.

The Court held that to exclude from the benefit of those substantive and procedural safeguards citizens of the Union would deprive those safeguards of their essential effectiveness. The Dutch legislation made it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion in respect of citizens of the Union. As an automatic expulsion infringed Directive 64/221, the Netherlands was found to be failing in its obligations under Community law.

Link
Judgment

3 EMPLOYMENT

3.1 Judgment in Commission v UK (C-127/05)

14 June 2007, Third Chamber

Health and safety – Employers' liability

Background
The Commission argues that the UK is in violation of the Health and Safety at Work Directive (Directive 89/391). The UK has restricted the duty on employers to ensure the safety and health of workers only "so far as is reasonably practicable". The Commission argues that this implementation fails to fulfil the UK's obligations under Articles 5(1) and (4) of the Directive. Unless the very special circumstances of Article 5(4) can be invoked, the Commission considers that Article 5(1) imposes a responsibility upon the employer to ensure health and safety in relation to all events that are adverse to the health and safety of his workers. The Commission further argues that the UK's legislation permits an employer to escape responsibility if he can prove that the sacrifice involved in taking further measures, whether in money, time or trouble, would be grossly disproportionate to the risk.

Judgment
The Court has dismissed the action brought by the Commission. It stated that the Commission interpretation of the Directive, where the employer is subject to no-fault liability, cannot be founded on the wording, the legislative history or the scheme of the Directive. The Commission had not established that, in excluding a form of no-fault liability, the disputed clause limits employers' responsibility in contravention of the Directive. Neither had the Commission clarified sufficiently its interpretation of the content of the employer's duty to ensure safety nor had it established how the disputed clause, considered in the light of the national case-law cited, infringed the provisions of the Directive. Consequently, the Court held that the Commission had not established that the UK had failed to fulfil its obligations under the Directive by limiting the employer's duty to what is reasonably practicable.

Link
Judgment

3.2 Judgment in National Pensions Office v Jonkman and others (C-231/06, C-232/06 and C-233/06)

21 June 2007, First Chamber

Equal treatment – statutory pensions scheme – air hostesses

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 "adjustment" 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.

Judgment
The Court has ruled that the principle of equal treatment is not incompatible with requiring employees to make adjustment contributions, but the scheme cannot require employees to pay interest on those contributions, over and above the rate of inflation. A requirement that the adjustment contributions must be paid in a single lump sum is unreasonable. Where the Court has previously found that national legislation is incompatible with EU law, as it has previously in the case of this pension scheme, the Member State concerned must take "the general or particular measures necessary to ensure that Community law is complied with". Where the Member State has not yet reinstated equal treatment, it is the obligation of the national court to set aside any discriminatory provision of national law and apply the same arrangements to a disadvantaged group as those enjoyed by persons in the more favoured category.

Link
Judgment

4 ENVIRONMENT

4.1 Reference in Salvatore Aiello and others v Comune di Milano (C-156/07)

Lodged 21 March 2007

Environmental impact assessments – Whether required only for specified projects

Background
Directive 85/337 states that projects likely to have significant effects on the environment should be subject to environmental impact assessments and such projects are defined in Article 4 of said Directive. The question referred is whether any project having an environmental impact should be subject to an assessment or whether assessments should be limited to those projects listed in the Annexes to the Directive. The Court is also asked further questions regarding the specific rules on impact assessments.

Link
Reference

5 FREEDOM OF ESTABLISHMENT

5.1 Reference in Apothekerkamer des Saarlandes and others v Saarland and Ministerium fur Justiz and others (C-171/07)

Lodged 30 March 2007

Foreign ownership of pharmacies – Prohibition in domestic law

Background
The initial question asked of the Court is whether a German provision prohibiting the foreign ownership of pharmacies is contrary to the right of freedom of establishment provided for in Articles 43 and 48 TEC. If this is answered in the affirmative the ECJ is asked, with particular regard to Article 10 TEC and the principle of effectiveness of Community law, whether a national authority is obliged to disapply provisions it regards contrary to Community law even if there has been no clear breach and the provision has not been ruled to be incompatible by the ECJ.

