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The Law Societies

JOINT BRUSSELS OFFICE

The Brussels Office Update Series: Developments from the European Court of Justice

September 2009

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INTRODUCTION

September – News from the EU Courts

Following the August recess, September has been a busy month for the European courts. The European Court of Justice handed down a competition law judgment in *Akzo Nobel NV and Others v Commission* (C-97/08) holding that a 100% shareholding in a subsidiary, gives rise to a presumption that the parent company has exerted a decisive influence over that subsidiary. In the field of State aid, the Court held in *Commission v MTU Friedrichshafen GmbH* (C-520/07) that the Commission is entitled to adopt a decision based on available information but it may not adopt a decision requiring recovery of incompatible State aid based on mere hypothesis.

The CFI upheld two complaints from Poland and Estonia (*Poland v Commission* (T-183/07) and *Estonia v Commission* (T-263/07)). These concerned the Commission's rejection of their national allocation plans that allocated allowances under the emissions trading scheme.

Advocate General Bot delivered his opinion in two age discrimination cases. The first, *Colin Wolf v Stadt Frankfurt am Main* (C-229/08), concerned a piece of German legislation setting an upper age limit of 30 for recruitment to the German state of Hessen's fire brigade. The second case, *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (C-341/08), also concerned German legislation, which provides that upon reaching the age of 68, dentists could no longer practise as panel dentists for state health insurance. In both cases the Advocate General concluded that the legislation could be justified.

In *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* (C-45/08) Advocate General Kokott was of the opinion that simply dealing in financial instruments whilst in possession of insider information would normally amount to "using" that insider information in the context of the Market Abuse Directive. In *Consorzio Nazionale Interuniversitario per le Scienze del Mare v Regione Marche* (C-305/08) Advocate General Mazák was of the opinion that the term "economic operator" should be given a broad interpretation to include any person who offers services on the market in the context of public procurement.

Coming up in October

On 6 October the Court is to hand down its judgment in *Wolzenburg* (C-123/08), a case regarding the non-execution of a European Arrest Warrant. The same day, judgment is expected in *Joined Cases GlaxoSmithKline Services v Commission, Commission v GlaxoSmithKline, EAEPC v GlaxoSmithKline and Aseprofar v GlaxoSmithKline* (C-501/06, C-513/06, C-515/06, C-519/06) regarding price fixing in the pharmaceuticals sector.

Later in the month, on 27 October, the Court is due to give judgment in *Wall AG v Stadt Frankfurt am Main* (C-91/08) concerning remedies available to an unsuccessful tenderer for breach of transparency duties.

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. Annex II provides an overview of the European courts. Please see the glossary of terms in Annex III for an explanation of the abbreviations used in this Update.

1. ASYLUM & IMMIGRATION

1.1 Opinion in *Salahadin Abdulla and Others v Bundesrepublik Deutschland* (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08)

15 September 2009, Advocate General Mazák

Cessation of refugee status – Directive 2004/83 – Changed circumstances in country of nationality

Background

This case concerns the revocation by the German authorities of the refugee status of Iraqi nationals as a result of changed circumstances in Iraq. The German Federal Administrative Court asks a series of questions about the interpretation of Directive 2004/83 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. In particular, it asks whether a refugee ceases to have refugee status if the well-founded fear of persecution, on the basis of which that status was granted, no longer exists and he has no other reason to fear persecution. It queried whether the cessation of refugee status requires other factors to be present in the country of the refugee's nationality. The referring court also asks about how new, different circumstances founding persecution must be assessed in the context of cessation of refugee status.

Opinion

The Advocate General was of the opinion that refugee status may cease to exist if a lasting solution, free from persecution, is available for the refugee in the country of nationality. The national court must conclude that the stability of the security situation in the refugee's country of nationality is such that a refugee should not become eligible for refugee status in the foreseeable future. In order to determine whether this lasting solution exists, it must be established that the circumstances in connection with which the refugee was recognised as such have ceased. It must further be established that the refugee's country of nationality is able and willing to protect the refugee in question. If there is an actor of protection which takes reasonable steps to prevent persecution, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution, then this will meet the requirements of the Directive. Protection from persecution provided by multinational troops may meet the requirements where they operate under the mandate of the international community. The availability of a minimum standard of living in the country of nationality must be taken into consideration as part of the assessment of whether the change in circumstances is significant and non-temporary in nature but it is not an independent criterion. In a situation in which the circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, entirely new, different circumstances founding persecution must be assessed in accordance with the standard of probability applicable to the grant of refugee status pursuant to Article 13 of that Directive.

Link

[Opinion](#)

1.2 Opinion in *Janko Rottmann v Freistaat Bayern* (C-135/08)

30 September 2009, Advocate General Poiares Maduro

Loss of EU citizenship – Statelessness

Background

Mr Rottman was born in Austria in 1956 and had Austrian nationality. The Austrian police suspected that he had committed a serious fraud in his professional activities and he was interrogated in July 1995. He left Austria and went to Germany. In 1997 Austria issued a national arrest warrant for him. In 1998 he applied to become a German national without declaring the criminal proceedings against him. He acquired German nationality in 1999 and thereby lost his Austrian nationality. Austria later informed Germany of the criminal proceedings pursuant to which Germany withdrew his nationality. The German court asks whether Community law precludes the legal consequence of the loss of Union citizenship, and of the associated rights and fundamental freedoms, resulting from a lawful revocation under national law of nationality acquired by intentional deception in combination with non-revival of the original nationality. If it does, the German court asks whether Germany must refrain altogether or temporarily from revoking the naturalisation or whether Austria, the Member State of former nationality, is obliged to interpret its national law so that such statelessness does not arise.

Opinion

The Advocate General considered that Community law does not prevent the loss of European Union citizenship, which results from the revocation of naturalisation by one Member State and the fact that the person's original nationality does not automatically resume. This is the case provided that naturalisation has not been withdrawn for reasons which would impinge on the exercise of rights and freedoms protected either by the Treaty or other Community law. Community law does not require the return of the initial nationality.

Link

[Opinion](#)

2. CIVIL JUSTICE

2.1 Judgment in Erhard Eschig v UNIQA Sachversicherung AG (C-199/08)

10 September 2009, Second Chamber

Legal expenses insurance – Clause restricting choice of lawyer – Mass claims

Background

Mr Erhard Eschig entered into a contract for legal expenses insurance with UNIQA Sachversicherung AG (UNIQA). Eschig invested in investment services undertakings which became insolvent and instructed a lawyer of his choice. UNIQA, which insured around 180 victims of the insolvency, asserted that it was entitled to select a legal representative. The Austrian law on insurance contracts 1958 provides that the insurance contract can prevent the insured from choosing a lawyer of his choice in certain circumstances. The general conditions on legal expenses insurance elaborated by the Austrian confederation of insurance enterprises allow the insurer, and not the insured, to choose the lawyer in certain circumstances. The Austrian court asked whether Article 4(1)(a) of Directive 87/344 on legal expenses insurance precludes a clause, which entitles the insurer to select a legal representative for insured parties with claims arising from the same event, thereby restricting the right of the individual insured person to choose his own lawyer.

Judgment

The Court held that Article 4(1)(a) must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, to select the legal representative of all the insured persons concerned.

Link

Judgment

2.2 Judgment in German Graphics Graphische Maschinen GmbH v V van der Scree (C-292/08)

10 September 2009, First Chamber

Insolvency proceedings – Reservation of title – Brussels I¹

Background

A German company, German Graphics Graphische Maschinen GmbH (“German Graphics”), concluded a contract for the sale of machines with Dutch company, Holland Binding. In concluding the contract they included a reservation of title clause in favour of German Graphics. Holland Binding was subsequently placed in involuntary liquidation by the Utrecht District Court (Netherlands) on 1 November 2006. On 5 December 2006, the Brunswick Regional Court (Germany) granted the application made by German Graphics for the adoption of protective measures with regard to a number of machines situated at the premises of Holland Binding. It was declared enforceable by a Dutch court on 18 December 2006. On appeal the Supreme Court stayed the proceedings and sought clarification from the Court. It queried the compatibility of Regulation 1346/2000 on insolvency proceedings (“Insolvency Regulation”) with the Brussels I Regulation. In particular, it asked to what extent and how the scope of Brussels I should be interpreted before applying it to judgments in the area of insolvency.

Judgment

The Court ruled that the Insolvency Regulation must be examined to determine if it falls materially outside the scope of Brussels I. Only after that examination can it be concluded that the recognition and enforcement provisions of Brussels I apply. As regards the exceptions provided for in Brussels I, read in conjunction with the Insolvency Regulation, it should be interpreted as meaning that it does not apply to an action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset subject to such reservation of title is situated in the Member State where insolvency proceedings are commenced at the time such proceedings are opened.

Link

Judgment

2.3 Judgment in Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG (C-347/08)

17 September 2009, Third Chamber

Brussels I – Objective of protecting weaker party – Social security institution as statutory assignee of rights

Background

An Austrian resident, Ms Kerti, was seriously injured in a road accident in Germany by another driver. The other driver was insured by WGV-Schwäbische Allgemeine Versicherungs AG (WGV). By operation of Austrian law, Ms Kerti’s rights were statutorily assigned to Vorarlberger Gebietskrankenkasse (VGKK) which had paid for her treatment. The VGKK applied for payment of the treatment costs from WGV. When no payment was received, VGKK commenced proceedings in Austria, where it is established. WGV asserted that the

¹ Please refer to Glossary in Annex III.

