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The Brussels Office Update Series:

Developments from the European Court of Justice

October 2007

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INTRODUCTION

October – News from the EU Courts

In *Palacios de la Villa* (C-411/05) the Court of Justice considered the legality of Spanish employment legislation that allows the imposition on Spanish workers of compulsory retirement. The Court found that national legislation allowing enforced retirement at a set age can be justified if it is adopted in the context of trying to improve national economic and labour market conditions.

The Court of Justice released a long-awaited judgment on 23 October - *Commission v Germany* (C-112/05). The Court found that the German "Volkswagen Law", limiting the ability of foreign investors to gain voting rights on Volkswagen's board, was in breach of the Community principles of free movement of capital, although not in breach of freedom of establishment rules.

One further keenly-anticipated judgment was released by the Court on 23 October 2007 – *Commission v Council* (C-440/05) – the "ship-source pollution" case. The Court concluded that there is an implied Community law competence to adopt criminal law measures when that is considered essential in order to combat serious environmental crimes, but, importantly, the Court found that the Community does not have the power to set the level and type of penalties that should be imposed.

Coming up

On 15 November the Court is due to give its judgment in *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* (C-404/06). This case looks at the extent to which a consumer can be held liable to compensate a seller for the use of goods, which have been subsequently replaced because they did not meet the terms of the contract but were used nevertheless.

The Court is due to hold a hearing on 20 November in *Stringer v HMRC* (C-520/06), a case dealing with indefinite sick leave. It examines whether, on termination of a contract, Member States can allow entitlement to a payment in lieu of outstanding annual leave to be waived when the employee in question has been absent on sick leave for a significant part of the preceding year.

Case tracker

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

1 AUDIOVISUAL

1.1 Judgment in Kommunikationsbehorde Austria (KommAustria) v Osterreichischer Rundfunk (ORF) (Case C-195/06)

18 October 2007, Fourth Chamber

Freedom to provide services – Television broadcasting – Teleshopping and advertising

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

Judgment
The Court decided to leave it to the national court decide on the facts of the case but set criteria by which the determination could be made. It highlighted the importance of the motivation of the broadcasters organising such competitions. The Court found that in order to constitute teleshopping the broadcast in question had to constitute a real offer of services i.e. it constituted an actual economic activity in its own right. Account had to be taken of the purpose of the broadcast, the significance of the game within the broadcast as a whole, the economic effects and benefits of it and the type of questions asked. On the other hand the game could be classified as advertising if its purpose is to promote the broadcaster's programmes, such as by using derivate goods of programmes as prizes, or it encourages viewers to buy the goods and services presented as prizes.

Link
Judgment

2 CIVIL JUSTICE

2.1 Judgment in Freeport plc v Olle Arnoldsson (C-98/06)

11 October 2007, Third Chamber

Special jurisdiction – Multiple defendants – Legal base of actions - Abuse

Background
Mr Arnoldssen seeks the payment of a commission, in connection with the construction of a shopping centre project on a site in Sweden. Freeport AB, a Swedish company own the site; Freeport AB is in turn owned 100% by Freeport PLC, a UK company. Mr Arnoldssen is suing both Freeport AB and Freeport PLC, invoking Article 6(1) of Regulation 44/2001 (Brussels I). This allows 'connected'

claims to be tried together, where the connection is 'of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.' Freeport PLC claims there is no risk of irreconcilable judgments, and suggests that suing Freeport AB is an abusive exercise of Article 6(1), to enable him to sue Freeport PLC in a Swedish court. The Högsta Domstolen (Supreme Court) in Sweden has asked the ECJ to determine whether Article 6(1) of Brussels I can apply. In particular, the Court is asked to determine whether there is an implied condition in 6(1), which would preclude jurisdiction where a defendant is sued purely for the purpose of bringing the matter into a court other than the court which would normally have jurisdiction.

