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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

The Law Societies' Joint Brussels Office
142-144 avenue de Tervuren
B-1150 Brussels, Belgium
Tel : (+32) 2 743 85 85
Fax : (+32) 2 743 85 86
Email: brussels@lawsociety.org.uk

INTRODUCTION

September – News from the EU Courts

In *Akzo Nobel Chemicals Ltd v Commission* (T-125/03) the Court of First Instance upheld the Court's earlier conclusion in the case of *AM&S Ltd v Commission* (155/79) by finding that in-house legal counsel are not entitled to the same degree of protection through legal professional privilege as are lawyers in private practice.

The Court's long-awaited judgment in *Microsoft v Commission* (T-201/04) was released on 17 September. The Court of First Instance rejected Microsoft's appeal against its record €497 million fine, judging that the Commission had acted reasonably and proportionately in finding Microsoft guilty of a serious breach of competition law.

Following the partial renewal of Members of the Courts of First Instance at the beginning of September, Marc Jaeger, judge at the Court since 11 July 1996, has been elected president of the Court of First Instance for the period from 17 September 2007 to 31 August 2010.

The Court of First Instance published in the Official Journal on 4 September 2007 revised guidelines on court procedure for practitioners in the Court.[1]

Coming up

On 23 October, the ECJ is due to give its judgment on the Commission's challenge to the Council Framework Decision on ship-source pollution (C-440/05). This is an important case in relation to the Community's competence to adopt criminal law measures. The Court will also rule on the legality of the golden share arrangements in place for Volkswagen in Germany, which give special voting rights to the Land of Lower Saxony (C-112/05). The ECJ is also due to publish its judgment in *Palacios de la Villa* (C-411/05) on 16 October. This case deals with the issue of non-discrimination on the grounds of age and whether European legislation makes national laws that set retirement ages illegal.

There will also be two hearings of interest in October. On 11 October the ECJ will hold a hearing in *Marks & Spencer* (C-309/06) dealing with the VAT-related question of whether traders in the UK have a directly enforceable Community law right to be taxed at zero rate when the goods they are trading are exempt under UK VAT legislation. Also the ECJ will hold a hearing in the *Coleman* case (C-303/06) which asks whether EU rules prohibiting discrimination on grounds of disability extend protection to discrimination against those associated with a disabled person, such as family members.

Case tracker

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

[1] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_232/l_23220070904en00070016.pdf

1 COMPETITION

1.1 Judgment in Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission (T-125/03)

17 September 2007, First Chamber (Extended Composition)

Legal professional privilege – In-house counsel – Competition investigation

Background
The Commission, having adopted a decision that the applicants should submit to an investigation for competition law infringement, carried out an investigation of the applicants' premises on 12 and 13 February 2003. In the course of its investigations, the Commission found several documents that the applicants claimed were subject to legal professional privilege (LPP) as they were prepared by or for in-house lawyers. Despite the claims of the applicants, the Commission decided to place only some of the documents into sealed envelopes for their privileged status to be considered at a later time. It copied some of the other documents which it did not believe to be subject to LPP. Having had a request for the return of the documents refused by the Commission, the applicants submitted a formal request to the CFI for the annulment of the rejection decision.

Judgment
In its judgment, the CFI addressed three main points arising from this action. First, it looked at the Commission's conduct of the dawn raid investigation. It found that a company under investigation by the Commission does not necessarily have to reveal the contents of documents when it demonstrates to Commission officials that the relevant documents are of a confidential nature. Additionally, the CFI found that companies under investigation are entitled to refuse Commission officials even a cursory look at the documents that they claim to be subject to LPP. Second, the CFI found that internal company documents, even if they have not been exchanged with a lawyer, may be covered by protection of confidentiality of communications between lawyers and their clients. However, they must have been drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence. The CFI rejected the applicants' submissions that this applied to their documents in this particular instance. Finally, the CFI addressed the scope of LPP and reiterated the ECJ's previous findings that LPP only applies to the extent that a lawyer is independent. The Court found that, even though it was the case that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers is more common today, it was still not possible to identify a clear, uniform change in the law across Member States. The applicants' arguments were, therefore, rejected by the CFI.

