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The Law Societies
JOINT BRUSSELS OFFICE

The Brussels Office Update Series:

Developments from the European Court of Justice

March 2008

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INTRODUCTION

March – News from the EU Courts

The Court was on vacation during the weeks of 17 and 24 March.

The Court published a supplement to its information note on references for preliminary rulings with respect to the new urgent preliminary ruling procedure concerning cases in the area of freedom, justice and security. This clarifies the conditions to be satisfied before the procedure will be applied and the information that should be included in the national court's request.[1]

In the case of *Securenta* (C-437/06) the ECJ has made an important judgment restricting the extent to which VAT can reclaimed for expenses incurred in relation to share offers. It is thought that this could have important ramifications for financial markets and in particular for the costs incurred by companies involved in raising capital. The *Infront* (C-125/06) looks at how Member States should go about restricting exclusive broadcasting rights for important events, like the World Cup.

Advocate General Kokott gave an opinion in the case of *Total* (C-188/07), which concerns litigation following on from the Erika disaster and in particular the application of EU legislation on waste and issues of liability. Another case from Belgium (C-54/07) examines the extent to which representative bodies can seek redress against potential employers who make racially discriminatory remarks in the media about who they will and will not employ.

Last of all, for the globetrotter reader, the *Emirates Airlines* case (C-173/07) clarifies the extent to which the EU's air passenger compensation rules apply to flights outwith the EU or with non-EU carriers.

Coming up in April

The Court will give a ruling in *Maruko* (C-267/06), which concerns the ability of registered partners in a same-sex relationship to claim survivor's benefits. A hearing will take place to examine competition and VAT issues related to off-street parking on the Isle of Wight (C-288/07) and the opinion in *Huber* (C-524/06) will look at the processing of personal data in Germany and the different treatment of foreign nationals with respect to its central register of foreign nationals.

The Court will rule in the *Derouin case* (C-103/06) concerning the tax and social security treatment of foreign lawyers practising in France. It will also rule on Marks and Spencer's challenge to the way in which VAT refunds are conducted in the UK following a misapplication of the rules by domestic authorities (C-309/06).

Case tracker

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

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:064:0001:0002:EN:PDF

1. CITIZENSHIP

1.1 Reference in Deniz Sahin v Bundesminister fur Inneres (C-551/07)

Lodged 11 December 2007

Asylum seeker – Family member of EU citizen - Right to reside

Background
The German court asks the ECJ whether Directive 2004/38, on the rights of EU citizens and their family members to move freely within the territory of Member States, confers rights on individuals who arrive independently in the Member State in question, only then to become a family member of an EU citizen. It goes on to ask whether this can be made dependent on the person in question residing legally in that Member State or if it extends to those who are entitled to stay there pending an application for asylum.

Link
Reference

2 COMPANY LAW

2.1 Reference in HSBC Holdings plc, Vidacos Nominees Ltd v The Commissioners of Her Majesty's Revenue & Customs (C-569/07)

Lodged 24 December 2007

Duty on the transfer of shares between Member States

Background
The reference from the Special Commissioners asks whether Community law allows the levy of a duty on the transfer of shares into a clearing service in the following circumstances. In particular this concerns the situation where company A in Member State A acquires shares in company B established in Member State B in return for shares in company A, which are to be listed on the stock exchange of Member State B. The legislation in Member State A provides that duty is not to be charged on the issue of shares in certificated form, but is to be charged at 0.5% on the subsequent sale of those shares. The transfer of uncertificated shares to a clearing service is subject to duty of 1.5% but the operator may seek approval to avoid such duty and charge a duty of 0.5% on subsequent sales. Member State B requires that all shares issued there are to be held in uncertified form through a clearance service established in that Member State, which has not sought the afore-mentioned approval.

