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# The Brussels Office Update Series:

# Developments from the European Court of Justice

## December 2007

*Whilst every effort is made to ensure the information published in this update is accurate and up to date, it is provided for information purposes only and does not constitute legal advice and should not be relied upon as such. For the full text of a case please refer to the website of the European Court of Justice: http://curia.europa.eu/en/index.htm*

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## INTRODUCTION

### December - News from the EU Courts

The Court, on 18 December, issued its judgment in *United Kingdom v Council* (C-137/05) concluding that the UK is not entitled to take part in certain measures on passports since it is not fully signed up to the Schengen acquis.

On 6 December the Court issued its judgment in *Ursula Voss v Land Berlin* (C-300/06) concluding that there was discrimination between part-time and full-time teachers, because they were paid an equal amount for any overtime worked, but at a rate that was lower for over-time than for normal hours worked.

The Court issued its judgment on 18 December in the case of *Skatterverket v A* (C-101/05), a case involving questions over tax exemptions for dividend distributions from a Swiss company to a Swedish subsidiary. The Court concluded that tighter restrictions on capital movements from non-EU countries could be justified because a different legal context applies (lack of harmonised rules and legislation on information exchange).

### Coming up

The Court is due to issue an Opinion on 9 January in *IMPACT* (C-268/06), a case originating from the Irish Labour Court. This case looks at questions surrounding the fair treatment of fixed-term workers in comparison with permanent workers, and asks whether an Irish law preventing civil servants employed on a fixed-term basis from renewing their contract beyond a certain period is compatible with the Community rules on free movement of workers.

On 16 January the Court is due to issue an Opinion in *Adidas v Marca Mode & Others* (C-102/07), dealing with a reference from a Dutch court. The case involves Adidas which has brought several cases against clothing manufacturers claiming infringement of the widely-known three-stripe Adidas trade mark. This case poses the question of how much account a court should taken of the general interest in ensuring that a sign or mark is not unduly restricted for other traders, when deciding on how much protection to afford to a trade mark.

### Case tracker

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

## 1 CIVIL JUSTICE

### 1.1 Judgment in FBTO Schadeverzekeringen NV v Jack Odenbreit (C-463/06)

13 December 2007, Second Chamber

***Insurance – Liability insurance – Direct action against insurer - Jurisdiction***

*Background*
The claimant, who lived in Germany, was injured in a road traffic accident which occurred in the Netherlands. He brought an action directly against the defendant's insurance company, which was established in the Netherlands, before his local court in Germany. The action was brought on the basis of Regulation 44/2001 on the recognition and enforcement of judgments in civil and commercial matters, allowing for an injured party to bring an action in his home court directly against an insurer. The action was dismissed by the German court on the basis that it did not have jurisdiction over a claim against a Dutch insurer. The decision was overturned by the appeal court, which recognised the jurisdiction of the court, under Article 11(2) of the Regulation. During the course of an appeal by the insurer on a point of law, a reference was made to the ECJ for a ruling on the correct interpretation of Article 11(2) of Regulation 44/2001 as to whether it allows for an injured party to bring an action directly against an insurance company in the court of the country where he or she is domiciled.

*Judgment*
The ECJ found that Article 11(2) does allow an injured party to sue the defendant's insurance company in the court of the country where he or she is domiciled.

*Link*
Judgment

### 1.2 Reference in Memltis Apostolides v David Charles Orams, Linda Elizabeth Orams (C-420/07)

Lodged on 13 September 2007

***Enforcement of judgments - Territories***

*Reference*
An English civil court has made a reference to the ECJ for a ruling on the application of Regulation 44/2001 in the northern and government-controlled Cypriote territories. The referring court asked whether Regulation 44/2001 allows the court of one Member State to refuse the recognition and enforcement of a judgment given by a court in another Member State, where that judgment concerns land over which the Government of the issuing state does not have effective control. If so, may it be denied on the grounds that the judgment cannot be enforced where the land is situated? In addition, the court asks whether a defendant may resist enforcement of a judgment on the ground that service of proceedings had not been sufficient to allow him to prepare a defence, and, if so, what factors are relevant in consideration of whether service was effective?

*Link*
Reference

## 2 COMPETITION LAW

### 2.1 Judgment in Autorita Garante della Concorrenza e del Mercato v Ente tabacchi italiani – ETI SpA and Philip Morris Products SA (C-280/06)

11 December 2007, Grand Chamber

***Cartel decision– Responsibility for predecessor's infringement***

*Background*
In a decision of 13 March 2003 the Italian competition authority decided that various members of the Phillip Morris Group had, between 1993 and 2001, been involved in price fixing of cigarettes with firstly the state tobacco producing monopoly (AAMS) and subsequently ETI, which took over all the relevant commercial activities of AAMS in 1999. Created in 1978, ETI initially took the form of a public body, was converted into a limited company in 2000 and was privatised and bought by British American Tobacco in 2003. ETI was fined 20 million euro for both its own involvement and the previous involvement of AAMS in the price fixing. After a series of appeals the Italian Supreme Administrative Court examined the question of whether ETI could be culpable for the price fixing carried out by AAMS before ETI took over its commercial functions. The court decided to refer two questions to the ECJ. It first asked what was the correct business to sanction, under Article 81 TEC and the principles of Community law, in a situation where a price-fixing arrangement was commenced by one undertaking, then continued by its economic successor, and where the original undertaking continued to exist but no longer operated in this sector. A second question asked what combination of circumstances would make it justifiable to sanction the economic successor for infringements by its predecessor.