Judgment
The Court held that Article 6(1) of Regulation 44/2001 is to be interpreted as meaning that the fact that claims brought against a number of defendants are different in nature (contractual or tortious) does not in itself preclude application of that provision. The Court also ruled that Article 6(1) applies where claims brought against different defendants are connected and where it is expedient to hear and determine proceedings together to avoid the risk of irreconcilable judgments resulting from separate proceedings. It is not necessary to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

Link
Judgment

2.2 Judgment in Rampion and Godard v Franfinance SA and K par K SAS (C-429/05)

4 October 2007, First Chamber

Consumer credit – Right of consumer to pursue remedies – Credit facility used on multiple occasions

Background
Mr and Mrs Rampion entered into a contract with K par K SAS (KpK) for the purchase of windows, following a visit from a door-to-door salesperson. The contract indicated that the purchase was to be financed entirely by means of a credit agreement granted by Franfinance SA (Franfinance). The claimants entered into an arrangement with Franfinance for a credit facility, with a credit limit equal to the sale price. Upon delivery, the windows were found to be defective and the work went unfinished. The claimants repudiated the contract by letter of 5 January 2004. Proceedings were brought before the French Court against Franfinance and KpK seeking a declaration that the contract of sale was void, and a termination of the credit agreement. This was either on the ground that the contract of sale did not indicate precisely the deadline for delivery, in contravention of the French Consumer Code or on the grounds of failure by KpK to fulfil its obligation to give advice. The defendants claimed that as the credit agreement did not indicate the goods being financed, the credit agreement was not connected, or interdependent, to the contract of sale for the purposes of allowing remedies to be sought against the creditor, as provided for in Directive 87/102 concerning consumer credit.

Judgment
In response to the first question, the Court held that Articles 11 and 14 of Directive 87/102 must be interpreted as meaning that the right to pursue remedies against the creditor may not be subject to the condition that the prior offer of credit must indicate

the goods and services being financed. It found the Directive to have a wide scope and ruled that Article 11 will apply to both credit designed to finance a single transaction and a credit facility for use on a number of occasions. Secondly, it was held that national courts should be able to apply the provisions implementing this Directive, and the associated remedies, of their own volition.

Link
Judgment

3 COMPANY LAW

3.1 Judgment in Commission v Germany (Case C-112/05)

23 October 2007, Grand Chamber

Free movement of capital – Shareholdings – Controlling shares

Background
In July 1960, the German federal government introduced a law (the Volkswagen Law) that made it impossible for a Volkswagen shareholder with a holding in excess of 20 per cent to have voting rights above 20 per cent. Alongside this provision, the Volkswagen Law also provided that 80 per cent of the shareholding was required to pass general shareholder resolutions, which normally require 75 per cent. Last of all, the law entitled both the federal and state governments (Lower Saxony) to appoint two representatives each to Volkswagen's board as long as they held shares. Lower Saxony continues to hold approximately a 20 per cent stake in the company, thus giving it a blocking minority. In 2005 the Commission challenged the legality of the Volkswagen Law, arguing that it adversely affected the free movement of capital and freedom of establishment rules.

Judgment
In its judgment the Court emphasised that any restrictions on the free movement of capital between Member States, whether direct or indirect, were prohibited under the terms of the EC Treaty. The Court pointed out that any national legislation that is liable to deter direct investments from other Member States will constitute a serious restriction on the free movement of capital, particularly if it limits the possibility of shareholders participating in a company with a view to exercising some form of management of that company. As regards the capping of voting rights at 20 per cent and the fixing of a blocking minority at 20 per cent, the court found that the net effect of these provisions was to deter direct investors from other Member States, particularly given that the Land of Lower Saxony and, originally, the federal government held significant shareholdings in Volkswagen. Crucially, the Court concluded that Germany had been unable to provide any relevant justification for the law, neither in terms of the protection of workers or in terms of the prevention of domination of Volkswagen by a single shareholder.