Link
Judgment

1.2 Judgment in Microsoft Corp. v Commission (T-201/04)

17 September 2007, Grand Chamber

Abuse of dominance – Software bundling

Background
The Commission adopted a decision that the applicant had abused its dominant position, contrary to Article 82 TEC, by refusing to disclose interoperability

information (information to enable competitors to make their products work with those of the applicant). The Commission also found that the applicant had infringed competition rules by tying a media player to its Windows software. The Commission imposed a fine of €497 million and required the applicant to submit a proposal for a suitable mechanism to monitor its compliance with the Commission decision. This mechanism was to include the appointment of an independent monitoring trustee. The applicant applied to the CFI for the annulment of the Commission's decision, arguing that the Commission had incorrectly interpreted the term 'interoperability' and that there was no obligation on the applicants to make the relevant information available to its competitors.

Judgment
The CFI found that the correct approach to this issue was to ask whether a refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right could, in itself, constitute an abuse of a dominant position. In answering this question, the CFI noted that although these circumstances would not normally give rise to a finding of abuse, there were exceptional circumstances where a refusal of licences might. In particular, the CFI focused on the circumstances where the refusal, relating to a product or service indispensable to the exercise of a particular activity on a neighbouring market, might exclude any effective competition on that neighbouring market. In some circumstances, the refusal may result in the prevention of a new product emerging for which there was potential consumer demand. In these specific circumstances, the CFI found that the applicant had not been able to refute convincingly the Commission's finding that the applicant fell within exceptional circumstances. The CFI found consequently that the fine imposed by the Commission, as well as the compliance mechanism, were reasonable and proportionate.

Link
Judgment

1.3 Reference in Département du Loiret v Commission (C-295/07)

Lodged 20 June 2007

State aid – Recovery of aid – Calculation method

Background
This case constitutes an appeal by the Commission against an earlier judgment by the CFI. The CFI had found in the contested judgment that the Commission, in adopting a decision against the respondent, erred in its calculation of the amount of money to be recovered from the respondent and, in particular, the interest rate used in its calculations. The Commission claims in its appeal that the CFI's judgment is based on a misreading of Community rules on State aid. It argues that its decision ordering the recovery of illegally granted aid contained a sufficiently reasoned, simple and mathematical calculation. Specifically, the Commission contests the CFI's finding that it was unclear what type of interest rate the Commission had used in its calculations. The Commission argues that it was at least implicit that it had used a compound rate of interest in its calculations.

Link
Reference

2 CRIMINAL LAW

2.1 Reference in Staatsanwaltschaft Regensburg v Klaus Bourquain (C-297/07)

Lodged 21 June 2007

Schengen Agreement – Ne bis in idem

Background
The German court asked the ECJ a question regarding the interpretation of Article 54 of the Convention implementing the 1985 Schengen Agreement on the gradual abolition of checks at the borders of Benelux, Germany and France. The referring court asks whether the prohibition against prosecuting someone for a crime for which he has already been tried and sentenced in other contracting state applies where the penalty imposed could never be enforced in the sentencing state. In other words could this constitute an exception from the *ne bis in idem* principle outlined in the Agreement.

Link
Reference

3 EMPLOYMENT

3.1 Judgment in Yolanda Del Cerro Alonso v Osakidetza Servicio Vasco de Salud (C-307/05)

13 September 2007, Second Chamber

Meaning of 'employment condition' – Fixed-term work – Principle of non-discrimination

Background
Introduced under Directive 99/70, the Framework Agreement on Fixed-term Work (Framework Agreement) is intended to ensure that fixed-term workers will not be treated differently to comparable permanent workers solely because of the fact that they are employed on a fixed-term contract. The applicant worked for over 12 years as an administrative assistant in various hospitals in the public health service – a position defined under national legislation as 'temporary regulated staff'. From July 2004 the applicant became employed as 'permanent regulated staff' and therefore became entitled to an extra allowance (paid for every three years of employment) as part of her remuneration. She applied to the health authority for retrospective inclusion of her previous 12 years' employment on a temporary regulated basis, but did not receive a response from the authority and brought proceedings in the national court. She claimed that the refusal to grant retroactively the economic benefits arising from the recognition of length of service constituted discrimination against 'temporary regulated staff' as compared to 'permanent regulated staff'. The national court referred several questions to the ECJ, asking primarily whether the concept of 'employment conditions' referred to in the Framework Agreement should be interpreted as meaning that it could be the basis for such a claim.

Judgment
The ECJ considered that the concept of 'employment conditions' could act as the basis for a claim which sought the grant to a fixed-term worker of a length-of-service

allowance that is reserved under national law solely to permanent staff. Additionally, the ECJ found that the Framework Agreement had to be interpreted as meaning that it precluded the introduction of a difference in treatment justified solely on the basis that it was provided for by statute or by a collective agreement.