Austrian courts did not have jurisdiction to hear the case. The referring court asks whether Brussels I is to be interpreted as giving a social security institution, which is the statutory assignee of the injured party's rights, the right to commence proceedings in the Member State in which it is established against an insurer domiciled in another Member State. If so, it asks whether the social security institution retains that right even when the direct victim is not permanently resident in its Member State.

Judgment

The Court emphasised that Recital 11 to Brussels I makes clear that jurisdiction must be certain and predictable. The Court went on to note that Brussels I's general regime is that the defendant to an action has the right to be sued in the Member State in which it is domiciled. This is subject to certain exceptions set out in Sections 2 to 7 of Chapter II of the Regulation. One such exception is the protection of the economically weaker or legally less-experienced party. However, it cannot be said, in the case of a social security institution suing an insurer, that there is a weaker party worthy of protection. The Court held that the fact that the social security institution derives its rights from a statutory assignment of the direct victim's rights, who might well have availed herself of such protection, cannot change that conclusion. VGKK may not bring an action against WGV in the Austrian courts when WGV is established in another Member State. It was, therefore, unnecessary to answer the second question.

Link

Judgment

2.4 Opinion in Car Trim GmbH v KeySafety Systems Srl (C-381/08)

24 September 2009, Advocate General Mazák

Jurisdiction – Sale of goods and supply of services –Place of performance

Background

Under several contracts, KeySafety Systems Srl ("KeySafety") purchased components for airbag systems from Car Trim GmbH ("Car Trim"). The components were primarily provided by other providers but would be brought up to specification by Car Trim, which was then obliged to deliver the parts to specific addresses. KeySafety terminated their agreements with Car Trim, which considered the terminations to constitute breaches of the contracts. Under Brussels I, the Regional Court found that it did not have jurisdiction to hear the matter. Questions as to the concepts of "sale of goods", "supply of services" and the place of performance, as stated in Article 5 of Brussels I, were referred to the Court.

Opinion

The Advocate General found it objectively impossible to set down a general distinction between the sale of goods and the supply of services under Brussels I, deciding that this should be determined on a case-by-case basis. In this case, the essential obligation in the contracts in question was to deliver the airbag system components and adjusting or transforming the components from other suppliers only constituted ancillary contractual obligations. Following on from this, the Advocate General stated that the place where, under the contract, the goods were delivered, or should have been delivered, was the place where the purchaser obtained actual possession of the goods or should have obtained it under the contract.

Link

Opinion

2.5 Reference in Olivier Martinez, Robert Martinez v Société MGN Limited (C-278/09)

Lodged 16 July 2009

Jurisdiction – Infringement of personal rights - Publication via internet

Background

The Parisian Court of First Instance has referred a question to the Court asking under which conditions a court would have jurisdiction in relation to an action for infringement of personal rights by the online publication of photographs or other information where the publication was carried out by a company in another Member State. It asks whether the court in the first Member State would only have jurisdiction to hear the action where the internet site in question can be accessed from that Member State. It also asks whether the court in the first Member State would have jurisdiction to hear the action on the sole condition that there is a sufficient, substantial or significant link between the harmful act and the territory of the first Member State. If so, it enquires whether that link would be identified by the number of hits on the page at issue made from the first Member State, the residence or nationality of the person concerned, the language used, or any other factor that may demonstrate the publisher's intention to target the public of the first Member State.

Link

Reference

3. COMPETITION & STATE AID

3.1 Judgment in Akzo Nobel NV and Others v Commission (C-97/08)

10 September 2009, Third Chamber

Cartels – Parent company's liability – Presumption of single economic entity

Background

This case was an appeal against the CFI's decision in *Akzo Nobel and Others v Commission* (T-112/05), which upheld the Commission's Decision 2005/566 in the choline chloride cartel. The Commission had found that four wholly-owned subsidiaries of Akzo Nobel NV ("Akzo Nobel") had infringed Article 81(1) TEC and Article 53(1) of the European Economic Area Agreement. The parent company, Akzo Nobel, despite not having participated in the cartel, was found jointly and severally liable with its subsidiaries. Akzo Nobel and its subsidiaries appealed against this finding to the Court. Akzo Nobel essentially conceded that a parent company could be held liable for the actions of one or more of its subsidiaries if they were found to form a single economic unit and the parent exerts decisive influence over the subsidiary. However, it disputed that a presumption of such arises solely by virtue of a subsidiary being owned wholly by its parent. It argued that there must be clear indications that the parent in fact exerted its influence. Akzo Nobel also argued that the CFI took account of the wrong factors when determining that it formed a single economic unit with its subsidiaries. The Commission argued that a 100% shareholding was sufficient to give rise to the presumption. It also argued that the four subsidiaries ought not to be party to the appeal since they had no legal interest in the outcome.

Judgment

In dismissing the appeal, the Court noted first that Akzo Nobel's subsidiaries were properly party, since, if the judgment against Akzo Nobel were to be set aside, such a finding would impact on the subsidiaries vis-à-vis their joint and several liability. The Court emphasised that Community case law makes it clear that the conduct, and hence liability, of a subsidiary

company may also be imputed to that undertaking's parent if the subsidiary simply follows directions given to it. The two companies then fall to be treated as a single economic unit and there is no need to establish the direct involvement of the parent company. The Court held that a rebuttable presumption that two or more companies are a single economic unit does arise where a parent company owns 100% of the shares in its subsidiary. It is sufficient for the Commission to adduce evidence as to the shareholding and it is then for the parent company to prove that it did not in fact exert decisive influence. In determining whether two or more companies form a single economic unit, reference must be had not only to factors such as pricing policy and sales targets, as discussed by the CFI, but also to the economic, organisational and legal links between parent and subsidiary. Since Community competition law is based on the answerability of an undertaking that infringes competition rules, if a parent company forms a single undertaking with its subsidiary, it is liable also.

Link

Judgment

3.2 Judgment in Commission v MTU Friedrichshafen GmbH (C-520/07)

17 September 2009, First Chamber

State aid – Restructuring aid – Commission decision on available information

Background

Following the reunification of Germany, the German government notified the Commission of a number of payments made to companies to aid their restructuring. One such recipient was SKL Motoren- und Systemtechnik GmbH (SKL), a manufacturer of high-speed diesel engines. Pursuant to a number of contracts concluded during the course of 1997, MTU Friedrichshafen GmbH (MTU) was granted exclusive use of various know-how generated by SKL in return for a payment intended to cover development costs. In 2000 the Commission notified the German government that it was commencing a formal investigation procedure and asked whether MTU had benefited, or was likely to benefit, from the restructuring aid paid to SKL. The Commission found that Germany had not complied with Community guidelines with regard to the aid granted to SKL and further that the information provided was not sufficient to rule out the possibility that MTU had benefited from the aid. It adopted a Decision requiring Germany to recover all the incompatible State aid including an amount from SKL and MTU jointly and severally. The CFI, in an action brought by MTU, annulled the part of the Decision requiring recovery from MTU. It found that Regulation 659/1999, laying down detailed rules for the application of Article 88 TEC, allows the Commission to adopt a decision on the information available to it. It is not entitled, however, to require recovery from an undertaking where that undertaking's alleged benefit from the incompatible aid is purely hypothetical. The Commission appealed submitting that the CFI erred in law in requiring complete certainty when making decisions on the available information.

Judgment

Dismissing the appeal, the Court pointed out first that the Commission's appeal was based on an incorrect reading of the appealed judgment. The CFI did not require complete certainty but rather it annulled part of the challenged Decision because it found it to be based on pure hypothesis. The Court confirmed that Article 13(1) of Regulation 659/1999 allows the Commission to adopt a decision on the information available to it, where a Member State has failed to cooperate and provide sufficient information. However, being empowered to take a decision on the information available does not mean that the Commission is released from the obligation to base a decision on evidence actually supporting its conclusion. In particular the Commission cannot adopt a decision finding that an undertaking has benefited from incompatible State aid, simply on the basis that there is no evidence to the contrary.

Link

Judgment

3.3 Judgment in Commission v Koninklijke FrieslandCampina NV (C-519/07)

17 September 2009, Third Chamber

State aid – Standing – Direct and individual concern – Legitimate expectation

Background

Prior to Member States agreeing to dismantle “harmful” tax regimes, the Netherlands operated a favourable tax structure for undertakings fulfilling certain requirements (“the GFA Scheme”). Koninklijke FrieslandCampina NV (KFC) applied for authorisation under the GFA Scheme. However, after KFC’s application had been submitted, the Commission adjudged the GFA Scheme to be incompatible with State aid rules. As a result, the Netherlands was required to stop entry to the GFA Scheme. Existing members of the scheme were permitted to continue benefiting from it until their authorisation expired under transitional measures, so as not to infringe the principle of the protection of legitimate expectation. The Commission confirmed that the transitional measures would not apply to undertakings whose applications for authorisation under the GFA Scheme were undetermined. Consequently, the Netherlands rejected KFC’s application. KFC took its case to the CFI and succeeded. The Commission appealed against the CFI’s decision.

