Important Judgements Delivered by the Court of Justice of the European Communities in the period 1 October 1997 to 1 March 1998

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The Court of Justice has recently submitted a proposal to the Parliament and the Council, which would enable the Court of First Instance to give decisions in cases when constituted by a single Judge. This proposal, which would alter the essential collegiate and multi-national character of the Court of First Instance, reflects the fact that it is necessary to deal with the still growing caseload and the proposal would, in fact, increase its judicial capacity. However, even if this proposal becomes reality, it will still be necessary to undertake a review of the EC's judicial structure. A debate on the ECJ's future has to be launched.

I

With respect to the **free movement of goods**, the Court upheld the Commission's high profile case against France concerning this country's failure to take all necessary and proportionate measures in order to prevent French farmers from hindering the free movement of fruit and vegetables into France. With regard to the frequency and seriousness of the incidents against foreign products, the Court found that the measures adopted by the French government were manifestly inadequate to ensure *de facto* freedom of intra-Community trade in agricultural products. In our view, some of the arguments put forward by the French government did not deserve the attention granted them by the Court: the 'very difficult socio-economic context of the French market in fruit and vegetables after the accession of Spain' is, of course, not a serious argument, neither is it valid to argue that 'the threat of serious disruption to public order' could in principle justify non-intervention by the French police. (Case C-265/95 of 9 December 1997).

While the Commission was very successful in the 'French Farmers case', the Court did not agree to the Commission's action for a declaration that, by granting exclusive import rights for electricity intended for public distribution, the Netherlands, Italy, France and Spain had all failed to comply with Articles 30 and 37. The Court held that while such exclusive rights *were* contrary to Article 37, which requires abolition of commercial State monopolies, it was however not possible for the Court to decide whether the exclusive rights at issue were necessary to enable the national bodies to perform the tasks of general economic interest assigned to them. Furthermore, the Court criticised the Commission for not having demonstrated that, because of the exclusive import rights, the extent of the development of intra-Community trade in electricity had been and continues to be contrary to the interests of the EC (Cases C-157/94 *Commission v the Netherlands*; C-158/94 *Commission v Italy*; C-159/94 *Commission v France* and C-160/94 *Commission v Spain* (all delivered on 23 October 1997).

Mr *Harry Franzén* (Case C-189/95 of 23 October 1997) became famous in Sweden for trying to bring down the Swedish monopoly on the retail of alcoholic beverages by intentionally selling wine imported from Denmark without a license. Criminal proceedings were brought against Mr Franzén, who broke the Law on Alcohol on the very first day of Sweden's membership of the European Union. From the outset, the Court held that a domestic monopoly on the retail of alcoholic beverages, such as that conferred on *'Systembolaget'*, pursues a public interest aim and could be compatible with Article 37. Subsequently, the Court analyzed several elements of the law in order to decide whether the monopoly *operated* in a way which excluded any discrimination between Member State nationals. The Court did not find the production selection system or the limited number of 'shops' to be discriminatory. Neither did the Court find that the national promotion scheme was discriminatory and thus contrary to Article 37. The Advocate General found that the existence and operation of the monopoly was contrary to Article 37. The Court approached this case in a very delicate way. Contrary to the Advocate General, it held that the operation of the monopoly was compatible with Article 37, but at the same time incompatible with Article 30 because the licensing system, under which only holders of licences were allowed to import alcoholic beverages, meant additional costs (charges and fees for the grant of a licence) and costs arising from the obligation to maintain storage capacity in Sweden.

II

The Court continues to rule on a number of cases concerning trademark rights, especially reselling-cases. In Case C-337/95 *Parfums Christian Dior SA v Evora BV*, the Court decided on 4 November 1997 that when trademark products have been put on the market by the proprietor of the trademark, or with his consent, the reseller is free to make use of the trademark in order to bring the commercialization of those goods to the public's attention. He only has to make sure that he does not

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seriously damage the reputation of the trademark. Unfortunately, the Court did not give a full definition of how these criteria are to be applied in practice.

In Case C-349/95 *Frits Loendersloot v George Ballantine & Son* of 11 November 1997, the Court ruled on another 'repackaging case'. Contrary to the last series of cases, it was not pharmaceuticals but whisky bottles that were involved. The re-importer, Mr Loendersloot, had removed the original labels bearing the Ballentine trademark and, either replaced the mark with copies or simply 'changed' the original ones. He had removed the word 'pure' and the name of the importer on the labels and, furthermore, removed the identification number marked on the original labels and on the packaging of the bottles. The question was whether Mr Loendersloot's actions infringed trademark rights and, if so, whether Ballantine could rely on such rights even if this would constitute a barrier to intra-Community trade. Based on its repackaging case-law, the Court ruled that the owner may rely on his rights unless it is established that this would contribute to an artificial partitioning of the market (a notion which still has to be clarified by the Court) and as long as it is shown that the relabelling cannot affect the original condition of the product, the reputation of the trademark owner is not damaged by the relabelling and the trademark owner is informed about the process.