Link
Judgment

4 COMPETITION

4.1 Judgment in Pergan Hilfsstoffe fur industrielle Prozesse GmbH v Commission (T-474/04)

12 October 2007, Court of First Instance, Third Chamber

Article 81 TEC – Professional secrecy - Confidentiality

Background
The Commission began an investigation into a suspected cartel in the organic peroxides sector in 2002. In March 2003 the Commission embarked on formal proceedings, notifying several operators in the market, including the applicant, that it believed that they had been engaged in unlawful and anti-competitive conduct. In December 2003, the Commission notified the applicant that it intended to close proceedings against it, while continuing with proceedings against the remaining suspected cartelists. In 2004 the Commission informed the applicant that it intended to publish a non-confidential version of its infringement decision, including some references to the applicant's suspected involvement in cartel activities. After several rounds of correspondence, the applicant succeeded in having certain references to it removed from the Commission's decision, but the Commission hearing officer refused to remove all references. He believed that the test for excluding information – the business secrets test – was not met in this case. He noted that the Commission did not believe that including references to the applicant in the published decision would cause sufficient damage or harm to the applicant's commercial interests to merit excluding the references.

Judgment
The Court discussed the scope of the obligations of professional secrecy and the extent to which these should be interpreted in light of the principle of the presumption of innocence. Pergan's involvement in a cartel was implied in the recitals of the decision, but there was no finding of an infringement against it and it was not an addressee of the decision. This meant that Pergan was not able to challenge the substance of the decision in question as one of its addressees. Pergan had brought proceedings to challenge the decision because of the rejection of its application for complete confidentiality. The Court found that the publication of the decision could result in a breach of the right to the presumption of innocence. Since Pergan had no standing to challenge the Commission's finding of infringement, the Court found that it was unfair and unreasonable that the Commission could proceed with the publication of its decision, which could harm severely the dignity and standing of the applicant. In this context, the Court found that the Commission's decision to reject the applicant's appeal for confidentiality was unlawful and it annulled the Commission's decision.

Link
Judgment

5.2 Reference in National Association of Licensed Opencast Operators v Commission (T-318/07)

Lodged 28 August 2007

State aid – Price discrimination – Energy supply

Background
The applicant made a complaint to the Commission in 1990 that the UK's Central Electricity Generating Board (CEGB) paid lower prices for coal to members of the applicant's association than to members of the British Coal Corporation (BCC) for no objective reason. The Commission dismissed this complaint at the time, saying that although it accepted there was a difference in the price paid, it found that members of the applicant's association did not supply coal to the CEGB under comparable conditions to the BCC. This reference arises from the applicant alleging that the Commission did not demonstrate sufficient evidence to support its decision. Additionally, the applicant has alleged that higher payments to the BCC constituted illegal State aid as the CEGB was a state-owned enterprise operating under strict statutory terms.

Link
Reference

6 CRIMINAL LAW

6.1 Judgment in Commission v Council (Case C-440/05)

23 October 2007, Grand Chamber

Ship-source pollution – Criminal law measures – Community's competence

Background
In 2005, in the wake of the Prestige disaster, the Council of Ministers adopted a Framework Decision on ship-source pollution. This measure complemented a Directive on the same subject and specified that certain conduct outlawed by the Directive should be treated as criminal conduct and should be punishable by certain sanctions, also set down in the Framework Decision. Following its adoption, the European Commission challenged the validity of the measure. It disputed the legal base of the measure – the EU Treaty's provisions on police and judicial cooperation - and claimed that such provisions should have correctly been adopted in a Directive, with a legal base of Article 80 TEC on common transport policy.

Judgment
The Court confirmed its previous ruling in *Commission v Council* (C-176/03) in which it annulled the Framework Decision 2003/80 on environmental crime and clarified the scope of the Community's criminal law competence. It stated that there is an implied Community competence to adopt criminal law measures when "the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences" (paragraph 66). It is unclear whether this paragraph of the ruling 1) limits the Community's criminal law competence to measures whose objective is combating serious environmental offences or 2) whether the Court is simply stating that because the measure pursues one of the Community's objectives (protection of the environment) there exists competence to adopt criminal law measures.

The Court held that Articles 2, 3 and 5 of the Framework Decision were essentially aimed at improving maritime safety / environmental protection, and as such could have been adopted under Article 80 TEC on maritime policy. Article 2 specifies what conduct is to be deemed criminal, Article 3 includes aiding, abetting and inciting and Article 5 specifies the liability of legal persons. The Court states specifically at paragraph 70, however, that "by contrast, and contrary to the submission of the

Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence". As such it states that the Community may not adopt provisions, such as found in Articles 4 and 6 of the Framework Decision, on the type and level of the applicable criminal penalties. Such provisions should correctly to be adopted under Article 47 TEU. The Court did not comment on the remainder of the articles, which it said were inextricably linked to those already discussed. The Court annulled the Framework Decision in its entirety given the errors in legal base in relation to Articles 2, 3 and 5.