Link
Reference

3 COMMUNITY LAW

3.1 Judgment in Commission v Infront WM AG (C-125/06)

12 March 2008, Fourth Chamber

TV broadcasting – Action for annulment – Direct and individual concern

Background
This case is an appeal by the Commission against the CFI judgment in case *T-33/01 Infront WM v Commission*, which annulled a decision of the Commission addressed to the UK. Infront bought the rights to broadcast various sporting events and then resold them to broadcasters. Its parent company had bought from FIFA the exclusive rights to broadcast certain matches of the 2002 and 2006 football World Cups within Europe. The rights were then assigned to Infront. Directive 89/552, known as the "Television without borders" Directive permits Member States to take measures to ensure that certain events of "major importance for society" are not broadcast on an exclusive basis, if this would deprive a substantial proportion of the population from viewing them. A list of such events was to be drawn up by Member States. Subsequent measures to be taken by Member States were to be notified to the Commission, which was to check their compliance with Community law within three months and notify Member States thereof. The UK had taken such measures in relation to the World Cup Finals, which the Commission had checked and had published in the Official Journal. Infront successfully challenged the decision of the Commission before the CFI, as it had been adopted by the Commission's Director General for Education and Culture (not the College of Commissioners), who did not possess the powers to do so. The Commission appealed, contesting whether a "decision" had been taken and whether Infront had standing i.e. was the measure of direct and individual concern according to Article 230 TEC.

Judgment
The Court rejected the Commission's appeal. The Commission's approval of the measures and subsequent publication of the UK measures in the Official Journal engaged other Member States' obligations under the mutual recognition provisions of the Directive. Other Member States were to ensure that broadcasters within their jurisdiction did not act to frustrate the UK measures. Therefore there was a decision of the Commission that could be challenged. The Court then found that Infront did meet the requirements of direct and individual concern. As a result of the Commission's actions, new restrictions were imposed on Infront's exclusive broadcasting rights and Member States had no margin of discretion when implementing the measures published in the Official Journal. As such the measures were of direct concern. As Infront held the exclusive broadcasting rights before the adoption of the decision, it was "identifiable" and therefore the decision was of individual concern.

Link
Judgment

3.2 Reference in Amministrazione dell'Economia e delle Finanze Agenzia delle Entrate v Olimpiclub Srl (C-2/08)

Lodged 2 January 2008

Res judicata – Compatibility with Community law

Background
The Italian court asks whether Community law prevents the application of a provision of domestic law, setting down the principle of *res judicata*, where its application would lead to a result that is incompatible with Community law. This relates, in particular, to the application of the rules on VAT and the abuse of rights, where a

judgment in another case on a fundamental issue common to other cases has binding authority with respect to the case at hand.

Link
Reference

4 COMPETITION LAW

4.1 Judgment in Ioannis Doulamis v Union des Dentistes et Stomatologistes de Belgique (UPR) (C-446/05)

13 March 2008, Second Chamber

Dentists – Advertising – Criminal sanctions – Restriction of competition

Background
Mr Doulamis is a Belgian dentist who, under national law, was prohibited from advertising his practice. He was charged with placing adverts, containing factual information, in a telephone directory. Criminal proceedings were brought against him for breaching Belgian legislation on the dental profession and on advertising in dental care matters. In his defence, he claimed that advertising is essential to free economic competition and asserted that his dental practice was equivalent to an "undertaking" as defined by Article 81 TEC on anti-competitive agreements and concerted practices. Mr Doulamis argued that this, in conjunction with Articles 10 and 3(1)(g) TEC prohibited Member States from adopting such laws, in so far as they interfere with free competition.

Judgment
The Court considered that the Community law provisions relied upon in the present case did in principle prevent Member States from introducing national provisions which may serve to jeopardise the competition rules. However, the Court concluded that the laws in question did not fall within the situations covered by Articles 81 and 10 TEC. In other words, in line with previous case law, Belgium did not "require or encourage the adoption of agreements, decision or concerted practices contrary to Article 81". Nor did it reinforce the effects of such agreements. Accordingly, the Court found that the national prohibition against advertising was not incompatible with Community law.

