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The Brussels Office Update Series:

Developments from the European Court of Justice

July 2008

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INTRODUCTION

July – News from the EU Courts

The Court delivered a groundbreaking ruling in *Coleman* (C-303/06), effectively extending the scope of the Framework Directive on equal treatment at work (Directive 2007/78) to treatment based not on the disability of a worker, but rather the disability of someone to whom the worker is related and caring for. In this case it was Mrs Coleman's son.

The Court also found that direct discrimination can exist even where there is not an identifiable victim. In *Feryn* (C-54/07) the Court held that a public statement made by an employer during a recruitment drive, to the effect that he would exclude applications from persons of a certain ethnic origin, constituted direct discrimination.

The Court also examined the extent to which legal advice can remain confidential when given in the context of an EU legislative process. *Sweden and Turco v Council* (C-39/05 and C-52/05) related to an access to documents request for legal advice given by the legal service of the Council of Ministers on a legislative proposal. The Court ruled that the Council has a duty to grant public access to such advice in order to increase transparency. Where the Council is not prepared to disclose such documents, it must give a detailed explanation as to its reasoning.

The Court applied the first urgent preliminary ruling procedure in *Rinau* (C-195/08), concerning the custody of a child and the recognition of judgments on this in another Member State. The Court received the reference on 14 May and handed down the ruling on 11 July. Frequent flyers may be interested to know that under the judgment given in *Emirates Airline* (C-173/07), travellers returning to the EU on a non-EU carrier will not be covered for that flight by the EU's air passengers' rights legislation - Regulation 261/2004.

Amendments to the rules of procedure of the ECJ were published in the Official Journal on 29 July.[1] These changes serve to establish, *inter alia*¸ a special Chamber to review decisions of the CFI and the rules concerning the review process.

Coming up in September

The Court is on judicial vacation until the end of August. In September, the Court is set to give a ruling in *Union General de Trabajadores* (C-428/06), on whether autonomous regions in Member States are allowed to apply different tax rates or whether this can constitute State aid. The Advocate General's opinion is set to be delivered in *The Incorporated Trustees of the National Council for Ageing (Age Concern)* (C-388/07) which is a challenge to the UK's rules on mandatory retirement at the age of 65.

Those wishing to park their cars on the Isle of Wight or in other car parks operated by local authorities might be interested in the judgment to be delivered in *Isle of Wight Council* (C-288/07). The Court is asked to rule on whether VAT should be applied to such services when operated by local councils.

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:L:2008:200:0018:0019:EN:PDF

1. CITIZENSHIP

1.1 Judgment in Ministerul Administrației şi Internelor – Direcția Generală de Paşapoarte Bucureşti v Gheorghe Jipa (C-33/07)

10 July 2008, First Chamber

Repatriation under readmission agreement – Restriction of movement of citizens

Background
Mr Jipa is a Romanian citizen who went to Belgium in September 2006. He was repatriated in November 2006 under a repatriation agreement between the countries because of his illegal residence in Belgium. Subsequent to Romania's accession to the EU on 1 January 2007, the Ministry of Justice applied on 11 January for a court order prohibiting Mr Jipa from travelling to Belgium for a period of three years. The Romanian legislation stated that such an order could be sought when a Romanian citizen had been repatriated under a repatriation agreement. The Romanian court asked the ECJ to what extent Member States are allowed to restrict the movement of citizens under Article 18 TEC on European citizenship and Article 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Judgment
As a Romanian national, Mr Jipa enjoys the status of an EU citizen. The right of freedom of movement includes the right for a citizen to leave the Member State of origin in order to enter freely another Member State. This right is not unconditional but limitations should be strictly interpreted. Directive 2004/38 states that Member States are entitled to restrict the freedom of movement of EU citizens on grounds of public policy, public security or public health. Should measures be taken on these grounds, they must be proportionate and based entirely on the conduct of the individual that they relate to. This conduct must pose a genuinely serious threat affecting a fundamental interest of society. The measure limiting the exercise of free movement can therefore not be based solely on reasons given by another Member State to remove an EU national from its territory, as is here the case. The Court held that although Community law does not preclude national rules restricting free movement, particularly on grounds of a previous repatriation order, given that there had been no assessment of Mr Jipa's personal conduct or the threat he might present to public policy or security, the limitation on his free movement was not proportionate

Link
Judgment

1.2 Judgment in Metock and Others v Minister for Justice, Equality and Law Reform (C-127/08)

25 July 2008, Grand Chamber

Family members who are non-EU nationals– Right to rely on free movement provisions

Background
Directive 2004/38 on free movement of EU citizens confers rights allowing all citizens to move and reside freely in the territory of another Member State. Their family members can also benefit from the right to accompany the citizen, provided they possess a valid entry visa or residence card. Irish legislation transposing the Directive provides that for a family member of an EU citizen to join that citizen in Ireland, he must first have been lawfully resident in another Member State. Four separate cases, including that of Mr Metock, were brought before the

High Court. In each case, a third country national had applied for asylum in Ireland only to be refused. While still present in Ireland, each of those individuals married EU citizens who, though not of Irish nationality, were resident there. Subsequently, the claimants' applications for residence were rejected because the condition of prior lawful residence had not been satisfied. The Court is asked in this context whether such a condition is compatible with Community law and whether the manner in which a spouse of an EU citizen entered the Member State should affect the application of the Directive.

