THE LAW SOCIETY OF ENGLAND AND WALES
THE LAW SOCIETY OF SCOTLAND
THE LAW SOCIETY OF NORTHERN IRELAND

The Law Societies
JOINT BRUSSELS OFFICE

The Brussels Office Update Series:

Developments from the European Court of Justice

November 2007

Whilst every effort is made to ensure the information published in this update is accurate and up to date, it is provided for information purposes only and does not constitute legal advice and should not be relied upon as such. For the full text of a case please refer to the website of the European Court of Justice: http://curia.europa.eu/en/index.htm

CONTENTS PAGE

The Law Societies' Joint Brussels Office
85 Avenue des Nerviens
B-1040 Brussels, Belgium
Tel : (+32) 2 743 85 85
Fax : (+32) 2 743 85 86
Email: brussels@lawsociety.org.uk

INTRODUCTION

November – News from the EU Courts

The CFI, on 8 November 2007, issued its judgment in *The Bavarian Lager Co. Ltd v Commission* (T-194/04). This case had raised questions around how much access should be given to the public to information held by the European institutions. The Court found that the Commission, in refusing an application from Bavarian Lager for the release of some meeting documents, had gone too far in terms of preventing publication of the documentation.

The Judges of the Court elected Judges Tizzano, Bay Larsen, Lohmus and Arestis as Presidents of the Fifth, Sixth, Seventh and Eighth Chambers. Their periods of office last for one year, ending on 6 October 2008. In addition, Poiares Maduro was appointed by the Court on 6 October 2007 as an Advocate General for a one-year period.

The Treaty of Lisbon, due to be signed by Member States on 13 December, would introduce some significant changes to the working practices of both the ECJ and the CFI. Amongst some of the more notable alterations, the CFI will change name, becoming known as the 'General Court'. Also, the appointment process for Judges and Advocate Generals of the Court of Justice and General Court will change, with the appointment of a panel of experts to oversee and verify judicial appointments by Member States.

Coming up

On 18 December the Court is due to give its judgment in *United Kingdom v Council* (C-137/05). This case arises from an application that the UK made to the Council in 2005 to participate in a Regulation setting down standards for security features in biometric passports. This Regulation had been adopted under the Schengen acquis, a body of law that the UK has chosen not to participate in. The Council informed the UK that it could not opt in to the Regulation, and this case will answer the question of whether this refusal constitutes an unlawful act on the part of the Council.

The Court is due to issue an Opinion on 13 December in *Marks & Spencer plc v Her Majesty's Commissioners of Customs and Excise* (C-309/06), a case dealing with the operation of the Sixth VAT Directive. The issue under examination is whether a trader who operates in a Member State where it is possible to claim a refund on input tax on certain products has a Community law right to be taxed at zero rate.

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 CIVIL JUSTICE

1.1 Judgment in Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo, (Case C-68/07)

29 November 2007, Third Chamber

Jurisdiction in matrimonial cases – Respondent not an EU national or resident

Background
Kerstin Sundelind, a Swedish woman resident in France and married to a Cuban man raised an action for divorce in the Swedish courts rather than the French courts. By the time of the court action, her husband had returned to Cuba. Mrs Sundelind argued that Articles 6 and 7 of Regulation 2201/2003 on the recognition and enforcement of judgments in matrimonial matters, which sets out rules on jurisdiction, did not cover the situation where one of the parties to the action was not a national of or resident in a Member State of the EU. The Regulation in question establishes exclusive jurisdiction for the courts of the Member State of nationality of the respondent or his Member State of habitual residence. In this case, the respondent was neither a national nor was he habitually resident in a Member State. Mrs Sundelind argued therefore that the Regulation did not apply and that the national court of her home Member State had jurisdiction under Swedish national law. The Swedish Supreme Court sought a preliminary ruling on whether that interpretation was correct.