Link
Judgment

4.2 Opinion in Motosykletistiki Omospondia Ellados NPID (MOTOE) (C-49/07)

6 March 2008, Advocate General Kokott

Sport – Definition of undertaking - Articles 82 and 86 TEC

Background
This reference from the Greek courts seeks to ascertain the extent to which EC Treaty provisions on competition law apply to sporting events. The Greek automobile and touring club (ELPA) is a non-profit-making organisation. It organises motor sports competitions and has created a committee for supervising and organising such motorcycling events (ETHEAM). ELPA also participates, however,

in the Greek state's process of approving all such events, under which ELPA's consent is necessary before an event can be authorised. Another, independent, non-profit making organisation, MOTOE, had attempted to organise a number of events in 2000 but had not received authorisation to do so as ELPA had withheld its consent. MOTOE had sought damages against the Greek Ministry of Public Order for the tacit refusal of its application, claiming that the approval process was not impartial and that it infringed Articles 82 and 86 TEC. Article 82 outlaws abuses of a dominant position by undertakings, while Article 86 requires Member States to ensure that public bodies or bodies that are granted special or exclusive rights do not infringe Treaty rules, such as Article 82.

Opinion
The Advocate General commented that sport was not excluded entirely from the application of the provisions of the Treaty. As such a body such as ELPA should be considered as an "undertaking" for the purposes of applying Articles 82 and 86 TEC. It was, however, up to the referring court to ascertain whether ELPA held a dominant position on the market and whether any abuse of that position would have an appreciable effect on inter-state trade. In particular it was also unclear the extent to which ELPA's refusal or withholding of consent could be done arbitrarily or whether it was obliged to grant consent when all other conditions in the legislation were met. As such the Advocate General continued by stating that the provisions of the Greek Road Traffic Code did not comply with Articles 82 and 86 to the extent that it provided ELPA with a power of co-decision in the state's authorisation of all such events, without imposing any apparent restrictions, obligations or controls. The Treaty provisions of services of general economic interest did not apply to the case in hand.

Link
Opinion

5 CONSUMER LAW

5.1 Opinion in Emirates Airline Direktion fur Deutschland v Diether Schenkel (C-173/07)

6 March 2008, Advocate General Sharpston

Air Transport – Compensation - Scope of Regulation 261/2004

Background
Regulation 261/2004 allows for compensation to passengers on flights from a Member State to a third country in the event of a cancellation, delay or boarding refusal. The same is not awarded to passengers facing similar cancellations or delay where they depart from a third country to a Member State on a non-Community carrier. Mr Schenkel was booked on a return flight from Düsseldorf via Dubai to Manila. His return flight from Manila was cancelled and Mr Schenkel attempted to recover his costs through the German courts, relying on the Regulation along with the Montreal Convention to which the Community is a signatory. He claimed that both the outward and inward journeys, which were booked simultaneously, constituted one flight that commenced in and was to end in a Member State. Emirates Airline contended that the outward and inward journeys were to be considered as two distinct flights, the latter involving a non-Community carrier departing from a third country and, according to the Regulation, not liable to pay compensation. The referring court highlighted the differences between the Montreal

Convention and the Regulation, questioned the scope of the latter, the definition of "flight" contained within it and asked whether persons travelling on such a return flight fell within the ambit of the protection afforded by the Regulation.

Opinion
The Advocate General remained unconvinced as to Mr Schenkel's interpretation of the Regulation, according to which flights from a Member State to a third country and back are to be regarded as a single flight. He asserted instead that regardless of whether or not the flights were booked at the same time, Article 3(1) of the Regulation is unambiguous in its terms. It should be construed as covering individuals on outbound flights from a Member State while excluding from its scope individuals on flights which depart from a third country to a Member State, unless operated by a Community carrier.

Link
Opinion

5.2 Reference in Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA (C-549/07)

Lodged 11 December 2007

Air passengers' rights – Extraordinary circumstances – Engine damage

Background
The reference from an Austrian court asks whether damage to an aircraft engine constitutes "extraordinary circumstances" within the meaning of Regulation 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. It also asks whether satisfying the legal minimum with respect to maintenance work constitutes the taking of "reasonable measures" for the purposes of the Regulation, thus relieving the airline of liability to pay compensation. Last, it asks whether "extraordinary circumstances" are instead to be considered as cases of *force majeure* or natural disaster.