*Judgment*
The Court pointed out that an undertaking can be held to be responsible for an infringement by a predecessor where the earlier entity has ceased to exist in law, or economically. It also noted that there was little deterrent effect in applying a penalty to an undertaking that continues to exist in law (as with AAMS) but does not carry out any economic activities. The Court went on to find that there was a well-established principle in Community law that it should be possible to find undertakings responsible for infringements by connected bodies. If this were not possible, it would be open to companies to escape penalties for unlawful activity simply by restructuring their corporate organisation. The Court concluded that, in the situation where the activities of two organisations are overseen by the same public authority and where the infringement started by one is continued by its predecessor, the latter may be penalised in respect of both organisations' infringement if it is shown that both bodies were subject to the control of the same public authority.

*Link*
Judgment

### 2.2 Reference in Inspecteur van de Belastingdienst v X BV (C-429/07)

Lodged 22 May 2006

***Cartel fine – Tax deductibility – Amicus curiae brief – Commission competence***

*Reference*
This referral from a Dutch court asks whether the Commission is competent under Regulation 1/2003 to submit, of its own initiative, written observations in a case concerning the ability to deduct a fine for a competition law infringement from tax liability.

*Link*
Reference

## 3 EMPLOYMENT LAW

### 3.1 Judgment in the International Transport Workers' Federation and the Finnish Seamen's Union v Viking Line ABP and Ou Viking Line Eesti (C-438/05)

11 December 2007, Grand Chamber

***Employment – Collective action – Trade union***

*Background*
Viking owned and operated several ferries running from Finland. One ship in particular, the *Rosella*, was registered under the Finnish flag and, consequently, Viking was bound to pay crew members Finnish wages. The International Transport Workers' Federation (ITF) required that ship owners must operate under the terms of the trade union for the country of beneficial ownership, rather than the country under whose flag the operator's ships sailed. Viking was operating the *Rosella* at a loss, facing stiff competition from Estonian-registered ships that paid lower, Estonian wages to its crew members. In October 2003 Viking announced a plan to reflag the *Rosella* under either the Norwegian or Estonian flag so that it could enter into a new, more favourable collective agreement with one of the trade unions in either of those states. The ITF and the affiliated Finnish maritime union, the FSU, threatened to call a strike if Viking went ahead with its plans for reflagging and the ITF also circulated a memo to all affiliates, including those in other Member States, requiring them to refrain from entering into negotiations with Viking. Viking challenged this as being contrary to Article 43 TEC (freedom of establishment).

*Judgment*
The Court accepted Viking's arguments in respect of the potential restrictions that the ITF's policy and actions were placing on its freedom of establishment. The Court found that by requiring ferry operators to conclude collective agreements only with trade unions in the Member State of beneficial ownership, the ITF was potentially acting unlawfully in terms of Community law. Although the ITF had argued before the Court that the (non-binding) Charter of Fundamental Rights conferred a protection for the right to strike that took precedence of the EC Treaty freedoms, the Court rejected this argument. The Court did conclude, however, that there may be an objective justification for the creation of some restrictions on the principle of freedom of establishment, such as the protection of workers. The Court emphasised that any such restriction would have to be reasonable and proportionate to the aim being pursued.

*Link*
Judgment

### 3.2 Judgment in Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundets avd. 1, Byggettan, Svenska Elektrikerforbundet (C-341/05)

18 December 2007, Grand Chamber

***Posted workers - Terms and conditions – Collective agreements***

*Background*
This case referred from the courts in Sweden has received much media attention over the last year or two. Similar to the case reported above, it concerns the compatibility of social rights – the right to collective action – with the Treaty rights of free movement, and the treatment of "social dumping" within the EU. A Latvian company, Laval, posted a number of workers from Latvia to Sweden to work on building sites of its subsidiary Baltic Bygg. Some of its sites were the subject of public works contracts, under which the parties agreed to apply Swedish collective agreements, although this was point contested by Laval.

Local trade unions subsequently tried unsuccessfully to get Laval to agree to apply collective agreements to its workforce. The Swedish legislation implementing Directive 96/71 on the posting of workers was silent however as to whether collective agreements on wages should be extended to such posted workers. After Laval concluded two collective agreements with the relevant trade union in Latvia, Swedish unions took collective action against the company – a blockade of the sites in question. As a result the subsidiary, Baltic Bygg, went into liquidation and the Latvian workers returned home. In the meantime, Laval challenged the legality of the industrial action in the Swedish courts.

*Judgment*
The ECJ found that the action of the trade unions in taking collective action to force negotiations to determine remuneration and sign a collective agreement, constituted a restriction on the freedom to provide services and was therefore prohibited under Community law. The public interest objective of protecting workers was not considered to be a legitimate aim in this case and so the collective action could not be considered objectively justified.

