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Developments from the European Court of Justice

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INTRODUCTION

July – News from the EU Courts

The Court is on judicial vacation from 16 July until 2 September, however several cases of note were released early in the month.

In *Schneider Electric SA v Commission* (T-351/03) the Court of First Instance, in a landmark ruling, awarded damages against the Commission for the first time for blocking a merger. It is thought that the amount of damages could run into hundreds of millions of euro.

In *Ntionik and Pikoulas* (C-430/05) the ECJ confirmed 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 opinions regarding the UK's status vis-à-vis the Schengen Agreement were handed down on 10 July. Despite not being to the agreement that opened the borders across much of continental Europe, the UK is entitled to be consulted on some decisions taken by the Schengen countries if it so wishes. In cases *UK v Council* (C-77/05 and C-137/05) the UK sought annulment of regulations passed without its input, however in both cases its application was deemed to be unfounded.

Coming up

It was announced that the long-awaited judgment in the case *Microsoft v Commission (T-201/04)* will be released on 17 September. This follows a hearing which took place from 24 to 28 August 2006.

It is also possible that the judgment in the case *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (joined cases T-125/03 and T-253/03) will be issued in September. This case concerns the extent of legal privilege attaching to advice given by in-house lawyers. A hearing was held in June this year. As yet a date has not been set for the judgment.

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 COMPANY LAW

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

5 July 2007, First Chamber

Securities - Inaccurate listings - Competence to impose sanctions

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

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

Link
Judgment

2 COMPETITION

2.1 Judgment in Schneider Electric SA v Commission (T-351/03)

11 July 2007, Fourth Chamber (Enlarged Composition)

Blocked merger – Damages – Non-contractual liability of the Commission

Background
In October 2001, the Commission decided to block the proposed merger between two French companies, Schneider Electric and Legrand, judging it to be incompatible with the common market. As Schneider had already gone through with the merger, the Commission ordered it to divest itself of Legrand. While Schneider was agreeing a contract with another consortium to sell Legrand, the CFI annulled the Commission's decision prohibiting the merger and the subsequent divestiture decision. The CFI ruled that the Commission had failed to respect Schneider's rights

of defence by introducing for the first time in the merger decision new objections to the merger. However Schneider then divested itself of Legrand before the Commission closed its subsequent examination of the merger in light of the CFI judgment. Schneider brought the current action against the Commission, based on the non-contractual liability of the Community, seeking compensation for the loss it had suffered as a result of the initial decisions.

Judgment
In line with previous case law on the non-contractual liability of the Community, the Court examined whether the unlawful conduct of the Commission went so far as to constitute a "grave and manifest disregard" of the limits of its powers of assessment. While rejecting other claims made by Schneider, the Court did uphold its argument that the breach of its right to be heard meant it was not able to offer corrective measures in relation to that specific objection before the Commission decision was taken. For the first time ever in a merger case, the Court therefore held that Schneider was entitled to compensation. First it was entitled to compensation for the expenses incurred in the resumed merger control procedure following the CFI's annulment of the Commission's initial decisions. Second, the Commission was ordered to pay two-thirds of the loss incurred by Schneider from the reduction in the divestiture price, which had to be given to Legrand's new purchaser to delay the execution of the contract of sale. The actual amounts involved are still to be settled over the coming months but are expected to run into hundreds of millions of euro.

Link
Judgment

2.2 Judgment in Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA (C-119/05)

18 July 2007, Grand Chamber

State aid – Recovery – Principle of res judicata – Primacy of EC law

Background
Lucchini was awarded a subsidy by the Italian Government which the Commission later declared to be incompatible with the common market. Lucchini did not challenge the Commission's decision but brought proceedings against the Italian authorities. The court, without reference to Community law or the Commission's decision, held that Lucchini was entitled to payment of all of the aid. The authorities did not appeal this and eventually an order for payment was obtained against them, and a ministerial decision was taken to make payment to Lucchini. The Commission declared the Italian authorities to be in breach of Community law, and called on them to recover the aid. The Italian authorities then revoked the earlier ministerial decision and requested the return of the sums paid. Lucchini then obtained a court ruling which stated that the authorities could not revoke their own act as Lucchini's entitlement to the aid had been confirmed by a final and conclusive court decision. The authorities appealed and the court found that there was a conflict between the 1994 judgment and the 1990 Commission decision. It thus asked the ECJ whether Community law precludes the application of a national law which seeks to implement the principle of res judicata, where this application prevents the recovery of State aid found to be incompatible with the internal market by a Commission decision.