Link
Reference

6 EMPLOYMENT LAW

6.1 Opinion in Centrum voor Gelijkheid van Kansenen voor Racismebestrijding v Firma Feryn NV (C-54/07)

12 March 2008, Advocate General Poiares Maduro

Discriminatory comments in media – Recruitment policy

Background
Mr Pascal Feryn is one of the directors of NV Firma Feryn (Feryn) who was quoted by various national newspapers as having given a statement during an interview on national television to the effect that he would not recruit persons of Moroccan origin in order to meet customer requirements. The centre for equal opportunities and opposition to racism (CGKR) brought proceedings against Feryn on the basis that its discriminatory recruitment policy infringed national laws against discrimination. These transposed Directive 2000/43 on the principle of equal treatment between

persons irrespective of racial or ethnic origin into Belgian law. The national court sought a preliminary ruling, essentially asking whether, during a recruitment drive, a public statement made by an employer to the effect that it excludes applications from persons of a certain ethnic origin constitutes direct discrimination, or whether, not having acted upon this discriminatory statement, the discrimination is hypothetical and falls outwith the ambit of the Directive.

Opinion
The Advocate General initially considered whether, in the absence of an actual complainant, a public interest body, such as the CGKR, was entitled to seek a remedy in cases where the principle of equal treatment had been breached. The Advocate General opined that the scope of the Directive was not limited to situations where an individual victim exists, as this would serve to weaken the value of the principle of equal treatment in the field of employment. A public statement which infers that applicants of a particular ethnic origin will not even be considered for the position has the effect of dissuading such persons to apply. The effect is not hypothetical and is in itself a form of discrimination. As a result, individual victims may be hard to trace, considering that they have been deterred from applying for the position from the outset. Allowing employers to advertise publicly a discriminatory recruitment process at the outset and thereafter escape the consequences would clearly thwart the very purpose of the Directive. If a prime facie case of direct discrimination based on racial or ethnic origin is established, it is for the employer to prove that equal treatment provisions have not been breached. If the breach of equal treatment rules is found, the national court must then grant remedies that are effective, proportionate and dissuasive.

Link
Opinion

6.2 Reference in Evangelina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), Alcampo SA (C-537/07)

Lodged 3 December 2007

Parental leave – Invalidity pension – Social security entitlements

Background
The Spanish court seeks guidance from the ECJ on the framework agreement on parental leave and Directive 1996/34 implementing it. It would appear that the case concerns a worker who has reduced her working hours and her salary as a form of parental leave. As such the amount of invalidity pension to which she is entitled is reduced, as is her future entitlement to accrued social security benefits. The court has asked whether the level of social security benefits must be maintained and whether the situation at hand constitutes direct or indirect discrimination in contravention of Directive 79/7 relating to equal treatment between men and women in the field of social security.

Link
Reference

6.3 Reference in Seda Kucukdeveci v Swedex GmbH & Co KG (C-555/07)

Lodged 13 December 2007

Age discrimination – Notice – Termination of employment

Background
The German employment court asks about the conformity to EU anti-discrimination legislation of a national law setting notice periods for the termination of employment contracts. This increases the minimum notice period incrementally with the length of service, but states that periods of employment before the age of 25 are to be disregarded. The Court goes on to ask whether the requirement to provide younger employees with only the basic period of notice can be justified by the need to provide flexibility in the workforce.

Link
Reference

7 ENVIRONMENT

7.1 Opinion in Commune de Masquer v Total France SA and Total International Ltd (C-188/07)

13 March 2008, Advocate General Kokott

Pollution - Concept of waste - Polluter-pays principle

Background
This case stems from the Erika shipping disaster. The ECJ was asked to interpret the provisions of Directive 75/442 on waste in relation to whether heavy fuel oil can be considered waste or becomes waste as a result of a spillage accident. The Court was also asked to consider whether the defendants' subsidiaries had to bear the costs of clearing off the oil pollution given that they produced the heavy fuel oil and arranged its transportation. Total International Ltd had been contracted by the Italian electricity production company ENEL to supply heavy fuel oil. In 1999, Total chartered a tanker named Erika to transport the fuel. The tanker sank off the French Atlantic coast and some of the cargo was spilled, polluting several coastal areas including the Masquer District. The latter brought proceedings seeking an order for the defendants to dispose of the waste from the tanker and to bear the costs incurred in cleaning and removing the pollution from the area. The French court sought to ascertain whether the heavy fuel in question was waste within the meaning of Article 1 of the Directive or whether it became so when spilled by accident in the sea. The court also asked whether the producer, seller and carrier of heavy fuel oil were to be considered the producers and/or holders of waste within the meaning of the Community legislation.