Judgment

The Court held that KFC did have standing to bring an action. The Court recalled that a group of persons might be individually concerned by a measure where it affected a group of persons who were identified, or identifiable, by reason of criteria specific to the members of the group when that measure was adopted. If the Commission’s decision were annulled, the Court found that KFC’s application would be considered by the Netherlands, with the result that KFC might gain authorisation under the GFA Scheme. KFC therefore also had an interest in bringing proceedings. KFC could therefore gain an advantage by bringing proceedings. In noting that Dutch law required the adoption of a decision granting authorisation, which could be subject to conditions, and that KFC had not undertaken any commitments with a view to gaining authorisation, the Court found that the principle of legitimate expectation had not been infringed. Deciding, furthermore, that the principle of equal treatment had not been infringed, the Court observed that there was a valid justification for applying transitional measures to those undertakings that already had authorisation under the GFA Scheme, but not to those whose applications were yet to be determined.

Link

Judgment

3.4 Judgment in Joined Cases Erste Bank der österreichischen Sparkassen AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG, Österreichische Volksbanken AG v Commission (C-125/07, C-133/07, C-135/07 and C-137/07)

24 September 2009, Second Chamber

Competition – National cartel – Banking – Calculation of a fine

Background

This case concerns an appeal against the CFI’s decision in *Raiffeisen Zentralbank Österreich and others v Commission* (Joined Cases T-259/02 – T-264/02 & T-271/02), which essentially upheld the Commission’s Decision 2004/138 in the Austrian banks (Lombard Club) cartel.

The Commission had imposed fines totalling just over €124mn on the eight participants in the cartel. Seven of the eight participants appealed to the CFI, which upheld the Commission's findings and dismissed the appeals in all respects other than in relation to one of the banks. Four of the Austrian banks then appealed, disputing the CFI's analysis of the conditions necessary for the application of Article 81(1) TEC, in particular, the condition relating to an effect on trade between Member States. The appellants claimed that the CFI incorrectly assessed the gravity of the infringement for the purpose of calculating the fine. Finally, the appellants complained about the CFI's assessment concerning the existence of attenuating circumstances and the extent to which the appellants co-operated in the proceedings.

Judgment

Despite the opinion of the Advocate General, which had proposed that the CFI's decision be set aside and that the fines be reduced, the Court rejected the appeal in its entirety and upheld the ruling of the CFI. The Court's lengthy judgment upheld the action and assessment of the Commission on the points raised by the parties. In particular the Court rejected the arguments put by the appellants that the Commission had committed errors in assessing the markets that were affected by the cartel and in concluding that it had intra-Community effects.

Link

Judgment

3.5 Judgment in Hoechst GmbH v Commission (T-161/05)

30 September 2009, Seventh Chamber

Cartel – Agreed facts – Cooperation - Reduction of fines

Background

The Commission imposed fines on a number of companies that were found to be involved in a cartel on the monochloroacetic acid market. This cartel involved market sharing agreements and the exchange of price information. Four companies appealed the Commission's decision of January 2005, imposing fines. The Court gave four separate judgments, three of which (*Arkema v Commission* (T-168/05), *Elf Aquitaine SA v Commission* (T-174/05), and *Akzo Nobel NV v Commission* (T-175/05)) upheld the Commission's decision. In relation to Hoechst, the question arose whether the amount of the fine imposed should be reduced because the company had not disputed the facts outlined in the Commission's Statement of Objections. The Commission contended that the company had not lodged a formal application for leniency and that it did not consider it to have cooperated genuinely with the Commission, as it did not comment on the details of the infringement. Indeed the company continued to dispute the legal conclusions that the Commission had drawn, based on the facts that were not disputed by Hoechst.

Judgment

The Court referred to the Commission's 1996 Leniency Notice and noted that a fine may be reduced if, after the Statement of Objections has been published, a company cooperates and informs the Commission that it does not dispute the facts of the case. The Court noted that Hoechst did state expressly in its response to the Statement of Objections that it did not dispute the facts, even though it did question whether they were sufficient to reach the legal conclusions the Commission did. The Court concluded that this admission in itself should be considered to help the Commission in its task. As such the company should be entitled to a reduction in its fine, which the Court reduced by 10%.

Link

Judgment

3.6 Opinion in Commission v Alrosa Company Ltd. (C-441/07)

17 September 2009, Advocate General Kokott

Abuse of dominant position – Commitments – Proportionality

Background

This case concerns an undertaking given by De Beers, the world's largest diamond dealer, not to purchase rough diamonds from Alrosa, the second largest. The two companies had notified an agreement to the Commission for negative clearance. Concerns were expressed by the Commission, however, about the anti-competitive nature of the agreement and about the extent to which De Beers was abusing its dominant market position. As a result De Beers unilaterally agreed not to buy diamonds from Alrosa. Under Article 9 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 TEC the Commission has the power to adopt a decision that makes such commitments binding. This is what it did in February 2006. Alrosa appealed against the Commission decision and, in July 2007, the CFI annulled the decision on the ground that Alrosa had not been heard in relation to one of the undertakings and that it was disproportionate. The Commission sought to overturn this ruling. The two grounds of appeal concern the principle of proportionality and the right to be heard in administrative hearings.

Opinion

The Advocate General recommended that the judgment of the CFI be set aside. The opinion noted that Article 9 of Regulation 1/2003 does not contain reference to the principle of proportionality in the same way that that Regulation's Article 7 does. As such the CFI was mistaken in stating that such a principle should apply. The Advocate General also rejected the claim that Alrosa's right to a fair hearing was infringed. She stated that the company did have sufficient opportunity to assert its position after De Beers unilaterally made the undertakings in question. She also considered that the Commission decision did not infringe principles of equal treatment or non-discrimination, nor was it arbitrary.

Link

[Opinion](#)

4. CONSUMER

4.1 Judgment in Pia Messner v Firma Stefan Krüger (C-489/07)

3 September 2009, Third Chamber

Withdrawal from distance contracts - Compensation for use

Background

This case concerns Directive 97/7 on the protection of consumers in respect of distance contracts. The Directive provides that the only charge that may be made to the consumer following the exercise of her right of withdrawal is the direct cost of returning the goods. The German court asks whether this precludes a provision in national law which provides that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods delivered. In this case the consumer had used the product, a laptop, for approximately eight months but was still within the withdrawal period as she had not been informed of her withdrawal right.

Judgment

The Court held that the Directive must be interpreted as precluding a provision of national law which generally provides that in the case of withdrawal by a consumer from a distance contract, a seller may claim compensation for the use of the consumer goods acquired. It held, however, that this does not prevent the consumer from being required to pay compensation for use in certain circumstances. Such circumstance would include where the consumer has made use of the goods in a manner incompatible with the principles of civil law, such as good faith or unjust enrichment. However, it held that this is subject to the condition that the purpose of the Directive and, in particular, the functionality and efficacy of the right of withdrawal are not adversely affected, which is a matter for the national court to determine.

Link

Judgment

4.2 Reference in Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres (C-236/09)

Lodged 29 June 2009

Equal treatment – Insurance - Calculation of premiums and benefits

Background

Article 5(2) of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services affords a limited exception to the use of sex as a factor in the calculation of premiums and benefits for insurance and related financial services resulting in differences in individuals' premiums and benefits. The Belgian Constitutional Court asks whether the limited exception is compatible with the TEU provisions on equality and non-discrimination as a matter of principle and in any event where its application is restricted to life assurance contracts.

Link

Reference

5. CRIMINAL

5.1 Reference in Criminal proceedings against Emil Eredics and Another (C-205/09)

Lodged 8 June 2009

Criminal Law – Obligation to promote mediation between victim and offender

Background

Article 10(1) of Council Framework Decision 2001/220 on the standing of victims in criminal proceedings, requires Member States to promote mediation between the victim and the offender in appropriate criminal cases. This reference, from the Hungarian court, asks four questions. First it asks whether a person, other than a natural person, falls within the definition of a "victim" for the purposes of Article 10. Secondly, the Hungarian court asks for clarification of the extent to which "offences", referred to in Article 10, can be interpreted as meaning all the offences which are substantively the same. Thirdly, clarification is requested as to when the obligation to promote mediation ceases. Finally, the referring court queries whether mediation should be available at all stages where it would impact upon the exercise of discretion.

[Link](#)
[Reference](#)

5.2 Reference in I.B. v Conseil des ministres (C-306/09)

Lodged 31 July 2009

European Arrest Warrant – Execution of a sentence imposed in absentia – Return

Background

The Belgian Constitutional Court asks the Court whether a European Arrest Warrant (EAW), issued for the purposes of the execution of a sentence imposed *in absentia*, without the defendant having been informed of the date and place of the hearing and against which a remedy was still available, should actually be regarded as issued for the purposes of prosecution. If the Court's reply to this question is that the EAW was issued for the execution of a sentence, the Belgian court asks whether it was prohibited from inserting a condition of surrender, namely that the person subject to the EAW is to be returned to the executing state in order to serve the sentence. If the Belgian court is prohibited from inserting such a condition, it asks whether this infringes the principle of equality and non-discrimination. If the Court is of the opinion that the EAW could be regarded as issued for the purposes of prosecution, the Belgian court asks whether it could refuse the execution if, in its opinion, there are grounds for believing that such execution would infringe the fundamental rights of the person concerned.

