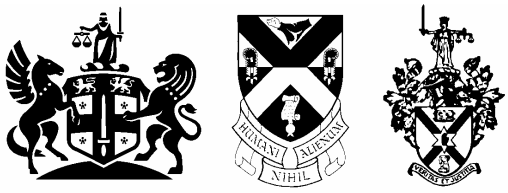

THE LAW SOCIETY OF ENGLAND AND WALES
THE LAW SOCIETY OF SCOTLAND
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The Law Societies
JOINT BRUSSELS OFFICE

The Brussels Office Update Series:

Developments from the European Court of Justice

June 2008

CONTENTS PAGE

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INTRODUCTION

June – News from the EU Courts

The Court gave a ruling in *Commune de Mesquer* (C-188/07), concerning the Erika shipping disaster. It had been asked to interpret the provisions of Directive 75/442 on waste, in relation to whether spilled heavy fuel oil can be considered waste, and to what degree the polluter-pays principle should apply to the case. The Court held that the oil itself could not be treated as waste but that it did become so when spilled. In a related matter, the Court ruled in *International Association of Independent Tanker Owners* (C-308/06) that it could not assess the validity of Directive 2005/35 (introducing *inter alia* criminal penalties for companies that discharge pollution into the seas) in light of international conventions, such as UNCLOS.

The Court also ruled in the *O2* case (C-533/06), referred from the Court of Appeal, stating that the company could not use its trade mark rights to prevent competitors using signs, similar to its own, in comparative advertising. In addition the Court ruled in the *Wood* (C-164/07) case against the rules of the French compensation fund for victims of crime and their relatives. Following the death of a French citizen in Australia, the French members of the family were granted compensation while the British father, who was resident in France, was refused on the ground of his nationality.

Those wishing to park their cars on the Isle of Wight or in other car parks operated by local authorities might also be interested in the opinion in the case of *Isle of Wight Council* (C-288/07) as to whether VAT should be applied to such services when operated by local councils. A preliminary reference from Spain has also been received at the Court concerning the extent to which VAT and duties can be applied to documented legal transactions (*Renta* (C-151/08)).

Coming up in July

The Court is to issue a ruling in *Coleman* (C-303/06) in which it was asked to determine whether the Disability Discrimination Act, implementing the Framework Directive on equal treatment at work (Directive 2000/78), prohibits direct discrimination against someone related to a disabled person. The Court was also due to hold a hearing in relation to the Heyday case (*National Council for Ageing* (C-388/07)) in relation to the legality of mandatory retirement ages.

The Court will rule in *Feryn* (C-54/07) in which it was asked to determine 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, it was only hypothetical and falls outwith the ambit of Directive 2000/43.

The Court is also due to rule in the joined cases of *Sweden and Turco v Council* (C-39/05 and C-52/05), which concerns whether legal advice given by the Legal Service of the EU Council of Ministers in relation to a legislative proposal should be disclosed. The Court will have to weigh up arguments between the public interest in the transparency of the legislative process and decision making and the need to protect legal advice and not create uncertainty about the validity of Community acts.

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. CITIZENSHIP

1.1 Judgment in James Wood v Fonds de Garantie (C-164/07)

5 June 2008, Second Chamber

Discrimination on grounds of nationality – European citizenship – Compensation to victims of offences committed abroad

Background
Mr Wood is a British national who has lived and worked in France for twenty years with his partner and their three children, each of whom have French nationality. Mr Wood and his partner lost their daughter, Helena, in a road traffic accident which occurred while she was in Australia. The Wood family applied to the Commission for Compensation in Nantes for compensation related to the material loss and moral wrong suffered as a result of Helena's death. Mr Wood's partner and three children were each awarded compensation. The Guarantee Fund claimed that according to the French Code on Penal Procedure, the right to compensation for a crime committed outside France was not open to Mr Wood on the basis that he was not a French national. Mr Wood claimed that this was discrimination on grounds of nationality. The question posed was essentially whether or not, having regard to the general principle of non-discrimination in Art 7 TEC, the rule of the French code was compatible with Community law.