*Link*
Judgment

### 3.3 Judgment in Ursula Voss v Land Berlin (C-300/06)

6 December 2007, First Chamber

***Equal pay – Differing overtime rates – Discrimination against part-time workers***

*Background*
Ms Voss worked as a civil servant, employed as a part-time teacher by Land Berlin working 23 teaching hours per week. Full-time teachers worked 26.5 hours per week and any hours worked beyond this were classified as overtime. Between January and May 2000, Ms Voss worked between four and six extra teaching hours each month. The hourly rate for overtime worked by teachers in Berlin is lower than the hourly rate for "normal working hours". Ms. Voss was paid the lower overtime rate for the extra hours she worked. She claimed that instead of being paid the lower rate she should be paid overtime, up to 26.5 hours per week, at the same hourly rate as for full time teachers. The case was referred to the ECJ to determine whether the

practice of paying part-time workers a lower overtime rate in such situations was in breach of Article 141 TEC on equal pay for men and women.

*Judgment*
The ECJ held that Article 141 TEC applies not only to direct discrimination but also to indirect discrimination i.e. criteria not related to sex but which have the effect of discriminating against one sex and are not justified by objective factors wholly unrelated to sex discrimination. The Court held that in the case in question there was a difference in treatment between part-time and full-time workers and that the vast majority of part-time workers were women (88% of teachers employed part time by Land Berlin in the spring of 2000). As to whether this difference in treatment could be justified by objective factors wholly unrelated to discrimination based on sex, the ECJ held that it was for the national court to check on that point as it was not clear from the order for reference.

*Link*
Judgment

### 3.4 Judgment in Doris Habelt, Matha Moser and Peter Wachter v Deutsche Rentenversicherung Bund (Cases C-396/05, C-419/05 and C-450/05)

18 December 2007, Grand Chamber

***Regulation 1408/71 - Social security - Old-age benefits***

*Background*
Regulation 1408/71 sets out the rules on the application of social security schemes to persons moving within the EU and provides that the payment of old-age benefits should not be affected by the fact that a person resides in another Member State. Special rules apply to Germany, which state that the inclusion of contribution periods for time spent outside of the Federal Republic of Germany may be made subject to the condition that the recipient reside in Germany. References were made to the ECJ by the German national courts in the course of separate proceedings brought by three claimants. The German pension insurance body had refused in all three cases to take into account certain periods of contribution completed whilst the claimants were residing outside the Federal Republic of Germany. Two claimants were claiming for periods while residing in territories under the German Reich and the third was an Austrian national with German expellee status claiming for periods while residing in Romania. The questions referred in each case concerned the validity of Regulation 1408/71 and its compatibility with the freedom of movement of persons under Articles 39 and 42 TEC.

*Judgment*
The Court held that the provisions of Regulation 1408/71 were incompatible with the free movement of persons, in so far as they allow for the inclusion of contribution periods for old-age benefits spent in territory outside the Federal Republic of Germany, whether in another Member State or a third country, to be made subject to the condition of residence in Germany.

*Link*
Judgment

## 4 FREE MOVEMENT

### 4.1 Judgment in Minister voor Vreedmelingenzaken en Integratie v R.N.G. Eind (C-291/05)

11 December 2007, Grand Chamber

***Rights of third country nationals to join their families – Right to return to the Member State of which a national originates – Residence rights***

*Background*
Mr Eind, a Dutch national, moved to the UK in February 2000 where he was subsequently joined by his daughter Rachel, born in 1989, who arrived from Surinam. In June 2001, Mr Eind was granted a right of residence by the UK authorities as was his daughter in her capacity as a member of the family of a Community worker. In October 2001 Mr Eind and his daughter entered the Netherlands and applied for a residence permit. In January 2002, the Staatssecretaris van Justitie refused Miss Eind's application as, since his return to the Netherlands, her father had not been carrying on effective and genuine economic activities. Miss Eind lodged an objection against the refusal which was ultimately referred to the ECJ for a preliminary ruling.

*Judgment*
The Court held that under Community law the rights of third country nationals to install themselves with family members are subject to various conditions. However, the Court also held that a national of a Member State could be deterred from leaving his home state to take up gainful employment in another Member State if he risks losing the right to return to his home state, irrespective of whether he is going to engage in economic activity in the home state. To permit this would, according to the Court, create barriers to family reunification which would be liable to undermine the rights of free movement accorded to all EU nationals under Community law. The Court therefore held that Miss Eind had the right to install herself in the Netherlands, even if her father was not economically active. This right is subject to the conditions laid down in Community law, such as the requirement that she has not reached the age of 21 years.