Judgment
The ECJ examined Article 2909 of the Italian Civil Code (principle of res judicata) and confirmed that it precludes the reopening of a case which has been expressly

and definitively determined, as well as the examination of matters which could have been raised in earlier proceedings but which were not. If applied fully, this would mean that it would be impossible to recover State aid in such situations. However, as a result of the primacy of Community law, national courts must give full effect to provisions of Community law, even if this means refusing to apply provisions of national law which run contrary to Community law. The national court was said to have been correct not to have referred a question to the ECJ regarding the validity of the original Commission decision as Lucchini could have challenged this itself before the CFI but failed to do so within the one-month limitation period.

Link
Judgment

2.3 Opinion in Autorita Garante della Concorrenza e del Mercato v Ente Tabacchi Italliani – ETI SpA e.a. (C-280/06)

3 July 2007, Advocate General Kokott

Price fixing – Liability in the case of change of ownership

Background
In a decision of 13 March 2003 the Italian competition authority decided that various members of the Phillip Morris Group had, between 1993 and 2001, been involved in price fixing of cigarettes with firstly the state tobacco producing monopoly (AAMS) and subsequently ETI, which took over all the relevant commercial activities of AAMS in 1999. Created in 1978, ETI initially took the form of a public body, was converted into a limited company in 2000 and was privatised and bought by British American Tobacco in 2003. ETI was fined 20 million euro for both its own involvement and the previous involvement of AAMS in the price fixing. After a series of appeals the Italian Supreme Administrative Court examined the question of whether ETI could be culpable for the price fixing carried out by AAMS before ETI took over its commercial functions. The court decided to refer two questions to the ECJ. It first asked what was the correct business to sanction, under Article 81 TEC and the principles of Community law, in a situation where a price-fixing arrangement was commenced by one undertaking, then continued by its economic successor, and where the original undertaking continued to exist but no longer operated in this sector. A second question asked what combination of circumstances would make it justifiable to sanction the economic successor for infringements by its predecessor.

Opinion
The Advocate General decided that, by virtue of the principle of personal responsibility, the acts of a company are ascribable to the legal entity exercising control of the company at the time, even if at the date a decision is taken by the competition authority, a new owner was in place. This also applies in the situation where the undertaking was originally controlled by the state before being transferred to private ownership. Only in very exceptional circumstances can the new owner be responsible. This could be where the original owner is no longer in existence or does not have a notable economic activity, even in another market, and either there is a structural bond between the past and present owner or the company changed hands specifically to avoid sanctions. The new owner is also responsible if they continue the conduct started by the original owner until a decision of the competition authority is given.

Link
Opinion

3 CRIMINAL LAW

3.1 Judgments in Norma Kraaijenbrink (C-367/05) and Jurgen Kretzinger (C-288/05)

18 July 2007, Second Chamber

Schengen Agreement – Principle of ne bis in idem

Background
Ms Kraaijenbrink, a Dutch national, was found guilty by a Dutch court in 1998 for receiving and handling the proceeds of drug trafficking in the Netherlands and received a six month suspended sentence. In April 2001 a Belgian court sentenced her to two years imprisonment for money laundering offences related to the proceeds of her drug trafficking. The Belgian court considered that the drug trafficking and the money laundering could be considered as separate offences, notwithstanding the common intention underlying both. Ms Kraaijenbrink appealed, pleading infringement of Article 54 of the Convention implementing the Schengen Agreement (CISA) of 14 June 1985, which states that a person whose trial has been finally disposed of in one Member State cannot be prosecuted in another for the same acts. This is known as the principle of ne bis in idem.

Mr Kretzinger, a German national, on two occasions in 1999 and 2000 transported cigarettes, which had been smuggled into Greece, by lorry via Italy and France to the UK. The lorry containing the first consignment was stopped and Mr Kretzinger was held for questioning then released. On appeal, the Italian court found him guilty and imposed, in absentia, a suspended sentence of twenty months imprisonment. The second consignment was also stopped and he was held briefly in custody before returning to Germany pending the trial. The Italian court imposed a two-year sentence, again in absentia. Aware of these two judgments, German courts imposed sentences for both offences and Mr Kretzinger appealed citing an infringement of Article 54 CISA. The German appeal court asks for clarification of “same acts” under Article 54.