Judgment
The Court held that by exercising his right to freedom of movement under Article 39 TEC and his right to freedom of establishment under Article 43 TEC, Mr Wood's situation fell within the scope of the Treaty and he could accordingly rely on his right not to suffer discrimination on grounds of nationality. The principle of non-discrimination requires that comparable situations should not be treated differently unless objectively justified and proportionate to the end. Mr Wood was in a comparable situation to that of his partner in relation to the loss of his daughter and the resulting damage. The only difference in their respective positions was that of nationality. The Court accordingly held that Community law precludes the national provisions at issue.

Link
Judgment

2. CIVIL JUSTICE

2.1 Reference in Intercontainer Interfrigo (ICF) SC v Balkenende Oosthuizen BV and MIC Operations BV (C-133/08)

Lodged 2 April 2008

Rome Convention – Applicable law – Charter parties

Background
This reference from the Dutch courts asks about the application of the Rome Convention rules on the law applicable to a contract in the absence of choice (Article 4). It seeks to ascertain whether Article 4(4) of the Rome Convention applies only to voyage charter parties or also to other forms of charter party. If the former, it asks whether aspects of the contract relating to the carriage of goods should be governed by Article 4(2) of the Convention, and which legal basis should be used for determining limitation periods.

Link
Reference

3. COMPETITION LAW

3.1 Opinion in Commission of the European Communities v France (C-214/07)

12 June 2008, Advocate General Sharpston

State aid – Recovery of aid – Defence of absolute impossibility

Background
Under the provisions of the French Tax Code, France granted a two-year exemption from corporation, business and property tax to companies whose main activity was to take over the activities of industrial businesses in difficulty. After seeking clarification on the nature of the exemption, the Commission initiated a formal investigation procedure against the French Government on the grounds that the exemption might add up to unlawful State aid within the meaning of Article 87 TEC. The article specifies the conditions under which State aid can be considered either compatible or incompatible with the common market and competition rules depending on the circumstances under which it was granted. The Commission concluded that the exemption granted was in breach of competition rules and requested France to start the recovery process of the aid granted. It also specified that it wanted the aid scheme abolished and to be informed of the measures taken to comply with the requirements imposed within two months of issuing the decision. On failing to do so, the Commission sought to have France declared in breach of its obligations under the Commission's decision and also Article 10 TEC.

Opinion
The French Government, argued that is was absolutely impossible to recover the aid granted because of the insolvency of the companies in question. Advocate General Sharpston stated that if a company was wound up it would have been possible to register the repayment of the unlawful aid in the company's schedule of liabilities. The registration of the liability would in principle be sufficient to re-establish the *status quo* and to eliminate the distortion of competition created. She also specified that if a company is liquidated, when the company's assets are sold to a new buyer, it is the responsibility of the Member State to make sure that the assets are bought under market conditions and with no intention on the part of the buyer to evade the obligation to repay the unlawful aid. She did not accept arguments that it would have been impossible to determine whether the liability to repay the unlawful aid laid with the original beneficiary or with the new buyer of the assets. She contended that France had more than adequate means to investigate such sales but that it had failed to take any steps to instigate such examination of companies' accounts. In addition, the Advocate General stated that she did not think that the decision of the French authorities to leave it to the identified beneficiaries to come forward and actively cooperate in the recovery was a sufficient or adequate measure to comply with the Commission's decision. Therefore, she concluded that France was in breach of Article 10 TEC.

Link
Opinion

4. EMPLOYMENT LAW

4.1 Opinion in Ruben Andersen v Kommunernes Landsforening som mandatar for Slagelse Kommune (tidl. Skælskør Kommune) (C-306/07)

19 June 2008, Advocate General Colomer

Collective agreements - Information to non-affiliated workers - Fixed term contracts