Link
Reference

6 INSTITUTIONAL AFFAIRS

6.1 Reference in Alfonso Luigi Marra v Edoardo De Gregorio (C-200/07)

Lodged 12 April 2007

Members of European Parliament – Failure to request right of privilege

Background
This case concerns the privilege of MEPs. In the present case the MEP has not exercised the right granted to him under the rules of procedure of the European Parliament to request the President of the Parliament to defend his privileges and immunities and thus the Italian court is seeking guidance from the ECJ as to how to proceed in the civil action before it. It asks whether it should either request the President to waive immunity for the purpose of pursuing proceedings and adopting a decision or simply take its own decision as to the existence of privilege in the absence of any communication from the European Parliament, having regard to the particular circumstances of the case.

Link
Reference

7 INTELLECTUAL PROPERTY

7.1 Judgment in Budejovicky Budvar v OHIM & Anheuser-Busch, Inc v OHIM (Joined cases T-53/04 to T-56/04, T-58/04 and T-59-04, T-57/04 and T-71/04 and T-60/04 to T-64/04)

Court of First Instance (Fifth Chamber, Extended Composition)

Community trade mark – Lisbon Agreement - Appellations of origin

Background
From 1996 to 1998 Anheuser-Busch ("Anheuser") applied to OHIM for registration of the words "Budweiser" and "Bud" and a sign containing the word "Budweiser" as Community trade marks for various products including stationery, clothing and confectionary. The sign also covered goods in the class which includes beer, ale, porter, malted alcoholics and non-alcoholic beverages. The Czech company Budejovicky Budvar ("Budvar") opposed these applications and brought opposition proceedings, claiming that they had already registered the appellations of origin "Budweiser" and "Bud" under the WIPO Lisbon Agreement and the international word

mark “Budweiser” for beer of any kind. OHIM rejected Budvar’s opposition in respect of goods other than beer but did accept the opposition to the use of the figurative sign containing the term “Budweiser” in respect of beer. Budvar brought an action to the CFI in respect of the first OHIM decision and Anheuser in respect of the second. The CFI joined the cases.

Judgment
The CFI found that the appellations of origin relied upon by Budvar are only protected under the Lisbon agreement for beer and similar products. Budvar had initiated its proceedings in France, and French law allows more extensive protection even where the goods are dissimilar. To benefit from this, Budvar had to prove that Anheuser’s use of the disputed sign would misappropriate or weaken the reputation of all the appellations of origin in question in France. The CFI found that Budvar had neither proved the existence of reputation in France nor shown that such reputation would be weakened by Anheuser’s use of the signs. Anheuser withdrew its application for registration of the sign containing the word “Budweiser” on beer and similar products, thus there was no need for the CFI to adjudicate on this matter.

Link
Judgment

8 PROFESSIONAL PRACTICE

8.1 Judgment in Ordre des barreaux francophones et germanophone et al v Council (C-305/05)

26 June 2007, Grand Chamber

Money laundering – Obligations on lawyers – Right to fair trial

Background
On 22 July 2004 the bar associations listed above made two applications to the Belgian Constitutional Court to have parts of the Belgian law which transposed Directive 91/308 (as amended by Directive 2001/97) on the prevention of the use of the financial system for money laundering annulled. The bar association members considered that the imposition of obligations upon lawyers to inform authorities if they suspected money laundering was an unjustifiable intrusion on legal professional privilege and the independence of lawyers - both of which are vital if the right to a fair trial is to be upheld. The question referred to the ECJ was whether Article 1(2) of Directive 2001/97 (which imposes the obligation upon lawyers) is contrary to the right to a fair trail contained within Article 6 ECHR, and, as a consequence Article 6(2) TEU.

Judgment
The Court rejected the claimants’ arguments. The obligations imposed upon lawyers only apply in so far as they advise their clients in certain financial or real estate transactions. As these activities take place outwith judicial proceedings they fall outside the scope of the right to a fair trial. Lawyers are exempted from the obligation to provide information to the authorities as soon as they are involved in instituting or attempting to avoid legal proceedings. This exemption applies whether the information is obtained by the lawyer before, during or after the judicial proceedings. An exemption such as this was held to be enough to safeguard the right to a fair trial.