Opinion
Advocate General Kokott stated that heavy fuel oil, which meets the user's specifications and is refined and intended to be sold as a combustible fuel, cannot be treated as waste within the scope of Directive 75/442. In relation to the second point, the Advocate General concluded that when heavy fuel oil is spilled by accident and is mixed with water and sediment, it can be treated as waste within the meaning of Directive 75/442. Finally, it was concluded that if the producer, seller and carrier of the heavy fuel oil can be found guilty of personally contributing and/or causing the

polluting spillage, then they may be ordered under Article 15 of Directive 75/442 to bear the costs of disposing of the waste and of clearing the pollution. It was noted, however, that liability was limited by the provisions of the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

Link
Opinion

8 FREE MOVEMENT

8.1 Judgment in Commission v France (C-89/07)

11 March 2008, Sixth Chamber

Captain of ship – French flag – Nationality requirement

Background
Provisions of French maritime law state that the positions of captain and officer on board all ships flying the French flag are open only to French nationals. The Commission asserted that in maintaining such national legislation, France was in breach of the obligations imposed by Community law, in particular Article 39 TEC (free movement of workers) and provisions prohibiting discrimination based on nationality between Member States. While France had acknowledged the failings of its law and undertook to rectify it the Commission had not been made aware of any measures to this effect and brought an infringement action.

Judgment
The Court considered previous case law on this point, which held that a general exclusion to access to jobs, such as captain and second officer of a fishing vessel, could not be justified on grounds of public order, public security or public health. In addition, the Court held that Community law should be interpreted to the effect that it only authorises a Member State to reserve these positions to its own nationals on the condition that the attributed public powers are effectively and regularly exercised and do not comprise a very small part of their activity. According to this line of reasoning, the Court held that France had failed to fulfil its obligations under Community law.

Link
Judgment

9 POSTAL SERVICES

9.1 Judgment in Deutsche Post AG and others v Germany (Joined cases C-287/06 to 292/06)

6 March 2008, First Chamber

Universal service provider –Refusal of special tariff to intermediary postal operators

Background
This reference from the German courts sought to clarify under what conditions providers of business postal services should have access to the services of the universal service provider (USP) and its network under the EU Directive liberalising postal services (Directive 97/67). The Directive allows Member States to reserve certain postal services to the USP, in order to guarantee the service. German legislation reserved services for letters weighing less than 50 grams to Deutsche Post – the USP – but the legislation permitted other companies to collect mail at the senders' premises and deposit it at a Deutsche Post collection point. The Federal Network Agency (BNA) had ordered Deutsche Post to apply special tariffs to business customers depositing minimum guaranteed amounts of mail that was pre-sorted. The other parties to the case (such as Vedat Deniz) were licensed by the BNA to collect mail and deliver it to Deutsche Post, but they were refused the special tariff for pre-sorting the mail, as the licence did not permit them to carry out other services, such as sorting. Subsequently the Federal Cartel Office ruled that Deutsche Post was not allowed to refuse access to such partial services and the BNA ordered Deutsche Post to grant intermediaries access to its sorting offices. Following various challenges the German court sought clarification of the extent to which the USP should apply the special tariff for business customers to other companies acting as intermediaries.

Judgment
The Court held that the Directive had made express provision for this situation. Article 7(1) of the Directive, allowing Member States to reserve certain activities to the USP, does not cover the collection, pre-sorting and transport of mail to access points, such as sorting offices. Insofar as third parties provide such a service, they should be offered the special tariffs granted to business customers on a non-discriminatory basis.

Link
Judgment

10 PROFESSIONAL PRACTICE

10.1 Action in Commission v Austria (C-454/06)

Lodged on 21 December 2007

Patent lawyers – Temporary provision of services in Austria – Conditions

Background
The Commission is seeking an order from the Court to declare certain provisions of Austrian law contrary to Article 49 TEC on the freedom to services. In particular, this concerns the temporary provision of services in Austria by patent lawyers established in another Member State. Such lawyers are: required to enrol in a special register, which is made conditional on taking out professional liability insurance; subject to local disciplinary supervision, even for conduct other than serious breaches of professional duties; and obliged to engage a local lawyer or agent.