Judgment
The Court stated that there are no provisions in the Directive making its application conditional on prior lawful residence in another Member State. It applies equally to all citizens of the EU and to their family members, without making any distinction as to their lawful residence. The Directive makes provision for entry into host Member States of family members who do not possess residence cards. This in itself shows that it is intended to apply to those who have not previously resided in the EU. It does not provide for the possibility of a host state to seek documentation demonstrating prior residence. Accordingly, the Court held that the Directive applies to all non-EU nationals who are family members of an EU citizen, regardless of whether or not they have already resided in another Member State. The Court held that the rights offered by the Directive apply to the spouse of a citizen, who is a national of non-member country and subsequently joins the EU citizen, regardless of when their marriage took place and of how they entered the host country.

Link
Judgment

1.3 Reference in Janko Rottmann v Freistaat Bayern (C-135/08)

Lodged 3 April 2008

Loss of EU citizenship – Statelessness

The referring court asks whether Community law preclude a Member State from declaring a person stateless. The German government naturalised a person as a national. At a later date, having discovered that the citizen had intentionally deceived the State by providing false information, it sought to revoke the naturalisation. The individual was previously of Austrian nationality. The question is whether the Member State can revoke the naturalisation process as a consequence of which the citizen would become stateless and would lose his EU citizenship, or alternatively whether it should be possible for him to revive his Austrian nationality.

Link
Reference

1.4 Reference in Real Sociedad de Futbol SAD v Consejo Superior de Deportes (C-152/08)

Lodged 15 April 2008

Rules governing sporting federation – EEC-Turkey Association Agreement

A Spanish rule enabled a sporting federation to limit the number of non-EU players that could be employed by Spanish football clubs. The Superior Tribunal in Madrid seeks to ascertain whether or not the EEC-Turkey Association Agreement precludes such a rule from being applied to a Turkish sportsman.

Link
Reference

2. COMPETITION LAW

2.1 Judgment in AC-Treuhand AG v Commission (T-99/04)

8 July 2008, CFI Third Chamber, Extended Composition

Cartel – Consultants – Contribution to cartel implementation – Fine for complicity

Background
At the end of 2003 the European Commission fined three organic peroxide producers for operating a cartel since 1971. This involved market sharing and price coordination. The companies also engaged the services of a consultancy – the claimant at hand – that facilitated the operation of the cartel through the organisation of meetings and concealing evidence. The Commission imposed a fine on the company for its actions, but limited this to 1,000 euro because it was a reasonably novel policy to prosecute those who facilitate a cartel, rather than participate in it as such. AC Treuhand challenged this decision, claiming that its rights of defence had not been respected and that it could not be held liable for the cartel.

Judgment
The Court rejected the arguments of AC Treuhand, stating in particular that it was legitimate for it to shoulder some of the liability for the cartel. Contrary to what it argued, the Court found that a company need not be active on the market in question in order to be liable for having participated in a cartel. Likewise the degree of involvement did not excuse the liability, but involvement of a secondary or passive nature could be reflected in the level of fine. This was not the case in the present matter, in which AC Treuhand was found to have taken active steps to help implement the cartel.

Link
Judgment

2.2 Judgment in Athinaïki Techniki AE v Commission (C-521/06)

17 July 2008, Fourth Chamber

State aid – Decision to take no further action – Act to challenge

Background
On 26 September 2006, the CFI made an order dismissing an action by the claimant, who had sought to annul a decision of the Commission. The substance of this decision was that the Commission intended not to take any further action in relation to a complaint made by the claimant about alleged State aid granted in Greece. The aid in question was said to have been granted in the context of a public procurement procedure in Greece whereby a contract was to be awarded to dispose of 49% of the capital the authorities possessed in the Casino Mont Parnès. The claimant made two complaints to the Commission: that the procedure had been invalid and infringed the public procurement rules; and that State aid had been granted as part of this process. The Commission wrote in September 2003 to the claimant to state that the information it had received provided insufficient grounds to examine the case and then in August 2004 to state that the file had been closed on 2 June 2004.

Judgment
The Court held that in the context of Regulation 659/1999, laying down the detailed rules for the application of Article 88 TEC, a decision that could be challenged had been taken. The two letters constituted respectively: the preliminary act for the purposes of Article 20 (2) of the Regulation, informing the parties that the Commission did not intend to take a view on the case; and the step informing the claimant of the decision to close the file i.e. the act in question. The decision taken was to bring the preliminary examination procedure to an end and this constituted a refusal to initiate a formal investigation. The fact that the submission of further information could lead to the investigation being reopened, did not prevent the act from being definitive according to the Court. As an act that prevented the claimant from submitting comments in the context of a formal investigation, it created legal effects capable of affecting the claimant's interests and as such it was open to challenge under Article 230 TEC. The case was referred back to the CFI for it to rule on the annulment sought.

