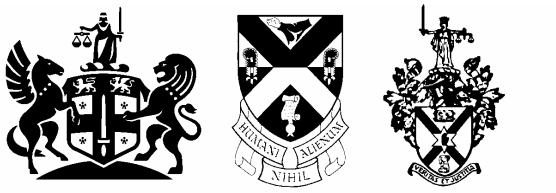

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The Brussels Office Update Series:

Developments from the European Court of Justice

January 2008

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INTRODUCTION

January - News from the EU Courts

There were several changes in membership of the Courts in January. On 14 January Jean-Jacques Kasel was formally appointed as a Judge of the ECJ, sitting until 6 October 2009. Judge Kasel replaces Romain Schintgen. Also, at a formal sitting of the Court of Auditors on 28 January, seven new members were appointed, each sitting for a term of six years.

Amendments to the Court's Rules of Procedure were published in the Official Journal on 29 January.[1] These amendments deal with the procedure to be followed by national courts when making references for preliminary rulings.

The Court issued its judgment on 29 January in the case of *Promusicae v Telefonica de Espana* (C-275/06), a case involving a non-profit making company that works with music performers. Promusicae, in conjunction with an online file sharing site, had been requested by Spanish authorities to hand over details of users' IP addresses and other details, but the Court held that Member States must respect data protection considerations and other fundamental rights of nationals.

On 31 January Advocate General Maduro issued an Opinion in *Coleman v Attridge Law* (C-303/06). Dealing with issues of disability, the question referred in this case asks whether an employer can be held to have discriminated against an employee on grounds of disability even if the disabled person is the employee's son. The Opinion concludes that this kind of direct discrimination can indeed be unlawful in terms of Community law.

An Opinion in the case of *Stringer v HMRC* (C-520/06) was released on 24 January. In the Opinion, Advocate General Trstenjak concluded that workers should be entitled to compensation for annual leave that has accrued but has not been taken due to illness of the employee. He rejected, however, the argument that sick leave and annual leave can run concurrently.

Coming up

The Court is on judicial vacation from 4 February to 10 February.

The Court is due to issue its judgment on 12 February in the case of *BUPA v Commission* (T-289/03), a case originating from Ireland. Following the liberalisation of the health insurance market, BUPA became an operator in Ireland, but complained to the Commission that a risk equalisation scheme, set up by the Irish Government to make payments to certain health insurers, constituted unfair State aid.

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.

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[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:024:0039:0041:EN:PDF

1 CIVIL JUSTICE

1.1 Opinion in Glaxosmithkline, Labaratoires Glaxosmithkline v Jean Pierre Rouard (C-462/06)

17 January 2008, Advocate General Maduro

Enforcement of judgments – Employment contracts – Multiple defendants

Background
The reference stems from a redundancy claim brought by Mr Rouard before a French labour court. The question referred was whether the French or British courts had jurisdiction to deal with a claim by a French employee, who was sent to work for a French company in Morocco and the French company subsequently transferred the employee to a British subsidiary company in the same group, which agreed to maintain certain aspects of the original contract. Regulation 44/2001 refers to jurisdiction and provides a general rule under Article 6 that, in a claim against multiple defendants, the competent court can be the court of the country where any one of the defendants is domiciled provided that the claims are so closely connected it would be expedient to hear and determine them together. The Regulation contains, however, a special rule referring specifically to employment contracts and allowing for the competent court to be the court of the country where the business which engaged the employee was situated. The Advocate General was required to interpret the Regulation to determine whether the criteria could be used in conjunction.

Opinion
The Advocate General concluded that the general rule may be applied in conjunction with the special rule applicable to employment contracts under Regulation 44/2001. For the general rule to apply there must be a close connection between the defendants and to establish this the following factors may be taken into account: the conclusion of the second contract was envisaged at the time of the conclusion of the first contract; the first contract had been modified by the second contract; there was an economic or organic link between the two employers; there was agreement between the two employers as to the co-existence of the two contracts; the continued supervision by the first employer; or the fact that the first employer may decide the duration of activity over the second employer.

Link
Opinion

1.2 Reference in A (C-523/07)

Lodged 23 November 2007

Enforcement of judgments – Mutual recognition – Child protection

Background
This reference from a Finnish court asks whether Regulation 2201/2003 (Brussels II) applies to the enforcement of a court decision that covers the protection of a child and orders the immediate taking into care of a child, involving placing the child outside of his home country. Alternatively, the reference asks whether Brussels II applies only to the part of the child protection decision that involves placement of the child, excluding all other aspects of the decision.