*Judgment*s
In both cases the ECJ confirmed that the meaning of “same acts” depends on a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In the case of Ms Kraaijenbrink, the acts of holding the proceeds of drug trafficking in one Member State and laundering money originating from the trafficking in another were not to be considered the “same acts” merely because they were linked by the same criminal intention. In Mr Kretzinger’s case the conduct of receiving contraband cigarettes in one Member State and then importing them to a final destination, via several other Member States, was considered to constitute the “same act”, as the intention had always been to transport the tobacco to the final destination. Despite offering this guidance in both cases, the ECJ stated that it was up to the national court to determine whether the factual circumstances amounted to a breach of the principle of ne bis in idem or not.

Link
Judgment – C-367/05
Judgment – C-288/05

4 EMPLOYMENT

4.1 Judgment in Commission v Germany (C-490/04)

18 July 2007, First Chamber

Posting of workers - Contributions to paid leave fund - Place of employment

Background
The Commission decided to take action against Germany for the way in which posted workers are treated under German legislation, which it deems to be contrary to the Treaty rules on the freedom to provide services - Article 49 TEC. In respect of posted workers, the German legislation states that foreign companies have to pay contributions to the German "paid-leave fund" even when those employees are subject to equivalent protection by virtue of the legislation in the employee's home state. Equally foreign companies are required to translate into German all the documents relating to the employment relationship that are required by virtue of Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. This includes pay slips, time sheets, proof of wages and other documents required by the German state. Last of all, foreign temporary employment agencies are to give the German authorities prior notification each time a worker is posted in Germany and each time the recipient of the worker's services asks the worker to start a new job on a building site.

Judgment
The Court held that the latter complaint against the obligations on foreign temporary employment agencies to notify the state of placements of temporary workers and of changes relating to the place of employment were valid and constituted a breach of Article 49 TEC. The Court dismissed the other actions, finding that the Commission had not established the facts in relation to the first complaint. In relation to the issue of translations, the Court found that such a requirement could be justified by objectives of social protection.

Link
Judgment

4.2 Opinion in Ursula Voβ v Land Berlin (C-300/06)

10 July 2007, Advocate General Mazak

Article 141 TEC - Equal pay – Over-time rate

Background
Ursula Voβ was employed as a teacher in Berlin. She taught 23 hours of lessons a week and was accorded the status of part-time worker. An overtime rate for both full and part-time public servants, which is lower than the standard hourly rate for work in normal hours, is paid to both categories of workers as provided for in the German legislation. Most part-time public servants are female. The Court was asked by the German Court to decide whether the national legislation concerning work done outside normal working hours could be construed as contrary to Article 141 TEC (enshrining equal pay for equal work for men and women). The lower overtime rate was more likely to affect part-time workers, and therefore women, who, for certain overtime hours would be paid less than full-time employees who were still earning the standard hourly rate.

Opinion
The Advocate General advised the Court that the lower rate for overtime could be discriminatory, as it affects more part-time female workers. He took the view that Article 141 TEC must be interpreted in a way which opposes discriminatory national legislation. Where the wage rate for additional or supplementary hours is less than the rate earned for normal hours, and where the difference in treatment concerns a higher number of women than of men, this could be discriminatory. It was open to the appropriate body to prove that there was a good reason for pursuing this objective, but this must be justified according to objective factors, not deriving from any form of gender discrimination.

Link
Opinion

4.3 Reference in Jorn Petersen v Arbeitsmarktservice Niederosterreich (C-228/07)

Lodged 9 May 2007

Unemployment benefit – Residing in another Member State

Background
The Austrian court asks the ECJ a question regarding intermediate unemployment benefit paid to persons claiming incapacity until a full analysis of their circumstances can be made. The benefit is paid without assessment of their capacity or willingness to work and is to be set off against any permanent benefit later decided upon. The question asked is whether such a benefit falls within the meaning of an unemployment benefit in terms of Regulation 1408/71. If the first question is answered in the affirmative, the ECJ is asked whether Article 39 TEC precludes a national provision which suspends the benefit if the person lives abroad.