Background
This preliminary reference from the Danish Supreme Court concerns questions relating to Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. Denmark had chosen to implement the Directive through legislation and via a series of collective agreements. A collective agreement had been drawn up between the Federation of Departmental Councils, the National Association of Municipalities and the Union of Functionaries and Municipal Contract Workers. This stated that authorities that give incorrect or incomplete information to an individual on their terms of employment have a two-week deadline from the time the employee makes a complaint within which to issue a correction. The claimant, Ruben Andersen, took part in a programme of professional placements organised by the municipal authorities, as part of his social benefits scheme, each expected to last between one and twelve months. Due to repeated absences, he did not actually complete a full month at any time. The claimant argued that the information he had received in relation to each placement contract was in contravention of the information provisions, and in particular Article 2(2) of the Directive in relation to the duration of the employment. After informing the municipal authority of this error he received an amended letter according to the provisions of the collective agreement. Arguing that the collective agreement did not apply to him he invoked provisions of Danish law and took action to seek compensation in the courts arguing that the amendments to the terms and conditions were not valid. Following an appeal, the Supreme Court asked the Court of Justice whether a collective agreement intended to implement the Directive can be applied to an employee who is not a member of an organisation party to that agreement and which criteria which should be used to determine whether an employment relationship is short-term or temporary.

Opinion
In his opinion Advocate General Colomer stated that Member States are free to extend the provisions of a collective agreement to a person who is not a member of any of the trade union party to the agreement. Contracts for temporary work do not refer to any type of fixed-term employment relationship but rather to those of a short duration. An examination of the agreed times, the activities in question and the nature of the contract will assist in determining whether an employment relationship is temporary.

Link
Opinion

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

3 June 2008, Advocate General Colomer

Social policy – Protection of employees – Insolvent employer

Background
This reference from a Swedish court concerns the Directive on the protection of employees in the event of the insolvency of their employer (Directive 80/987) and how the protections apply to the employees of companies with activities in two or more Member States. Mr Holmqvist

was a driver for a Swedish company (Jörgen Nilsson Akeri och Spedition AB). He made deliveries of goods from Italy to Sweden and was responsible for the loading and unloading activities in both countries. The company had no offices or presence in Italy. On the occasion of the company's insolvency proceedings, the Swedish authorities claimed that Mr Holmqvist was not entitled to the salary guarantees under Swedish law to the extent he carried out his job in other Member States, and that he should make the relevant claims in elsewhere. Swedish legislation provides that the guarantee fund will only cover those workers who have carried out their work principally in Sweden. The Directive provides that when a company has activities in more than one Member State, the worker should be compensated by the fund in the country where he usually carries out his work. The Swedish court asked to what extent it is necessary for the business to have a branch, presence or activities in another Member State for this to apply.

Opinion
Following an examination of the Court's previous rulings in the *Everson* and *Mosbaek* cases, the Advocate General found that for Article 8 of the Directive to apply, the business in question need not have a subsidiary or a permanent centre of activities for it to be considered as having activities in another Member State. The Advocate General did consider, however, that two criteria are relevant to determine the existence of "activities": the existence of a stable (long-term) infrastructure, in terms of human and material resources; as well as a social and linguistic attachment of the workers in question to the Member State. In the present case, it was thought that Mr Holmqvist should be entitled to claim against the Swedish fund. As to determining where the worker usually carries out his work, regard should be had to the Member State in which social security contributions, which would eventually protect salary payments in the event of insolvency, are paid. Exceptionally a social or linguistic link to another Member State could be considered.

Link
Opinion

5. ENVIRONMENT & ENVIRONMENTAL LIABILITY

5.1 Judgment in the International Association of Independent Tanker Owners (Intertanko) and others (Case C-308/06)

3 June 2008, Grand Chamber

Ship-source pollution – Criminal penalties – Validity under international law

Background
The applicants, including Intertanko, brought a joint action before the High Court in England aimed at challenging the Secretary of State's planned implementation of Directive 2005/35. This Directive provides for, amongst other things, the introduction of criminal penalties for infringements by companies that discharge pollution into the sea. In particular, Intertanko was concerned that there was a critical lack of legal certainty and a possible breach of international law given that international conventions (the International Convention for the Prevention of Pollution from Ships (Marpol) and the UN Convention on the Law of the Sea (UNCLOS)) already set down standards of liability in relation to pollution discharges. That standard, according to the applicants, is higher than that in the Directive, which states that serious negligence is sufficient to incur liability, rather than the required international standard of at least recklessness and knowledge that damage will probably result from the discharge.