Link
Judgment

8.2 Hearing in Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission (T-125/03 and T-253/03)

28 June, CFI (First Chamber, Extended Composition)

Legal Professional Privilege – In-house counsel

Background
This case concerns a dawn-raid by the Office of Fair Trading and Commission officials on premises in the UK, during which they wished to seize documents which Akzo claimed were privileged as they were communications with their in-house counsel. Under existing ECJ case law, the communications of in-house counsel do not generally benefit from legal professional privilege ("LPP"), but Akzo wishes to extend this. It has been joined in the action by the CCBE, the Dutch Bar, the European Company Lawyers Association, the International Bar Association and the American Corporate Counsel Association (European Chapter). During the hearing the Commission relied upon the existing case law to support its case, while Akzo and the other interested parties stressed the fact that any lawyer benefiting from a requisite level of independence should benefit from LPP. While the Court might be at least tempted by the arguments but forward by Akzo, it is unlikely that the CFI will be prepared to extend or overrule a previous judgment of a full bench of the ECJ. No indication was given as to when the decision will be handed down, but it is hoped that it will be forthcoming in September this year.

Link
Case History

9 PUBLIC PROCUREMENT

9.1 Reference in SAVA e C. S.r.l v Mostra d'Oltremare S.p.A (C-194/07)

Lodged 4 April 2007

Consortium without legal personality – Appeal against decision

Background
The question referred is whether an individual who is a member of a consortium, which does not possess its own legal personality, can bring an action against a decision not to award the consortium a contract or whether this is precluded by Directive 89/665 on the supply of public works contracts.

Link
Reference

10 TAX

10.1 Judgment in Rizeni v Bundesamt fur Finanzamt (C-335/05)

7 June 2007, First Chamber

VAT – GATS – Most favoured nation clause

Background
This reference from the German courts seeks primarily to determine the relationship between Member States' obligations under the VAT Directives and those under the WTO's General Agreement on Trade in Services (GATS). Article 2 (2) of the thirteenth VAT Directive (86/560) offers Member States the possibility to make a VAT refund conditional on the grant by a non-Member State of a similar advantage in relation to a turnover tax (reciprocity). The question asks whether this provision should apply in relation to countries already covered by the most-favoured nation (MFN) provisions of the GATS, and whether the German legislation is compatible with the thirteenth Directive. The case concerns a rejection by the German authorities of a request for reimbursement made by a Czech company for services rendered in Germany in 2002 i.e. before Czech accession to the EU.

Judgment
It is settled case law that international agreements concluded by the Community have primacy over secondary Community legislation, and the secondary legislation must be interpreted so as to conform. In the present case, however, Article 2(2) of the Directive merely gives Member States the option of making a refund conditional on reciprocity, thus leaving them free to comply with obligations under GATS and grant most-favoured-nation treatment. Therefore the expression "third states" in Article 2(2) is not to be interpreted restrictively so as to be limited to those third states which cannot invoke the most-favoured-nation clause in GATS.

Link
Judgment

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

28 June 2007, Third Chamber

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 the scope of the term "special investment funds", referred to in Article 13B (d) (6) of the Directive, is 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 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.

Judgment
The Court followed the reasoning of the Advocate General in this case and held that the term "special investment funds" must be interpreted to mean that it could include closed-ended investment funds such as ITCs. The Court also stated that the Directive gave Member States discretion as to when funds within that country are covered by the concept of special investment fund and thus exempt. In doing so, Member States must respect the objectives of the provision i.e. to promote investment through investment undertakings while guaranteeing fiscal neutrality with other competing special investment funds such as UCITS. The Court also held that Article 13B (d) (6) was capable of having direct effect.

Link
Judgment

10.3 Judgment in Albert Reiss Beteiligungsgesellschaft mbH v Land Baden-Württemberg (C-466/03)

28 June 2007, First Chamber

Notarial fees – Duties – Transfer of shares

Background
The dispute leading to this case concerns the payment of notarial fees in Germany in relation to the authentication of a transfer of shares. Reiss decided to increase its capital through a non-cash capital contribution – the transfer to Reiss of a shareholding in another company. When asked to pay 11,424 euro in notarial fees to certify the transfer, Reiss challenged the validity of the fees in light of Directive 69/335. This concerns the imposition of indirect taxes or duties on the raising of capital and attempts to eliminate tax barriers to the raising of capital, particularly through contributions of capital by shareholders.