Link
Judgment

2.3 Judgment in Bertelsmann AG v Sony Corporation of America (Case C-413/06)

10 July 2008, Grand Chamber

Joint venture – Collective dominance – Appeal

Background
This case concerns the joint venture undertaken by Bertelsmann AG (Bertelsmann) and Sony Corporation of America (Sony). The intention to merge and create three or more companies operating under the name Sony BMG was notified to the Commission in January 2004. A questionnaire was subsequently sent out to fellow participants in the market, on the back of which the Independent Music Publishers and Labels Association (Impala) lodged an application for the Commission to declare this move incompatible with the common market. The Commission sent a statement of objections to the parties which provisionally concluded that the planned operation would strengthen a collective dominant position. The parties were heard by the Hearing Officer in June 2004 after which the Commission declared the concentration compatible with the common market. Impala launched proceedings and the CFI annulled the decision in July 2006 on the basis that there were manifest errors in the assessment and the reasoning behind the decision was inadequate. While Sony and Bertelsmann appealed the decision of the CFI, the Commission undertook a second assessment approving the creation of Sony BMG in October 2007. The appeal was based on the argument that the CFI had overstated the legal requirements to be applied to the approval of a merger.

Judgment
The Court concluded that the CFI had committed a number of errors in its judgment. The CFI had *inter alia,* taken certain conclusions outlined in the Commission's statement of objections as being established in fact, whereas these should have been viewed as simply provisional. By requiring that the Commission carry out new market investigations after having received the responses to the statement of objections, the CFI committed an error in law. Similarly, an error of law was constituted by the fact that a particularly strict standard of proof was imposed by the CFI on the Commission in relation to the evidence submitted by the notifying parties. Moreover, the CFI had essentially committed an error in law by relying on confidential documents submitted by Impala after the hearing of June 2004. Under Regulation 4064/89 on the control of concentrations between undertakings, the Commission can only base its decisions on objections to which the parties have had a chance to express their observations. Given that the appellants were not provided with such an opportunity, this information should not have been used by the Commission in arriving at its decision. In addition, the CFI had

misinterpreted the criteria to be applied when establishing a collective dominant position by tacit coordination. This arises in concentrated markets where the main players are able to adopt tacitly a common policy, acting independently of consumers. The ECJ subsequently set aside the decision of the lower court and transferred the case back to the CFI for judgment as a number of pleas relied on by Impala had not been dealt with by ECJ.

Link
Judgment

2.4 Judgment in Motosykletistiki Omospondia Ellados NPID (MOTOE) (C-49/07)

1 July 2008, Grand Chamber

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.

Judgment
The Court outlined that in the absence of a definition of 'undertaking', it has consistently held that the term applies to any entity engaged in an economic activity. Therefore any activity consisting of offering goods and services on a market is an economic activity. The fact that ELPA is entrusted with public powers does not preclude it from being regarded as an undertaking. Nor does the fact that ELPA does not seek to make a profit from its activities have a bearing on its classification as an undertaking since the offer of its services exists in competition with that of other profit-seeking operators. Even non-profit associations offering goods and services may be in competition with one another, as presently is the case between ELPA and MOTOE. Having established that ELPA is an undertaking, for Article 82 TEC to apply, ELPA must also be confirmed as holding a dominant position, a fact which must be established by the Greek national court. Since ELPA's activities comprise taking administrative decisions authorising motorcycling events, organising such events itself and entering into sponsorship and advertising contracts, its activities fall within the scope of both Article 82 TEC and Article 86 TEC. These Community provisions therefore preclude the national rules in question which provide ELPA with the power to authorise applications to organise motorcycling events, without that power being made the subject of restrictions and review.

Link
Judgment

3. CONSUMER

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

10 July 2008, Fourth Chamber

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, they were 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.

Judgment
Regulation 261/2004 applies to situations where passengers embark on a flight departing from the territory of a Member State or, where there is a Community carrier involved, they embark on a flight departing from a non-EU country and arriving at an airport located in a Member State. Therefore, where passengers depart from a non-EU state, the Regulation will not apply unless the air carrier operating the flight is a Community carrier. The Regulation differentiates between the point of departure and the final destination of the passengers. If the term 'flight' was to cover both an outward and return journey, the point of departure would be the same as the final destination, thus rendering the distinction made by the Regulation futile. The Court held that a return journey cannot be regarded as a single flight. Consequently, the Regulation does not apply to the present situation where passengers who have initially embarked on a flight from a Member State travel back to that airport from a non-member country with a non-Community carrier.

Link
Judgment

4. CRIMINAL JUSTICE

4.1 Judgment in Yves Franchet and Daniel Byk v Commission (T-48/05)

8 July 2008, CFI Third Chamber

Fraud investigations – OLAF - Presumption of innocence – Reputational harm

Background
A number of internal audits carried out by Eurostat (the EU's statistical office) highlighted a number of potential financial irregularities. An investigation was launched by OLAF (the EU's

anti-fraud office), which resulted in it passing files to the French and Luxembourg authorities implicating the two claimants. The claimants are respectively the former Director General and Director of Eurostat and they are seeking damages from the OLAF and the Commission for harm caused to them by the handling of the case.