Link
Judgment

3.2 Judgment in Jouini and others v Princess Personal Service GmbH ("PPS") (C-458/05)

13 September 2007, Fourth Chamber

Safeguarding of employees' rights – Transfer of undertakings – Concept of transfer – Temporary employment business

Background
Mr Jouini and the other plaintiffs were temporary workers, who had been employed by Mayer & Co GmbH ("Mayer") employment agency. At the beginning of 2002, the manager of Mayer and his wife set up a new business, Princess Personal Service GmbH ("PPS"). This was done at the request of a principal client of Mayer and in view of Mayer's financial difficulties. The new business was also a temporary employment agency and, in order to accommodate the needs of the client, PPS gave instructions to Mayer to transfer 40 employees assigned to that client. The workers' employment relationship with Mayer ended on 30 November 2002 and commenced with PPS on 1 December 2002. This did not result in any alteration of activity. PPS took on one third of Mayer's personnel in total before insolvency proceedings were commenced. An action was brought by Mr Jouini and 24 other employees against PPS for payment of unpaid salary and a declaration of a transfer of employment to PPS for the purpose of calculating claims. A reference was made and the question is whether the approach developed in relation to other transfer of undertakings can be applied in the same way to temporary employment business.

Judgment
The Court examined Article 1(1) of the Directive 2001/23 and the settled case law, and confirmed that the Directive will apply to a situation where part of the administrative staff and temporary workers are transferred from one temporary employment agency to another in order to carry out the same activities for the same clients. It must relate to a 'stable economic entity'. This will include an organised grouping of wage earners who are specifically and permanently assigned to a common task and assets enabling the exercise of an economic activity pursuing a specific objective. It applies to a temporary employment business and must take into account the special characteristics of the business. In this case, the Court held that the fact that the temporary workers are integrated into the structure of the client's business will not prevent it from finding that an economic entity has been transferred.

Link
Judgment

3.3 Opinion in Tadao Maruko v Versorgungsanstalt der deutschen Bühnen (C-267/06)

6 September 2007, Advocate General Dàmaso

Discrimination on the basis of sexual orientation – Refusal of pension rights to surviving partner of civil partnership

Background
Mr Maruko and his male partner had concluded a registered partnership agreement in 2001, as permitted by German law. On his partner's death, Mr Maruko attempted to claim a widower's pension from his partner's former employer. The award of the pension was refused as the company's statutes did not envisage the allocation of a survivor's pension to registered partners, but only to spouses. The German court held that as the company's statutes provided only for the award of a pension to people who were 'married' the company's refusal was justified.

Mr Maruko claimed discrimination contrary to Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. This, amongst other things, outlaws discrimination in employment on grounds of sexual orientation. The German Court of Appeal referred the issue of whether the pension constituted remuneration for the purposes of the Directive and whether the failure to award a pension in these circumstances constituted discrimination.

Opinion
The Advocate General considered, firstly, whether a pension arising out of employment but paid by a state organisation constituted 'remuneration' for the purposes of Directive 2000/78. Whilst the Directive contained no definition of 'remuneration', such a definition had been progressively established through the jurisprudence of the Court. It was possible therefore to define 'remuneration' as all benefits paid directly or indirectly by an employer to an employee by reason of his employment, including benefits paid after the cessation of the employment. Given that the pension was directly related to the remuneration received by the deceased in relation to his employment, it constituted 'remuneration' for the purposes of the Directive and not a social security allocation which would have been excluded.

Second, on the issue of discrimination, the Advocate General concluded that the refusal to allocate this pension because of the absence of marriage, where a partnership having substantially similar effects has been registered between persons of the same sex, constitutes indirect discrimination on grounds of sexual orientation which is prohibited by Directive 2000/78. In the opinion of the Advocate General in determining whether there had been discrimination in this case, it fell to the national court to determine whether the situation of spouses could be assimilated to that of partners in a registered partnership.