[Link](#)
[Reference](#)

5.3 Reference in Extradition proceedings concerning Gaetano Mantello (C-261/09)

Lodged 14 July 2009

Ground for non-execution – European Arrest Warrant

Background

This case concerns Council Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW) and the surrender procedures between Member States. Article 3(2) thereof provides that an EAW may not be executed where a judicial authority is informed that the requested person has been finally judged by a Member State in respect of "the same acts" and any sentence imposed has been served. The German court asks whether the existence of "the same acts" is to be determined in accordance with the law of the issuing or the executing Member State, or an autonomous interpretation based on EU law. It also asks whether the acts in question, namely the illegal importation of drugs and membership of an organisation whose purpose is the trafficking of drugs, are "the same acts" where the investigating authorities did not pursue the latter and the sentence was only imposed in respect of the former.

[Link](#)
[Reference](#)

6. EMPLOYMENT

6.1 Judgment in Francisco Vicente Pereda v Madrid Movilidad SA (C-277/08)

10 September 2009, First Chamber

September 2009

Entitlement to paid annual leave – Annual leave coinciding with sick leave

Background

A reference to the Court for a preliminary ruling was made by the Juzgado de lo Social no 23 de Madrid during proceedings between Mr Vicente Pereda and his employer, Madrid Movilidad SA (“Movilidad”). After an accident at work, Mr Pereda was on sick leave during the period of annual leave that had been allocated to him. On his return to work, Mr Pereda requested that Movilidad allocate him a new period of annual leave equivalent to the period his original allocation overlapped with his period of sick leave. Movilidad refused the request without reasons and the question of whether Movilidad had to accede to the request made by Mr Pereda was referred to the Court.

Judgment

The Court referred to the relevant Spanish legislation and to Article 7(1) of Directive 2003/88 on the organisation of working time (“the Directive”). While the Court confirmed that the Directive did not preclude employers from attaching conditions to the right to annual leave, it was stated that the employee must have actually had the opportunity to exercise that right. In this respect, the Court clarified that the purpose of annual leave was for the worker to enjoy a period of rest and relaxation. This purpose was quite distinct from that attributed to sick leave, which was to enable the worker to recover from illness. Consequently, the Court ruled that, although the worker could elect to count sick leave as annual leave, if he did not wish to do so annual leave must be granted to him for a different period. National provisions or collective agreements going against this ruling were precluded.

Link

Judgment

6.2 Opinion in *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (C-341/08)*

3 September 2009, Advocate General Bot

Age discrimination – State dentists – Maximum practising age

Background

On attaining the age of 68, Ms Petersen was told that she could no longer practise as a dentist admitted to Germany’s panel of state dentists. The German court, on hearing Ms Petersen’s appeal, found that the national law behind the decision was not contrary to the German Constitution. This was because there were important policy decisions justifying an age limit in this area, namely preserving the financial balance of the statutory health insurance system and ensuring that future dentists could enter the profession. The question of legality under Directive 2000/78 on the establishment of a general framework for equal treatment in employment and labour was referred to the Court.

Opinion

The Advocate General considered that both justifications put forward by the German government were legitimate objectives and capable of constituting exceptions to the general rule against age discrimination in Directive 2000/78. German law provides certain exceptions to the general age barrier to ensure, among other things, that dentists obtained a pension and to countermand the scarcity of dentists in certain regions. These exceptions were found not to undermine the German position that the age limit had been imposed, in part, to preserve the financial balance of the health system.

[Link](#)
[Opinion](#)

6.3 Opinion in Colin Wolf v Stadt Frankfurt am Main (C-229/08)

3 September 2009, Advocate General Bot

Age discrimination – Firemen – Maximum recruitment age

Background

This reference from the German courts seeks to ascertain whether it is justified under Community law to impose an upper age limit on the recruitment of certain categories of firemen. Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, outlaws discrimination in the workplace on various grounds, including age. Article 6(1) of the Directive provides justifications for derogating from this principle. Mr Wolf's application for a post was refused as he was above the age limit of 30 years old. This age limit for certain public services is contained in the legislation of the German state of Hessen.

Opinion

The Advocate General examined whether the age limit could be justified in order to guarantee the age balance of the fire service and to ensure its continued good operation. Consideration was given to the very physical nature of the work in question and the need to provide for an appropriate length of service before the worker is physically less capable of carrying out the tasks at hand. The Advocate General accepted that such an age limit could be justified in the present case. As such it was concluded that, given its direct link to physical capability, age constituted an essential requirement of the work and the limit was justified objectively as being both appropriate and necessary.

[Link](#)
[Opinion](#)

6.4 Opinion in Susanne Gassmayr v Bundesministerin für Wissenschaft und Forschung (C-194/08)

3 September 2009, Advocate General Poiares Maduro

Maternity leave – Allowances for on-call duties - Directive 92/85

Background

Dr Gassmayr took two periods of pregnancy-related leave, first, with a medical certificate to the effect that continuing to work would endanger her or her child and, subsequently, ordinary maternity leave. She complained that during this period of leave she was not paid allowances for the average on-call duties that she would have otherwise performed. Austrian law does not provide an entitlement to specific allowances during such leave. The Austrian court asks whether certain provisions of Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers prevent a Member State from establishing such a system. The Austrian court also asks if the provisions of the Directive in question have direct effect.

Opinion

The Advocate General concluded that the provisions of the Directive do not preclude a provision of national law according to which an employer may refuse to pay to a pregnant employee a special allowance, such as the on-call duty allowance at issue in the main proceedings. Since such an allowance is directly linked to the performance of specific duties,

the employer may refuse to pay it if the employee concerned has not performed those duties, whether by reason of maternity leave or otherwise. It is for the national court to assess the nature of particular allowances and ascertain that the income of the pregnant employee is at least equivalent to the income that national law guarantees to employees who are away from their work for reasons connected with their state of health. The Advocate General also found that the provisions have direct effect and can be relied on by individuals in domestic proceedings.

[Link](#)
[Opinion](#)

6.5 Reference in Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, Filial Plovdiv (C-268/09)

Lodged 10 July 2009

Age limits for employment contracts – Directive 2000/78

Background

This case concerns Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. The Bulgarian court asks whether that Directive precludes a national law which: prohibits the conclusion of employment contracts of indefinite duration with professors who have reached the age of 65; imposes age limits for employment for specific posts; and imposes compulsory retirement for professors who have reached the age of 68.

[Link](#)
[Reference](#)

6.6 Reference in Albron Catering BV v FNV Bondgenoten and John Roest (C-242/09)

Lodged on 3 July 2009

Acquired rights – Group companies – Transferred company not employer

Background

This preliminary reference from the Dutch courts seeks to ascertain the extent to which Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, applies to transfers of a company that is part of a group of companies. The court asks to what extent the rules apply if the workers in the transferred business are actually employed by a separate personnel company within the group that employs staff on behalf of the group. The court goes on to ask whether the situation is different if the separate company employing the workers is not a "personnel" company.

[Link](#)
[Reference](#)

6.7 Reference in Günter Fuß v Stadt Halle (Saale) (C-243/09)

Lodged on 3 July 2009

Working time – On-call – Refusal to work long hours – Detriment

Background

This reference seeks to clarify the notion of detrimental treatment suffered by the worker in the context of the EU working time rules. It appears to concern a case where a worker with on-call duties asked that the rules on maximum working time be observed in his case. He was subsequently transferred to an administrative post against his will and the court asks whether this constitutes “detriment” within the context of Directive 2003/88 concerning certain aspects of the organisation of working time. The court also asks whether the consequent fall in remuneration linked to working less anti-social hours could also constitute detriment.

Link

Reference

6.8 Reference in Dita Danosa v LKB Lizings SIA (Case C-232/09)

Lodged 25 June 2009

Directive 92/85 – Definition of worker – Managerial body of a capital company – Pregnant woman

Background

The Latvian court asks the Court two questions. First, the referring court asks whether the members of a managerial body of a capital company are to be considered as workers under Community law. Secondly, the court queried whether Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding precludes the removal, without restrictions, of members of the board of a capital company, particularly if the person concerned is a pregnant woman.

Link

Reference

7. ENVIRONMENT

7.1 Judgment in Commission v Parliament and Council (C-411/06)

8 September 2009, Grand Chamber

Regulation 1013/2006 - Shipments of waste – Challenge to legal basis

Background

The Commission brought an action against the Parliament and the Council to challenge the legal basis upon which Regulation 1013/2006 on shipments of waste was adopted, namely Article 175 TEC. The Commission argued that a second legal basis, Article 133 TEC, should have been used. The Commission maintained that a dual legal basis was necessary and permissible as the instrument in question, dealing with the regulation of shipments of waste, not only impacted on intra-Community activity but also on extra-Community trade. Therefore Article 133 TEC on common commercial policy should have been added. The Parliament and the Council, on the other hand, argued that the contested Regulation clearly demonstrates that it has one main purpose, which is the protection of the environment, and therefore should be based on Article 175 TEC only.

Judgment

After examining the objective and content of the contested Regulation, the Court concluded that the protection of the environment must be regarded as being the predominant objective

and component. Moreover, the instrument did not contain such components of common commercial policy to justify the dual legal basis. The Court, following the reasoning of Advocate General Poiares Maduro, therefore dismissed the action.