Judgment
The Court concluded that it was not possible for the Court to assess the validity of the Directive in light of the international conventions. The Court acknowledged that the Community is bound by international agreements concluded by the Community and that these take precedent over Community legislation, provided they are unconditional and sufficiently precise. The Court held, however, that the Community was not a signatory to Marpol, and therefore not bound by its provisions, but that since Member States were signatories, the Court should take account of its provisions. In relation to UNCLOS the Court held that its nature was not to create rules or rights that applied directly to individuals. As such the validity of the Community measures could not be assessed with reference to UNCLOS. On the final point, the Court examined whether the use of the term "serious negligence" in the Directive violated the rule of legal certainty. The Court found that it did not, stating that the term should be understood as "entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation".

Link
Judgment

5.2 Judgment in Commune de Mesquer v Total France SA and Total International Ltd (C-188/07)

24 June 2008, Grand Chamber

Erika disaster - Pollution - Concept of waste - Polluter-pays principle

Background
This case stems from the Erika shipping disaster. 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 Mesquer 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 asked the Court 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 French 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. 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.

Judgment
The Court concurred with the Advocate General stating 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 Court concluded that when heavy fuel oil is spilled, even by accident, and is mixed with water and sediment, it can be treated as waste within the meaning of Directive 75/442. Finally, in relation to the question of liability, the Court found that the shipowner may be regarded as the "holder" for the purposes of the Directive. The national court may also find, however, that the seller of the fuel and the charterer of the ship be considered as producing the waste, if they contributed to the risk that the pollution could occur, such as through their choice of ship. The Court then goes on to state that if the costs of disposing of the waste cannot be met by the shipowner or charter because of limitations placed on liability (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) the producer of the product could be held liable if his conduct contributed to the risk of pollution.

Link
Judgment

5.3 Opinion in Commission v France (C-121/07)

5 June 2008 Advocate General Mazák

Release of GMOs - Member State breach of obligations – Monetary sanctions

Background
This case concerns the failure by France to implement Directive 2001/18 on the deliberate release into the environment of genetically modified organisms (GMOs). This Directive amends Directive 90/220 and sets down standard rules for the release of GMOs into the environment for reasons other than placing them on the market within the Community. In a ruling of 15 July 2004 (C-419/03) the Court found that France had failed to implement this Directive properly into national law. Since then the Commission has assessed the steps taken by France to meet the conditions of the judgment and came to the conclusion that France was still in breach of its obligations. An action under Article 228 TEC was brought.

Opinion
Advocate General Mazák advises the Court to order that France pay a penalty payment of €235,764 for each day of delay in implementing the measures necessary to comply fully with the judgment in the previous case. This fine is to be paid from the day on which the Court delivers judgment in the present case until such time as the previous judgment is complied with.

Link
Opinion

6. FREE MOVEMENT

6.1 Reference in Marc André Kurt v Bürgermeister der Stadt Wels (C-104/08)

Lodged 6 March 2008

Recognition of qualifications – Driving instructors

Background
This reference concerns an individual who is entitled to teach driving theory and practice to learner drivers and instructors and to operate a driving school in one Member State. He was denied the right to do so in his own Member State because of the requirement to hold a diploma, which cannot be met in practice by him. The Austrian court asks whether this is a breach of the claimant's Treaty rights of citizenship and free movement. It asks to what extent other forms of education and training should be recognised as equivalent for the purposes of the domestic legislation.

Link
Reference

7. INTELLECTUAL PROPERTY

7.1 Judgment in O2 Holdings Limited and O2 (UK) Limited v Hutchison 3G UK Limited (C-533/06)

12 June 2008, First Chamber

Trade marks – Exclusive rights of use – 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 the Directive 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) Limited 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 in question 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.