Link
Judgment

7 EMPLOYMENT

7.1 Judgment in Nadine Paquay v Société d'architectes Hoet et Minne SPRL (Case C-460/06)

11 October 2007, Third Chamber

Maternity leave – Protection of pregnant women – Notification of dismissal

Background
The applicant in this case was an employee with the respondent firm of architects. In September 1995 she left work on maternity leave. Under Belgian law a pregnant woman is entitled to the protection of her employment from the beginning of pregnancy until the end of maternity leave. Three weeks after the end of her statutory protection period the applicant received notification that her employer intended to dismiss her, giving her a six-month notice period. During the protected period, her employer had placed an advertisement in a newspaper that asked for applications for the applicant's position – to cover the maternity leave period, but also offering 'career prospects'. The Belgian court took this to be equal to an offer of permanent employment, and referred the question of whether Directive 92/85 on the protection of pregnant workers meant that an employer was only bound not to dismiss a worker during the protection period, or whether it meant that no steps could be taken in relation to the decision to dismiss before the expiry of the protection period.

Judgment
The Court noted that the Directive prohibits an employer deciding to replace a pregnant worker or a worker who has recently given birth on the grounds of her condition. As such, from the moment the employer first has knowledge of the pregnancy, any concrete steps taken with a view to finding a replacement are to be taken as pursuing this objective. Any employer doing this has, according to the Court, effectively dismissed the worker on the grounds of her pregnancy and has acted unlawfully.

Link
Judgment

7.2 Judgment in Félix Palacios de la Villa v Cortefiel Servicios SA (Case C-411/05)

16 October 2007, Grand Chamber

Termination of employment contract – Compulsory retirement age

Background
The applicant in this case had worked for a Spanish company, Cortefiel, for twenty-four years when, in 2005, the company notified him of the termination of his contract. The reason given for the notification was that the applicant had reached the compulsory retirement age of 65. The Spanish legislation made compulsory retirement clauses in collective agreements lawful. The applicant brought an action before the Spanish courts arguing that he had been unlawfully dismissed. The Spanish court referred a number of questions, asking primarily whether the Spanish legislation constituted unlawful discrimination as set out in Directive 2000/78 (on equal treatment in employment and occupation).

Judgment
The Court began by examining whether the Spanish legislation could be considered to be *prima facie* discriminatory. Given that the legislation allows for the termination of employment contracts on the basis of someone's age, the Court found that the national legislation allows less favourable treatment for workers who have reached the relevant age. It is therefore discriminatory in principle. The Court then examined whether there were any objective and reasonable justifications for the adoption and implementation of the Spanish legislation. In particular, the Court took note of the Spanish Government's intention to manage the labour market and boost employment through the adoption of this legislation. The Court described this as being, in principle, an objective and reasonable justification for the imposition of compulsory retirement. Although the legislation clearly affects people when they reach a certain age, the Court found that the legislation takes account of the fact that the individuals affected are entitled to financial compensation by way of a retirement pension. When viewed overall, the Court reached the conclusion that the national legislation was not incompatible with the Directive on equal treatment.

Link
Judgment

7.3 Reference in Turgay Semen v Deutsche Tamoil GmbH (Case C-348/07)

Lodged 30 July 2007

Agency – Commercial agency contract – Termination of employment

Background
In this reference, the referring German court has asked the ECJ whether it is compatible with Community law for a limitation to be placed on the indemnity to which a commercial agent is entitled according to the amount of commission lost as a result of the termination of the agent's contract, even though the principal employer continues to derive benefits of a higher monetary value.