Judgment
The Court had no difficulty in finding that the Swedish courts did not have jurisdiction in this case. Regulation 2201/2003 also provided at Article 3 that the court of last habitual residence of the parties should have jurisdiction in matrimonial matters and it was clear in this case that, given that Mrs Sundelind's place of residence was France, the French courts should have jurisdiction. That being the case, the courts of Sweden were not entitled to claim jurisdiction under national law.

Link
Judgment

1.2 Judgment in Applicant C (C-435/06)

27 November 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 Court considered that even though they are considered to be 'public law' decisions, such matters should be classed as 'civil matters' for the purposed of the Directive. As such, the national courts were not to apply provisions of national law or decisions of the Nordic Council that ran contrary to this Regulation.

Link
Judgment

1.3 Opinion in Weiss und Partner v Industrie und Handelskammer Berlin (Case C-14/07)

29 November 2007, Advocate General Trstenjak

Service of documents – Judicial co-operation – Language of documents

Background
A German company, l'Industrie und Handelskammer Berlin sought damages from an English architect firm for defective building plans. The architect firm claimed that it had not been notified effectively of the proceedings against them as, although the main document itself had been translated into English, the annex was in German which it did not understand. They refused service of the document at the time on these grounds. The original building contract had stated that correspondence between the parties and public authorities would be carried out in German and evidence of such correspondence had been adduced in the main proceedings. The ECJ was asked to consider whether a defendant may refuse service of a document received in civil proceedings from another Member State in such circumstances and when the receiving party claims not to understand the language of the Member State of origin, even though in the course of his professional business the receiving party had concluded a contract in which he was required to correspond with other parties in the same language. Even if this is not so, it was asked whether contractual agreement to use a particular language would itself prevent the addressee from refusing service of a document.

Opinion
The Advocate General concluded that, in the case of service of a document accompanied by annexes, the receiving party has the right to refuse service even though only the annexes of the document are not translated into the language of the receiving party or in a language agreed between the parties. There should be a presumption that the receiving party understands the language of the Member State of origin when, in the course of their business, they have included in a contract that the language of correspondence will be the language of that Member State. This presumption may be rebutted by evidence to the contrary. However, service cannot be refused where the annex is served in the language of the issuing party, where there has been prior contractual agreement to conduct correspondence in that language.

Link
Opinion

1.4 Reference in Marco Gambazzi v Daimler Chrysler Canada Inc and CIBC Mellon Trust Company (Case C-394/07)

Lodged on 22 August 2007

Enforcement of judgments – Rights of defence – Failure to comply with court injunction - Public policy

Reference
An Italian court was required to enforce a judgment issued in another Member State in a case in which the unsuccessful party had entered an appearance but had been denied the chance to present any form of defence, due to the issuing of a court order against him for failure to comply with a court injunction. The Italian court asked the ECJ whether, on the grounds of public policy, it may take into account the fact that the court, which handed down the judgment, denied the right of the unsuccessful party to present a defence. A supplementary question asks whether the provisions of the Brussels Convention, concerning mutual recognition and enforcement of judgments, precludes the court from finding that civil proceedings are contrary to public policy in such circumstances.

Link
Reference

1.5 Reference in Rechtsanwalt Christopher Seagon als Insolvenzverwalter uber das Vermogen der Frick Teppichboden Supermarkte GmbH v Deko Marty Belgium N.V (Case C-339/07)

Lodged on 20 July 2007

Jurisdiction - Insolvency – Set aside transaction

Background
The German Federal Supreme Court made a reference to the ECJ to clarify its jurisdiction in dealing with judgments closely connected to insolvency proceedings. The question referred was whether the German court had international jurisdiction to set aside a transaction against a debtor whose registered office is in another Member State. The Court is asked to consider whether jurisdiction is based on the provisions of the Brussels I Regulation (44/2001) or the Insolvency Regulation (1346/2000).