Link
Opinion

3.4 Opinion in Rechtsanwalt Dr Dirk Ruffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen (C-346/06)

20 September 2007, Advocate General Bot

Minimum wage – Collective agreement - Freedom to provide services

Background
A German public authority was involved in a dispute with a sub-contractor as part of a public works contract. The sub-contractor and authority disagreed after the defendant fell under suspicion of having paid some Polish workers at a lower wage

level than was set out in the collective agreement governing the works. That collective agreement provided that the defendant must pay the workers on the project the higher of the wages that may be applicable, depending on the Member State in which the workers were employed. The public authority terminated the contract and applied for the activation of a penalty clause requiring the sub-contractor to pay the Polish workers the amount that they had not been paid in comparison with German minimum wage levels. The defendant appealed against the decision of the local court, which found the applicant's argument to be well-founded. A reference from the German national court was sent on the question of whether the legislative requirement for the imposition of a clause in a public works contract, requiring the payment of workers at higher levels in certain Member States, constitutes a restriction on the Article 49 TEC freedom to provide services.

Opinion
The Advocate General accepted that there is the potential for a statutory condition such as the one in the present case to be seen as a restriction on freedom to provide services. However, he emphasised that the significant point when looking at this issue was that the public authority must comply with the principle of non-discrimination on the basis of nationality. As such it should make service providers subject to the same obligation to pay the minimum wages applicable at the place where the services are performed, whether they are established in Germany or another Member State. For the Advocate General, it was crucial that, in the context of the performance of this contract, local workers and posted workers should have been paid at the same rate. The Advocate General concluded that Article 49 TEC should not be interpreted as making unlawful any national legislation that requires contractors to pay workers posted under a public works contract the minimum wage that applies in the relevant Member State.

Link
Opinion

3.5 Reference in Kirtruna S L v Cristina Delgado Fernandez de Heredia and others (C-313/07)

Lodged 5 July 2007

Employers' insolvency – transfer of undertakings – transferred liabilities

Background
The Commercial Court in Barcelona has sent a number of questions to the ECJ on the interpretation of the Community rules on the transfer of undertakings (Directive 2001/23, the Acquired Rights Directive). In particular it asks the extent to which the employment-related liabilities of the insolvent transferor of a business are taken on by the transferee (acquiring business), such as for outstanding tax and social security debts. This is in the context of insolvency proceedings, which are said to offer employees a certain level of protection, apparently equivalent to the protection required by Community directives, and as such the transferee is guaranteed not to have to assume such debts.

Link
Preliminary reference

3.6 Reference in Ruben Andersen v Kommunernes Landsforening, acting on behalf of Slagelse Kommune (C-306/07)

Lodged 3 July 2007

Collective agreements – Temporary employment

Background
The ECJ is asked several questions by the Danish court, arising out of the interpretation of Article 8 of Council Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The referring court has asked the ECJ whether the provisions of a collective agreement can be applied to an employee who is not a member of an organisation that is party to the agreement. One other question posed by the Danish court is whether the term 'temporary', as used in the Directive, refers to a short-term relationship or all fixed-term employment relationships. If it applies to short-term contracts, what are the criteria for determining this.

Link
Reference

3.7 Reference in Svenska staten genom Tillsynsmyndigheten i konkurser v Anders Holmqvist (C-310/07)

Lodged 28 June 2007

Social policy – Protection of employees – Insolvent employer

Background
This reference from a Swedish court concerns the Directive on the protection of employees in the event of the insolvency of their employer (Directive 80/987). It asks whether, in order for a company to be regarded as having activities in the territory of a particular Member State, it is necessary for the company to have a subsidiary or a permanent place of business there. If the first question is answered in the affirmative, it asks what conditions are necessary in order to find that a company does have activity in several Member States. Finally, what criteria should be used in order to find which Member State is to be treated as the State where the company is based.

Link
Reference

4 FAMILY LAW

4.1 Opinion in Applicant C (C-435/06)

20 September 2007, Advocate General Kokott

Jurisdiction in child welfare – Foster care – Regulation 2201/2003 – Brussels IIa Regulation

Background
The Court is asked about the extent to which Regulation 2201/2003 ("Brussels IIa" on jurisdiction, recognition and enforcement of judgments in matrimonial and

parental responsibility matters) applies to the enforcement of public-law decisions relating to child welfare. In the case of "C" two children from a Finnish family were placed in immediate custody, according to a public law decision, with a foster family in Sweden. Special administrative arrangements exist between the Nordic states to facilitate such custodial arrangements. Mrs C challenged the action of the Finnish police. The Finnish court asks the ECJ to what extent the provisions of domestic legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody apply or are disapplied in favour of the Brussels IIa Regulation. This will then dictate the type of court in Finland that has jurisdiction to hear the case and the procedure to be followed.