Link
Reference

5 FREE MOVEMENT

5.1 Opinions in UK v Council (C–77/05) and UK v Council (C–137/05)

10 July 2007, Advocate General Trstenjak

Schengen area – Visas and passports – UK participation

Background
These two cases both concern the UK seeking annulment of two regulations made by the Council concerning the borderless Schengen area, on the grounds that despite having expressly requested it, it was denied the right to take part in the regulations' adoption process. The UK is not bound by any measures adopted under Title IV of the EC Treaty, which deals with visas, asylum, immigration and Schengen. However, the UK does retain a right to opt in where it so wishes. Specifically with regard to Schengen, to which the UK is not a party, the Protocol which transferred the Schengen acquis (body of law) into the EC Treaty allowed for the UK to take part in the adoption of legislation which builds on Schengen.

In Case C-77/05, the UK is seeking annulment of Regulation 2007/2004 establishing the European Border Agency – the 'Agency Regulation'. In Case C-137/05, the UK

is seeking annulment of Regulation 2252/2004 which laid down the standards for security features and biometrics in EU citizens' passports – the 'Passports Regulation'. The Council argues that the UK's ability to participate in the adoption of Schengen measures only applies to those measures which build on previous Schengen rules in which the UK has already participated. The UK counters that this reading of the Protocol is too restrictive.

Opinion
In Case C-77/05, the Advocate General finds that the scope of the *ius variandi* (Article 5, setting out the UK and Ireland's opt-out powers) is narrow – limited only to those proposals which are based on the Schengen acquis, but are capable of autonomous application. The Agency Regulation is not capable of autonomous application, and so the UK does not have the right to opt in.

In Case C-137/05, the Advocate General finds that the Passports Regulation cannot apply without the simultaneous implementation of other measures of the Schengen acquis. The Passports Regulation is also not capable of autonomous application and the UK did not have the right to opt in. Further, he advised that the Council's practice of allowing the UK to cooperate does not create an enforceable right to the application of Article 5.

Link
Opinion - C-77/05
Opinion - C-137/05

6 INTELLECTUAL PROPERTY

6.1 Reference in Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH (C-240/07)

Lodged 16 May 2007

Copyright – Subject matter not previously protected – Term of protection

Background
The ECJ is asked whether the term of protection of copyright and related rights granted by Directive 2006/116 also applies to a form of work that has not previously been eligible for protection in the Member State in which protection is sought. If this is answered positively, the Court is asked whether national provisions governing the protection of right holders who are not Community nationals constitute national provisions within the meaning of the Directive and whether the term of protection granted pursuant to the Directive also applies to a work which at a date specified in the Directive fulfilled the criteria set out in Directive 92/100 but whose right holder is not a Community national.

Link
Reference

7 JUDICIAL COOPERATION

7.1 Opinion in Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Limited (C-175/06)

18 July 2007, Advocate General Kokott

Hague Convention – Evidence - Intellectual property rights violations

Background
On 21 March 2005 Mr Tedesco brought an action against Tomasoni and RWO for breach of his intellectual property rights as the inventor of a harness system. RWO is a British company which operates through the intermediary of Tomasoni in Italy. An Italian court ordered the seizure of evidence from both Tomasoni, in Italy, and RWO in the UK, by way of a request to the Senior Master of the Queen's Bench Division to hear evidence on the matter itself. The Senior Master refused on the grounds that the search and seizure was not part of the remit of his agents and that the request did not fall into the framework of judicial cooperation. Subsequently the Genovan court referred the question of whether the request for obtaining a description of goods, properly made under Italian law, should be considered as one of the forms of "the taking of evidence" in Regulation 1206/2001 (on judicial cooperation in the obtaining of evidence in civil matters) under which a request can be made to another jurisdiction to take evidence. If the first question is answered in the affirmative, the Court is also asked what should happen if the request made is incomplete or incorrect.

Opinion
The Advocate General came to the conclusion that the Italian request did fall within the framework of Regulation 1206/2001 and that, moreover, the judicial authorities could not refuse to carry out this request if no good reason for refusal existed. The Advocate General considered that the subsequent question was inadmissible as this could only be properly asked by the English court.

Link
Opinion

8 TAX

8.1 Judgment in Hans Markus Kofoed v Skatteministeriet (C-321/05)

5 July 2007, First Chamber

Tax avoidance – Mergers, divisions and transfers of assets – Restructuring

Background
Two Danish taxpayers, who each owned 50% of a Danish company, transferred their shares in the company to an Irish company and in return each was given 50% of the shares in the Irish company. Therefore they no longer exercised direct control over the original Danish firm but did so through the intermediary of the controlling Irish firm. Shortly thereafter, as planned, the Irish company effected a substantial distribution of profits in favour of the two Danish taxpayers. According to the referring court, there was no specific commercial reason to do this; the objective reason was to avoid tax. The Irish-Danish double taxation convention allowed for both the dividends paid by the Irish firm and the cross-border exchange of shares to be exempt from Danish tax.