Link
Reference

2 CONSUMER LAW

2.1 Judgment in International Mail Spain SL v Administracion del Estado, Correos (Case C-162/06)

15 November 2007, First Chamber

Postal services – Liberalisation – Cross-border services

Background
International Mail, a private postal company, provided postal services in the main Spanish tourist resorts, allowing tourists to post postcards in boxes placed in locations such as hotels and campsites. The users of the service bought a specific type of stamp, produced by International Mail, that could be bought at postcard retailers. The Spanish authorities took the view that this was a clear infringement of Directive 96/67, which provides for the reservation of certain postal services to a single universal service provider (USP) in each of the Member States. The Spanish authorities imposed a fine and required International Mail to remove its infrastructure and stop providing its services. International Mail challenged this decision at a Spanish tribunal, and the tribunal referred the question of the legality of the Spanish authorities' actions to the ECJ.

Judgment
The Court had been asked by the Spanish tribunal whether a Member State can reserve a postal service to its designated USP simply for reasons of expediency (as opposed to economic reasons). The Court responded by giving a narrow definition to the terms of the Directive. Although Article 7 of the Directive allows Member States to reserve a variety of services to its designated USP, the Court found that national authorities may only reserve a service if, by failing to reserve that service, the whole preservation of a national universal postal service would be defeated (or, indeed, if the reservation is necessary to allow the service to be completed under "economically acceptable conditions"). The Court pointed out that it would be consistent with neither the substance nor the aims of the Directive to allow Member States to reserve services to USPs simply for reasons of expediency or uniformity.

Link
Judgment

2.2 Opinion in Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbande (Case C-404/06)

15 November 2007, Advocate General Trstenjak

Consumer Protection – Directive 1999/44 – Sale and guarantee of consumer goods – Right of the seller to compensation for use of goods delivered

Background
Bundesverband bought a kitchen from Quelle in August 2002 and in January 2004 Bundesverband noticed that a layer of the enamel in the interior of the oven had become detached. This defect was impossible to repair and so the buyer sought to obtain a replacement from Quelle. As the warranty period had expired, Quelle requested payment of an indemnity for the use of the original oven (at a value of €119.97), but Quelle accepted a payment of €69.97 from the buyer. In the current proceedings Bundesverband sought to recover the indemnity paid, claiming that Quelle was not entitled to obtain compensation from them for their use of the goods that had been delivered, which were not in line with the terms of the original contract. The question referred to the Court was whether the interpretation of Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees prevents the seller from relying on national legislation, which allows them to obtain compensation from the consumer for use of goods in these circumstances.

Opinion
The Advocate General gave an Opinion that the combined provisions of Articles 3(2) and (3) or Article 3 (3) of this Directive must be interpreted as opposing the terms of

national laws which allow the seller to obtain compensation from a consumer for use of goods originally delivered, which were not in conformity with the contract, where the contract is later brought into conformity with the contract by means of delivery of replacement goods.

Link
Opinion

2.3 Opinion in Annelore Hamilton v Volksbank Filder eG (Case C-412/06)

21 November 2007, Advocate General Maduro

Doorstep selling - Time-limit on right of cancellation – Defective notice – Right of withdrawal

Background
In 1992 Mrs Hamilton was visited by a door-to-door salesman from Volksbank Filder, with whom she entered into a contract for a loan. By 1998 Mrs Hamilton was struggling to meet the repayments on her loan, but with the help of her savings and an interim loan she was able to repay Volksbank in full. Under the terms of her credit agreement, at the time of entering into the contract, she should have received information on her rights of withdrawal. However, the information she received was insufficient as it did not include the conditions of revocation in the context of doorstep selling. German law on the revocation of contracts on doorstep selling provides that, in the absence of this information, the withdrawal period should extend to no more than one month after the execution by both parties of all of their obligations. The question referred was whether the provisions of Directive 85/577 on consumer contract terms may be interpreted as allowing national law to place a time limit of one month on the right of withdrawal, despite the consumer having been given defective notice.

Opinion
The Advocate General gave the Opinion that, in the context of doorstep selling, where a consumer does not receive full information on their rights of withdrawal at the time of entering into the contract, a time limit cannot be imposed on the exercise of this right. The Directive should not, however, preclude Member States from imposing a reasonable period during which the right of withdrawal may be legitimately exercised, where it is established that the consumer has been given notice of this right.