Judgment
The Court held first that the imposition of notarial fees did constitute a tax for the purposes of the Directive. In line with the case law, this is when a charge is levied by notaries who are civil servants and is, at least in part, paid to the state. The actual amount paid to the state should have no bearing on this finding. Article 10 of the Directive mentioned prohibits taxes with the same characteristics as a capital duty. The Court has held previously that the increase in capital constitutes a formality necessary for the carrying on of the company's business. As such the fees charged in relation to these formalities, which are necessary to complete this operation, fall within the scope of the Directive. The Court held that such fees were prohibited.

Link
Judgment

10.4 Judgment in Planzer Luxembourg Sarl v Bundeszentralamt fur Steuern (C-73/06)

28 June 2007, Fourth Chamber

VAT reimbursement – Certificates issued by Member State – Place of business

Background
Planzer is a transport company registered in Luxembourg, which carried out business in Germany and presented the German tax authorities with a request for

reimbursements of VAT paid on fuel. Each of these requests was accompanied by a certificate from the Luxembourg tax administration confirming, in terms of Annex B to the Eighth VAT Directive (79/1072), that Planzer was a Luxembourg registered company. On each occasion the German authorities rejected the requests, claiming that Planzer was a Swiss-controlled company. The question referred to the ECJ was whether a certificate issued under Annex B as described above has binding effect or creates an irrefutable presumption that the company is established in the Member State issuing the certificate. If not, the Court is asked whether the term "place of business" in Article 1 of the Thirteenth VAT Directive means the location of the registered office, the place where the management decisions are taken or the place from where decisions vital to normal, everyday operation are taken.

Opinion
The Court appeared to agree with the Advocate General stating that the certificate in question does not in itself create an irrefutable presumption as to the company's country of establishment, although it does allow in principle the presumption that the company is established in that Member State. The Court stated, however, that if the national authorities asked for a refund have doubts as to the economic reality of the establishment in that Member State, they are not prevented from carrying out further checks through the channels of administrative cooperation laid down in Community legislation. As for the second question, the Court stated that the way of determining a place of business is to look at where the essential decisions of the business concerning its general management are taken and where the functions of its central administration are exercised. A number of factors are listed by the Court to offer further guidance on this latter point.

Link
Judgment

10.5 Opinion in Firma Ing. Auer – Die Bausoftware GmbH v Finanzamt Freistadt Rohrbach Urfahr (C-251/05)

21 June 2007, Opinion of Advocate General Poiares Maduro

Capital duty – Transfer of centre of management

Background
Bausoftware was set up as an Austrian company in 1999 and was wholly owned by a German listed company, Nemetschek. Bausoftware's effective centre of management was, however, in Germany – a country that does not impose capital duties. One week after its formation, Nemetschek made a capital contribution to Bausoftware, which in turn bought an Austrian one-man company, Ing. Auer "Die Bausoftware". Mr Auer was made a managing director of the new company (Ing. Auer – Die Bausoftware GmbH) and allowed to manage the business. While Germany does not levy capital duty, Austria does and decided that the company had transferred its effective centre of management to Austria - a taxable event as the company had become an Austrian capital company.

Opinion
Directive 69/335 sets down basic rules for Member States that wish to impose indirect duties on the raising of capital, with a view to eliminating tax barriers in the EU. In terms of the transactions covered by the Directive, these include the transfer of a capital company's effective centre of management between Member States. The Advocate General stated in his response to the Austrian court that the fact the company is exempted from any such duty in Germany does not stop it being classed

a capital company for the purposes of the Directive. The Court was also asked whether Austria was prohibited from levying the charges in question if the transactions were completed before the company transferred its effective centre of management to Austria. In reiterating the case law on abusive practices, the Advocate General noted that it is for the national court to decide whether there has been an abuse of the rules. In light of this, courts should not apply the concept of effective centre of management to situations "created artificially for the sole purpose of obtaining a tax advantage".

Link
Opinion

10.6 Reference in AXA Belgium SA v Belgium (C-168/07)

Lodged 29 March 2007

VAT – Exemptions – Independent groups

Background
The question asked of the ECJ is whether Article 13(A)(1)(f) of the Sixth VAT Directive (77/388) should be interpreted as meaning that Member States may only grant exemptions where independent groups of persons supply services exclusively for the benefit of their members, to the exclusion of non-members.

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	5 July 2007
Competition				
Privilege of in-house lawyers under EC competition	Akzo Nobel T-253/03 R T-125/03 R	28 June 2007		Possibly September 2007
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	28 June 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