Opinion
The Advocate General considered that the Regulation should apply to the custody decisions in this case, even though they are considered to be public law, as opposed to civil law, decisions in the Nordic Council. As such, national courts should not apply provisions of national law that are contrary to this Regulation.

Link
Opinion

5 INTELLECTUAL PROPERTY

5.1 Judgment in Merck Genericos – Produtos Farmaceuticos Ld v Merck & Co. Inc., Merck Sharp & Dohme Ld (C-431/05)

11 September 2007, Grand Chamber

Patents – Direct effect of TRIPS Agreement – Jurisdiction of ECJ

Background
This preliminary reference from the Portuguese Supreme Court seeks to ascertain the extent to which elements of the WTO's TRIPS Agreements (Trade-related intellectual property rights), in particular provisions relating to patent protection, can be applied by domestic courts. The case involves a medical product patented by Merck & Co and marketed in Portugal by Merck Sharp. The third company Merck Genéricos produced an inferior, generic version of the product and started to market it in Portugal. The first two companies brought an action against the latter seeking a prohibition against marketing products containing Enalapril – the protected chemical compound – without permission, and damages.

The case turned on whether the compound was still covered by patent protection. Although Portugal amended its legislation to increase the length of protection from 15 to 20 years, this was done after the expiration of the patent in question. The Portuguese courts asked therefore whether the provisions of the WTO TRIPS Agreement – providing for 20 years protection – have direct effect and can thus be relied on directly in the national court instead.

Judgment
The ECJ found that, as the Community and its Member States had jointly signed the TRIPS agreement, it did have jurisdiction to hear questions that related to the obligations the Community has assumed and that concern the interpretation of its TRIPS obligations – Article 33 in this particular case. The Court, however, went on to state that, the Community has not yet legislated in this field to such a significant degree that the question of patent legislation falls within Community competence. As

such it is up to each Member State to determine for itself whether the relevant articles of the TRIPS Agreement are to be given direct effect in the domestic legal order. The Court concludes that it would not be contrary to Community law for a Member State to grant such treatment to provisions of the TRIPS Agreement.

Link
Judgment

5.2 Judgment in Céline SARL v Céline SA (C-17/06)

11 September 2007, Grand Chamber

Trademark – Essential function – Trademark Directive

Background
A French company, Céline SA, raised proceedings in the French courts against Céline SARL, for infringement of its trademark. Céline SA argued that the other company's adoption of the word Céline as a trading name constituted a straightforward breach of its trademark and the French national court agreed. Céline SARL appealed against this decision arguing that a company name does not constitute use within the meaning of the Community's Trademark Directive (Directive 89/104), as it is only in use as the company name rather than in the actual supply of goods or services. Further, Céline SARL argued that there could be no risk of confusion for consumers between the two companies as Céline SARL dealt with menswear and womenswear while Céline SA was focused on the sale and supply of luxury items of clothing and accessories. The national court referred to the ECJ the question of whether one company's use of a name could amount to an infringement of the Trademark Directive.

Judgment
The ECJ followed the opinion of Advocate General Sharpston, finding that the issue of the adoption of a name should be viewed separately from any subsequent trading done by the company. It is only when a company's use of a name affects the essential function of the trademark that an infringement might arise. Actions affecting the essential function of a trademark include affixing the company's name to whatever goods are being marketed or some other use of the company's name in order to demonstrate a connection between the name used and the origin of the goods or services. The ECJ left it to the national court to decide whether the use by Céline SARL of the name 'Céline' meant that it was affecting the essential function of Céline SA's trademark.

Link
Judgment

6 IMMIGRATION

6.1 Opinion in Parliament v Council (C-133/06)

27 September 2007, Advocate General Maduro

Legislative powers – Delegation by Council – Refugee status

Background
The European Parliament applied to the ECJ for annulment of certain articles of Council Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status. The Directive allows the Council to adopt a minimum common list of "safe" third countries, for the purposes of granting asylum, by a qualified majority vote after consulting the Parliament. Such countries are determined by criteria set down in the Directive. In effect this Directive creates a new procedure for adopting secondary or implementing legislation. The Parliament challenges the ability of Council to create such new legal bases without a Treaty basis. There is also concern as to the extent to which the co-decision procedure should apply to measures being adopted in this field. The Amsterdam Treaty provided for a "passerelle", which was activated by Member States, meaning certain legislation in this field should henceforth be adopted according to the co-decision procedure.