Link
Opinion

2.4 Reference in S.A.L.F Spa v Agenzia Italiana del Farmaco (AIFA) and Ministero della Salute (Case C-400/07)

Lodged on 29 August 2007

Pharmaceutical products – Price freezing - Public health

Reference
The Court is asked to deal with the interpretation of provisions of Directive 89/105, which regulates the relationship between public authorities and pharmaceutical companies, in relation to pricing of medicinal products. The question referred is

whether any decision to decrease the price of a specific product may also be applied to items which fall into the same category of medicinal product.

Link
Reference

2.5 Reference in Christopher Sturgeon, Gabriel Sturgeon, Alana Sturgeon v Condor Flugdienst GmbH (Case C-402/07)

Lodged on 30 August 2007

Air passenger rights – Compensation and assistance – Cancellation or delay

Background
This reference concerns the interpretation of the term "cancellation" within Regulation 261/2004 on compensation and assistance to passengers in the event of denied boarding, cancellation or long delay. The Court was asked to consider whether a delay for a long period is capable of amounting to a cancellation if the air carrier does not actually cancel the flight. If it is capable, in what circumstances would a delay become regarded as a cancellation and would this be dependent on the length of the delay?

Link
Reference

3 CRIMINAL LAW

3.1 Opinion in The International Association of Independent Tanker Owners (Intertanko) and others (Case C-308/06)

20 November 2007, Advocate General Kokott

Ship-source pollution – Criminal penalties

Background
The applicants, including Intertanko, brought a joint action before the High Court in England aimed at challenging the Secretary of State's planned implementation of Directive 2005/35. This Directive provides for, amongst other things, the introduction of criminal penalties for infringements by companies that discharge pollution into the seas. In particular, Intertanko was concerned that there is a lack of legal certainty given that an international convention, the Montego Bay Convention, already sets down a standard of liability in relation to pollution discharges. That standard, according to the applicants, is lower than that in the Directive, which states that serious negligence is sufficient to incur liability, rather than the Montego Bay Convention's requirement of at least recklessness and knowledge that damage will probably result from the discharge.

Opinion
The Advocate General did not accept the applicants' submission that there is a serious conflict between the terms of the Montego Bay Convention and the Directive. Indeed, he pointed out that the Directive makes specific reference to the Montego Bay Convention. The Advocate General was of the Opinion that, in principle at least, should there be a conflict between an international convention and European law, then European law should prevail. However, the approach that he identified as most

preferable is one whereby the national courts interpret the terms of legislation as being compatible with the terms of any applicable international conventions. In any case, he concluded that the fact that the Montego Bay Convention prescribes a different level of liability to the Directive does nothing to bring into question the validity of that Directive.

Link
Opinion

3.2 Reference in Criminal proceedings against István Roland Sós (Case C-404/07)

Lodged 7 August 2007

Criminal proceedings – Private prosecutions - Standing

Reference
The Hungarian court has referred the question of whether in terms of Framework Decision 2001/220, which deals with the standing of victims in criminal proceedings, the court must allow the victim to be heard in a private prosecution initiated by him as well as in the main criminal proceedings.

Link
Reference

4 ENVIRONMENTAL LAW

4.1 Judgment in Germany v Commission (Case T-374/04)

7 November 2007, Third Chamber (extended composition)

Climate change – Greenhouse gas emissions – Duty to state reasons

Background
Under the terms of Directive 2003/87, a greenhouse gas emission trading scheme was created. Several types of emitters – for example power stations, heavy industry – are encouraged to decrease their overall greenhouse gas emissions by being obliged to have a permit for every unit of greenhouse gas that they emit. As an added incentive, the installation concerned can sell any unused permits that it has been allocated to fellow installations with higher emissions. The German authorities, as part of their National Action Plan (NAP) to implement the Directive, made provision for certain companies to have their allocation of emission credits reduced if the company meets certain criteria – having consistently low emissions, for instance. The Commission challenged this provision as infringing the terms of the Directive.