Link
Reference

8 FREE MOVEMENT OF GOODS

8.1 Judgment in Commission v Sweden (Case C-186/06)

4 October 2007, Sixth Chamber

Free movement of goods – Alcohol imports – Public health justification

Background
The Swedish Government, under the terms of a law passed on alcohol in 2000, imposed a restriction on the importation of alcoholic drinks by private, independent operators. Importations of alcohol into Sweden are controlled by the state monopoly and only certain approved operators can import alcohol. In 2002 the Commission notified the Swedish authorities of its decision that such a restriction constituted an unlawful infringement of the Article 28 TEC right to free movement of goods. Sweden argued that while there might be a *prima facie* case of restriction of free movement, any restriction was justified on public health grounds, in accordance with the exceptions set out in Article 30 TEC. The Commission argued that the issue of whether there is a monopoly is separate to that of whether there can be private imports. It claimed there was no justification on public health grounds or on any other grounds for the quantitative restrictions put in place by the Swedish authorities.

Judgment
The ECJ found that the measure adopted by the Swedish Government in pursuit of public health grounds was disproportionate to the problem that it sought to address. The Court accepted that the measure was intended to assist in combating problems connected with consumption of alcohol by teenagers, but found that the restriction on private imports of alcohol went beyond what might have been a proportionate response to this problem. As such, the measure in question constituted a quantitative restriction in terms of Article 28 TEC and no justification in terms of Article 30 TEC or otherwise was applicable.

Link
Judgment

9 FREE MOVEMENT OF PERSONS

9.1 Judgment in Rhiannon Morgan v Bezirksregierung Koln; and Iris Bucher v Landrat des Kreises Duren (Joint Cases C-11/06 and C-12/06)

23 October 2007, Grand Chamber

Citizenship of the Union – Refusal to award education grant – Nationality and residency requirements

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

Judgment
The Court found that the answer to the question common to both sets of proceedings was that Articles 17 and 18 TEC preclude a condition in accordance with which, in order to obtain an education or training grant for studies in another Member State, those studies must include at least one year's study in the Member State of origin or stipulate the place of residence of those students, as specified in the German rules.

Link
Judgment

9.2 Judgment in Commission v Parliament and Council (C-299/05)

18 October 2007, Second Chamber

Social security – Special non-contributory benefits

Background
Regulation 1408/71 concerns the coordination of social security schemes to employed persons, self-employed persons and members of their families moving within the Community. The Commission had proposed an amendment to this Regulation to modernise it and bring it in line with ECJ case law. The proposal from the Commission aimed to remove certain benefits from the list of "special non-contributory cash benefits". When a benefit is classed as such, Member States can restrict its grant to those who are resident in that Member State. During the adoption process, the Council and Parliament reinstated a number of benefits into this list and the Commission has brought an action before the Court seeking to annul those specific provisions. These benefits are: Finnish child care allowance; Swedish care allowance for disabled children; and the UK disability living allowance (DLA), attendance allowance (AA) and carer's allowance (CA).

Judgment
In line with a series of case law, the Court held that the Swedish and Finnish allowances were not "special non-contributory benefits". They also found that the UK DLA, AA and CA are not "special non-contributory cash benefits". They found all of them to be sickness benefits. The Court did note, however, that in relation to UK DLA there was a distinct "mobility" element to it, which could be classed legitimately as a special non-contributory benefit. The UK would, however, have to create a separate allowance concerning that component in order that it could be classified as such. Accordingly, the Court annulled the relevant provisions.

Link
Judgment

10 PUBLIC PROCUREMENT

10.1 Order in Consorzio Elisoccorso San Raffaele v Elilombarda Srl, Azienda Ospedaliera Ospedale Niguarda Ca' Granda de Milano (C-492/06)

4 October 2007, Sixth Chamber

Public procurement – Remedies – Standing of individual members of tendering organisation

Background
This preliminary reference concerns a dispute in Italy over a public procurement procedure and the application of the public procurement Remedies Directive (89/655). A tender for the operation of a helicopter emergency service was published in 2004 and two offers were made. Consorzio made one and Elilombarda made the other, as the "lead party" (*chef de file*) of an association with Helitalia SpA that was still being formalised and as such had no legal personality. The decision to award Consorzio the contract was notified on 10 May 2005 and Elilombarda challenged the award. Consorzio challenged whether Elilombarda had standing to bring such a claim, arguing that only the association, formed with Helitalia, could itself mount a challenge. In its preliminary reference the Italian court notes that the national legislation and case law provides that individual members of such an association are entitled to bring such a claim. It asks, however, whether Article 1 of the Directive should be interpreted as precluding such an action, in light of the Court's ruling in *Espace Trianon et Sofibail* (C-129/04).