*Link*
Judgment

### 4.2 Judgment in UK v Council of the EU (Cases C-77/05 and C-137/05)

18 December 2007, Grand Chamber

***Schengen Agreement – UK participation – External borders – Biometric passports***

*Background*
Both these cases, which were decided on the same day, concern the rights of the UK Government to participate in the adoption of measures developing the Schengen *acquis*, which deals with the gradual abolition of border controls. Under a Protocol annexed to the EC and EU Treaties, Ireland and the UK are not obliged to take part in measures concerning visas, asylum, immigration and other policies related to the free movement of persons. However, there is a mechanism under this Protocol enabling Ireland or the UK to notify their wish participate in such measures.

The UK notified the Council that it wished to take part in the adoption of two Regulations, one on the establishment of an agency for the management of the EU's external borders (known as the Frontex agency) and the other on establishing standards for security features and biometrics in passports. The Council however refused the UK's request on the grounds that both Regulations "constituted a development of provisions of the Schengen acquis in which the UK does not take part." Both Regulations were therefore adopted without UK participation. The Court was called upon to decide on the interpretation of the Schengen Protocol.

*Judgment*
The Court held that the UK and Ireland could only take part in measures which seek to build on previous aspects of the Schengen *acquis* in which these countries have been authorised to participate. The Court therefore upheld the Council's refusal.

*Link*
Judgment (C-77/05) Judgment (C-137/05)

### 4.3 Reference in Hakan Er v Wetteraukreis (C-453/07)

Lodged 4 October 2007

***Third country nationals – EEC Turkey Association Agreement***

*Reference*
This preliminary reference from the German courts concerns the rights of a Turkish national to remain in Germany. The applicant was granted legal status to reside in Germany in order to join his father, who was registered as a Turkish worker there. Having lived with his father for five years, he acquired certain rights under the EEC-Turkish Association Agreement. The referring court asks whether this legal status should be withdrawn given that for more than seven years since leaving school, the applicant has only worked for one day and has dropped out of government schemes designed to promote the taking up of employment, nor has he made any serious efforts to seek work.

*Link*
Reference

## 5 PROFESSIONAL PRACTICE

### 5.1 Judgment in Commission v Germany (C-401/06)

6 December 2007, Third Chamber

***Executor of a will – VAT – Place of supply of services***

*Background*
This case concerns an infringement action brought by the European Commission against Germany. The Commission alleges a failure to define correctly in domestic VAT legislation the place of the supply of services in relation to the executors of wills of customers outside the EU or of taxable persons in another Member State. The German legislation provided that VAT on services should be applied at the place of the trader's business, unless it fell into certain specific categories. In those categories the service was deemed to have been carried out where the customer carried out his business. The latter included the services of lawyers and tax advisors

but the services of executors fell within the general rule (whether carried out by lawyers, tax advisors or others). The Commission contended that in relation to executors' services the legislation did not comply with Article 9(2)(e) of the Sixth VAT Directive, which states that the place of supply should be that of the customer, when he is in another country. The Commission argued that the execution of a will should be seen either as a service principally and habitually provided by a lawyer or as a service which is similar to those which are part of a lawyer's business.

*Judgment*
The Court dismissed the Commission's action, distinguishing the role of executing a will from the services of a lawyer. It argued that the executor did not strictly represent the interests of the testator in the way a lawyer represented the interests of a client. Instead, the executor carried out the wishes of the testator and was neutral in respect of the beneficiaries of the will. Neither concluded the Court, could such services be considered similar to a lawyer's services. As such, the Court concluded that the Commission had failed to establish a breach of the Community rules in question.

*Link*
Judgment

## 6 PUBLIC PROCUREMENT

### 6.1 Judgment in Frigerio Luigi & C. Snc v Comune di Triuggio (C-357/06)

18 December 2007, Fourth Chamber

***Public procurement – Awards restricted to companies with share capital***

*Background*
This reference from the Italian courts relates to the implementation of EU public procurement rules (Directive 92/50 relating to the coordination of procedures for the award of public service contracts). In particular this case concerns the award of environmental hygiene services by the Municipality of Triuggioto to a company (ASML) for a five-year period. The Municipality had also undertaken to acquire a shareholding in the company to ensure a degree of control over its activities. Frigerio, which had previously operated these services as part of a joint venture, challenged the action. The Municipality claimed that Frigerio had no grounds to do so as it was a legal partnership and under the Italian legislation only companies with share capital were eligible to tender for such services.

*Judgment*
The Court did not examine to any significant degree whether the provisions of the Directive should apply to the procurement procedure at hand, focussing rather on the legislative restrictions on legal form. It concluded that Article 26(1) of the Directive means that public authorities cannot require service providers, or groups of service providers, to take a specific legal form. As such the national law must be interpreted in conformity with Community law or, if not possible, the Community law must apply and contrary provisions of national law must be disapplied by the national court.