Judgment
The Court stated that the use in a comparative advertisement of a sign which is similar or identical to a registered trade mark, for the purposes of presenting the services provided by the advertiser, may be prevented by the provisions of Article 5(1) of the Directive. The Court also noted, however, that in order to promote competition between suppliers to the consumer's advantage, the limitation to a certain extent of the rights conferred to a trade mark holder is necessary. Therefore, the proprietor of a trade mark is not entitled to prevent a third party from using a sign identical or similar to the registered mark in a comparative advertisement, when the advertisement has satisfied all the conditions laid down in Article 3a(1) of the Directive on comparative advertising. Nevertheless, the proprietor of a trade mark may still prevent the use of a similar or identical sign if the following four conditions are met: the use must be in the course of trade; it must be without the consent of the proprietor of the mark; it must be in respect of goods and services which are identical or similar to those for which the mark is registered; and it must affect the essential function of the trade mark by giving rise to the likelihood of confusion on the part of the public. The Court found that the advertisement commissioned by H3G had satisfied the first three conditions but not the fourth. It stated that the use of bubble imagery by H3G in its advertisement did not give rise to a likelihood of confusion on the part of the consumers and, as already accepted by O2, the advertisement as a whole was not misleading and it did not suggest any commercial link between the two providers.

Link
Judgment

8. PUBLIC PROCUREMENT

8.1 Judgment in pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext – Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung (C-454/06)

19 June 2008, Third Chamber

Public procurement - Press agencies - Effective judicial protection

Background
The case at hand involves 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.

Judgment
Referring to the transfer to APA-OTS in 2000 of the OTS services originally provided by APA, the Court stated that such amendments, when made in the specific circumstances, did not constitute a change to a fundamental term of the contract, within the meaning Directive 92/50. The essential requirement is that the initial service provider continues to assume responsibility for compliance with the contractual obligations. In relation to the price amendments made to the basic agreement in 2001, the Court established that where a contract is changed by converting the initial prices into euro, the change is not a material contractual amendment but an adjustment to accommodate changes in external circumstances. Similarly the introduction of a new price index is not a material amendment when such introduction was already provided for in the initial contractual agreement. The final circumstance considered by the Court was a renewal of a waiver of the right to terminate the contract by notice and the agreement between the parties to increase the rebates granted on the prices of certain services covered by the contract. The Court stated that at present Community law does not prohibit the conclusion of public contracts for an indefinite period and it concluded that renewing a waiver of the right to terminate the contract did not constitute a material amendment resulting in a new award. Similarly it concluded that agreeing to lay down higher rebates than those initially provided for in respect of certain volume-related prices did not amount to awarding a new contract.

Link
Judgment

8.2 Opinion in Coditel Brabant SPRL c Commune d'Uccle and Région de Bruxelles-Capitale (C-324/07)

4 June 2008, Advocate General Trstenjak

Public procurement – Local cable television concession

Background
This question from the Belgian courts seeks to ascertain whether the EU public procurement rules apply to the delegation by a local authority of the management of its cable television network. In particular, the question is raised in the context where the body charged with this function is a body created through the cooperation of local authorities (communes) with no

involvement of private capital (a cooperative society). The challenge has been brought by Coditel, a Belgian cable television operator. Coditel's contract to manage the cable television services in the Uccle commune expired in 1999. Following various moves to sell the network and grant new concessions for its operations, the commune finally decided to affiliate itself to Brutélé. This affiliation included guarantees for the commune in relation to Brutélé's decision making and to the involvement in management boards. Coditel has sought to annul the various decisions taken with respect to the affiliation.

Opinion
The Advocate General concluded that Articles 12, 43 and 49 TEC in relation to non-discrimination and the freedoms of establishment and to provide services, did not prevent the affiliation of the commune to the cooperative society without any call for competitive tenders. Further to the conditions set in the *Teckal* case, the Advocate General stated that the commune must continue to exercise a similar degree of control over its own services once within the cooperative, which then provides the essential elements of its services with its affiliates. The fact that the cooperative was composed purely of communes tended to indicate that a similar degree of control was maintained by the communes concerned after affiliation. The fact that such decisions were reached by majority decisions between the communes involved did not prevent the degree of control from being considered similar.