Order
According to the Court's rules of procedure (Article 104), where the answer to a preliminary reference is clear from the Court's jurisprudence, it can make a reasoned order. The Court reiterated that the Directive sets only minimum standards as to those who should be entitled to seek remedies and what remedies should be available. In the *Espace Trianon et Sofibail* case it found simply that a national requirement that all the members of an association, which did not have its own legal personality, bring the action to challenge an award of a public contract was not contrary to the Directive. Nothing in the legislation or in the Court's case law precludes Member States from allowing individual members of such an association to bring an action challenging the award of a public contract. In as far as no such provisions of Community law exist, it is for Member States to determine the extent of rights of standing.

Link
Order

10.2 Opinion in Commission v Portugal (Case C-70/06)

9 October 2007, Opinion of Advocate General Mazak

Infringement action – Remedies – Fault requirement

Background
In November 2004 the Commission sent a letter to the Portuguese authorities indicating that it believed that Portugal had failed to implement the terms of Directive 89/665 on the award of remedies in the case of a failure of an authority to comply with public procurement rules (Remedies Directive). Portuguese legislation had the effect of requiring anyone wishing to make a claim against a contracting authority to prove some sort of fault or wilful misconduct on the part of the authority. The Commission took the view the Portuguese legislation did not comply with the terms of the Remedies Directive and that the national legislation would therefore have to be altered.

Opinion
In his Opinion, Advocate General Mazak noted that the Portuguese Parliament had made some effort to remove the legislative provision that had given rise to Portugal's breach of Community law. At the time of the Commission's referral, however, the repeal of the Portuguese law had still not taken effect. Advocate General Mazak

noted that providing parties with a right of redress against contracting authorities is a fundamental part of Community law. Having found Portugal to be in breach, the Advocate General reached the opinion that a penalty of almost 20,000 euro should be imposed daily (and retrospectively) until Portugal complies with the terms of the Remedies Directive.

Link
Opinion

11 TAX

11.1 Judgment in Européene et Luxembourgeouise d'investissements SA (ELISA) v Directeur général des impôts, Ministère public (C-451/05)

11 October 2007, Fourth Chamber

Holding company – Tax on French property – Tax avoidance – Arbitrary refusal of exemption

Background
ELISA is a holding company established in Luxembourg and as such is exempt from income, withholding and other local taxes there. It owned immovable property in France, which was taxed according to its value, and had submitted the necessary tax returns for it but had failed to pay the tax owed. Before the French courts, ELISA claimed the tax was contrary to EC Treaty provisions on freedom of establishment and the free movement of capital, as legal persons with their effective centre of management in France were eligible for exemption from the disputed tax. Those covered by a tax convention were also exempted. The purpose of the tax was apparently to combat tax evasion by those who had set up foreign holding companies to own properties in France. A number of questions were sent to the Court on the applicability of Treaty principles, of Directive 77/799 on mutual assistance in the field of taxation and of non-discrimination clauses found in bilateral tax conventions. The Franco-Luxembourg tax convention states that its provisions do not apply to holding companies.

Judgment
The Court held that the tax in question was a tax on capital similar to those covered by Directive 77/799. It also held however that Article 8(1) of the Directive applied, as Luxembourg law did not allow its own authorities to request information from holding companies for tax purposes. Therefore Luxembourg was not obliged to provide similar information on a company's ownership and shareholding to another Member State under the provisions of the Directive. The Court continued, however, that there was nothing to stop the French authorities requesting the necessary evidence from the company itself before ruling on the eligibility for exemption. While combating tax evasion was a legitimate objective, the arbitrary refusal of exemption for companies from Luxembourg was considered by the Court to be unnecessarily restrictive. As such it was not justified as a restriction on the free movement of capital.