Link
Reference

2 COMPETITION LAW

2.1 Judgment in Isabella Scippacercola and Ioannis Terezakis v Commission (C-280/06)

16 January 2008, Fifth Chamber

Abuse of dominant position – Airport charges – Excessive pricing

Background
Several passengers using Athens airport lodged a complaint with the Greek courts alleging that charges levied by the airport authorities were in breach of Community rules. The Athens airport authorities had imposed several charges on airport users, including a security charge, a passenger terminal facilities charge and a charge for parking cars at the airport. In July 2002 Mrs Scippacercola lodged a complaint with the Commission claiming that the charges imposed by Athens airport were illegal under Articles 82 and 86 TEC. Although the Commission decided against proceeding with Mrs Scippacercola's complaint, it received further information in 2004 and joined the initial complaint with a second complaint from Mr Terezakis. Having investigated the matter, the Commission found that the complainants did not have a legitimate case to make in relation to any of the charges levied by Athens airport. Both Scippacercola and Terezakis appealed against the Commission's decision.

Judgment
The Court found that although the applicants were entitled to have their complaints considered with due attention, the Commission had a certain amount of discretion to decide how much attention to devote to different types of complaints. The Court found in favour of the Commission in terms of the airport charges applied by Athens airport. It agreed that, as regards the additional charge for security checks, this constituted an action necessary for state security and therefore was outside the remit of Article 82 TEC. In relation to the other charges, the Court found that the Commission was acting lawfully when it concluded that the low risk of an actual competition law infringement, combined with the low significance of any potential infringement as regards the functioning of the common market, meant that it did not need to investigate the matter further.

Link
Judgment

3 CONSUMER LAW

3.1 Reference in Pia Messner v Firma Stefan Kruger (C-489/07)

Lodged on 6 November 2007

Distance selling – Compensation following cancellation of contract

Background
This reference, from a German court, asks whether Directive 97/7 (the Distance Selling Directive) means that Member States may not introduce legislation that

provides a seller with a right to claim compensation for the use made of consumer goods if the buyer returns the goods and cancels the contract within the "cooling off" period.

Link
Reference

4 CRIMINAL LAW

4.1 Reference in Criminal proceedings against Vladimir Turansky (C-491/07)

Lodged on 31 October 2007

Schengen protocol – Ne bis in idem – Discontinuation of criminal proceedings

Background
The referring Austrian court asks in this reference whether the Austrian government can prosecute a person for the same crime that he was prosecuted for in Slovakia, given that the criminal proceedings in Slovakia were discontinued after an evaluation of the merits of the case by the Slovak authorities. The case asks, essentially, whether such a prosecution would be prohibited by the *ne bis in idem* principle forming part of the Schengen Agreement.

Link
Reference

5 EMPLOYMENT LAW

5.1 Judgment in Josefa Velasco Navarro v Fondo de Garantia Salrial (Fogasa) (C-246/06)

17 January 2008, Fourth Chamber

Protection of workers – Insolvency – Direct effect

Background
Ms Navarro was dismissed by her employer, Camisas Leica, on 27 December 2001 and she reached a judicial conciliation settlement with the company for unfair dismissal on 13 May 2002. Camisas Leica was declared insolvent on 5 March 2003 and Ms Navarro sought to recover compensation for unfair dismissal from the Spanish Wages Guarantee Fund (Fogasa). Fogasa agreed to pay her the sum of "salarios de tramitacion", which corresponded to her wages for the period between the dismissal and the settlement of the claim, but it refused to pay her compensation for unfair dismissal. The compensation sum was refused on the basis that it had been agreed by judicial settlement and not been awarded by judgment or other judicial decision. Directive 2002/74 amends Article 3 of Directive 80/987 to include a provision ensuring that guarantee institutions guarantee payment of compensation fixed by judgment or administrative decision in case of insolvency. Directive 2002/74 entered into force on 8 October 2002, but the Spanish legislature had taken no steps to implement this Directive by the deadline of 8 October 2005, as it believed that existing Spanish domestic legislation fully complied with the Directive. The question referred was, in view of the failure to implement correctly Directive 2002/74, whether the direct effect of the Directive can be relied upon after the implementation date in

relation to facts which occurred before the implementation date. Although Directive 2002/74 was already in force on the date when Camisas Leica was declared insolvent, the implementation date had not passed.