Judgment
The Court rejected the Commission's submissions that providing for a reduction in the amount of credits allocated to a given industry was illegal. The Court found that the Commission's decision against Germany went against the purpose and spirit of the Directive, that is, to reduce greenhouse gas emissions as much as possible. Although the Commission had argued before the Court that Germany was required under the terms of the Directive to include in its NAP the exact names of the participant companies and amount of credits allocated to them, the Court rejected

the notion that to allow subsequent downward adjustment of these amounts would circumvent the purposes of the Directive.

Link
Judgment

4.2 Opinion in Paul Abraham and others v Region of Wallonia and others (Case C-2/07)

29 November 2007, Advocate General Kokott

Airport expansion – Environmental law – Impact assessments

Background
This case had been brought by residents living close to the Liège-Bierset regional airport in the Wallonia region of Belgium. The airport has a runway in excess of 2,100 metres in length and, following an economic study, the regional government of Wallonia had decided to develop air freight activities at the airport, to allow air traffic movement 24 hours a day. The local residents brought an action before the local court, alleging serious noise pollution and more general disruption. The residents contested that, in an agreement reached with the air freight company TNT, the regional government had agreed to carry out significant modifications of the airport that would increase air traffic and corresponding disruption. The local court referred to the ECJ the question of whether the Walloon government should have carried out an environmental impact assessment (as is required by Directive 85/337 for certain types of public works) before proceeding with the contract with TNT.

Opinion
The Advocate General reached the conclusion that, just because the agreement made between the Walloon government and TNT included detailed plans for modifications to the airport, this does not mean that the agreement should therefore be subject to an environmental impact assessment (as provided for in the Directive 85/337 on environmental impact assessments). The Advocate General did state, however, that he believed that, should some aspects of the agreement seek to limit the discretion of a national authority to oversee and assess the project in subsequent years, then an environmental impact assessment might become justified.

Link
Opinion

4.3 Reference in Commission v UK (Case C-390/07)

Lodged on 17 August 2007

Environmentally sensitive areas – Protection of water

Reference
This reference arises from the Commission having reached the opinion that the UK has taken an excessively restrictive approach to identifying geographical areas that are of an environmentally sensitive nature. Directive 91/271 on urban waste water treatment requires that certain areas can be identified as environmentally sensitive in order to protect waterways and other bodies of water. The Commission submits that the UK has failed to identify areas including the Humber estuary, the Wash, the Outer Thames estuary and the North East Irish Sea as sensitive, whereas these are all areas that should be treated as places of particular ecological sensitivity.

Link
Reference

5 EMPLOYMENT

5.1 Reference in Mirja Juuri v Fazer Amica Oy (Case C-396/07)

Lodged on 27 August 2007

Freedom to provide services – Television broadcasting – Teleshopping and advertising

Reference
Relating to Directive 2001/23 on collective employment agreements, this case asks whether a Member State is required to put in place legislation that guarantees an employee compensation where he hands in his resignation due to the conditions of his employment becoming substantially worse following the transfer of the business as a going concern.

Link
Reference

6 FREEDOM OF INFORMATION

6.1 Judgment in The Bavarian Lager Co. Ltd v Commission (Case T-194/04)

8 November 2007, Third Chamber

Freedom of information – Data protection – Free movement of goods

Background
The applicant lodged a complaint with the Commission in 1993 that UK legislation permitting breweries to tie UK pubs and bars to exclusive purchasing contracts constituted a serious infringement of Article 28 TEC on the free movement of goods. The Commission agreed with the applicant and started the process of drawing up a reasoned opinion to be issued against the UK. Following a meeting in October 1996 involving the Commission, UK Government representatives and other parties, the UK Government announced a change to the domestic law to allow pubs and bars some leverage in terms of selling third parties' beers. The Commission agreed to withhold its reasoned opinion and, in December 1997, decided to take no further action in the infringement procedure.