Judgment
The Court found in favour of the claimants and ordered the Commission to pay the claimants 56,000 euro in damages. In particular the Court found that OLAF and the Commission breached the claimants' defence rights in a number of respects. They should have informed the claimants that the files were being transmitted to the judicial authorities in France and Luxembourg. They should not have referred to the two publicly as being guilty or disclosed pieces of information that compromised the presumption of innocence and violated duties of confidentiality.

Link
Judgment

4.2 Judgment in Szymon Kozłowski (C-66/08)

17 July 2008, Grand Chamber

European Arrest Warrant (EAW) – Surrender procedures between Member States – Grounds for optional non-execution of an EAW

Background
This case concerns a request for a preliminary reference in European Arrest Warrant proceedings between Poland (issuing judicial authority) and Germany (executing judicial authority), on the question of optional grounds for non-execution. Under Framework Decision 2002/584, an executing judicial authority can decide not to execute an EAW where it undertakes to execute the sentence in their own Member State under domestic law. The circumstances in which this is possible are where the requested person is staying in, or is a national or a resident of, the executing Member State. In 2002 Mr Kozłowski, a Polish national, was sentenced by a court in Poland to five months' imprisonment for destruction of another person's property. In April 2007 an EAW was issued by the Polish authorities for the surrender of Mr Kozlowski who at that time was serving a custodial sentence of three years and six months in Germany for a number of fraud offences. A hearing took place in June 2007 where Mr Kozłowski stated that he did not consent to the surrender. However several weeks later the German executing judicial authority informed him that it was not going to activate any grounds for non-recognition on the basis that, having regard to his personal circumstances, they did not consider him to be resident or staying in Germany and instructed the Stuttgart court to execute the EAW. During a review of this decision, provided for under national implementing legislation, the Stuttgart court was charged with determining whether Mr Kozlowski was resident or staying in Germany, or not. The court made a preliminary reference asking whether a number of circumstances would preclude the assumption that an individual was resident or staying in a Member State as per Article 4(6) of the Framework Decision. These included the fact that an individual's stay did not comply with national legislation on residence of foreign nationals; that an individual had committed crimes systematically for financial gain; and/or was in detention there serving a custodial sentence.

Judgment
The Court ruled that a requested person is 'resident' in the executing Member State when he has established his actual place of residence there. Factors that can determine whether a person is 'staying' include a stable period of presence in that state and connections made with that state, which are of a similar degree to those resulting from residence. In order to ascertain whether there are connections between the requested person and the executing

Member State the judicial authority has to make an overall assessment of various objective factors relating to the situation of the individual, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the country in question.

Link
Judgment

4.3 Opinion in Gyorgy Katz v Istvan Roland Sos (C-404/07)

10 July 2008, Advocate General Kokott

Protection of victims – Substitutive private prosecutor – Evidence as a witness

Background
The present case concerns the interpretation of Framework Directive 2001/220 on the standing of victims in criminal proceedings. In particular, reference is made to the victim's right to provide and receive information, to be heard and supply evidence and to play an appropriate role in the criminal legal system. Hungarian national law stipulates that the victim of a crime can take on the role of 'substitute private prosecutor' in place of the public minister. It was in this capacity that Mr Katz engaged in legal proceedings against Mr Sos. He accused Mr Sos of having cheated him and of having caused particularly serious damage. Mr Katz then asked to be heard as a witness. His request was denied on the basis that as a private prosecutor and thereby a member of the public ministry, he was not also entitled to act as a witness. It is in this context that the Court is asked whether national laws should guarantee the possibility to hear the victim of a crime as a witness in a situation where he also acts in the capacity of private prosecutor.

Opinion
In principle, it is public authorities that are entrusted with conducting legal proceedings during the penal process. Exceptionally, victims of crime can also bring penal proceedings before a tribunal in place of the authority entrusted with such a function. The question therefore arises as to what extent the rules and competences applicable to public authorities also apply to private prosecutors and to what extent these competences are limited. The possibility of acting as a witness in the present circumstances poses difficulties in that there could potentially be a conflict of interest. Nonetheless, the victim's statement could contribute considerably to proving who committed the crime and to delivering a fair judgment. Although the Framework Decision does not contain specific rules regulating situations whereby victims act in the capacity of prosecutor, it nevertheless implies that victims should always be entitled to give evidence during criminal proceedings. The Advocate General ultimately advises that even in cases where the victim of a crime acts as a private prosecutor, he should be awarded the possibility to give evidence. It is however not necessary to award him the status of a 'witness' if national law offers a separate platform from which he can present his views and this constitutes a valid method of proof.

Link
Opinion

5. EMPLOYMENT

5.1 Judgment in Coleman v Attridge Law and Steve Law (C-303/06)

17 July 2008, Grand Chamber

Discrimination on grounds of disability – Associated person - Indirect discrimination – Treatment of workers

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

Judgment
The purpose of the Directive is to establish a general framework for combating discrimination on grounds of, *inter alia*, disability, within the field of employment and occupation. Although certain of its provisions relate to persons with disabilities, the Directive is not limited to people who themselves have a disability. In order to combat effectively all forms of disability-based discrimination and increase the effectiveness of the Directive, its provisions can be extended to persons, who although not disabled, have been treated less favourably than another employee based on the grounds of their child's disability and the fact that they are the primary carer. The situation remains that less favourable treatment has occurred because of the existence of the disability and accordingly, the Court held that the Directive must apply to such a situation. Similarly, where an employee suffers harassment based on the disability of her child for whom she primarily cares, this is contrary to the prohibition of harassment provided for by the Directive.