Link
Judgment

7.2 Judgments in Poland v Commission (T-183/07) and Estonia v Commission (T-263/07)

23 September 2009, Second Chamber

Emissions trading – National allocation plans – Annulment of Commission decision

Background

In 2003 the EU adopted Directive 2003/87, which established the EU trading scheme for greenhouse gas emission allowances. As part of this system each Member State has to submit a national allocation plan (NAP) to the Commission. This NAP sets out the allowances that the Member State intends to allocate over a five-year period. The Directive specifies criteria, which the NAPs must observe, and allows the Commission to contest a NAP if it fails to do so. In 2007 the Commission decided that the Polish and Estonian NAPs for the 2008 to 2012 period failed to meet the criteria and that the total amount of allowances should be reduced. The two Member States challenged the Commission's decision, stating that it had exceeded its powers, failed to give sufficient reasons and breached the principle of sound administration.

Judgments

The CFI concluded that it is for Member States alone to draw up the NAPs and decide on the total quantity and allocation of allowances. The CFI noted that the Commission's power of review is very restricted whereas Member States possess a margin of discretion in how they go about deriving their NAPs. The CFI criticised the Commission for its treatment of the supporting data used by Poland and Estonia, and stated that it was not up to the Commission to determine that only one method of assessing NAPs should be used. Neither was it for the Commission effectively to cap the total quantity of allowances in any Member State. The Court agreed with Poland that the Commission had not provided sufficient reasoning when rejecting the methodology used for its NAP. In relation to Estonia's NAP the Court considered that the Commission had breached the principle of sound administration. This was because it had not considered correctly those aspects of the NAP relating to the provision of reserves of allowances. The CFI annulled the two Commission decisions in question.

Links
Judgment in T-183/07
Judgment in T-263/07

7.3 Opinion in Pontina Ambiente Srl v Regione Lazio (C-172/08)

17 September 2009, Advocate General Sharpston

Landfill waste – Special tax – Late payments

Background

This case presents questions on an unusual combination of EU legislation. The company in question, Pontina, is an operator of a landfill site. An Italian law implementing the Landfill Directive (1999/31) created a levy on solid waste, which is to be paid quarterly to the Regional authority in question. Pontina's site was designated for use by certain local authorities. While

the levy was to be paid to the Region within a month from the end of the quarter, local authorities' standard payment terms are 120 days. As such, Pontina was not receiving payment from the authorities in time to pay the levy. In addition certain authorities were insolvent and the Italian legislation did not permit Pontina either to require a down-payment in advance or to refuse to treat the waste. Pontina was fined for late payment of the levy and challenged this, citing the late payment of the local authorities that had in turn caused the late payment of the levy. A series of questions on the Landfill Directive and on the Late Payments Directive (2000/35) were referred.

Opinion

In her opinion, Advocate General Sharpston dismissed arguments that Articles 12, 14, 43 or 46 TEC were relevant to the case. Considering the scheme of the Landfill Directive, the Advocate General noted that it did not prevent a national system whereby landfill operators initially pay the levy in question and then pass it on, and whereby they can be penalised for late payment. She went on, however, to note the obligation on Member States to ensure that the entirety of the national legal system did not frustrate the objectives of the Directive. Because the national scheme does not provide any effective redress mechanism for the site operator against the local authorities or require those authorities to reimburse the levy within a reasonable time, the Advocate General stated that the Italian legislation did not comply with the Directive. She continued by examining whether it was legitimate for the operator to pass on the costs of the penalties it was incurring. It was concluded that it was not, unless the national court was satisfied that it is a cost that the operator necessarily incurs in providing the service. Finally it was noted that the payments to Pontina by the local authorities were covered by the Late Payments Directive and that interest could be charged if payment was not made within the stated period for payment.

Link

Opinion

7.4 Action by Commission v United Kingdom (C-259/09)

Lodged 10 July 2009

Waste management – Directive 2006/21

Background

This is an action by the Commission against the UK for failure to transpose Directive 2006/21 on the management of waste from extractive industries by the 1 May 2008 deadline for transposition.

Link

Action

7.5 Reference in Lesoochranárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (C-240/09)

Lodged 3 July 2009

Locus standi – Recognition and effect of Åarhus Convention

Background

The Slovakian court asks whether it is possible to recognise Article 9 of the Åarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters as having direct effect in the absence of Community legislation implementing it. Article 9 accords the public, or the public concerned, the status of

a party to proceedings. If the Court finds that Article 9 does have direct effect, then should Article 9(3) of the Åarhus Convention be interpreted so as to include the delivery of decisions within the term “act of a public authority”? To construe the article in this way would mean that the right of public access to court hearings also includes the right to challenge administrative rulings if they are unlawful by virtue of their environmental effect.

Link

Reference

8. FAMILY

8.1 Reference in Bianca Purrucker v Guillermo Vallés Pérez (C-256/09)

Lodged 10 July 2009

Family – Recognition and enforcement - Child custody - Regulation 2201/2003

Background

This case concerns Regulation 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (the “Brussels Ila Regulation”). The German court asks whether the provisions of the Brussels Ila Regulation on the recognition and enforcement of decisions of other Member States also apply to enforceable provisional measures concerning the right to child custody.

Link

Reference

9. FINANCIAL MARKETS

9.1 Opinion in Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA) (C-45/08)

10 September 2009, Advocate General Kokott

Insider dealing – Use of privileged information – Market Abuse Directive (2003/6)

Background

In 1999 Spector Photo Group NV (“Spector”), a listed company, put in place a share option scheme for its employees and those of related companies. In May 2003, Spector notified the stock exchange of its intention to buy back a number of its own shares, in several separate transactions, to perform its obligations under the share option scheme. The CBFA held that two transactions concluded by Mr Van Raemdonck, on behalf of Spector, constituted illegal insider dealing since they were made shortly before the publication of half-yearly results and with knowledge of an impending acquisition to be made by Spector. The applicants appealed this decision to the referring court, which asks a number of questions about the proper interpretation of Directive 2003/6 on insider dealing and market manipulation (market abuse) (“the Directive” or MAD). The Belgian court asks whether the simple fact of dealing in financial instruments whilst in possession of insider information related thereto, means that a person “uses” the insider information for the purposes of Article 2(1) MAD, or whether a conscious decision is required. Among other things, the court also asks whether the Directive allows Member States to implement a stricter prohibition on insider dealing than foreseen in the wording of Article 2(1). The court asks for clarification as to Member States’ freedom to legislate in setting sanctions for insider dealing.

Opinion

In the opinion of the Advocate General, it will normally be the case that dealing in financial instruments, whilst in possession of insider information, which the person knew or ought to have known related to those same instruments, will equate to “using” that information for the purposes of Article 2(1) MAD. Exceptionally, the recitals to the Directive make it clear that, if it is apparent that the possession of insider information cannot have influenced a person’s decision to deal, dealing whilst in possession of insider information will not necessarily constitute its “use”. Recital 18 MAD cites the examples of market-makers and authorised counterparties simply carrying out third party instructions. The Advocate General went on to state that the policy and the purpose of the Directive is to ensure a consistent application of insider dealing rules across the Community. Therefore, the Directive does not allow Member States to enact a stricter prohibition on insider dealing. As an exception thereto, Article 14 MAD leaves the actual enactment of civil law sanctions against insider dealing to the individual Member States provided that such sanctions are proportionate, effective and have a deterrent effect.

Link

Opinion

10. FREE MOVEMENT

10.1 Judgment in Liga Portuguesa de Futebol Profissional, Bwin International Ltd, formerly Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (C-42/07)

8 September 2009, Grand Chamber

Freedom to provide services – Online gambling – Prohibition in Member State

Background

This case concerns the ability of one Member State to prohibit online gambling that is being operated from another Member State. In Portugal, games of chance such as lotteries and sports betting are generally prohibited. The Portuguese legislation does, however, confer on Santa Casa the exclusive right to run certain lotteries and sports betting online, and provides that other operators operating such services in contravention of the legislation may be fined. Bwin is an operator established in Gibraltar where its services are marketed legally. It entered a sponsorship agreement with the Portuguese football league and references to Bwin’s web-site were placed on the league’s web-site. The two bodies were fined for doing so and they subsequently challenged the legislation as a violation of free movement rights.

Judgment

The Court did not consider the case to concern the rights to freedom of establishment or the free movement of capital. It did, however, consider that the legislation constituted a barrier to the freedom to provide services as such services could be offered legally in another Member State. It continued, however, that such a restriction was justified by overriding reasons of public interest. To be permissible, the restriction must be suitable to achieve the objective sought, it must be necessary, proportionate and non-discriminatory in its application. The fight against crime and fraud was considered to be a legitimate reason for the restriction and the Court considered the measures suitable to meet the objective. The Court continued that the fact that a company operated lawfully in one Member State did not necessarily offer the required assurances as to consumer protection in the second Member State, particularly because of the online (remote) nature of the service.