Opinion
The Advocate General discussed at some length the various aspects of this challenge: the legislative or executive nature of the subsequent measures; the extent to which custom can be relied on as creating a legal precedent for the adoption of such measures; the legality of creating a "derived" legal base and so on. In the end, however, he concluded that the Council could not link its actions in adopting this measure sufficiently with the body of Community law that has developed. Accordingly, the Advocate General recommended that the relevant articles of the Directive be annulled.

Link
Opinion

7 TAX

7.1 Judgment in Teleos and Others v Commissioners of Customs and Excise (C-409/04)

27 September 2007, Third Chamber

VAT zero-rating – Free movement of goods – Definition of 'dispatched'

Background
A disputed VAT assessment had been heard before the Queen's Bench Division in May 2004. The claimants in the case had all supplied mobile phones to a company in Spain (TT) that was registered for VAT in Spain. The arrangement between the claimants and TT was that they would deliver the phones to a warehouse in the UK where the phones were put at the disposal of TT for onward delivery to another Member State, usually France. A few days after every sale, the claimants received a stamped confirmation that the phones had been successfully delivered to their destination. The claimants had been supplying the phones at zero-rate and, consequently, made a claim for the refund of input tax. The Commissioners found that the destination on the stamped confirmations was false and that the phones had not left the UK in the first place. During proceedings in the national court, a question arose as to whether the relevant Community VAT exemptions require that the goods be removed from the Member State from which they are supplied to the destination Member State, before the supplier is able to zero-rate the goods.

Judgment
The ECJ found that the term 'dispatched', used in several Community directives, must mean that the intra-Community acquisition of goods takes place when the right to dispose of the goods as owner has been transferred to the purchaser. It is also necessary for the supplier to establish that the goods have been dispatched or transported to another Member State and that they have, therefore, physically left the territory of the Member State. The ECJ then went on to set down the conditions under which the supplier, who had originally submitted evidence in good faith on his right to an exemption, could subsequently be required to account for the VAT if the evidence was false. The Directive precludes the national authorities from doing so if the supplier's involvement in the tax evasion has not been established and he took every reasonable measure to ensure that his supply of goods did not lead to participation in tax evasion. The fact the supplier made a declaration on the intra-Community acquisition to the authorities of the Member State of destination is not sufficient to constitute conclusive proof for the purposes of the VAT exemption.

Link
Judgment

7.2 Opinion in Skatteverket v A (C-101/05)

11 September 2007, Advocate General Bot

Taxation – Distribution of dividends – Shares in subsidiary – Non-EU companies

Background
This case referred from the courts in Sweden seeks to ascertain whether the EC Treaty provisions on the free movement of capital (Article 56 TEC) apply in the same way to movements of capital to and from third countries as they do to movements between Member States – as is implied by the wording of the Article. A Swiss company distributed dividends to its shareholders in the form of an issue of shares in one of its subsidiary companies. The Swedish legislation provided for an exemption from income tax for such distributions, which were subject to certain conditions. One condition was that the company distributing the profit should be situated in a Member State of the EEA (European Economic Area) or in a country with which Sweden had a taxation agreement providing for information exchanges. Switzerland falls into neither category. It was claimed that this condition constituted a barrier to the free movement of capital and was thus contrary to Article 56 TEC. The Court has been asked to ascertain whether such a restriction was permissible under the Treaty rules.

Opinion
While the Advocate General agreed that the Swedish rule did constitute a restriction to the free movement of capital that was contrary to the EC Treaty provisions, it was considered that these could be justified. As such it was thought that such conditions were objectively justified in order to ensure the effectiveness of fiscal controls. This was because the conditions imposed (on information exchange) could not be satisfied by the Swedish authorities acting on their own and it was necessary for the effectiveness of the tax systems to have such information, which was only held by the authorities of the country in which the company was established.

Link
Opinion

8 TELECOMMUNICATIONS

8.1 Opinion in Centro Europa 7 Srl v Ente Tabacchi Italliani – ETI SpA e.a. (C-380/05)

12 September 2007, Advocate General Poiares Maduro

Media ownership – Plurality of ownership – Free movement – Non-discrimination

Background
In Italy a law was adopted in 1997 that introduced new restrictions on concentration in the media market with a view to ensuring competition and pluralism, particularly in relation to national broadcast television. Under the law, no operator was allowed to control more than 20% of national broadcast channels. A public tender process was held to encourage companies to apply for and run licences on the channels that were not publicly-owned. Centro was successful in the tender process and was told that it would receive its specific allocation of radio frequencies once a national allocation plan was settled. This plan never materialised and, in the meantime, many of the incumbent operators were able to continue broadcasting – some of whom had been unsuccessful applicants in the tender procedure. Centro entered into legal proceedings to contest the state's failure to formulate and implement its national allocation plan. The national court referred several questions to the ECJ, centred on the question of whether Community law dictates that a Member State must ensure plurality its national media sector.