Link
Judgment

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

10 July 2008, Second Chamber

Discriminatory comments in media – Recruitment policy

Background
Mr Pascal Feryn is one of the directors of NV Firma Feryn (Feryn). He was quoted in 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, citing the fact that certain customers did not wish to deal with immigrants. The centre for equal opportunities and opposition to racism (CGKR) brought proceedings against Feryn on the basis that its discriminatory recruitment policy infringed Belgian anti-discrimination laws. These transposed Directive 2000/43 on the principle of equal treatment between persons irrespective of racial or ethnic origin. The national court asks whether such a public statement made by an employer to the effect that it excludes job 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. The court also asks if direct discrimination can exist in cases where there is no identifiable victim.

Judgment
The purpose of Directive 2000/43 is to 'foster conditions for a socially inclusive labour market'. The Court held that although the Directive defines direct discrimination as existing where one person, due to racial or ethnic origin, is treated less favourably than another in a comparable situation, this does not limit its application solely to cases where there is an identifiable complainant. It was accordingly noted that the Directive covers selection criteria and recruitment conditions. An employer making public statements that he will not employ immigrants presupposes the existence of direct discrimination for the purposes of the Directive. It will be for the employer to prove and the national court to assess that there has been no breach of the principle of equal treatment. Should a finding of direct discrimination be reached, the Directive requires that effective, proportionate and dissuasive sanctions be imposed on the employer, even where there is no identifiable victim.

Link
Judgment

5.3 Reference in Georgios K Lagoudakis v Kentro Aniktis Prostasias Ilikiomenon Dimou Rethimnis (Joined cases C-162/08 to C-164/08)

Lodged 28 April 2008

Fixed-term work – National implementation – Reduced protection

Background
A series of preliminary references have been made from the Greek courts on the issue of fixed-term work and, in particular, the implementation of Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. This provides that Member States should take measures to prevent the abusive use of successive fixed-term contracts if equivalent protection does not already exist. The questions ask to what extent the Directive prevents Member States from taking new implementing measures where existing equivalent measures are in place and the new measures reduce the level of protection afforded. The reference goes on to ask a number of lengthy and detailed questions, should the first be answered affirmatively.

Link
Reference

6. ENVIRONMENT

6.1 Judgment in Dieter Janecek v Freistaat Bayern (C-237/07)

25 July 2008, Second Chamber

Air pollution – Action plans – Rights of third parties

Background
Directive 96/62 sets down limit values for emissions in order to ensure air quality. It also provides that Member States are to draw up action plans setting down short-term measures that are to be taken when there is a risk that the limits will be exceeded. Mr Janecek lives near the Munich ring road and Munich does have an action plan. Emissions in that area exceeded the limits more frequently than the 35 occasions per year permitted by German law. Mr Janecek requested that an action plan be drawn up for his district, which was refused by the authorities. The German Federal Administrative Court has sought to ascertain whether an

individual can require authorities to draw up such action plans where there is a risk that limit values or alert thresholds might be exceeded.

Judgment
The Court responded that in such circumstances, people who are directly concerned should be entitled to require the authorities in question to produce an action plan. This entitlement is not to be affected by the fact that other avenues exist under national law to force authorities to take anti-pollution measures. In relation to the content of action plans, it had not been clear what their objective should be. The Court clarified that measures in the action plan should aim to reduce the risk of exceeding the limits and thresholds in the Directive to a minimum. They should seek to bring emission levels to below the limits and thresholds but Member States are not obliged to ensure these limits and thresholds are never exceeded.

Link
Judgment

6.2 Judgment in Ecologistas en Acción-CODA v Ayuntamiento de Madrid (C-142/07)

25 July 2008, Third Chamber

Environmental impact assessments – Urban roads – Splitting up projects

Background
The Administrative Court of Madrid sought to establish whether certain urban road projects in Spain should, depending on their effects, be subject to the procedural requirements of an environmental impact assessment (EIA), according to Directive 85/377 on the assessment of the effects of certain public and private projects on the environment (as amended by Directive 97/11). In particular it was suggested that in order to circumvent the requirement for an EIA, the local authority divided a larger urban road development project into smaller projects. AN EIA is required for certain types of project listed in Annex I of the Directive but others, listed in Annex II, are subject to the discretion of the Member States. Member States are then to assess whether an impact assessment is necessary or not. The main question referred to the Court was whether projects for the refurbishment and improvement of an urban ring road had to be subject to EIA as provided by the amended Directive.

Judgment
The defendant in the proceedings took the view that because urban roads were not listed in either of the annexes, the alteration works on such roads were not covered by the Directive and an EIA was not necessary. The Court rejected this argument stating that the scope of the Directive is so wide that it would be contrary to the overall aim of the legislation if the kind of urban road projects carried out by the defendant were to fall outside the scope of the Directive just because they had not been specifically listed in the annexes. The Court took the view that the definition of express road as contained in Annex II of the Directive also encompassed urban roads. The Court also stated that when the refurbishment project of a road is equivalent in size and method to a major construction project, it must be regarded as such for the purposes of the Directive. Finally, the Court concluded that the Directive applied to urban road projects. Such projects must be made subject to EIA by virtue of their nature, size or location, especially if interacting with other projects where they might have a more significant impact on the environment.