Link

Judgment

10.2 Opinion in Blanco Pérez and Chao Gómez (Joined cases C-570/07 and C-571/07)

30 September 2009, Advocate General Poiares Maduro

Limitation on number of pharmacies – Public health – Freedom to provide services

Background

This case stems from a reference from the High Court of Justice of Asturias (Spain). The Asturian law regulating pharmacies and pharmaceutical services sets up a system of licensing including certain restrictions on the setting up of new pharmacies within the region. Such restrictions include a geographical restriction preventing the opening of a pharmacy within 250 metres of another pharmacy and a limit on the number of pharmacies in an area by reference to the population of that area. A number of other criteria are set out for the selection of competing candidate pharmacists, namely: points allocated for professional and teaching experience of the candidates; and professional experience gained in a town with a population of less than 2,800 people. Where candidates have been awarded an equivalent number of points, licences are granted according to the following criteria in this order: first to those who have not been accredited to open a pharmacy; secondly to those who have been accredited to operate a pharmacy in a town with a population of fewer than 2,800 inhabitants; thirdly to those pharmacists who have practised in Asturias; and finally to those pharmacists with the best academic qualifications. José Manuel Blanco Pérez and María del Chao Gómez are Spanish citizens. Whereas they are both qualified pharmacists they are not accredited to open a pharmacy. Their application for permission to open a pharmacy was denied by the Council of Health and Sanitary Services, a decision which was confirmed by the Asturian Government Council in 2002. In an action against this decision the national court chose to refer a question to the Court asking whether the rules were compatible with the principle of freedom of establishment as enshrined in Community Law, namely Article 43 TEC.

Opinion

Advocate General Miguel Poiares Maduro concluded that the national legislation was indeed a restriction on the freedom of establishment. He did however state that in some instances such measures may be justified if they satisfy four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective. In this case the provisions in question were on the whole non-discriminatory, treating all pharmacists equally, regardless of origin. However, the fact that additional priority is given to applicants who have practised within the territory of Asturias, does amount to impermissible discrimination on grounds of nationality contrary to the principle of freedom of establishment. Moreover, rules limiting the number of pharmacies by population cannot be justified in the interests of public health. The Advocate General concluded that it is for the national court to decide, having regard to the public interest and freedom of establishment, whether the imposition of a specific distance between pharmacies is justified.

Link

Opinion

11. INTELLECTUAL PROPERTY

11.1 Judgment in *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH (C-478/07)*

8 September 2009, Grand Chamber

Geographical indications - Designations of origin – Designation of “Bud”

Background

Budějovický Budvar, národní podnik (“Budvar”) markets and exports beer under the name “Budweiser Budvar” to Austria. Rudolf Ammersin GmbH (“Ammersin”) markets a beer under the name “American Bud”, which it buys from Josef Sigl KG, the sole importer of the beer into Austria. Budvar brought an action against Ammersin in the Austrian courts requesting that Ammersin be ordered to refrain from using the name “Bud”, or similar designations. On a previous reference from the Handelsgericht Wien (the Vienna commercial court) in this matter, the Court had ruled that a bilateral treaty between a Member State (Austria) and a non-member country (the Czech Republic), protecting a designation of the non-member country in the Member State, would not infringe Community law on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, if that designation gave a “simple and indirect indication of geographical source”. Where the designation was not the name of a place, the Court had held that, in order to be compatible with EC legislation, the designation must, according to the factual circumstances and perceptions prevailing in the place of origin, designate a region or place in that state and that its protection must be justified by the criteria laid down in Article 30 TEC. In this reference, the Vienna court wanted further clarification on how this indication of geographical source was to be established in practice. Furthermore, since the Czech Republic’s accession to the EU, Budvar’s failure to register the designation “Bud” under Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs had become relevant.

Judgment

The Court clarified that the designation concerned must at least be capable of informing the consumer that the product bearing it came from a particular place or region. After answering this question, the national court should query, in the light of factual circumstances and perceptions prevailing in the country of origin, whether the designation had become generic. In order to answer both questions, it was for the national court to decide whether a consumer survey was required and what percentage response to such a survey would be sufficient. Similarly, questions of the quality and duration of the name’s use made in a Member State, with respect to the application of Article 30 TEC, were matters for the national court. The second question from the Vienna court concerned whether the Community system of protection, laid down by Regulation 510/2006, was exhaustive. The context of this question was that Budvar had not applied for registration of “Bud” under the Regulation since the Czech Republic’s accession and therefore had not gained its protection. The Court ruled that provisions in a bilateral convention between two Member States would not apply where they conflicted with the Treaty: the Regulation was exhaustive.

Link

[Judgment](#)

11.2 **Opinion in Joined Cases *Google France and Google Inc v Louis Vuitton Malletier, Google France v Viaticum Luteciel, Google France v CNRRH Pierre-Alexis Thonet, Bruno Raboin and Tiger, a franchise of Unicis (C-236/08, C-237/08 and C-238/08)***

22 September 2009, Advocate General Poiares Maduro

Infringement of trade marks – Keywords – Directive 89/104 – Directive 2000/31

Background

Google operates a system, “AdWords”, which displays advertisements in response to certain keywords input by an internet user into the Google search engine. Advertisers are permitted to select keywords, which can correspond to trade marks. Each time an internet user clicks on the advertisement, Google is remunerated. A number of parties launched proceedings against Google in an attempt to stop advertisers being able to select keywords corresponding to their trade marks. They argued that, when these trade marks were typed into the Google search engine, counterfeit products, identical or similar products were displayed. Questions were referred to the Court concerning the applicability of Directive 89/104 (which approximates the laws of the Member States relating to trade marks) and Directive 2000/31 (the e-commerce Directive), which provides certain entities, including online search engine providers, with protection against liability that may be incurred through hosting third party content.

Opinion

The Advocate General examined the claimants’ complaints in light of the conditions in Directive 89/104. Uses were divided into two categories: when Google allowed the advertisers to select the keywords; and when Google displayed the advertisements. The Advocate General found that the first use fell outside the protection of the Directive. Regarding the second use, the Advocate General considered that, by displaying advertisements in response to keywords corresponding to the trade marks, a link was established between the keyword and the sites advertised. However, the Advocate General considered that the risk of confusion on the part of the public, relevant to the essential function of the trade mark, lay in the advertisement, not the keywords. Ultimately, internet users would only decide on the origin of the goods or services offered by reading the advertisement and by leaving Google’s site to enter those sites. Consequently, the second use also fell outside of Directive 89/104 and it was established that advertisers were not prohibited from choosing keywords connected to trade marks. The Advocate General found that AdWords (as opposed to natural results produced by the Google search engine) should not be covered by the exemption in Directive 2000/31, whose aim was to promote a free and open domain on the internet. AdWords was distinguished from Google’s natural results on the basis that, by receiving remuneration for AdWords, the system was no longer a neutral vehicle and therefore should not be exempt. Actual liability, such as that relating to the content of the advertisements featured on Adwords, was left to national law.

Link

Opinion

11.3 Request for an opinion submitted by the Council of the European Union pursuant to Article 300(6) TEC (Opinion 1/09)

Published 12 September 2009

Patent litigation system – Compliance with EC Treaty

Background

The Council asks that the Court give its opinion as to whether the proposed creation of a unified patent litigation system, as proposed in Council Working Document 7928 of 23 March 2009, is compatible with the provisions of the EC Treaty.

[Link](#)
[Request](#)

11.4 Reference in DHL Express France SAS v Chronopost SA (C-235/09)

Lodged 29 June 2009

Community trade mark – Effect of prohibition rulings

Background

The referring court asks questions concerning the Community trade mark and the effect of judgments given by Community trade mark courts. In particular it asks whether Article 98 of the Community Trade Mark Regulation (on sanctions and prohibition orders) means that prohibition rulings by such courts have legal effect throughout the EU and, if not, can the court in question specify that the prohibition applies with respect to other Member States.

[Link](#)
[Reference](#)

12. PROFESSIONAL PRACTICE

12.1 Judgment in Commission v Austria (C-477/08)

24 September 2009, Seventh Chamber

Directive 2005/36 – Recognition of professional qualifications – Failure to implement

Background

In November 2008, the Commission brought infringement proceedings against Austria for failure to implement Directive 2005/36 on the recognition of professional qualifications. The deadline for implementation of this Directive was 20 October 2007.

Judgment

The Court ruled that Austria had failed to take the necessary steps to implement the Directive on time and is, therefore, in breach of its obligations.

[Link](#)
[Judgment](#)

12.2 Judgment in Commission v Spain (C-504/08)

24 September 2009, Fifth Chamber

Anti-money laundering – Failure to implement – Politically exposed person

Background

In November 2008, the Commission lodged an action with the Court seeking a declaration that Spain has failed to implement correctly Directive 2006/70 which set out the implementing measures for Directive 2005/60 (the third Money Laundering Directive). It concerns the definition of a “politically exposed person” as well as the technical criteria for simplified customer due diligence procedures and exemption on grounds of a financial activity conducted on an occasional or very limited basis. The deadline for the Directive’s implementation was 15 December 2007.

Judgment

Although upon receipt of the reasoned opinion, Spain stated that it would have the implementing measures in place shortly in order to comply fully with the provisions of the Directive this did not satisfy the Court. It concluded that the timeframe within which to determine whether a Member State had met its obligations was from the deadline specified in the reasoned opinion and Spain had not demonstrated full transposition at this point. Therefore the Court supported the Commission in concluding that Spain was in breach of its obligations.

Link

Judgment

12.3 Reference in Joanna Jakubowska Edyta v Alessandro Maneggia (C-225/09)

Lodged 19 June 2009

Prohibition on practice of law by part-time public employee – Lawyers Directives

Background

This case, referred from an Italian court, seeks clarification as to whether a national provision, which prohibits the practice of law by part-time public employees, is in breach of Community law, specifically the Lawyers' Directives (Directives 77/249 and 98/5). The national provision prohibits part-time public employees from practising as lawyers, despite being qualified to do so, by laying down that such lawyers shall be struck off the register by the competent bar council unless the public employee opts to relinquish his salaried post. The court refers to general principles of Community law on the protection of legitimate expectations and acquired rights. It also asks whether these preclude national rules providing for only a short "moratorium" for lawyers to choose between employment and practice of the profession of lawyer.