In filing their Danish tax returns for the year, both of the individuals concerned assumed their profits to be tax free. The competent authorities, however, treated the exchange of shares and the distribution of profits as a single transaction. As the cash payment made in the context of an exchange of shares exceeded 10% of the

nominal value of the shares transferred, the exemption provisions of the legislation were considered not to apply. The national court asked whether such a transaction should be considered an exchange of shares within the meaning of Directive 90/434, which is aimed at removing tax disadvantages to cross-border restructuring. This Directive permits cash payments of less than 10% to be made within the context of an exchange of shares. The referring court wondered whether the national taxation authority should treat a distribution of profits as 'partial consideration' and thus a cash payment made by the acquiring company in exchange for shares.

Judgment
The Court appeared to reach the same conclusion as the Advocate General finding that profit distributions such as those in the present case, paid to the previous owners of the company, are not cash payments as described in Article 2(d) of Directive 90/434. As such the exchange of shares is to be considered an exchange of shares within the meaning of that same article. The Court went on to rule that the exchange should not, in principle, be taxed according to Article 8(1) of the Directive. That said, national rules on abuse of rights and tax evasion could be allowed if interpreted in accordance with Article 11(1)(a) of the Directive.

Link
Judgment

8.2 Judgment in Commission v Belgium (C-522/04)

5 July 2007, Second Chamber

Taxation – Contributions to occupational pension scheme

Background
This infringement action brought by the Commission concerns the compatibility of the Belgian legislation on income tax and stamp-duty tax with the EC Treaty and Directive 2002/83 concerning life assurance. A number of elements of the Belgian legislation impose less favourable tax treatment on contributions made to occupational pension schemes based in other Member States – deductions are only possible in respect of those based in Belgium.

The legislation also treats as taxable events certain cross-border transactions that would not have been taxable or would have been taxed differently had they occurred entirely in Belgium. For instance, capital and savings transferred to a person who has already moved his residence from Belgium are caught, even when the new country of residence should be responsible for taxing this under bilateral tax Conventions. Similarly, transfers of capital made between pension funds or insurance companies when a pension scheme is moved out of Belgium are also covered. Lastly, certain obligations placed on insurance providers, such as a requirement to have a representative residing in Belgium, were deemed by the Commission to run contrary to EC law provisions.

Judgment
The Court decided that one of the Commission's grounds for action, based on Article 11(2) of Directive 92/96 as amended by Directive 2002/83, was inadmissible. Besides that however, the Court agreed with the assertions made by the Commission and found that the various elements of the Belgian tax system that were being challenged did in fact constitute a violation of the free movement provisions of the EC Treaty (Articles 18, 39, 43 and 49 TEC) as well as corresponding provisions of the EEA Agreement and Directive 2002/83.

Link
Judgment

8.3 Judgment in Oy AA (Case C-231/05)

18 July 2007, Grand Chamber

Freedom of establishment – Intra-group transfers

Background
This preliminary reference from the Finnish courts is another case in the long line of challenges to national taxation systems grounded in the Community's rules on free movement and the freedom of establishment. The case concerns the Finnish law on the taxation of intra-group transfers i.e. transfers within a group of companies, which imposes tax only on the recipient company within the group, thus aiming to avoid a double imposition of tax. This applies equally to the offsetting of loss within a group and thus the case has similarities to that of *Marks & Spencer* (Case C-446/03; see December 2005 Update). The facts of this case are the opposite, however, insofar as the Finnish legislation allowed the profits to be transferred to the loss-making company. The Finnish tax authorities ruled that a transfer from Oy AA to the UK company AA Ltd (the parent company and sole owner of Oy AA) did not constitute such a transfer as the domestic tax rules applied only to Finnish companies.

Judgment
The Court decided, however, that the Finnish legislation did not fall foul of the rules contained in Directive 90/435 (taxation applicable in the case of parent companies and subsidiaries of different Member States). While it was caught by the free movement provisions of the EC Treaty, the Court held that Article 43 TEC did not preclude Member States' tax rules from preventing a subsidiary from deducting intra-group transfers made to parent companies that are not resident in the same Member State. The Court held that such a rule could be justified by the need to safeguard the balanced allocation of taxation powers between Member States and the need to protect against tax avoidance, as these constitute overriding reasons in the public interest. As such the solution found by the Finnish system was held to be necessary to meet the objectives pursued.