*Link*
Judgment

### 6.2 Judgment in Bayerischer Rundfunk v Gesellschaft fur Gebaudereinigung und Wartung mbH (C-337/06)

13 December 2007, Fourth Chamber

***Public procurement – Meaning of "contracting authority"***

*Background*
GEZ, an administrative body responsible in Germany for the collection of public broadcasting fees, invited tenders for the cleaning services on its premises in Cologne. One of the unsuccessful bidders for the tender, GEW, brought a legal challenge in a German tribunal against GEZ. It claimed that GEZ should have followed the EU procurement rules, particularly the Directive on procedures for the award of public service contracts (92/50) and issued an invitation to tender that complied with Community law rules. GEW argued that GEZ, as a body managed by several German public broadcasters, was essentially a "contracting authority" under Directive 92/50 – in other words – it was publicly funded and therefore subject to the European legislation. While the German tribunal agreed initially with GEW's arguments, the public broadcasters making up GEZ contested the decision, arguing that as their funding came directly from members of the public who received their services, they were not, in terms of the procurement rules, contracting authorities. The public broadcasters submitted that they would have to receive funding directly from the State in order to be considered a contracting authority.

*Judgment*
The Court rejected the public broadcasters' submissions in respect of the funding they received. Noting that Directive 92/50 contains no details of the procedures for delivering financing to the relevant bodies, the Court found that there is no requirement that the activity of bodies covered by this Directive should be directly financed by the State, or indeed by another public body. The Court then moved on to assess whether the broadcasters' funding could be reasonably regarded as financing by the State. It found that, considering that the broadcasters were governed by a national statute and also considering that the fee levied on the public was not set through any commercial negotiations, but rather through measures of the regional parliaments and governments, the funding received by the broadcasters could be considered to be financing by the State. In doing so, the Court emphasised the need to give a functional interpretation to the terms of Directive 92/50.

*Link*
Judgment

## 7 TAX

### 7.1 Judgment in Skatteverket v A (C-101/05)

18 December 2007, Grand Chamber

***Taxation – Distribution of dividends – Non-EU companies***

*Background*
This case referred from the courts in Sweden seeks to ascertain whether the EC Treaty provisions on the free movement of capital (Article 56 TEC) apply in the same way to movements of capital to and from third countries as they do to capital movements between Member States – as is implied by the wording of the Article. A

Swiss company was to distribute dividends to its shareholders in the form of an issue of shares in one of its subsidiary companies. The Swedish legislation provided for an exemption from income tax for such distributions, which was subject to certain conditions. One condition was that the company distributing the profit should be situated in a Member State of the EEA (European Economic Area) or in a country with which Sweden had a taxation agreement providing for information exchanges. The Switzerland-Sweden tax convention did not provide for information exchange to the extent that the information required by the Swedish authorities could be verified. It was not possible for the tax payer to provide the requisite proof himself. It was claimed that the condition in the Swedish legislation constituted a barrier to the free movement of capital and was thus contrary to Article 56 TEC.

*Judgment*
The Court noted initially that the provision of the Treaty in question does have direct effect in relation to capital movements between Member States and non-Member States. It agreed that the Swedish rule did constitute a restriction to the free movement of capital that was contrary to the EC Treaty provisions. It continued, however, that the legal context of capital movements from non-EEA countries was different to that of capital movements between EU and EEA Member States, and thus certain different restrictions might be justified. The Court acknowledged that the need to maintain the effectiveness of fiscal supervision could constitute an overriding public interest requirement that could justify such a restriction. Because of the different legal context concerning capital movements with non-EEA countries, it might be justified to require certain information from another tax authority as opposed to relying on information provided by the tax payer. Also, satisfying the conditions of the legislation (on information about the dividends/shareholding) could not be satisfied by the Swedish authorities acting on their own. As such the Court held that the refusal of the exemption could be justified if it proves impossible to obtain the information from the third country in question because it is not under a contractual obligation to provide it. It was for the Swedish court to decide whether the provisions of the relevant tax convention provided for the necessary information exchange.

*Link*
Judgment

### 7.2 Judgment in Grønfeldt and Grønfeldt v Finanzamt Hamburg (C-436/06)

18 December 2007, Second Chamber

***Taxation – Sale of shareholdings – taxation of profits***

*Background*
The profit made on the sale of shares in companies by German tax payers was taxed as “business income” under a 1999 law when the shareholding in that company was at least 10% within the last five years. A subsequent law of 2000 introduced a 1% threshold for the application of tax on the profits. There was a distinction in how this new rule applied between companies that were subject to unlimited corporate taxation and those that were not. The latter, which tended to be foreign companies, were subject to taxation for the 2001 financial year, whereas for German companies the rule only applied from the 2002 tax year, and thus the 10% threshold continued to apply in 2001. The claimants sold shares in a Danish company and challenged the application of the new legislation to the profits they made.

*Judgment*
The Court examined the arguments of the German Government about the need to ensure full taxation and the need for a transitional period linked to other elements of the tax system. It concluded that the difference in treatment infringed Article 56 TEC (free movement of capital) and that it had not been objectively justified.

*Link*
Judgment

### 7.3 Judgment in Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt (C-298/05)

6 December 2007, First Chamber

***Taxation of foreign income – Exemption or offsetting***

German legislation taxes its residents on their worldwide income irrespective of the source. The case concerned a Belgian partnership established in Antwerp but owned directly and indirectly by eight partners all resident in Germany. A double taxation convention between Belgium and Germany had provided that the profits distributed by the partnership would be taxed in Belgium. As a consequence it provided that the income received by the German resident would be exempt from tax. In contravention of this convention, Germany introduced new legislation concerning income derived from certain controlled foreign corporations. This provided that when the tax levied in the other country was low (below 30%) the income would not be exempted from German tax, but that the tax already paid in the other country would be offset. Columbus, which was covered by this new provision, claimed that it breached the Community rules on the freedom of establishment and the free movement of capital (Article 43 and 56 TEC).