Link

Reference

12.4 Action in Commission v The Netherlands (C-157/09)

Lodged 7 May 2009

Nationality requirement – Notary – Exercise of official authority – Freedom of establishment

Background

The Commission is taking action against the Netherlands on the basis that a law from 1999 on the statutory regulation of the notary profession, which restricts the exercise of the profession of notary to nationals, has not been repealed. The Commission takes the view that the duties carried out by notaries under Dutch law represent the exercise of official authority to only a very limited extent. Therefore, this nationality requirement is considered contrary to the freedom of establishment and is not justified under exemptions for activities connected with the exercise of official authority. Although the Netherlands had prepared a draft law removing the requirement in 2007, it has since failed to adopt it. In its action the Commission adds that there are alternative ways to achieve a certain level of professional qualification in order to ensure that consumers are protected. Principally this could be achieved through Directive 89/48 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

[Link](#)
[Action](#)

13. PUBLIC PROCUREMENT

13.1 Judgment in WAZV Gotha v Eurawasser (C-206/08)

10 September 2009, Third Chamber

Service concession – Water supply and treatment – Payment from third parties

Background

This case concerned the interpretation of the term “service concession” within the meaning of Directive 2004/17 concerning the procurement procedures of entities operating in the water, energy, transport, and postal service sectors. In 2007 WAZV Gotha, an association of German municipalities, initiated an informal bidding procedure for the grant of a concession involving the distribution of water and the disposal of sewage for a period of 20 years. Eurawasser, one of the interested parties, brought an action before the Vergabekammer (Public Procurement Board) objecting to WAZV Gotha’s plans to grant the concession in the form of a service concession, preferring the formal tender procedure for a service contract. The Vergabekammer held the operation did amount to a service contract and thus the formal tender procedure should have been used. WAZV Gotha appealed to the Thüringer Oberlandesgericht (Higher Regional Court of Thuringia). The German Court asked whether a contract for the supply of services in which the supplier collects payment from third parties under private law should be classified, for this reason alone, as a “service concession” under Article 1(3)(b) of Directive 2004/17, as opposed to a service contract for pecuniary interest. It then asked if the answer to the previous question is negative, would it constitute a “service concession” if the risk is limited from the outset and the supplier receives the full risk, or the majority of the risk. Lastly the court asked if Article 1(3) of Directive 2004/17 implied that the degree of risk must be equivalent to that which exists in a free market with more than one competing tender.

Judgment

The Court considered that the difference between a “service contract” under Article 1(2)(d) of Directive 2004/17 and a “service concession” under Article 1(3)(b) lies in the consideration paid for the services. A “service contract” involves consideration paid directly from the contracting authority to the service provider. A “service concession” provides for consideration in the supplier’s right to exploit the service, remuneration from third parties is one such way of exploiting the service. The Court held that the arrangement in question was a “service concession” within Article 1(3)(b) of the Directive because the supplier is remunerated through payments by third parties. This results in the supplier assuming the risk of operating the service. The Court reasoned that the argument that the risk be significant is not convincing as in certain instances pre-existing public law concepts minimise the risk for the supplier. The Court held that “service concessions” require the contracting authority to have transferred the existing risk to the supplier and whether this had happened in this case was for the German court to decide. The Court felt the third question was sufficiently answered in the previous two answers.

[Link](#)
[Judgment](#)

13.2 Opinion in Consorzio Nazionale Interuniversitario per le Scienze del Mare v Regione Marche (C-305/08)

3 September 2009, Advocate General Mazák

Concept of “economic operator” – Non-profit-making entity – University

Background

This case concerns Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and the scope of the term “economic operator”. Article 1(8)(2) of the Directive states that the term “economic operator” covers the concepts of contractor, supplier and service provider. These in turn are defined as “any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services”. The Regione Marche organised a public service tender for geophysical data and marine samples. The National Inter-University Marine Sciences Consortium (CoNISMa) applied to take part in the process but was rejected. The Italian court made a reference for a preliminary ruling, asking whether such a non-profit-making consortium of universities and government ministries could be excluded from such a procedure according to the Directive.

Opinion

The Advocate General concluded that the term “economic operator” should be given a broad interpretation to include any person who offers services on the market. This includes those doing so for the first time or on an occasional basis. The Advocate General also rejected arguments about potential distortions of competition if such entities were permitted to participate in these tenders. He considered that the Directive could not be interpreted as allowing Member States to exclude such consortiums from the tender procedure when the tender relates to services that the consortium is otherwise entitled to provide. The Directive prohibits Member States from excluding entities whose objectives are principally non-profit-making, such as research objectives, from such tender procedures. This is conditional, however, on the fact that national legislation already allows such entities to provide these services (or work or products) on the market.

Link

Opinion

14. TAXATION

14.1 Judgment in Amministrazione dell’economia e delle Finanze and Agenzia delle Entrate v Fallimento Olimpclub Srl, in liquidation (C-2/08)

3 September 2009, Second Chamber

VAT – Res judicata – Primacy of Community law

Background

Fallimento Olimpclub Srl (“Olimpclub”) builds and manages sporting facilities and it had concluded a contract with Olimpclub Sports Association (“the Association”), transferring the management and administration of a sports complex to the Association. The Association had to bear the associated costs and transfer any gross income from the club’s members’ fees to Olimpclub. The tax authorities claimed that the arrangement was intended solely to circumvent the tax rules as the non-profit-making Association had taken on the management and transferred the income to Olimpclub without it being subject to any VAT. Before the Italian courts, Olimpclub referred to previous judgments on the contract in relation to previous tax years that found it was not an unlawful or abusive agreement. These judgments had since acquired the force of *res judicata* (a matter having been finally decided by a competent court, cannot be challenged). The essential question from the Italian court was, therefore, whether a national rule, which gives findings the force of *res judicata* in subsequent cases, was

precluded by Community law if it has the effect of preventing a national court from considering Community law on, in this case, abusive VAT practices.

Judgment

The Court emphasised the importance of the *res judicata* principle in ensuring legal certainty at both national and Community level. Once all appellate procedures have been exhausted or the periods for making an appeal have expired, a judgment by a national or Community court ought to acquire binding force. In *Kapferer* (C-234-04) the Court held that a national court can apply domestic procedural rules of *res judicata* even if that means an infringement of Community law will go unremedied. In finding the Italian legislation to be precluded by Community law, the Court held that, whilst the lack of Community legislation means *res judicata* is a matter for national law, that law must not be such as to make it excessively difficult to enforce or apply Community law. The principle of *res judicata* expressed in Italian law not only prevents a final judicial decision from being called into question, it also prevents future judicial examination of an issue common to a judgment which has become *res judicata*. As such, a decision that attains the force of *res judicata* which entails a misapplication of Community tax law for one tax year would continue to be applied in every subsequent tax year. The Italian *res judicata* rules should not be applied if they would prevent a consideration by the national court of the Community law rules concerning abusive practices in the VAT field.

Link

Judgment

14.2 Judgment in Glaxo Wellcome GmbH & Co. KG v Finanzamt München II (C-182/08)

17 September 2009, First Chamber

Member State power to impose taxes – Tax credits and right to offset

Background

To avoid economic double taxation, German income tax legislation establishes a system of tax credits and rights of set-off to reflect decreases in the value of shareholdings and distributions made by a company to its shareholders. These measures do not apply to non-resident shareholders. Following a number of complex share acquisitions, Glaxo Wellcome GmbH & Co. KG (“Glaxo”) found itself unable to take advantage of this system in relation to shares acquired from a non-resident. The referring court therefore asked whether either the freedom of establishment (Article 52 TEC) or free movement of capital (Article 73b TEC) prohibit national legislation which prevents a resident shareholder from taking advantage of a tax credit system in relation to shares acquired from a non-resident shareholder. Had those shares been acquired from a resident shareholder, Glaxo could have taken advantage of those provisions.

Judgment

In holding that such legislation was permitted, the Court noted that it will generally only examine legislation in relation to one of the two freedoms referred to. The Court held that the acquisition of shares and their resale falls primarily within free movement of capital and would be examined in that light. The grant of a tax credit to a resident purchaser of shares, in circumstances where the price paid for the shares includes an amount representing the tax credit, would indirectly lead to the non-resident seller receiving a tax credit for the tax charged to the company. The profits normally taxable in the company’s Member State would then be transferred to the Member State of the non-resident seller. This would not only reduce Germany’s tax revenue but would also threaten the balanced distribution of tax powers between Member States. The German legislation is, therefore, justifiable. The German law

may also be justified if it is targeted at arrangements of an artificial nature, designed solely to gain a tax advantage. The legislation must not, however, go beyond that which is necessary to achieve these aims and this assessment is a matter for the national court.