The present action arises from the applicant's attempt to attain a copy of the minutes from the meeting held in October 1996. Its application to the Commission for full details of that meeting was refused on the grounds that the applicant had not proven an 'express and legitimate purpose' for seeing the meeting papers. Although the Commission subsequently agreed to release the names of some of the parties who had attended the meeting, it refused to release the minutes taken. The applicant applied to the Court to annul this Commission decision.

Judgment
The Court found that the Commission reached an incorrect decision by deciding that to release the meeting documents would constitute an infringement of the meeting participants' right to privacy and family life. The Court pointed out that there is no justification for the Commission to claim that revealing that a party participated in a professional meeting, on a professional basis, would be in any way infringing that party's right to privacy. Further, the Court found that the Commission had erred by placing so much emphasis on the need for the applicant in this case to prove the necessity of having the information released to it. In the absence of some special exception from the terms of the relevant transparency legislation – Regulation 45/2001 - the Court found that there was no need for 'necessity' to be taken into account as a crucial factor in determining whether to accept an application for the release of information.

Link
Judgment

6.2 Opinion in Sweden and Maurizio Turco v Council (Joined Cases C-39/05 and C-52/05)

29 November 2007, Advocate General Maduro

Access to documents – Legal opinion supplied to Council – Partial refusal

Background
The applicant had applied in October 2002 to the Council of Ministers for access to documents that had appeared in the agenda for a meeting of the Justice and Home Affairs Council in Luxembourg that month. The applicant's request in respect of one of the documents – a legal opinion supplied to the Council – was refused. The Council's justification for withholding the legal opinion was that Article 4(2) of Regulation 1049/2001 on access to documents of the European Institutions meant that the release of internal legal opinions on proposed legislation could be seriously prejudicial to the legal certainty and effectiveness of the relevant acts, should they eventually become law. The applicant applied again to the Council for the release of the document and, although the Council released the opening paragraph of the document, it refused to release anything further. Subsequently, the applicant submitted an application to the CFI to annul the Council's decision, but the CFI found no basis in Mr Turco's submissions for annulment of that decision. The present action constitutes an appeal against the judgment of the CFI.

Opinion
The Advocate General, in his Opinion, analysed the merits of proceeding on a case-by-case basis, as the applicant submitted in his pleadings before the Court. Although the applicant suggested to the Court that under the terms of the 2001 Regulation some parts of a legal opinion could be released while other, more sensitive parts, could be withheld, the Advocate General did not agree. He pointed out that such an approach would be divisive and would lead to a presumption on the part of the public that anything not released must be negative, and this would simply contribute towards legal uncertainty. The Advocate General did, however, reach the opinion that the Council had acted upon a flawed analysis of the 2001 Regulation. He noted that the Council refused to disclose the legal opinion because it did not accept that there could be an overriding public interest in the transparency and openness of the decision-making process. This, he stated, was a flawed analysis which failed to assess whether the public interest in transparency might prevail over

the need for protection. The Advocate General, therefore, recommended that the Court should annul the Council's decision to withhold the document.

Link
Opinion

7 LEGAL PROFESSION

7.1 Reference in Hospital Consulting Srl, ATI HC, Kodak SpA, Tecnologie Sanitaire SpA v Esaote SpA, ATI, Ital Tbs Telematic & Biomedical Service SpA, Draeger Medica Italia SpA, Officina Biomedica Divisione Servizi SpA (Case C-386/07)

Lodged on 14 August 2007

Lawyers' fees – Minimum charges

In this case concerning the charging of fees by the legal profession in Italy, the referring Italian court asks several questions of the ECJ, focusing on the issue of the setting of minimum fees for lawyers' services. The referring court asks whether the mandatory nature of a minimum fee level for lawyers' services is contrary to Article 81 TEC. Further questions referred include whether an obligation to state reasons for the use of fees below the recommended limit should be considered to be an unlawful limitation on practice as a lawyer, as prohibited under Directive 98/5 on the legal profession.