Link
Judgment

8.4 Opinion in Staatssecretaris van Financiën v Orange European Smallcap Fund NV (C-194/06)

3 July 2007, Advocate General Bot

Dividends – Compensation – Withholding tax in another Member State

Background
This preliminary reference comes from the Netherlands and concerns the taxation of collective investment organisations or funds. Taxation on the dividends received by these funds is due by all the investors in the fund, rather than the fund itself, after distribution of the profits. Where tax is withheld at source by Dutch companies in respect of dividends paid to these funds it is reimbursed to the fund. The tax scheme also compensates these funds for tax levied abroad on the dividends paid out by foreign companies. This compensation is, however, limited to the amount that an

individual could be credited under a double tax treaty with the other Member State. The compensation is then reduced according to the proportion of investors in the fund who are not resident in the Netherlands. Obviously, this system results in differences in the treatment of domestic and foreign dividends and then of resident and non-resident investors. The Dutch court asks whether this is compatible with Article 56 and 58 TEC on the free movement of capital.

Opinion
Advocate General Bot concluded that both of the restrictions placed on the level of compensation provided in respect of foreign dividends are incompatible with the relevant provisions of the Treaty. As the Dutch authorities had decided to compensate these investment funds by reimbursing tax that had been withheld at source by a Dutch company, so should it reimburse the tax withheld at source by a foreign company. Neither, he concluded, were these restrictions justified by the fact that some investors were not resident in an EU Member State or other third country with which the Netherlands had agreed a double tax treaty. The difference between the level of withholding tax applied to the foreign dividends when initially distributed and that applied in the Netherlands to dividends redistributed to foreign investors should not be of relevance to the outcome of the case.

Link
Opinion

8.5 References in Tierce Ladbroke SA v Belgium (C-231/07) and Derby SA v Belgium (C-232/07)

Lodged 10 May 2007

Gambling – Exemption of agent from VAT

Background
Both of these Belgian cases concern the operation of agents who work for bookmakers. The Sixth VAT Directive (77/388) exempts bookmakers from VAT on certain transactions, including negotiations, deposit accounts and payments. The question is whether the actions of an agent who carries out similar functions for the bookmaker, including receiving bets and issuing winnings, and is remunerated by way of a commission from the bookmaker should benefit from the same exemptions under the Sixth Directive.

Link
Reference – C-231/07
Reference – C-232/07

9 TELECOMMUNICATIONS

9.1 Opinion in Arcor AG & Co. KG v Germany (C-55/06)

18 July 2007, Advocate General Maduro

Telecommunications – Local loop access

Background
Arcor is a telecommunications operator, which is entitled to unbundled access to a local loop (the final part of the telecommunications network closest to customers)

controlled by Deutsche Telekom (DT). DT is subject to regulation by the national regulatory authority in respect of the provision of this access. In September 1998 Arcor signed a contract with DT on access to the local loops. The German authority approved DT's access rates but Arcor sought judicial annulment of this decision. It argued that the rates were too high as they had been calculated on the basis of the current cost of setting up a modern, efficient, local network, rather than actual cost DT had incurred. Article 3(3) of Regulation 2887/2000 (on unbundled access to the local loop) states that prices charged for access should be based on "cost-orientation". Arcor's submission was that this had not happened. In light of these circumstances, the referring court asked several questions of the ECJ, many of which consider the technicalities of cost-assessment. The significant question raised, however, is whether Member States, in their application of the regulation, can deviate from the concept of cost-orientation to the detriment of those seeking access to local loops.

Judgment
The Advocate General considered that the concept of cost-orientation contained no reference to the law of the Member States and was an autonomous concept of Community law which must be interpreted in a uniform fashion. This had been confirmed in two earlier cases. While accepting that Member States had some discretion in their implementation of the concept, it was stated that this discretion must be exercised in conformity with Community law. Article 3(3) was to be interpreted as imposing a limit on prices charged by controllers of local loops, which may not be departed from to the detriment of those seeking access, notwithstanding an inevitable margin of discretion for actual implementation at national level.

Link
Opinion

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				
Abuse of dominant position	Microsoft v Commission T-201/04	24 – 28 August 2006		17 September 2007
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			
Taxation				
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 *Judgment*s 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, *Opinion*s 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 *Opinion*s 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 *Judgment*s
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