Link
Judgment

11.2 Judgment in Maria Guerts, Dennis Vogten v Administratie van de BTW, Belgian State (C-464/05)

25 October 2007, Fourth Chamber

Inheritance tax – Exemption of shares in family companies – Regional tax policies

Background
The claimants are heirs (wife and son) of the deceased Joseph Vogten who died on 3 January 2003. He had been resident in the Flemish region of Belgium for 13 years and owned jointly with his wife all the shares in a Dutch company, which held 100% of the shares in Vogten Staal BV. Both companies had employees in the Netherlands. On 4 August 2003 the claimants paid inheritance tax in order to avoid fines under Belgian inheritance law, despite contesting the amount of inheritance tax they were charged. Flemish regional law allows a zero rate of tax in respect of family-owned companies but only on production of a certificate to the effect that the company has employed at least five workers in Flanders for the previous three years. The claimants allege that the requirements of the legislation constitute an infringement of Articles 43 and 56 TEC on the freedom of establishment and free movement of capital.

Judgment
The Court concurred with the conclusion of the Advocate General that the Belgian rule constituted a violation of Article 43 TEC. As such this precludes such a provision that restricts an exemption to companies having employees in that region. The Court held that the rule could neither be justified by the need to protect the survival of small business businesses nor by the need to maintain the effectiveness of fiscal supervision.

Link
Judgment

11.3 Judgment in Fortum Project Finance SA (C-240/06)

25 October 2007, First Chamber

Exchange of shares – Capital transfer tax – Prohibition on double taxation

Background
This case referred by the Finnish courts concerns the application by the Finnish tax authorities of a capital transfer tax to share transfers within the Fortum group of companies. Fortum Project Finance (FPF) is a Luxembourgish company and Fortum Oyi (Fortum) and Fortyum Heat and Gas Oy (FHG) are Finnish companies. Fortum transferred its entire holding in FHG to FPF. In exchange FPF made an issue of new shares of an equivalent value to Fortum. Thereafter FPF was liable to capital duty of 1% in Luxembourg on the capital acquired and the Finnish authorities decided that FPF would be liable to pay a 1.6% capital transfer tax on the value of the shares in FPF it received as consideration. It was disputed to what extent this would constitute double taxation, contrary to Article 56 TEC on the free movement of capital, and to what extent Directive 69/335, which harmonises rules on the charging of capital duty, applies to shares transferred as contribution to a capital company which gives new shares of its own as consideration.

Judgment
The Court stated initially that there was no question concerning the application of Article 56 TEC as the national rules applied equally to domestic transfers of shares. The Court concluded that the transfer in question was covered by the Directive. Articles 12(1)(c) of the Directive did not apply to the charging of such a duty in the circumstance outlined, as the more specific provision of Article 12(1)(a) on the transfer of securities did. According to the Court's decision in *Codan* (C-236/97), this provision of the Directive allows a duty to be charged in the event of a transfer of shares, in addition to the capital duty applicable as a result of the increase in share capital. As such the Court found that the Finnish duty was permissible.

Link
Judgment

11.4 Opinion in Philippe Derouin v Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris – Région parisienne (Urssaf) (Case C-103/06)

18 October 2007, Advocate General Mengozzi

Regulation 1408/71 – Social security – Calculation of general social contribution – Exclusion of income from another Member State

Background
This case concerns a lawyer based in Paris and subject to French social security. The French social security authorities had asserted that they should take account of income generated in the UK for the purposes of levying social security contributions. The applicant in the case has argued that the contributions under discussion (general social contributions and social debt repayment contributions) are in fact taxes rather than social security. The UK/France Taxation Convention of 1968 makes provision against the double imposition of income tax. As tax has already been paid in the UK on the UK income, he claims that it should not be taxed again. The Social Security Tribunal in Paris asks whether Regulation 1408/71 (on the application of social security schemes) prohibits that such a taxation convention exclude the inclusion of the UK income from the basis upon which the general social contribution and social debt repayment contribution levied in France is assessed.