Link

Judgment

14.3 Judgment in RCI Europe v Her Majesty's Commissioners of Revenue and Customs (C-37/08)

3 September 2009, First Chamber

Timeshare – Exchange service – Place of taxable transaction – Jurisdiction

Background

RCI operates a timeshare exchange business. Individuals holding timeshare rights to a property in certain resorts can pay an enrolment fee and annual subscription fees to RCI. This entitles them to exchange their own timeshare entitlement with that of other subscribers. This is done on a week for week basis and an additional exchange fee is paid in advance when the request for exchange is made. RCI also buys in accommodation from third parties to supplement the accommodation available. A dispute arose between the UK and Spanish tax authorities as to the correct VAT treatment of such services. RCI is a UK registered company and most of its members are UK nationals but many of the properties in question are located in Spain. RCI had been paying VAT to the UK authorities on the afore-mentioned fees, except for the exchange fees concerning property outside the EU. The Spanish authorities asserted that VAT is payable in Spain as the services are connected with immovable property there. As a result, in 2004 RCI stopped accounting to HMRC for income related to properties in Spain and HMRC attempted to recover the related VAT that it considered was due. During the resultant proceedings between the parties, the UK VAT and Duties Tribunal made a reference for a preliminary ruling to the Court.

Judgment

The Court examined Article 9 of Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes ("the VAT Directive"). As a general rule, this states that the place of supply should be considered as the place where the supplier is located. Special rules exist, however, for the use of immovable property and for travel agents. The Court appeared to diverge from the Advocate General as to the outcome of the ruling. Rather than recommending different possibilities for the different elements of the payment, the Court found that Article 9(2)(a) of the VAT Directive should apply to the fees for members enrolment, annual subscription and exchange. This states that the place of supply should be that where the immovable property (i.e. the timeshare property) is located. The Court added that RCI should not be liable for VAT on the supply of timeshare property made available to its members by third parties.

Link

Judgment

14.4 Reference in *Ministre du budget, des comptes publics et de la fonction publique v Société Accor* (C-310/09)

Lodged 4 August 2009

Free movement of capital – Elimination of double taxation of dividends – Subsidiary based in another Member State – Shareholders

Background

In this case the French Conseil d'Etat asks for clarification on the issue of double taxation of dividends and the disparities between the treatment of such where a subsidiary is based in the same Member State as its parent company, as opposed to a subsidiary in another Member State. The regime allows a French-based parent company to offset the tax credit applied to the distribution of dividends paid by its subsidiaries against the advance payment of such where they come from a French subsidiary established in France. The referring court asks whether Articles 56 and 43 TEC preclude a regime which does not offer the same option to a parent company based in another Member State. The French court then asks whether such a regime should nonetheless be prohibited on the basis that in making the advance payment, the amount of the dividends received by the parent company from its subsidiaries and redistributed by it to its shareholders will differ according to where the subsidiaries are based within the EU.

Link

Reference

ANNEX I: CASE TRACKER

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

Topic	Case	Hearing	Opinion	Judgment
Asylum & Immigration				
EU Citizenship	Janko Rottmann v Freistaat Bayern <u>C-135/08</u>		<u>30 September 2009</u>	
Company				
Award of contracts – time for review – date this commences	Uniplex (UK) Ltd v NHS Business Services Authority <u>C-406/08</u>	24 September 2009		
Citizenship				
Right to remain – non-EU national married to EU national – EU national lost right	London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department <u>C-310/08</u>	2 September 2009		
Right of residence - right of child to complete training – right of mother to remain as guardian	Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department <u>C-480/08</u>	2 September 2009		
Competition				
Price Fixing – Pharmaceuticals sector	Joined cases GlaxoSmithKline Services v Commission, Commission v GlaxoSmithKline, EAEPK v GlaxoSmithKline and Aseprofar v GlaxoSmithKline <u>C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P</u>		<u>30 June 2009</u>	6 October 2009
Consumer				
Unfair commercial practices	Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v Österreich’-Zeitungsverlag GmbH <u>C-540/08</u>			
Right of seller to claim compensation when consumer cancels within “cooling off” period	Messner v Firma Stefan Kruger <u>C-489/07</u>		<u>18 February 2009</u>	<u>3 September 2009</u>
Criminal				
Visa Information System: Schengen acquis	UK v Council <u>C-482/08</u>			
Non-execution of European Arrest Warrant	Wolzenburg <u>C-123/08</u>		<u>24 March 2009</u>	<u>6 October 2009</u>
Employment				
Age discrimination- maximum recruitment age	Colin Wolf v Stadt Frankfurt am Main <u>C-229/08</u>		<u>3 September 2009</u>	

Injury at work-holiday and sickness leave	Francisco Vincente Pereda v Madrid Movilidad S.A. <u>C-277/08</u>	4 June 2009		<u>10 September 2009</u>
Pregnant worker – requirement to maintain pay level	Sanna Maria Parviainen v Finnair Oyj <u>C-471/08</u>	17 September 2009		
Environment				
Shipments of waste regulation – challenge to legal basis	Commission v Parliament and Council of the European Union <u>C-411/06</u>		26 March 2009	<u>8 September 2009</u>
Duty to remedy environmental damage without investigation of party responsible	ERG Raffinerie Mediterranee SpA and Others v Ministero dello Sviluppo Economico and Others <u>C-378/08</u>	15 September 2009		
Free Movement				
Mutual recognition of professional qualifications	Robert Koller v Rechtsanwaltsprüfungscommission beim Oberlandesgericht Graz <u>C-118/09</u>			
Social-housing – prior authorisation for cross-border activities	Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius <u>C-567/07</u>			1 October 2009
Health and Safety				
Workers - pregnancy - health and safety conditions	Dr Susanee Gassmayr v Bundesministerin Fur Wissenschaft und Forschung <u>C-194/08</u>		<u>3 September 2009</u>	
Pregnant workers – Prohibition of dismissal	Virginie Pontin v T-Comalux S.A. <u>C-63/08</u>		<u>31 March 2009</u>	
Intellectual Property				
Trademarks and use of AdWords in search engines.	Google France, Google Inc v Louis Vuitton Malletier <u>C-236/08</u>		<u>22 September 2009</u>	
Public Procurement				
Remedies for breach of transparency duties (advertising)	Wall AG v Stadt Frankfurt am Main <u>C-91/08</u>		<u>27 October 2009</u>	
Service concession - water supply and treatment - payment from third parties	WAZV Gotha v Eurawasser Aufbereitungs und Entsorgungsgesellschaft mbH <u>C-206/08</u>			<u>10 September 2009</u>
Damages for breach of rules - time limit	Uniplex (UK) Ltd v NHS Business Services Authority <u>C-406/08</u>			
Professional Practice				
Fee cap on lawyers services	Commission v Italy <u>C-565/08</u>			
Legal expenses insurance rules -	Dr Erhard Esching v UNIQA Sachversicherung AG		<u>14 May 2009</u>	<u>10 September</u>

choice of lawyer clause - mass claims	<u>C-199/08</u>			<u>2009</u>
Privilege of in-house lawyers under EC competition	Akzo Nobel <u>T-253/03 R</u> <u>T-125/03 R</u> Appeal notice 8 December 2007 (<u>C-550/07</u>)	28 June 2007		<u>17 September 2007</u>
VAT and duty on documented legal transactions	Renta, S.A. v Generalitat de Catalunya <u>C-151/08</u>			
VAT applicability to legal advice - Legal aid	Commission v Finland <u>C-246/08</u>			
Legal education - German legal exams and assessment of equivalence	Krzysztof Pesla v Justizministerium Mecklenburg-Vorpommern <u>C-345/08</u>			
Economic or private individual interest – right of lawyer acting alone to bring action	Lancôme v OHIM - CMS Hasche Sigle <u>C-408/08</u>	9 September 2009		
Taxation				
Entitlement of bookmakers' agents to VAT exemptions	Tierce Ladbroke SA v Belgium <u>C-232/07</u>			
Duty to prevent abuse of law and national rules on res judicata	Judgment in Amministrazione dell'economia e delle Finanze and Agenzia delle Entrate v Fallimento Olimpiclub Srl, in liquidation (C-2/08)		<u>24 March 2009</u>	<u>3 September 2009</u>
VAT recovery of input tax – Non-EU taxable persons	Commission v UK <u>C-582/08</u>			
Definition of small gifts and samples for VAT.	EMI Group Ltd v The Commissioners for HMRC <u>C-581/08</u>			
Transport				
Imposition of public service obligations on publicly-run bus company	Antrop v Council <u>C-504/07</u>		<u>7 May 2009</u>	

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 *Judgments* 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, *Opinions* 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	<p>European Court of Justice</p> <p>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.</p>
CFI	<p>Court of First Instance</p> <p>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.</p>
Community institutions	<p>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.</p>
JURISDICTION OF COURTS	
<p>Reference for a preliminary ruling</p> <p>Article 234 TEC</p>	<p>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 <i>Judgment</i> 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.</p>
<p>Action for failure to fulfil an obligation</p> <p>Articles 226 & 227 TEC</p>	<p>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.</p>
<p>Action for annulment</p> <p>Article 230 TEC</p>	<p>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.</p>

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 <i>Opinion</i> 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 <i>Opinion</i> .
Judgment/Rulings	Judgments and rulings in both the CFI and ECJ are delivered in open court. No dissenting <i>Opinions</i> 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 <i>Judgments</i>
TREATIES	
TEC	The Treaty establishing the European Community
TEU	The Treaty on the European Union
ECHR	European Convention on Human Rights
LEGISLATION	
Brussels I	Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

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>