*Judgment*
The Court disagreed with the claimant, finding that the new legislation did not constitute a restriction on the freedom of establishment or movement of capital. On the contrary the new legislation meant that those receiving income from a partnership in Germany were put in the same position as those receiving income from a foreign partnership. As such it concluded that such a rule should not be precluded. The Court also noted that it was not competent to rule on whether the legislation contravened the double tax convention between the two countries.

*Link*
Judgment

### 7.4 Judgment in Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg (C-281/06)

18 December 2007, Third Chamber

***Income tax – Deductions – Expense allowance from second Member State***

*Background*
Mr Jundt is a German lawyer, resident and working in Germany. He accepted to teach at the University of Strasbourg for 16 hours and was paid a fee of 5,760 French Francs. French social security contributions were deducted and then the German tax authorities calculated income tax on the gross amount. He objected to this deduction, citing a provision in German law that exempts certain expense

allowance payments made in respect of part-time work as an educator in a public institution. He later appealed against a finding of the German Finance Court in favour of the Tax Office, claiming discrimination under Article 59 TEC (freedom to provide services) because the authorities were treating activities done for public institutions in another Member State differently.

*Judgment*
The Court followed the reasoning of Advocate General Poiares Maduro's Opinion and found that there were serious problems with the national rule on university teachers in respect of Article 49 TEC (on freedom to provide services). The Court rejected the arguments of the respondent that as Mr Jundt was only employed in a quasi-honorary capacity he should not be subject to the same privileges as teachers at universities in the Member State.

*Link*
Judgment

### 7.5 Opinion in Marks & Spencer v Her Majesty's Commissioners of Customs and Excise (C-309/06)

13 December 2007, Advocate General Kokott

***VAT – Equal treatment – Neutrality – Principles relating to refunds***

*Background*
This preliminary reference from the House of Lords concerns the Community rules to be applied in relation to VAT refunds. The Sixth VAT Directive allows Member States to apply derogations from the rules, as transitional measures, and the UK therefore applied a zero VAT rating to food. Until 1994 the UK authorities considered Marks & Spencer's tea cakes as confectionery and applied a standard rate of VAT. Thereafter, they viewed the product as food and applied a zero rating. Marks & Spencer applied for a refund of the VAT that had been paid before 1994. Section 80(3) of the UK Value Added Tax Act 1984 provided a defence to the Commissioners in such a circumstance if the repayment would unjustly enrich the claimant. This section only applied to net tax payers (payment traders), and not in respect of "repayment traders" i.e. those whose input tax deduction exceeded the VAT payable in respect of outputs. The latter would be entitled to a refund. The VAT and Duties Tribunal agreed with the Commissioners that only the 10% of the VAT paid that had not been passed on to consumers should be refunded.

*Opinion*
The Advocate General concluded that when a Member State applies an exemption or derogation under the Sixth VAT Directive the tax payer still has a right to insist on the correct application of the rules. As a consequence, the Community rules also confer on the tax payer a right to be refunded where the wrong tax rate has been applied. The Advocate General went on to state that in principle the Community rules did not prevent Member States from having a rule against unjust enrichment. They did not, however, permit such a rule to be applied in a manner that was inconsistent with the principle of equal treatment i.e. applying the rule to payment traders and not to repayment traders. The Advocate General concluded that the House of Lords had to ensure the full effect of Community law rights and, as such, disapply the domestic provisions that are contrary to the principle of equal treatment.

*Link*
Opinion

**ANNEX I: CASE TRACKER**

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

| Topic | Case | Hearing | *Opinion* | *Judgment* |
|---|---|---|---|---|
| Civil justice | | | | |
| Language of documents served in legal proceedings | Weiss und Partner v Handelskammer Berlin<br>Case C-14/07 | | 29 November 2007 | |
| Enforcement of judgments – failure to comply with court injunction | Marco Gambazzi v Daimler Chrysler Canada Inc<br>Case C-394/07 | | | |
| Competition | | | | |
| Privilege of in-house lawyers under EC competition | Akzo Nobel<br>T-253/03 R<br>T-125/03 R | 28 June 2007 | | 17 September 2007 |
| Setting of mandatory minimum lawyers' fees | Hospital Consulting Srl<br>C-386/07 | | | |
| Constitutional | | | | |
| Review of final administrative decision, interpretation of EU law, conditions | Willy Kempter KG v Hauptzollamt Hamburg-Jonas<br>C-2/06 | | 24 April 2007 | |
| Criminal | | | | |
| Standing in private prosecutions | István Roland Sós<br>C-404/07 | | | |
| Prosecution of a national for a crime already prosecuted in another Member State | Staatsanwaltschaft Regensburg v Klaus Bourquain<br>C-297/07 | | | |
| Employment | | | | |
| Equal pay and working time for men and women | Ursula Voβ v Land Berlin<br>C-300/06 | | 10 July 2007 | 6 December 2007 |
| Discrimination on grounds of disability | S. Coleman v Attridge Law, Steve Law<br>C-303/06 | 9 October 2007 | | |
| Social security for migrant workers | Derouin<br>C-103/06 | 7 March 2007 | 18 October 2007 | |
| Indefinite sick leave | Stringer v HMRC<br>C-520/06 | 20 November 2007 | | |
| Indemnity for commercial agents | Turgay Semen v Deutsche Tamoil GmbH<br>C-348/07 | | | |
| Refusal of pension rights to surviving partner of a civil | Tadao Maruko v Versorgungsanstalt der deutschen | | 6 September 2007 | |