Opinion
The Advocate General, in his Opinion, concluded that under the terms of Regulation 1408/71, the French social security authorities were entitled to take social security contributions from the earnings of a self-employed person, even where that involves income that is earned in a Member State other than France.

Link
Opinion

11.5 Opinion in Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg (C-281/06)

10 October 2007, Advocate General Poiares Maduro

Income tax – Deductions – Expense allowance from second Member State

Background
Mr Jundt is a German lawyer, resident and working in Germany. He accepted to teach at the University of Strasbourg for 16 hours and was paid a fee of 5,760 French Francs. French social security contributions were deducted and then the German tax authorities calculated income tax on the gross amount. He objected to this deduction, citing a provision in German law that exempts certain expense allowance payments made in respect of part-time work as an educator in a public institution. He later appealed against a finding of the German Finance Court in favour of the Tax Office, claiming discrimination under Article 59 TEC (freedom to provide services) because the authorities were treating activities done for public institutions in another Member State differently.

Opinion
The Advocate General considered first that the service provided by Mr Jundt did fall within the scope of Article 59 TEC, as an element of profit did not need to be present for the payment to be considered "remuneration" for the service. As the parties had already agreed that the national rule restricted Mr Jundt's freedom to provide services, the Advocate General examined whether it was justified because: its aim was to benefit public law bodies; it preserved the coherence of the tax system; and it promoted education and R&D in German universities. The promotion of education did not justify the restriction in question and neither did arguments for the coherence of the tax system – there was not a sufficiently direct link between the tax exemption and the benefit derived by the state from the teaching activity according to the Advocate General. Last of all, he found that Article 149 TEC, restating the responsibility of Member States for the organisation of their education systems, was not a justification for the restriction at hand. He recommended therefore that the Court find the national rule to be an unjustified restriction on the freedom to provide services.

Link
Opinion

11.6 Reference in Ernst & Young Deutsche Allgemeine Treuhand AG v Finanzmat Stuttgart-Köperschaften (C-285/07)

Lodged 14 June 2007

Taxation – Transfer of shares – Double book value carryover

Background
This preliminary reference from the German courts asks about the compatibility of a domestic tax rule with Directive 90/434 on the taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. In particular the domestic rule concerns double book value carryover – when shares are transferred from one company to another, the transferring company can maintain the book value only if the receiving company has also valued the shares at their book value. It also asks whether the rules in question are contrary to Articles 43 and 56 TEC on the right of establishment and the free movement of capital.

Link
Reference

11.7 Reference in Hein Persche v Finanzamt Lüdenscheid (C-318/07)

Lodged 11 July 2007

Taxation – Donations to foreign entity – Free movement of capital

Background
The German courts have asked how the EC Treaty rules on the free movement of capital are to be applied to the situation where a national of one Member State makes a donation of goods to a charitable organisation in a second Member State. The court asks whether a national rule is permissible if it only confers a tax benefit on the donor when the charitable organisation is resident in the same Member State. Furthermore the court asks whether the burden of proof lies on the donor to prove the facts asserted or whether the competent authorities have to obtain assistance from their foreign counterparts according to Directive 77/799 on mutual assistance by competent authorities in the field of direct taxation.

Link
Reference

11.8 Reference in TNT Post UK Ltd v The Commissioners of Her Majesty's Revenue & Customs and Royal Mail Group Ltd (C-357/07)

Lodged 31 July 2007

VAT – Exemption of postal services – Universal services provider

Background
This reference from the Queen's Bench Division of the English High Court concerns the application of the VAT rules in the UK to providers of postal services. In particular the court asks for an interpretation of "public postal services" in the Sixth VAT Directive and whether this concerns only the sole designated universal services provider or other private operators now that the market in the UK has been liberalised and there are no reserved services. Thereafter the court asks to what extent such postal services can be covered by the exemption in the Directive. The Commission also announced on 24 July that it was launching the second stage of infringement proceedings against the UK, considering that the exemption granted to the Royal Mail for all postal services was contrary to the VAT rules.

Link
Reference

ANNEX I: CASE TRACKER

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

Topic	Case	Hearing	*Opinion*	*Judgment*
Competition				
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		
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	
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