Link
Opinion

8.3 Reference in Wall AG v Stadt Frankfurt am Main, Frakfurter Entsorgungs- und service GmbH (FES) (C-91/08)

Lodged 28 February 2008

Remedies – Injunctions – Transparency – Service concessions

Background
This preliminary reference from the German courts seeks to ascertain what remedies should be available to unsuccessful tenderers under EU public procurement rules. This question is raised in the context of the award of service concessions and the duty of transparency on public authorities to use an appropriate degree of advertising to enable an award to be open to competition and to allow for review of the impartiality of the procedure used. The Court is asked whether this requires that unsuccessful tenderers should be able to seek an order to prevent public authorities from breaching such duties. It asks whether such transparency duties relate to amendments to such contracts and whether they relate to bodies that are not entirely controlled by public authorities and operate in addition on the free market.

Link
Reference

9. TAX

9.1 Judgment in Finanzamt Hamburg-Am Tierpark v Burda GmbH, formerly Burda Verlagsbeteiligungen GmbH (Case 284/06)

26 June 2008, Fourth Chamber

Distribution of revenue - Increases in share capital – Withholding tax – Directive 90/435

Background
This case concerns the interpretation of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. One of the objectives of the Directive is to ensure that groups of companies in various Member States do not suffer fiscal disadvantage. The defendant company (Burda) is a German limited liability company with its registered office in Germany and governed by German law. At the time in question it was owned by Burda International Holding GmbH (Burda International), a company situated in Germany and the Dutch company RCS, in equal share. In 1998 Burda distributed profits for 1996-1997 equally between the two companies. Only Burda International received a certificate of deductibility of corporation tax in respect of the profit distribution. In addition a tax audit by the authorities concluded that Burda had distributed an amount of dividend that exceeded the amount of the company's taxable income. The German legislation provides that when a company distributes profits, the amount of tax will be increased or decreased according to the difference between 1) the tax on the company's capital and reserves (tax on retentions) that are deemed to be used for the distribution, and 2) the tax resulting from the application of a rate of 30% of the profit before the deduction of corporation tax (tax on distribution). As the authorities reduced the amount of taxed capital and reserves, the distributions were not covered by the taxed capital and were set off against other capital and reserves. It was argued by Burda that the application of this system to it led to an increase in corporation tax and that the application of the offsetting rules in respect of RCS, which did not receive a tax credit, was wrong. At appeal, the Federal Finance Court stayed the proceedings and referred the case to the Court of Justice asking whether the system constituted a withholding tax as the income and asset increases would not be taxed if they had not been distributed to the parent companies.

Judgment
The Court held that the national provision which provides for the taxation of income and asset increases of the subsidiary when distributed to the parent company does not constitute withholding tax within the meaning of the Directive. Moreover it stated that the free movement provisions of the Treaty should not rule out the application of a national measure, which is subject to a "corrective mechanism" that applies regardless of whether the parent company is resident in the same Member State or in another Member State. This follows even though, unlike a resident parent company, a non-resident parent company is not granted a tax credit by the Member State in which the subsidiary is resident.

Link
Judgment

9.2 Opinion in RHH Renneberg v Staatssecretaris van Financiën (C-527/06)

25 June 2008, Advocate General Mengozzi

Income tax on non-residents – Negative income from property

Background
The matter relates to the interpretation of Article 39 TEC. It is asked whether a Member State is allowed to refuse a non-resident taxpayer, who receives the entirety of his professional taxable income in that Member State, the deduction of rental losses for a property owned and located in his country of residence, when such a deduction is granted to resident taxpayers. Mr Renneberg, a Dutch resident, moved to Belgium in 1993 where he bought a property through a mortgage with a Dutch bank. Between 1996 and 1997 he returned to work in the Netherlands where he paid income tax on his professional income. During this period he continued to be liable for property tax in Belgium. The Dutch tax office refused to deduct negative property income for Mr Renneberg's property in Belgium from his tax liability. The

referring court asks whether the discrepancy in treatment complied constituted a breach of Community law.