Link
Judgment

7. FAMILY

7.1 Judgment in Inga Rinau (Case C-195/08)

11 July 2008 Third Chamber

Recognition and enforcement - Regulation Brussels II bis (2201/2003) - Parental responsibility - Urgent preliminary reference procedure

Background
This case concerns conflicting decisions relating to parental responsibility following divorce proceedings and hinges on the question of recognition and enforcement under the Brussels II *bis* Regulation dealing with matrimonial matters and parental responsibility. After marrying in 2003, Lithuanian citizen Mrs Inga Rinau and her German husband Mr Michael Rinau subsequently initiated divorce proceedings in 2005. In July 2006 Mrs Rinau and their daughter returned to Lithuania and remained there. Her husband had however only consented to his daughter's two-week absence from Germany, not a permanent change in her residence. In August 2006 the local German court provisionally awarded custody to Mr Rinau. The Lithuanian courts refused to recognise and enforce that decision in December 2006. In June 2007 divorce proceedings were concluded in the local German court with custody of the daughter awarded to Mr Rinau. Under the terms of the Brussels II *bis* Regulation the German court issued a certificate to enable automatic recognition in Lithuania of the German order for return of the daughter. Further proceedings had taken place in Lithuania in relation to the provisional German judgment and the Court of Appeal had overruled the decision not to return the daughter to Germany. However enforcement of this decision was put on hold whilst the Supreme Court asked the Court of Justice for clarification. This was done via the new urgent preliminary reference procedure. A lengthy series of questions were posed by the Lithuanian Supreme Court with a focus on the implications for enforceability of a decision where the German court may not have followed the correct procedures under Community legislation. Furthermore the court enquired whether an interested party can apply for non-recognition of a judicial decision if no application has been submitted for recognition of that decision, as is the case in relation to the definitive decision of the German courts on custody.

Judgment
This case was examined under the urgent preliminary reference procedure designed for use in cases in the area of freedom, security and justice (particularly family law). The Court received the reference on 14 May 2008 and handed down judgment on 11 July 2008. The Court ruled that any interested party can apply for non-recognition of a judicial decision, even if no application for recognition of the decision has been submitted beforehand. Certain limitations to this general rule are imposed, including in cases that deal with the return of the child following a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention. The Court confirmed that the German court had followed the provisions correctly therefore opposition to the recognition of the decision ordering return was not permitted. The Lithuanian court as the requesting court must declare the enforceability of the certified decision to allow the immediate return of the child.

Link
Judgment

8. FREEDOM OF INFORMATION

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

1 July 2008, Grand Chamber

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

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

Judgment
Regulation 1049/2001 allows EU citizens a right of access to documents of the institutions in all cases expect where disclosure would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest to disclose. Its purpose is to give effective rights while outlining that limits on access should be interpreted in the strictest sense. The Regulation imposes an obligation to disclose the opinions of the Council's legal service relating to a legislative process. The Court held that where the Council is asked to disclose a document, it must examine in each individual case whether the document falls within the exceptions. Such an examination is to be composed of three stages. The Council must confirm that the requested document relates to legal advice. It must then assess whether disclosure would risk 'undermining the protection' of that advice. The risk must be foreseeable and not hypothetical. Should the Council decide that disclosure would undermine the protection of legal advice, it must ascertain whether there is nonetheless any overriding public interest in disclosure. If the Council subsequently refuses access to documents, it is required to explain its decision. By simply submitting that disclosure would give rise to doubts as to the lawfulness of legislative acts, the Council had failed to explain fully how it arrived at its decision. Accordingly, the Court set aside the decision of the CFI and annulled the decision of the Council.

Link
Judgment

9. FREE MOVEMENT

9.1 Opinion in Commission v Italy (C-110/05)

8 July 2008, Advocate General

Free movement of goods – Quantitative restrictions – Measures of equivalent effect – Road safety justification

Background
This infringement action by the Commission against Italy concerns national rules prohibiting motorbikes from pulling trailers. The Commission argues that this rule constitutes a breach of Article 28 TEC concerning the free movement of goods, as a measure that has equivalent

effect to a quantitative restriction. The Advocate General examined whether the case at hand meets the criteria set down in the seminal ruling of *Keck and Mithouard* (cases C-267/91 and C-268/91). In particular the issue is when can a rule that governs the *use* of a product (rather than its characteristics) and which applies equally to domestic and imported goods be considered to breach Article 28 TEC.

Opinion
The Advocate General concluded that national measures governing the use of certain products can constitute a measure having equivalent effect to a quantitative restriction on the free movement of goods. While Member States are free to determine their own rules of the road, they should do so within the limits of Community law. The Italian rule provides a blanket prohibition of the use of trailers for safety reasons and provides no exception. The measures were held to make it practically impossible to enter the Italian market for trailers and made their use purely marginal. The Advocate General could not see the justification for such measures, when considering whether they were proportionate to the objective sought. As such he advised the Court to find that the rule did contravene Article 28 TEC.