Opinion
The Advocate General found that while Member States are not obliged to privatise particular sectors of their media markets, they are not permitted under the terms of the EC Treaty to curtail selectively the access of market operators once sectors of the market have been privatised. National measures aimed at restricting the number of operators in a particular market sector are liable to restrict free movement and it is only in certain defined circumstances where such a restriction can be justified – chiefly on public policy grounds where, for example, it is necessary in order to reduce the risk of harmful radio interference. Article 49 TEC requires Member States to comply with the principle of non-discrimination. The Advocate General was of the opinion that the national courts must closely scrutinise the reasons given for the delay in allocation of frequencies to an operator. He did not see any justification for the continuation of a situation where a new media entrant's rights are rendered useless in the face of the entrenched rights of incumbent operators.

Link
Opinion

8.2 Reference in Radiotelevisione italiana SpA (RAI) v PTV Programmazioni Televisive SpA (C-305/07)

Lodged 2 July 2007

State aid – Television licence fee

Background
In this preliminary reference, the Italian court asks the ECJ whether a licence fee imposed on all owners of televisions and radios constitutes State aid within the meaning of Article 87 TEC. If so, the reference goes on to ask about the

compatibility with this finding of a previous Commission decision that examined the RAI licence fee, also in connection with Article 86(2) on services of general economic interest. Finally the court asks whether Article 86 TEC permits a rule that allows regional public authorities to impose additional, subsidised public service tasks on RAI without having to carry out a separate tendering procedure.

Link
Reference

9 TRANSPORT

9.1 Opinion in Eivind F Kramme v SAS Scandinavian Airlines Danmark A/S (C-396/06)

27 September 2007, Advocate General Sharpston

Air transport – Cancellation of flight – Compensation for passengers

Background
In February 2005 SAS, the defendant, cancelled a flight from Paris to Copenhagen. Mr Kramme, the applicant, was booked on that flight, but had to spend a night in Paris and return to Denmark the following day. He claimed against SAS for himself and three fellow passengers the expenses incurred as a result of the cancellation and compensation in accordance with the Regulation 261/2004 on compensation of air passengers. SAS agreed to pay for the applicant's expenses, but refused to pay compensation. It claimed that the cancellation was the result of technical problems with the aircraft, which constituted extraordinary circumstances within the meaning of the Regulation and that therefore there was no entitlement to compensation. On the contrary, the applicant claimed that the defendant cancelled the Paris-Copenhagen flight for commercial reasons and that technical problems do not fall within the scope of the definition of 'extraordinary circumstances'. The national court referred the question of whether technical problems come within that definition.

Opinion
The Advocate General concluded from these proceedings that in order for an air carrier to be able to use the 'extraordinary circumstances' exception so that it can avoid paying compensation, the aircraft must have been removed from operation because the technical problems could not have been avoided even if all reasonable measures were taken. 'Reasonable measures' include proper compliance with the schedule of maintenance and every reasonable effort to fix the problem without withdrawing the aircraft from service. Importantly, the Advocate General is of the opinion that in order for a technical problem to be considered extraordinary within the meaning of the Regulation, it must not be a problem of a kind typically occurring from time to time on all aircraft. The Advocate General left the assessment of whether these particular circumstances fall within the scope of the extraordinary circumstances exception to the national court.

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		17 September 2007
Constitutional				
Community competence in criminal law matters	Commission v Council C-440/05		28 June 2007	23 October 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		10 July 2007	
Discrimination on grounds of disability	S. Coleman v Attridge Law, Steve Law C-303/06	9 October 2007		
Employee rights in transfer of undertaking	Jouini and Others C-458/05		22 March 2007	13 September 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	16 October 2007
Social security for migrant workers	Derouin C-103/06	7 March 2007	18 October 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		20 September 2007	
Taxation				

Contributions to occupation pension scheme	Commission v Belgium C-522/04		3 October 2006	5 July 2007
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