Judgment
The ECJ found that, where Directive 2002/74 had not been transposed into national law by the deadline for implementation, the possible direct effect of Article 3 of the Directive could not be relied upon in relation to insolvency which occurred before the implementation date. The Court did rule, however, that national rules should be interpreted in accordance with general principles and fundamental rights of Community law. It found that there had been a breach of the principle of equal treatment during the period between the date of entry into force of Directive 2002/74 and the deadline for implementation, as Spanish national law did not provide a guarantee of payment of compensation for dismissal where compensation had not been awarded by judgment or other judicial decision but had been agreed by judicial settlement.

Link
Judgment

5.2 Opinion in Stringer v Her Majesty's Revenue and Customs (C-520/06)

24 January 2008, Advocate General Trstenjak

Working time – Minimum period of annual leave – Sick leave

Background
This case involves questions concerning sick leave. Several claims were brought by workers in the UK, including, in one case, an employee who had been on sick leave for one year and had then been denied annual leave that she claimed should have accrued to her during the period she spent on sick leave. In another case, several employees brought a claim against their employer arguing that, having been dismissed and having been on sick leave for a substantial part of the year prior to dismissal, they were entitled to compensation for paid annual leave that should have accrued to them. This case arises from a reference from the House of Lords asking the Court about the meaning of Article 7 of Directive 2003/88 (on the organisation of working time and unpaid annual leave) and whether a worker who has spent a substantial period of time on annual sick leave is entitled to claim annual leave accrued, nominally, during that period.

Opinion
The Advocate General reached the conclusion that a worker is entitled to accrue paid annual leave while ill and away from work. He did, however, rule out the possibility of running two types of leave – sick leave and annual leave – concurrently. He found that paid annual leave accrued during a period of sick leave cannot be taken during that time spent on sick leave. The Advocate General went on to find that workers are entitled to claim money for annual leave which has accrued but has not been taken due to illness. Ultimately on these questions, the Advocate General concluded that the existence of the right to paid annual leave cannot be made subject to the ability of the worker.

Link
Opinion

5.3 Opinion in Coleman v Attridge Law and Steve Law (C-303/06)

31 January 2008, Advocate General Maduro

Discrimination on grounds of disability – Indirect discrimination – Treatment of workers

Background
The applicant in this case was employed as a legal secretary by an English law firm. Having given birth to a disabled son in 2002, Coleman requested that her employers give her flexible working hours in order that she could have more time to care for him. Coleman left her job in 2005 claiming that due to her employer's refusal to offer her as much flexibility in her working hours as parents of other children, she had been subject to constructive dismissal. In bringing a claim before the Employment Appeal Tribunal, Coleman argued that her employers had breached the terms of the Disability Discrimination Act (DDA), even though she herself was not disabled. The question was, therefore, whether the DDA, implementing the Framework Directive on equal treatment at work (Directive 2000/78), prohibited direct discrimination against someone related to a disabled person.

Opinion
The Advocate General reached the Opinion that the Framework Directive protects those who are directly discriminated against as a result of an association with a disabled person, even if they themselves are not disabled. The important part of the Framework Directive for the purposes of this case was the words "on the grounds of", according to the Advocate General. He concluded that Article 1 of the Framework Directive prohibits discrimination on the grounds of several different bases, while there is no mention of the need for the person being discriminated against to be disabled himself. The Advocate General did not accept the argument of the UK Government that the Framework Directive only provides minimum protection for workers. He concluded that, as the Directive was adopted under Article 13 TEC (giving the EU the power to take action to combat discrimination), the Directive can be read as ensuring more than just a minimum level of protection for employees.

Link
Opinion

5.4 Opinion in Othmar Michaeler and Subito GmbH v Labour Inspectorate of the Autonomous Province of Bolzano and the Autonomous Province of Bolzano (C-55/07)

24 January 2008, Advocate General Colomer

Equal treatment – Part-time workers – Employment contracts

Background
Italian national provisions imposed an obligation on employers to send a copy of part-time employment contracts within 30 days of their conclusion to the competent provincial department and imposed an administrative fine for delay, which did not set an upper limit. The same did not apply to full-time contracts. The question referred to the ECJ was whether such obligations were compatible with Community law provisions and Directive 97/81 concerning the Framework Agreement on part-time work.