Link
Opinion

10. INTELLECTUAL PROPERTY

10.1 Opinion in Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg (C-304/07)

10 July 2008, Advocate General Sharpston

Protection of databases – Extraction

Background
The case was referred by the Bundesgerichtshof (the German Federal Court of Justice) which asks whether the transfer of data from a given database and their incorporation in a different one are considered forms of extraction within the meaning of Article 7(2)(a) of Directive 96/9 on the legal protection of databases (the Database Protection Directive). As part of a project for the collection and drafting of an anthology of the most important verses in German poetry and literature, a University professor compiled a list of the verse titles he was going to use in the anthology and he published it on the internet. A company called Directmedia Publishing GmbH (Directmedia) was at the time marketing a CD-ROM of the best German poems. In selecting the poems for the CD-ROM, Directmedia consulted the list published on the internet and selected those verses it thought better suited to insert in its product. Of the verses contained in the CD-ROM, 98% were named in the university internet list. The professor and the university sued Directmedia on the grounds that by reproducing and distributing its CD-ROM, the company was infringing the copyright of the professor as compiler of the anthology and the right of the university as maker of the database.

Opinion
Advocate General Sharpston stated that Article 7(2)(a) defines 'extraction' as the permanent or temporary transfer of all or substantial part of contents of a database to another medium by any means or in any form. She did not agree with Directmedia's argument that by consulting the list only as a reference guide and by critically evaluating and selecting from it, it did not commit 'extraction' because it did not physically copy the contents of the database either directly or indirectly. Instead, she stated that the aim of the Directive was to protect '*sui generis*' the copyright of an original work and it did not matter to what extent and how a database had been copied. When material contained in a database is systematically and

methodically reproduced and arranged into another, it will be considered extracted - it does not presuppose the physical copying of data. The degree of independence and critical evaluation of the data demonstrated by the company was immaterial.

Link
Opinion

11. PROFESSIONAL QUALIFICATIONS

11.1 Reference in Maria Kastrinaki v A.KH.E.P.A. University Hospital, Thessaloniki (Joined Cases C-180/08 and C-186/08)

Lodged 28 April 2008

Higher education - Recognition of diplomas - Directive 89/48 - Academic equivalence

Background
The Administrative Court of Appeal in Greece has instituted two separate references for a preliminary ruling to the Court. The questions posed relate to Directive 89/48 on a general system for the recognition of higher-education diplomas. The Greek court asks whether a competent authority can prevent an individual from exercising their professional rights where it is not possible to recognise the academic equivalence of the qualification relied on. In this instance equivalence was not recognised as the qualification was awarded at the end of a course, part of which was completed at an institution not recognised as an educational establishment in the host Member State. The second question is whether the individual can be prevented from progressing in career and salary by way of a permanent appointment in a fixed post as a civil servant on the grounds that recognition of the academic equivalence of the university qualification from the original Member State is not possible.

Link
Reference C-180/08
Reference C-186/08

12. TAX

12.1 Opinion in Belgium – SPF Finances v Les Vergers de Vieux Tauves SA (C-48/07)

3 July 2008, Advocate General Sharpston

Parent/subsidiary companies – Usufructuary rights

Background
The claimant is a Belgian company that purchased usufructuary rights over shares in the company Narda SA (Narda) for a period of ten years, whilst another company acquired the legal ownership of the shares. Usufructuary rights grant the use and enjoyment of property belonging to another, as well as the right to receive profits made and generated by the property. The usufructuary rightholder claimed a deduction for the dividends received from the shares in Narda from its taxable basis. The Belgian tax authorities did not accept the reduced tax declaration and taxed the dividends arguing that the usufructuary right held by the claimant was not a 'holding in the capital' of Narda. In fact Belgian legislation, implementing Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent/Subsidiary Directive), requires that the beneficial owner of dividends must have a holding of capital in the company

which distributed the dividends, before claiming a tax deduction on the dividends. The Court of Appeal in Liège asks whether the national legislation is compatible with the Directive and whether the usufructuary rightholder can be regarded as the parent.

Opinion
Advocate General Sharpston stated that the Parent/Subsidiary Directive aims to eliminate the less advantageous treatment of parent and subsidiary companies which are based in different Member States. She therefore stated that it would be contrary to the aim of the Directive if the dividends in shares received by a usufructuary rightholder were subject to double taxation when Article 4(1) of the Directive prescribes tax exemptions for dividends arising from other types of rights. The Advocate General also explained that according to the Directive the definition of a parent company is 'a company which has a holding… in the capital' of another company, whether a subsidiary or not; and a parent company is authorised to claim tax exemption for the dividends and profits it receives', by virtue of its association with its subsidiary'. She therefore, stated that she considered the holding of a right of usufruct as a holding in the capital of a company. She concluded that by virtue of the Parent/Subsidiary Directive provisions, Member States must grant tax exemption on dividends received by a parent company from a subsidiary, as prescribed by Article 4(1), even when the ownership of the shares in the subsidiary has been severed, and the parent company only holds rights of usufruct whilst another retains legal ownership of the subsidiary.