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| partnership | Bühnen<br>C-267/06 | | | |
| Right to claim unemployment benefit while residing in another Member State | Jorn Petersen v Arbeitsmarktservice Niederosterreich<br>C-228/07 | | | |
| Legality of national legislation enforcing obligatory retirement ages | Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform<br>C-388/07 | | | |
| Environment | | | | |
| Environmental impact of airport expansion | Paul Abraham v Wallonia<br>Case C-2/07 | | 29 November 2007 | |
| Freedom of information | | | | |
| Access to European Council documents | Sweden and Maurizio Turco v Council<br>Joined Cases C-39/05 and C-52/05 | | 29 November 2007 | |
| Immigration | | | | |
| Power of Council to legislate on immigration issues | Parliament v Council<br>C-133/06 | | 27 September 2007 | |
| Intellectual property | | | | |
| Trade mark protection – taking account of other traders' general interest | Adidas v Marca Mode & Others<br>C-102/07 | | | |
| Entitlement to copyright protection of new media | Sony Music Entertainment v Falcon Neue Medien Vertrieb GmbH<br>C-240/07 | | | |
| Public procurement | | | | |
| Right of redress against state authorities | Commission v Portugal<br>C-70/06 | | 9 October 2007 | |
| State aid | | | | |
| Calculation methods for recovery of aid | Département du Loiret v Commission<br>C-295/07 | | | |
| Taxation | | | | |
| UK Corporate tax regime – UK parent and foreign subsidiary | Finanzamt Hamburg-Am Tierpark v Burda Verlagsbeteiligungen GmbH<br>C-284/06 | | | |
| Autonomous regional tax policies conflicting with national tax law | Unión General de Trabajadores de la Rioja<br>C-428/06 | | | |
| Sixth VAT Directive – | Marks & Spencer plc | | 13 December | |

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| zero rating | v HMRC<br>C-309/06 | | 2007 | |
| Offsetting of profits and losses | Société Papillon v Ministère du budget<br>C-418/07 | | | |
| Tax treatment of charitable donations to foreign entities | Hein Persche v Finanzamt Lüdenscheid<br>C-318/07 | | | |
| VAT applicable to UK postal services | TNT Post UK Ltd v HMRC and Royal Mail Group Ltd<br>C-357/07 | | | |
| Entitlement of bookmakers' agents to VAT exemptions | Tierce Ladbroke SA v Belgium<br>C-232/07 | | | |
| Telecommunications | | | | |
| Plurality of media ownership | Centro Europa 7 Srl v Ente Tabacchi Italliani – ETI<br>C-380/05 | | 12 September 2007 | |
| Unbundling of local loop access | Arcor AG & Co. KG v Germany<br>C-55/06 | | 18 July 2007 | |
| Transport | | | | |
| Air passenger rights when flight cancelled | Eivind F Kramme v SAS<br>C-396/06 | | 27 September 2007 | |

## ANNEX II: OVERVIEW OF THE EUROPEAN COURT OF JUSTICE

This update is a monthly publication summarising the main cases that are being heard by the EU Courts and which are of importance and interest to practising solicitors in the UK and other legal practitioners.

The European Court institution comprises the European Court of Justice (ECJ), the Court of First Instance (CFI) and the Civil Service Tribunal, recently established to deal with staff cases. This update shall only cover the case law of the ECJ and CFI.

The ECJ was established in 1952 under the ECSC Treaty and its competence was later expanded to ensure that the then EEC legislation was interpreted and applied consistently throughout the Member States. While subsequent treaty amendments have further extended the Court's jurisdiction to new areas of EU competence, the Court has also been instrumental, through its *Judgment*s and rulings, in furthering the process of European integration. Articles 7, 68, 88, 95, 220-245, 256, 288, 290, 298, and 300 of the Treaty of the EC set down the composition, role and jurisdiction of the Court.

Currently there are 27 Judges (one from each Member State) and 8 Advocates General who are appointed by Member States for a renewable term of six years. The Advocates General assist the Court by delivering, in open court and with complete impartiality and independence, *Opinion*s in all cases, save as otherwise decided by the Court where a case does not raise any new points of law.