Link
Reference

8 PUBLIC PROCUREMENT

8.1 Judgment in Commission v Ireland (Case C-507/03)

13 November 2007, Grand Chamber

Public procurement – Irish postal service – Social security payments

Background
The Irish Government, in December 1992, entered into a contract with the state postal service, An Post, allowing for social security claimants to collect their payments from post office branches. The Commission entered into correspondence with the Irish authorities, reaching the reasoned opinion that Ireland had acted unlawfully in terms of the procurement rules by failing to advertise the contract for provision of social security payments, and failing to hold any form of competitive tendering process. While Ireland did not formally extend its contract with An Post in the wake of the Commission's intervention, the Commission referred the matter to the Court, arguing that Ireland has not provided any credible solutions to this situation. The dispute centred on the extent to which Treaty rules and principles applied when the procurement directives did not.

Judgment
The services in question fell within the list of services in Annex I B of Directive 92/50, which sets down the public procurement rules, and which does not therefore require

the authorities to advertise for tenders. The Court went on to state, however, that general Treaty principles should apply (Articles 43 and 49 TEC on the freedom to provide services and the freedom of establishment). As such it was for the Commission to demonstrate that the contract was of "certain interest to an undertaking located in a different Member State" and that the company was unable to express its interest in the contract because of the lack of information. The Court stated that the Commission could not rely on a mere presumption that such a contract would be of a cross-border interest.

Link
Judgment

9 TAX

9.1 Judgment in Amurta SGPS v Inspecteur van de Belastingdienst / Amsterdam (C-379/05)

8 November 2007, First Chamber

Corporation tax – Exemption of dividends – Refusal of exemption to foreign company

Background
This case, referred from the Dutch courts, concerns the payments of dividends from a Dutch company (Retailbox) to Amurta – a company established in Portugal. Amurta owned 14% of the shares of Retailbox. When dividends were distributed, an exemption from taxation was applied to the dividends paid to a Dutch shareholder. A dividend tax (withholding tax) of 25% was levied on the payments to Amurta and two other Portuguese companies holding shares. In general terms, the exemption in the Dutch law applied only to dividend payments to companies with their seat in the Netherlands or to foreign shareholders with a permanent establishment there.

Judgment
The Court held that the difference in treatment by the Dutch authorities did constitute a breach of the Treaty rules on the free movement of capital (Articles 56 and 58 TEC). The Court noted that the Dutch system had chosen not to tax Dutch companies in respect of the same income. As such it could not justify the restriction on grounds of safeguarding either the cohesion of the national tax system or the allocation between Member States of the power to tax. The existence of a tax credit in the home Member State of the company in question was not considered a justification on which the Dutch authorities could rely. The Court left it to the Dutch courts to determine, however, whether the provisions of a double taxation convention applied and the extent to which such provisions 'neutralised' the restrictions on the free movement of capital.

Link
Judgment

9.2 Opinion in Deutsche Shell v Finanzamt für Groβunternehmen in Hamburg (Case C-293/06)

8 November 2007, Advocate General Sharpston

Taxation – Exchange rate losses – Cross-border repatriation of start-up capital

Background
Deutsche Shell, a company established in Germany, set up a branch in Italy in 1974 and provided start-up capital. This capital was gradually repaid through the repatriation of profits of the Italian branch. Accounting of these arrangements had continued to take place in Italian Lira in Italy and Deutschmark in Germany, applying the exchange rate that applied on the day in question. In 1992 Deutsche Shell closed the branch, transferring the assets to a wholly-owned subsidiary (Sierra) and then selling its shares to an independent company (Edison). On repaying the outstanding start-up capital, this resulted in a loss of over 62 million euro, when converted back into Deutschmark. The loss was not, however, considered by the Italian authorities when they taxed the profits from the sale of the company to Edison. The German tax authorities refused to take into account the currency loss incurred and to set it off against profits when calculating the tax liability of Deutsche Shell. Under the German legislation, the loss was considered to have arisen 'through the activity of' the branch in Italy and as such was part of its 'income' – not that of the German company. It could therefore be taken into account for tax purposes only in Italy. In addition operating expenditure could not be deducted from the parent's profits if it had a 'direct economic link' to tax-free income. As the sale of shares to Edison was taxed in Italy, it was considered tax free in Germany.