Link
Opinion

12.2 Judgment in Flughafen Köln/Bonn GmbH v Hauptzollamt Köln (C-226/07)

17 July, Third Chamber

Taxation of energy products – Exemption – Direct effect

Background
The claimant is an airport operator. The airport generated its own electricity by using ground power units which ran on gas oil. Article 14(1)(a) of Directive 2003/96 on a revised Community framework for the taxation of energy products and electricity provides that Member States shall exempt from taxation energy products used for the production of electricity. Member States were to implement this by the end of 2003, whereas the German implementing legislation entered into force on 1 August 2006. In the meantime, the gas oil in question remained subject to excise duty. The airport operator claimed a tax refund in respect of the tax that had already been levied on the gas oil. It argued that it could rely on the direct effect of the provisions of the Directive and Article 14(1)(a). The Directive does, however, provide that tax may continue to be levied on such products for reasons of environment policy. As such the Court has been asked whether the provision is capable of having direct effect, given the discretion that has been granted to Member States to continue taxing such products for environmental purposes.

Judgment
The Court found that, by laying down clearly the products covered by the exemption (gas oil used to generate electricity), the Directive and Article 14 (1)(a) is sufficiently precise and is capable of having direct effect. It provides that Member States should not impose taxation on energy products used to produce electricity. The fact that Member States could impose tax for environmental policy reasons was simply seen by the Court as a limitation to this exemption. As the Member State had taken no action to put in place such a limitation (or indeed the exemption itself) it could not rely on this provision to deny taxpayers their right to benefit from the exemption in question. It follows that individuals seeking to rely on the provision have the right to do so by virtue of its precise and unconditional wording. National

courts should disapply any national legislation that contradicts the Community law provisions in question and should refund any tax that had been paid because of it.

Link
Judgment

12.3 Judgment in Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën (C-484/06)

10 July 2008, Fourth Chamber

First and Sixth VAT Directive – Rounding of VAT

Background
Fiscale eenheid Koninklijke Ahold NV operates supermarket chains through one of its companies, Albert Heijn BV. The latter had the practice of calculating and declaring VAT in respect of the sales of goods, by rounding up the amounts on the till receipts to the nearest euro cent. In two of its shops, however, the VAT was calculated not per till receipt but on each individual item sold to customers, by rounding the amount calculated per item down to the nearest cent. According to this latter method, the claimant realised it should have paid less VAT and requested a refund, which was refused. The Court is asked whether, in the light of the First and Sixth VAT Directives, the issue of rounding the VAT amount is a matter solely governed by national law or whether it is also a matter of Community law. If governed by Community legislation, are Member States required to permit the rounding down 'per article' method, even if different supplies are included in one invoice and consequentially in the tax return?

Judgment
The Court explained that both Directives do not provide explicit and direct provisions on the rounding of VAT. In response to the first question, the Court held that where Community law is silent on a specific issue, it is for the national legal systems to determine, within the limits of Community law, their preferred practices for rounding of the VAT amounts declared by taxable entities. When a method is established, however, Member States are obliged to apply the principles of fiscal neutrality and proportionality governing the common system of VAT. In relation to the second question, the Court stated that as long as these principles are respected, it is up to Member States to ensure that the amount of VAT levied corresponds exactly to the amount of VAT declared on the invoice and paid by the consumer. Member States must ensure any method of rounding is proportionate.

Link
Judgment

12.4 Reference in EHA Passenheim-van Schoot v Staatssecretaris van Financien (C-157/08)

Lodged 16 April 2008

Tax – Undisclosed foreign balances – Recovery period

The Dutch national court asks whether Articles 49 TEC and 56 TEC can be interpreted as allowing national tax authorities (that do not have effective means of monitoring foreign balances) to provide for a recovery period of twelve years in cases where foreign savings balances are not disclosed.

Link
Reference

12.5 Reference in NCC Construction Danmark A/S v Skatteministeriet (C-174/08)

Lodged 28 April 2008

Sixth VAT Directive – Real estate transactions

The claimant business builds real estate for sale to the public. The Court is asked whether the sale of real estate to the public is an activity fully subject to VAT and whether Article 19(2) of the Sixth VAT Directive and the definition of 'incidental real estate transactions' are applicable to the activities carried out by the case at hand. The referring court also asks whether the fact that the business, in carrying out its sale activities, uses goods and services which are subject to VAT, is of relevance in determining the answer to the first question. Further, the referring court asks whether the fact that the business, under national legislation, is required to pay VAT on its internal building supplies but has only a partial right to deduct VAT for general costs incurred during the build of the real estate, is consistent with principles of neutrality in VAT law.

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			25 July 2008
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	10 July 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	18 September 2008		
Right to claim unemployment benefit while residing in another Member State	Jorn Petersen v Arbeitsmarktservice Niederosterreich C-228/07		15 May 2008	11 September 2008
Legality of national legislation enforcing	Age Concern England v Secretary of State	2 July 2008	18 September 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 EU 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	11 September 2008
Offsetting of profits and losses	Société Papillon v Ministère du budget C-418/07		4 September 2008	
Tax treatment of	Hein Persche v	17 June		

charitable donations to foreign entities	Finanzamt Lüdenscheid C-318/07	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