Link
Action lodged

11 PUBLIC PROCUREMENT

11.1 Opinion in Pressetext Nachrichtenagentur GmbH (C-454/06)

13 March 2008, Advocate General Kokott

Public procurement - Press agencies - Effective judicial protection - Directives 92/50 and 89/665

Background
The matter at hand involved a contract with the Austrian authorities for the provision of press agency services. These services were contracted to Austria Presse Agentur (APA) and were then transferred in 2000 to a wholly-owned subsidiary (APA-OTS). Modifications were made to the pricing arrangements in the original contract in subsequent years. Pressetext Nachtrichtenagentur (PN), another news services provider in the Austrian market, challenged the existing contractual relations, claiming that the Austrian authorities should have launched a public procurement procedure, rather than agreeing to the modifications in the contractual arrangements with APA and APA-OTS.

Opinion
Advocate General Kokott, in assessing the very detailed referral, answered three main points. She stated that if a contract which falls within the scope of Directive 92/50 is modified towards the end of its duration, it is not necessary for the contractor to start a process of public procurement, unless the modification substantially alters the contract. The Advocate General also stated that if the execution of a public procurement contract is passed to a subsidiary company, which the contractor holds and controls 100%, the passing on does not constitute a substantial modification of the contract, even when the contractor can then theoretically sell its shares in the subsidiary company to a third party. Finally, in relation to the question as to whether a basic modification of remuneration clauses constitutes a substantial modification of the contract, she concluded that this would depend on the significance of the modification in the context of the specific service provided and the public procurement market taken as a whole.

Link
Opinion

12 TAX

12.1 Judgment in Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG v Finanzamt Göttingen (C-437/06)

13 March 2008, Fourth Chamber

VAT- Scope of right to deduct VAT- Sixth VAT Directive

Background
This case concerns the apportionment of input VAT and the restrictions on its recovery, which could have significant impacts on EU financial markets. Securenta was a public company that carried out activities involving the acquisition, management and selling of real estate, securities, financial holdings and other investments. To raise capital for these activities it made public offers of shares, as well as of “atypical silent partnerships”, which have been likened to non-voting

preference shares. The company claimed that all its input VAT paid (including for expenditure in relation to the issue of shares) was deductible, as the costs incurred were linked to strengthening the company's capital – or in other words were part of its economic activity. The Finanzamt (German Tax Office) refused to allow the deduction of input VAT paid in relation to the costs incurred in the issue of silent partnerships and leasing transactions. A deduction was allowed in relation to the remainder of the input tax paid. Although this was not attributable to output transactions, the authorities applied a deduction formula that was in proportion to the size of investments made. Germany argued that deduction of input VAT is only allowable to the extent the expenditure connected with the issue of shares and silent partnerships is attributed to a business activity. Part of Securenta's capital was allocated to the acquisition of financial holdings, however, which is not a business activity. As such, input VAT paid had to be apportioned between business and non-business activities in relation to the nature of the investments made.

Judgment
The Court specified that non-economic activities (acquisition, holding and sale of interests in other businesses) do not fall within the scope of the Directive. For the costs incurred in issuing shares and silent partnerships, there is only entitlement to deduct input VAT in relation to costs that are directly attributable to the taxable person's economic activity within the meaning of Article 2(1) of the Directive. This has been read to imply that expenditure attributable to non-economy activities is non-deductible. Given the lack of methodology set in the Directives, Member States are to determine the method of apportionment between economic and non-economic activities. In doing so, Member States must have regard to the aims of the Directive and use a method that objectively reflects the input expenditure incurred in relation to the two activities.