Opinion
The Advocate General concluded that both Directive 97/81 on part-time work and Directive 76/207 concerning the application of the principle of equal treatment of men and women at work must be interpreted as prohibiting national provisions which impose an obligation on an employer to submit a copy of all part-time employment contracts within 30 days of their conclusion. Such a notification requirement is disproportionate and capable of amounting to discrimination against part-time workers, under Directive 97/81. It may also amount to sex discrimination under Article 3 of Directive 76/207, where it is shown to affect a larger proportion of women than men.

Link
Opinion

6 FREE MOVEMENT

6.1 Opinion in KD Chuck v Raad van bestuur van de Sociale Verzekeringsbank (C-331/06)

16 January 2008, Advocate General Mazak

Retired persons – Pensions – Third countries

Background
Mr Chuck was a British national who had worked in the EU for a number of years, working for the majority of the time in the Netherlands, and in Denmark for nine months. Mr Chuck then moved to the United States, from where he later submitted a request for a pension to the Netherlands pension authorities. The question arose as to whether the provisions of Regulation 1408/71, on social security schemes for workers, apply to pension requests submitted by a person living outside the EU. The Dutch contested whether the Netherlands pension authorities would have to take into consideration, when calculating the pension request, the periods of insurance paid under both Netherlands and Danish law.

Opinion
The Advocate General concluded that when a worker lives outside the EU at the time of reaching retirement age, Article 48 of the Regulation should be applied in the same way as for workers who are still resident within the EU. It was deemed incompatible with EU law to make the calculation of a pension dependent on the condition that the person lives within the EU at the time of making the request. The Regulation, however, does not provide for the pension to be paid into a bank account outside the EU and such payment would remain subject to agreement between the Member State and third country.

Link
Opinion

7 INTELLECTUAL PROPERTY

7.1 Judgment in Productores de Musica Espana (Promusicae) v Telefonica de Espana SAU (C-275/06)

29 January 2008, Grand Chamber

Copyright – Personal data – Disclosure – Civil litigation

Background
Promusicae is a Spanish non-profit-making organisation of producers and publishers of musical and audiovisual recordings. It applied to the Spanish court for an order against Telefonica to disclose the identities and physical addresses of certain persons to whom it provided internet access services, whose IP address and date and time of connection were known. Those persons used the KaZaA file exchange program and provided access in shared files to music in which Promusicae held the exploitation rights. Promusicae claimed that the users of this program were engaging in unfair competition and infringing intellectual property rights and sought to bring civil proceedings against them. Telefonica refused to disclose the information, contending that, under Italian national law, disclosure of such data is authorised only in relation to criminal proceedings and for the purposes of safeguarding public security and national defence. The question referred was whether Community law requires Member States to lay down an obligation to communicate personal data in the context of civil proceedings in order to ensure effective protection of copyright.

Judgment
The ECJ held that Community law does not require Member States to lay down an obligation to communicate personal data in the context of civil proceedings in order to ensure effective protection of copyright. The Court, however, did note the need for Member States, when transposing the directives on intellectual property and the protection of personal data, to strike a balance between fundamental rights, namely the right to respect for private life on the one hand and the right to protection of property and the right to an effective remedy on the other. Member States must interpret national law in a manner consistent with the directives, also making sure that they do not rely on an interpretation which would be in conflict with those fundamental rights or other principles of EU law, such as proportionality.

Link
Judgment

7.2 Opinion in O2 Holdings Limited & O2 UK Limited v Hutchison 3G UK Limited (C-533/06)

31 January 2008, Advocate General Mengozzi

Trade mark – Comparative advertising

Background
Directive 89/104 concerns registered trade marks and Article 5 confers on the proprietor exclusive rights, which entitles him to prevent all third parties from using any sign in the course of trade without consent. Article 5(1)(b) of Directive 89/104, prevents the use of a registered trade mark where there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark. The UK mobile phone company O2 Holdings Limited & O2 (UK) (O2) brought an action against Hutchison 3G (H3G) for infringement of both the O2 trade mark and its bubbles trade mark in H3G's TV advertising. The claim for infringement of the O2 trade mark was subsequently dropped, as it was accepted that the price comparison was true and it was not misleading in any way. The remaining action, directed only against the use of the bubble images, was dismissed by a UK court, as the use was found to comply with the provisions permitting comparative advertising under Article 3a(1) of Directive

84/450. O2 appealed this judgment and the Court of Appeal referred the question of whether the use of the registered trade mark falls within Article 5 of Directive 89/104, preventing the use of a registered trade mark by third parties.