Opinion
While the German Government disputed the facts of the case, saying that the loss was fictive, Advocate General Sharpston decided the case was admissible. She went on to state that she considered Germany's treatment of the currency loss to be contrary to Articles 43 and 48 TEC (freedom of establishment). The German authorities considered the currency loss as part of the 'profits' of the Italian company, thus excluding it from the basis of German tax assessment. The Italian authorities did not, however, consider this to be a profit that could be assessed for tax and so the currency loss could not be taken into account in Italy or Germany. She went on to rule that it was also contrary to the Treaty rules for Germany to state that the loss may only be deducted as operating expenditure to the extent that no tax-free profits were received from the Italian company.

Link
Opinion

9.3 Reference in Jobra Vermögensverwaltungs-Gesellschaft mbH v Finanzamt Amstetten Melk Scheibbs (Case C-330/07)

Lodged 16 July 2007

Tax advantage – Investment growth premium – Domestic use of assets

Reference
This preliminary reference from the Austrian courts seeks to ascertain whether a tax advantage – an investment growth premium – is compatible with the Treaty rules on the freedom of establishment and the freedom to provide services (Articles 43 and 49 TEC). The tax advantage is granted for the acquisition of unused tangible assets, on the condition that these are used in a place of business in Austria. The same does not apply in respect of use in another Member State.

Link
Reference

9.4 Reference in Société Papillon v Ministère du budget, des comptes publics et de la function publique (Case C-418/07)

Lodged 12 September 2007

Groups of companies – Offsetting profit and loss – Foreign subsidiary

Reference
This preliminary reference from the French Conseil d'Etat also questions whether an element of the domestic tax regime contravenes the Treaty rules on the freedom of establishment (Article 43 TEC). The French system of corporation tax allows parent companies to offset profits and losses with other companies (subsidiaries) in the group and treat internal transactions neutrally. The same treatment is not given when a subsidiary is located in another Member State, and this question concerns the resultant tax treatment of a sub-subsidiary held through a subsidiary located in another EU Member State. The court goes on to ask whether such arrangements could be objectively justified, should the ECJ consider that they constitute a restriction.

Link
Reference

10 TELECOMMUNICATIONS

10.1 Judgment in Deutsche Telekom AG v Germany (Case C-262/06)

22 November 2007, Second Chamber

Universal Service – Voice telephony tariffs – Administrative authorisation

Background
This case concerns the transition between the old and the new EU frameworks for telecoms. The new framework (Article 16 of Directive 2002/21 – the Framework Directive – in particular) provides that a market study has to be carried out by national regulators. Under the previous regime, certain telecoms providers who held a position of dominance on the market (significant market power operator) had to have their tariffs authorised by the regulator. A number of complaints to the German telecoms regulator led it to investigate some of the tariffs and terms and conditions offered by Deutsche Telekom in some of its packages. A dispute arose as to whether the German legislation requiring Deutsche Telekom to seek authorisation for such tariffs was still valid under the new EU regime.

Judgment
The judgment stated simply that Directive 2002/22 on Universal Service and Directive 2002/21 mean that, until the market study required by Article 16 of the Framework Directive had been carried out, the former statutory regime must be kept in place. As such Deutsche Telekom should still have to have its tariffs approved by the regulator.

Link
Judgment

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
Setting of mandatory minimum lawyers' fees	Hospital Consulting Srl C-386/07			
Constitutional				
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	6 December 2007
Discrimination on grounds of disability	S. Coleman v Attridge Law, Steve Law C-303/06	9 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	27 November 2007
Taxation				
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