Opinion
Advocate General Mengozzi stated that according to the principle of freedom of movement of workers granted by Article 39 TEC any discrimination based on nationality between workers of the Member States is forbidden. He stated that before discrimination can be established it must be possible to make a comparison between the situation of resident and non-resident taxpayers and establish that, under the exact same circumstances, they are being treated differently. The Advocate General rejected the argument of the Dutch Government that it could not allow the deduction because of a lack of provision in the Netherlands-Belgium Convention. Advocate General Mengozzi invited the Court to find that Article 39 TEC prohibits a Member State from refusing to allow a non-resident taxpayer, receiving the entirety of his taxable income in that Member State, to deduct rental losses from a property in his Member State of residence, when the former Member State allows the deduction in respect of resident taxpayers in a similar situation.

Link
Opinion

9.3 Opinion in Kollektivavtalsstiftelsen TRR Trygghetsrådet v Skatteverket (C-291/07)

17 June 2008, Advocate General Mazák

VAT – Economic and non-economic activities – Place of supply of services

Background
The case concerns the interpretation of Articles 9(2)(e) and 21(1)(b) of the Directive 77/388, as well as of Articles 56(1)(c) and 196 of Directive 2006/112 on a common system of VAT. The Kollektivavtalsstiftelsen TRR Trygghetsrådet (TRR) is a Swedish foundation, formed by collective agreement, whose aim is to pay compensation for unemployment, promote measures to facilitate re-employment and to give advice to businesses on how to develop their human resources. These activities, of a non-economic nature, are financed by the employers bound to TRR by contract. TRR is additionally registered for VAT in respect of services it provides in respect of company outsourcing. This service corresponds to only 5% of TRR's overall activities. TRR intended to purchase consultancy services from Denmark that relate to its non-economic activities. It sought a ruling from the Swedish Tax Board of the VAT and a dispute arose as to whether TRR should be regarded as a "trader" or "taxable person" for these purposes. This determination would then have an effect on the place of supply of the service and where the tax is paid.

Opinion
The question referred is whether an entity, which carries out activities of both an economic and non-economic nature, is a taxable person when purchasing consultancy services from a different Member State in respect of the non-economic activities. Advocate General Mazák took the view that, under the Directives, a purchaser does not need to act in the capacity of a "taxable person" when making a purchase or when making the purchase as part of his economic activities, in order to be considered liable to pay VAT. The Advocate General agreed with the Swedish Tax Board, stating that in the circumstances the recipient of services should be regarded as a taxable person. This should be done independently of the reason and final purpose of the purchase of services and even if the purchase is made solely in respect of the service recipient's non-economic activities. Therefore the supply of services must be considered to be carried out in Sweden, where TRR is established.

Link
Opinion

9.4 Opinion in the Commissioners of HMRC v Isle of Wight Council & Others (C-288/07)

12 June 2008, Advocate General Poiares Maduro

Sixth VAT Directive - Public authorities – Off-street parking – Distortion of competition

Background
The matter refers specifically to the interpretation and scope of Article 4(5) of the Sixth VAT Directive. The article provides that authorities governed by public law should not be considered taxable entities for the purpose of paying VAT in respect of those activities they carry out by virtue of their role as public bodies. However, if their treatment as non-taxable entities in respect of economic activities would lead to significant distortion of the competition market, then the public authorities should remain liable to pay VAT. Additionally the Directive provides a list of activities in respect of which public bodies will still remain liable to pay VAT despite engaging in them as public authorities. The Isle of Wight Council along with other local authorities were offering services of off-street car parking for a fee payable by the general public. The councils took the view that this type of economic activity did not distort the market and furthermore, being public bodies, that they were exempt from paying VAT. Therefore, they made claims to HMRC for the refund of VAT paid since 2000. HMRC refused to reimburse them. The matter went to appeal to the High Court of Justice which referred it to the ECJ.