Opinion
The Advocate General concluded that the use by a trader of a sign identical or similar to the registered trade mark of a competitor in comparative advertising, is covered exclusively by Article 3a of Directive 84/450 and is therefore not subject to Article 5 of Directive 89/104. Furthermore, Article 3a allows the use of such a sign in this way even if the use is not indispensable for the purpose of identifying the competitor or the goods or services concerned.

Link
Opinion

8 PUBLIC PROCUREMENT

8.1 Judgment in Commission v Portugal (C-70/06)

10 January 2008, First Chamber

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. This concerns 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.

Judgment
Following the line adopted in Advocate General Mazak's Opinion, the Court found that, despite some efforts on the part of the Portuguese to remove the legislative provision in question, Portugal remained in breach of its obligations. At the time of the Commission's referral of the matter to the Court, the repeal of the Portuguese law had not taken effect. The Court concluded that by imposing legislation that made awards for breaches of procurement law contingent on proof of fault or fraud, Portugal had clearly failed to implement the terms of the Remedies Directive fully. The Court reiterated that providing parties with a right of redress against contracting authorities is a fundamental part of Community law. Given the seriousness of the breach, it imposed a daily penalty of €20,000 to be levied until such time as Portugal complies with the terms of the Remedies Directive.

Link
Judgment

8.2 Judgment in Emm, G Lianakis AE and others v Dimos Alexandroupolis and others (C-532/06)

24 January 2008, First Chamber

Public service contracts – Award criteria – Subsequent determination – Equal treatment of operators

Background
This case came from two sets of proceedings in Greece concerning the application of Directive 92/50 on the procedures for the award of public service contracts. The contract concerned a project relating to the local tax register (cadastre) and town plan and a committee was set up by the Municipal Council to assess the bids. After the bids were submitted, however, the committee decided on the weighting to be given to each of the three criteria specified in the contract notice (3:1:1). The award notice merely gave the criteria in order of priority. The committee then set further specific criteria for the awarding of points to each company in respect of each of the three criteria. For instance, experience was to be evaluated with reference to the monetary value of the company's previously completed projects (ranging from 60 points for projects valuing over €12 million to 0 points for projects worth up to €500,000). Following the award of the contract, unsuccessful bidders challenged the decision, claiming that weighting the criteria and setting further sub-criteria constituted an infringement of the Directive.

Judgment
The Court clarified that the criteria used were to be classed as qualitative selection criteria, as opposed to award criteria for the purposes of the Directive. It stated that according to Article 36(2) of the Directive, public authorities were precluded from stipulating at a date, later than the publication of the contract notice, weighting factors or sub-criteria not published in the contract notice or documents. Such action did not comply with the principles of equal treatment of bidders and of transparency that were inherent in the procurement process. Specific criteria are laid down by the Court to be met if weighting factors are to be applied subsequently to sub-criteria, as have been set out in previous case law.

Link
Judgment

9 TAX

9.1 Judgment in NV Lammers & Van Cleeff v Belgium (C-105/07)

17 January 2008, Fourth Chamber

Interest payments – Dividends for foreign director

Background
This case concerns the Belgian subsidiary of a Dutch company, one of whose directors is the Dutch parent company itself. Interest payments were made by the subsidiary to the parent in respect of a loan made by the parent. The Belgian tax authorities considered such payments to be dividends and decided to tax them accordingly. The company challenged this assessment, noting that such payments would not be reclassified as dividends and would not be taxable if made to a director that was a Belgian company. The Antwerp court seized of the matter made a

preliminary reference to the ECJ asking whether the Belgian legislation contravened Treaty principles of free movement.

Judgment
The Court agreed with the claimant company, finding that the legislation did contravene Articles 43 and 48 TEC (freedom of establishment). The Court went on to examine whether the legislation in question could, however, be objectively justified as a measure intended to address abusive practices. While the Court agreed that examining whether the offer of a loan was made on terms that would not be offered in an arm's-length transaction could be used to determine whether a transaction is artificial, it did not find that the Belgian legislation met this test. The Belgian legislation stated that dividends included where the "total of the interest-bearing loans is higher than the paid-up capital plus taxed reserves at the beginning of the taxable period". The Court found that such a test could also be met by transactions carried out on an arm's length basis.