Link
Judgment

12.2 Opinion in Ecotrade SpA v Agenzia Entrate Ufficio Genova 3 (Joined cases C-95/07 and 96/07)

13 March 2008, Advocate General Sharpston

VAT – Reverse Charge Mechanism – Error in classification – Recovery

Background
An Italian company, Ecotrade, traded in ingredients for the manufacture of cement and made a number of shipments in 2000 and 2001 using non-Italian shipping companies. Ecotrade and its suppliers believed such services to be VAT exempt (as shipping) and did not enter them in their VAT returns. The tax authorities inspected Ecotrade and contended that these were services for the intra-Community transport of goods. As such, Ecotrade should have declared the VAT and entered it as input tax, which it would then have been able to deduct as output tax. The company acknowledged the error and there was no suggestion of fraud. In effect its tax liability was the same. The tax authorities demanded payment of the tax concerned but did not allow Ecotrade to deduct the same amounts, as the time limit for doing so, set in the national legislation, had expired. In addition fines were imposed. The Italian court asked whether the Directive allowed Member States to apply a shorter time limit to the right to deduct tax (two years) compared to the longer period within which the tax authorities could demand payment of the tax under the reverse charge mechanism (four years).

Opinion
Advocate General Sharpston concluded that the VAT Directives do not prevent Member States from imposing such time limits for the deduction of input tax. Such time limits should comply with general principles of Community law i.e. they should not be less favourable then similar domestic procedures or render the exercise of the right virtually impossible or excessively difficult. Nor do the Directives prevent tax authorities from investigating tax returns and claiming unpaid tax after the expiry of such periods. The Advocate General continued, however, by stating that when an undeclared liability is discovered, which would have given rise to a right to deduct such tax, such a right must be taken into account when determining liability.

Link
Opinion

12.3 Opinion in Hans Eckelkamp and Others v Belgium (C-11/07)

13 March 2008, Advocate General Mazák

Free movement of capital - Inheritance tax - Articles 56 and 58 TEC

Background
This case concerns the compatibility of Belgian inheritance tax rules with the EC Treaty rules on free movement of capital and of citizens. In essence the Belgian legislation did not permit certain charges (such as debts secured against a mortgage) to be deducted from the inheritance tax assessment of immovable property when the deceased was residing in another Member State. Such charges would have been deductible if the deceased had been resident in Belgium. In 2002, Ms Eckelkamp had taken a loan from Hans Eckelkamp, secured against a property in Belgium. Ms Eckelkamp died in Düsseldorf at the end of 2003, leaving her estate to Hans Eckelkamp and other members of the family. In 2004 inheritance tax was calculated, following a declaration on the value of the estate made by the heirs. The Belgian tax authorities had advised the heirs that when the deceased had been non-resident, the debts in question should not be mentioned on the declaration. They followed this advice and paid the tax. Later on they claimed a refund. The Belgian court dismissed the claim, stating it was time-barred. It noted, however, that the debt should have been declared and that the Belgian rule in relation to non-resident testators should have been disapplied as contrary to Community law. On appeal the heirs argued the direct effect of Community law and the duty of administrative authorities to reconsider decisions taken in contravention of it.

Opinion
The Advocate General concluded that the provisions of the Belgian legislation amounted to arbitrary discrimination within the meaning of Article 58(3) TEC and was therefore incompatible with the Treaty provisions on the free movement of capital. While arguments were examined as to why a difference in treatment based on residence was objectively justified, the Advocate General did not agree that the mere fact of residence satisfied any overriding pubic interest reason.

Link
Opinion

12.4 Reference in Staatssecretaris van Financiën v Stadeco BV (C-566/07)

Lodged 21 December 2007

VAT – Liability in Member State of residence - Activity in another Member State

Background
The reference asks whether the VAT rules are to be interpreted as not imposing any liability to pay VAT in a company's country of residence in respect of an activity carried out in another Member State. If not, it asks whether the authorities are allowed to require the taxable person to issue a corrected invoice to his customer.

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			
Consumer				
Right of seller to claim compensation when consumer cancels within "cooling off" period	Messner v Firma Stefan Kruger C-489/07			
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 C-303/06	9 October 2007	31 January 2008	
Social security for migrant workers	Derouin C-103/06	7 March 2007	18 October 2007	3 April 2008
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	1 April 2008

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			
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			
Professional Practice				
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			
Local conditions on temporary provision of patent lawyers' services	Commission v Austrian C-564/07			
State aid				
Calculation methods for recovery of aid	Département du 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	Unión General de			

tax policies conflicting with national tax law	Trabajadores de la Rioja C-428/06			
Sixth VAT Directive – zero rating	Marks & Spencer plc v HMRC C-309/06		13 December 2007	13 April 2008
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				
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		1 April 2008	

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