The ECJ has competence to hear actions by Member States or the EU institutions against other Member States or institutions – either enforcement actions against Member States for failing to meet obligations (such as implementing EU legislation) or challenges by Member States and institutions to EU legal acts (such as challenging the validity of legislation) – although some jurisdiction for the latter has now passed to the CFI. The ECJ also hears preliminary references from the courts in the Member States, in which national courts refer questions on the interpretation of EU law to the ECJ. The ECJ normally gives an interpretative ruling, which is then sent back to the national court for it to reach a *Judgment*.

The CFI was set up in 1989, creating a second tier of the ECJ. All cases heard by the CFI may be subject to appeal to the ECJ on questions of law. The CFI deals primarily with actions brought by individuals and undertakings against decisions of the Community institutions (such as appeals against European Commission decisions in competition cases or regulatory decisions, such as in the field of intellectual property).

For more detail please refer to the Glossary of Terms at Annex III of this update and the Court's website: http://curia.europa.eu/en/index.htm

**ANNEX III: GLOSSARY OF TERMS AND ACRONYMS**

| THE INSTITUTIONS | |
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| ECJ | European Court of Justice<br>The Court of Justice may sit as a full Court, in a Grand Chamber (13 Judges) or in chambers of three or five Judges. It sits in a Grand Chamber when a Member State or a Community institution that is a party to the proceedings so requests, or in particularly complex or important cases. Other cases are heard by a chamber of three or five Judges. The Presidents of the chambers of five Judges are elected for three years, the Presidents of the chambers of three Judges for one year. The Court sits as a full Court in the very exceptional cases exhaustively provided for by the Treaty (for instance, where it must compulsorily retire the European Ombudsman or a Member of the European Commission who has failed to fulfil his obligations) and where the Court considers that a case is of exceptional importance. The quorum for the full Court is 15. |
| CFI | Court of First Instance<br>The Court of First Instance sits in chambers composed of three or five Judges or, in certain cases, may be constituted by a single Judge. It may also sit in a Grand Chamber or as a full court in particularly important cases. |
| Community institutions | The three main political institutions are the European Parliament, the Council of Ministers (comprising Member States) and the European Commission. The ECJ and the Court of Auditors are also Community institutions. |
| JURISDICTION OF COURTS | |
| Reference for a preliminary ruling<br><br>Article 234 TEC | As certain provisions of the Treaties and indeed much secondary legislation confers individual rights on nationals of Member States which must be upheld by national courts, national courts may and sometimes must ask the ECJ to clarify a point of interpretation of Community law (for example whether national legislation complies with Community law). The ECJ's response takes the form of a ruling which binds the national court that referred the question and other courts in the EU faced with the same problem. The national court then proceeds to give its *Judgment* in the case, based on the ECJ's interpretation. Only national courts may make a preliminary reference, but all parties involved in the proceedings before the national court, the Commission and the Member States may take part in the proceedings before the ECJ. |
| Action for failure to fulfil an obligation<br><br>Articles 226 & 227 TEC | Usually the Commission, although also another Member State (very rare in practice) can bring an action at the ECJ for another Member States' breach of Community law. The ECJ can order the Member State to remedy the breach and failing that can impose a financial penalty. Most commonly this concerns a Member State's failure to properly implement a directive. |

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| Action for annulment<br><br>Article 230 TEC | The applicant (Member State, Community institution, an individual who can demonstrate direct and individual concern) may seek the annulment of a measure adopted by an institution. Grounds for annulment are limited to: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or of any rule of law relating to its application; and misuse of powers. |
| Action for failure to act<br><br>Article 232 TEC | Either the ECJ or CFI can review the legality of a Community institution's failure to act after the institution has been called to act and not done so. These actions are rarely successful. |
| Appeals | Appeal on points of law only against Judgments of the CFI may be brought before the ECJ. |
| PROCEDURE | |
| Written Procedure | Any direct action or reference for a preliminary ruling before the ECJ must follow a specific written procedure. Actions brought before the CFI follow a "written phase". |
| Hearing | Where a case is argued orally in open court before the ECJ. In the CFI there is an "oral phase" (which can follow on from an initial "written phase") where a case may be argued openly in court. |
| *Opinion* of the Advocate General | In open court an Advocate General will deliver his *Opinion* which will analyse the legal aspects of the case and propose a solution. This often indicates the outcome of a case but the judges are not bound to follow the *Opinion*. |
| Judgment/Rulings | Judgments and rulings in both the CFI and ECJ are delivered in open court. No dissenting *Opinion*s are ever delivered. |
| Reasoned order | Where a question referred to the ECJ for a Preliminary Ruling is either identical to a question on which the ECJ has already ruled or where the answer to the question admits no reasonable doubt or may be deduced from existing case law the ECJ may give its ruling in the form of an Order citing previous *Judgment*s |
| TREATIES | |
| TEC | The Treaty establishing the European Community |
| TEU | The Treaty on the European Union |
| ECHR | European Convention on Human Rights |

Further information can be found in the "texts governing procedure" section of the ECJ website: http://curia.europa.eu/en/index.htm

EU legislation can be found on the Eur-lex web-site: http://eur-lex.europa.eu/en/index.htm