Link
Judgment

9.2 Judgment in Theodor Jäger v Finanzamt Kusel-Landstuhl (C-256/06)

17 January 2008, Second Chamber

Inheritance tax – Assets situated in another Member State - Valuation

Background
German inheritance tax is applied in respect of all assets of those domiciled in Germany whether those assets are situated in Germany or abroad. If a foreign equivalent to inheritance tax is levied on the beneficiary of the foreign assets, it may be offset against the liability for taxation in Germany if no relevant double taxation agreement exists. For German inheritance tax purposes, foreign agricultural and forestry property is valued at fair market value, whereas a special valuation procedure is applied to such property in Germany, which generally arrives at a value that is 10% of the market value. Further reductions and tax-free amounts were available to those who acquired such property if it was located in Germany but not so for foreign property. Mrs Jäger died in Germany leaving property in Germany and a farm in France to her sole heir, her son, who lived in France. He challenged the German assessment of tax liability, arguing that the above-mentioned provisions were discriminatory and contrary to Community law.

Judgment
The ECJ concluded that, indeed, it was contrary to Articles 56 and 58 TEC (free movement of capital) for German legislation to provide for such a difference in the treatment of foreign as opposed to domestic inherited agricultural property. The Court held that the difference in treatment could not be justified by stating that this situation was not objectively comparable to that of a domestic inheritance. The Court agreed that it might be possible to provide an objective justification in the public interest for such measures as they pursue social goals and aim to preserve agricultural jobs. The Court could not, however, see why such an objective would justify withholding such benefits in respect of the inheritance of agricultural property outside Germany.

Link
Judgment

9.3 Judgment in Commission v Germany (C-152/05)

17 January 2008, Second Chamber

Tax relief – Restriction of relief on grounds of nationality – Article 39 TEC

Background
The German federal government introduced legislation that created a subsidy for people building houses in Germany, in the form of a partial exemption from income tax. The tax exemption covered the highest earning workers paying income tax in Germany and was intended to encourage those on high incomes to build houses in Germany and settle there rather than elsewhere. The tax subsidy offered under the legislation did not extend to houses built in Member States other than Germany. The Commission issued the federal government with a notice that it found this legislation to be incompatible with Article 39 TEC on free movement of workers and Article 49 TEC on freedom of establishment. Following a dispute on the matter between Germany and the Commission, the issue was referred to the Court.

Judgment
The Court found little difficulty in reaching the conclusion that the German federal law was incompatible with Community rules on free movement insofar as it constituted a disincentive for German nationals to work and establish themselves in other Member States. Germany argued that the measure was justified as it had as its ultimate aim stimulation of the federal economy. The Court rejected this as a valid justification, finding that the measure was disproportionate to the aim that the German federal government was trying to achieve and, effectively, impeded freedoms guaranteed in Articles 39 and 49 TEC.

Link
Judgment

10 TELECOMMUNICATIONS

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

31 January 2008, Fourth Chamber

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

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

the question of whether Community law dictates that a Member State must ensure plurality in its national media sector.

Judgment
The Court found that while Member States are not obliged to privatise particular sectors of their media markets, they are not permitted under the terms of the EC Treaty to curtail selectively the access of market operators once sectors of the market have been privatised. National measures aimed at restricting the number of operators in a particular market sector are liable to restrict free movement. It is only in certain defined circumstances that such a restriction can be justified – chiefly on public policy grounds where, for example, it is necessary in order to reduce the risk of harmful radio interference. Article 49 TEC requires Member States to comply with the principle of non-discrimination. The Court concluded that there was no justification for the Italian authorities to continue to apply national legislation that made it impossible for media operators to broadcast, even though they had the right to do so. That position unfairly favours the incumbent and, as such, the Court found in favour of the applicant.

Link
Judgment

11 TRANSPORT

11.1 Reference in Associação Nacional de Transportes Rodoviários de Pesados de Passageiros (Antrop) and Others v Council (C-504/07)

Lodged on 19 November 2007

Bus service – Public service obligations – State aid

Background
The referring Portuguese court asks whether national authorities are entitled to impose public service obligations on a public company that is designated to provide public passenger transport in one particular municipality. A supplementary question asks whether the national authority will be obliged to pay compensation to the transport operator in question, and if so, how that compensation should be paid. The reference goes on to ask, in the light of possible compensation payments by the public authorities to the bus company, whether these would be acceptable in terms of Article 87 TEC which prohibits illegal State aid payments.