Opinion
Advocate General Poiares Maduro expressed his doubts as to whether he should consider the provision of parking space by a local authority subject to a legal regime specific to the public body. He considered that offering parking space for a fee can be considered as an activity of an essentially economic nature and that the private sector offers similar services. The local authorities were not engaging in an activity exclusively related to their status as public bodies and that exempting the latter from paying VAT on a service which is also provided by the private sector may become a source of distortion of a competitive market and could disrupt the VAT system, which is based on the fundamental principle of fiscal neutrality. However, since the concept of distortion operates on an incidental basis and not on a one-size-fits-all basis, it should be up to the individual Member State to determine, within the scope of discretion awarded by the Directive, whether there would be a distortion of competition. The Advocate General stated that the definition of distortion of competition includes both actual and potential competition as long as there is a real possibility of distortion. He also specified that 'significant' distortion does not have to be exceptional but simply out of the ordinary and that once again, it is up to the individual Member State to interpret what kind of behaviour is out of ordinary in the specific context.

Link
Opinion

9.5 Reference for a preliminary ruling in the case N.N. Renta, S.A. v Generalitat de Catalunya (C-151/08)

Lodged 14 April 2008

VAT - Legal transactions - Immovable property - Stamp duty

Background
This reference for a preliminary ruling is made by the High Court of Justice of Cataluna, Spain. The Court seeks advice as to whether maintaining a variable or proportional amount of the duty on documented legal transactions in certain circumstances is compatible with Article 33 of the Sixth VAT Directive which allows Member States to maintain or introduce taxes including stamp duty.

Link
Reference

9.6 Reference in CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi Kft. v Adó- és Pénzügyi Ellenőrzési Hivatal Hatósági Főosztály (C-96/08)

Lodged 3 March 2008

Freedom of establishment – Vocational training tax

The referring court asks whether Articles 43 and 48 TEC exempt a trading company established in Hungary from paying vocational training taxes in the country of establishment when the company has a branch abroad actively employing workers and where all taxes and social securities payment are met in the foreign State.

Link
Reference

9.7 Reference in Jacques Damseaux v Belgium (C-128/08)

Lodged 28 March 2008

Double taxation – Taxation of dividends

The referring court asks whether Article 56 TEC prevents a restriction under the France-Belgium Convention on double taxation to be applicable. The restriction, if valid, would allow for partial double taxation of dividends from shares of companies established in France. This would be more onerous than Belgian withholding tax alone payable by a Belgian resident in respect of dividends from a company established in Belgium.

Link
Reference

ANNEX I: CASE TRACKER

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

Topic	Case	Hearing	*Opinion*	*Judgment*
Citizenship				
Rights of residence of the spouse of an EU national	Blaise Baheten Metlock v Minister for Justice C-127/08			
Civil justice				
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	19 June 2008		
Prosecution of a national for a crime already prosecuted in another Member State	Staatsanwaltschaft Regensburg v Klaus Bourquain C-297/07		8 April 2008	
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	17 July 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			
Right to claim unemployment benefit while residing in another Member State	Jorn Petersen v Arbeitsmarktservice Niederosterreich C-228/07		15 May 2008	
Legality of national legislation enforcing	Age Concern England v Secretary of State	2 July 2008		

obligatory retirement ages	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	1 July 2008
Free Movement				
Failure to implement Directive 2004/83 on the right of Union citizens to move and reside freely within the EU	Commission v UK C-122/08			
Public Procurement				
Remedies available to unsuccessful tenderer in relation to breach of transparency duties (advertising)	Wall AG v Stadt Frankfurt am Main (C-91/08)			
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
Local conditions on temporary provision of patent lawyers' services	Commission v Austrian C-564/07			
VAT and duty on documented legal transactions	Renta, S.A. v Generalitat de Catalunya C-151/08			
State aid				
Calculation methods for recovery of aid	Département du Loiret v Commission C-295/07	4 June 2008	5 June 2008	
Taxation				
Corporate tax regime – parent and foreign subsidiary	Finanzamt Hamburg-Am Tierpark v Burda Verlagsbeteiligungen GmbH C-284/06		31 January 2008	26 June 2008
Autonomous regional tax policies conflicting with national tax law	Unión General de Trabajadores de la Rioja C-428/06		8 May 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	17 June 2008		
VAT applicable to UK postal services	TNT Post UK Ltd v HMRC and Royal Mail Group Ltd C-357/07	18 June 2008		
Entitlement of bookmakers' agents to VAT exemptions	Tierce Ladbroke SA v Belgium C-232/07			
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