Link
Reference

ANNEX I: CASE TRACKER

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

Topic	Case	Hearing	*Opinion*	*Judgment*
Civil justice				
Language of documents served in legal proceedings	Weiss und Partner v Handelskammer Berlin C-14/07		29 November 2007	
Enforcement of judgments – failure to comply with court injunction	Marco Gambazzi v Daimler Chrysler Canada Inc C-394/07			
Mutual recognition of decision on placement of child in custody	A C-523/07			
Competition				
Privilege of in-house lawyers under EC competition	Akzo Nobel T-253/03 R T-125/03 R Appeal notice 8 December 2007 (C-550/07)	28 June 2007		17 September 2007
Setting of mandatory minimum lawyers' fees	Hospital Consulting Srl C-386/07			
Consumer				
Right of seller to claim compensation when consumer cancels within "cooling off" period	Messner v Firma Stefan Kruger C-489/07			
Constitutional				
Review of final administrative decision, interpretation of EU law, conditions	Willy Kempter KG v Hauptzollamt Hamburg-Jonas C-2/06		24 April 2007	
Criminal				
Standing in private prosecutions	István Roland Sós C-404/07			
Prosecution of a national for a crime already prosecuted in another Member State	Staatsanwaltschaft Regensburg v Klaus Bourquain C-297/07			
Prosecution of a national for a crime already prosecuted but discontinued in another Member State	Vladimir Turansky C-491/07			
Employment				
Discrimination on grounds of disability	S. Coleman v Attridge Law, Steve Law	9 October 2007	31 January 2008	

	C-303/06			
Social security for migrant workers	Derouin C-103/06	7 March 2007	18 October 2007	
Indefinite sick leave	Stringer v HMRC C-520/06	20 November 2007	24 January 2008	
Indemnity for commercial agents	Turgay Semen v Deutsche Tamoil GmbH C-348/07			
Refusal of pension rights to surviving partner of a civil partnership	Tadao Maruko v Versorgungsanstalt der deutschen Bühnen C-267/06		6 September 2007	
Right to claim unemployment benefit while residing in another Member State	Jorn Petersen v Arbeitsmarktservice Niederosterreich C-228/07			
Legality of national legislation enforcing obligatory retirement ages	Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform C-388/07			
Environment				
Environmental impact of airport expansion	Paul Abraham v Wallonia C-2/07		29 November 2007	
Freedom of information				
Access to European Council documents	Sweden and Maurizio Turco v Council Joined Cases C-39/05 and C-52/05		29 November 2007	
Immigration				
Power of Council to legislate on immigration issues	Parliament v Council C-133/06		27 September 2007	
Intellectual property				
Trade mark protection – taking account of other traders' general interest	Adidas v Marca Mode & Others C-102/07		16 January 2008	
Entitlement to copyright protection of new media	Sony Music Entertainment v Falcon Neue Medien Vertrieb GmbH C-240/07			
Public procurement				
Right of redress against state authorities	Commission v Portugal C-70/06		9 October 2007	
State aid				
Calculation methods	Département du			

for recovery of aid	Loiret v Commission C-295/07			
Taxation				
Corporate tax regime – parent and foreign subsidiary	Finanzamt Hamburg-Am Tierpark v Burda Verlagsbeteiligungen GmbH C-284/06		31 January 2008	
Autonomous regional tax policies conflicting with national tax law	Unión General de Trabajadores de la Rioja C-428/06			
Sixth VAT Directive – zero rating	Marks & Spencer plc v HMRC C-309/06		13 December 2007	
Offsetting of profits and losses	Société Papillon v Ministère du budget C-418/07			
Tax treatment of charitable donations to foreign entities	Hein Persche v Finanzamt Lüdenscheid C-318/07			
VAT applicable to UK postal services	TNT Post UK Ltd v HMRC and Royal Mail Group Ltd C-357/07			
Entitlement of bookmakers' agents to VAT exemptions	Tierce Ladbroke SA v Belgium C-232/07			
Telecommunications				
Plurality of media ownership	Centro Europa 7 Srl v Ente Tabacchi Italliani – ETI C-380/05		12 September 2007	31 January 2008
Unbundling of local loop access	Arcor AG & Co. KG v Germany C-55/06		18 July 2007	
Transport				
Air passenger rights when flight cancelled	Eivind F Kramme v SAS C-396/06		27 September 2007	
Imposition of public service obligations on publicly-run bus company	Antrop v Council C-504/07			

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