The Advocate General delivered a very interesting opinion on trade marks in Case C-355/96 *Silhoutte International* of 29 January in which he backed the Europe-wide abolition of trade marks, contrary to the EFTA Court decision of 3 December 1997 (E-2/97). It is very likely that the Court will follow its Advocate General.

III

As regards the **free movement of persons,** the Court declined jurisdiction in Case C-291/96 *Grado* of 9 October 1997. In his reference, the referring judge emphasized that, when referring to Grado and Bashir – who were foreigners and only one of them a Member State national – the public prosecutor refused to use the courtesy term 'Herr', whereas he would have used that polite form if foreigners were not involved. It follows from existing case law that the prohibition of all discrimination on grounds of nationality as laid down by Article 6 applies only within the Treaty's area of application. The Court held that the national judge had failed to prove that he might be required to apply provisions intended to ensure compliance with EC rules. While it was relatively clear that the Court had to decline jurisdiction, it will in any case be interesting to see whether the Court will follow its Advocate General's opinion in the pending Case C-266/96 *Corsica Ferries*.

In Case C-90/96 *Petrie* of 20 November 1997 the Court had to decide whether Article 48 precludes a national rule in Italy which restricts eligibility for temporary teaching posts in universities to tenured teaching staff and established university researchers, this excluding foreign-language assistants who are nationals of other Member States. Does such a national requirement breach the principle of equal treatment? One should believe so, but the Court decided otherwise and thus did not follow its Advocate General. The Court held that the situation of established researchers was not in principle comparable to that of foreign-language assistants, and that the rule was therefore not contrary to Article 48. The Advocate General argued vehemently that the Italian rule constituted unlawful covert discrimination.

On 15 January, the Court had to decide in Case C-15/96 *Kalliope Schöning-Kougebetopoulou* whether Article 48 of the Treaty and Regulation 1612/68 could preclude a clause in a collective agreement applicable to the public service of a Member State. The question raised in a case before the labour court in Hamburg was whether the period of work in another countries' civil service had to be taken into account for the purposes of calculating the seniority required for classification into a higher salary group, contrary to the clause in the collective agreement. The German collective agreement for employed doctors stipulated eight years' practice in the German public service as a pre-condition for classification into a higher salary group, not taking into account periods of employment completed in the public service of another Member State. The Court stated that this was discriminatory and to the detriment of migrant workers and could not be justified on the basis of Article 48(4). Moreover, the Court decided that such a clause in a collective agreement was null and void by virtue of Article 7(4) of Regulation 1612/68 and therefore the national court had to apply the same rules to the members of the group disadvantaged by that discrimination as those applicable to the other workers.

IV

As regards **equal treatment for men and women**, the Court delivered two very interesting judgements on 2 October 1997 in Cases C-1/95 *Hellen Gerster v Freistaat Bayern* and C-100/95 *Brigitte Kording v Senator für Finanzen*. The Court ruled that national legislation which, for the purpose of calculating the length of service of public servants, requires that periods of employment involving working hours of at least one-half to two-thirds of normal working hours be counted only as two thirds of normal working hours, to be indirectly discriminatory and incompatible with Directive 76/207. According to settled case law, indirect discrimination arises where a national measure, although formulated in neutral terms, works to the disadvantage of far more women than men. In both cases almost 90% of the part-time employed persons were women.

Of even greater interest was the decision rendered on 11 November in Case C-409/95 *Marschall*. A question on the interpretation of Articles 2(1) and (4) of the Directive 76/207 had been raised in proceedings between Mr Marschall and the *Land* Nordrhein-Westfalen concerning his application for a higher grade post in a

comprehensive school in Germany. Once again – as in *Kalanke* (ECR I-1995 3051) – a German '*Gleichstellungsgesetz*' was in question. Unlike in the *Kalanke* case, the law in Nordrhein-Westfalen reads that: 'Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual (male) candidate tilt the balance in his favour.' (our underlining). This saving clause saved the provision in question. The Court stated that a national rule containing a saving clause does not exceed the limits of Art. 2(4) of Directive 76/207. The provision in question in *Kalanke* did not contain such a savings clause and the Court thus found the law to be incompatible with EC law.

On 17 February 1998 the full Court delivered a very important judgement on equal treatment of persons of the same sex in Case C-249/96 *Jacqueline Grant v South-West Trains Ltd*. This judgement should be considered together with *P v S and Cornwall County Council* [1996] ECR I-2143 in which the Court held that it is discriminatory to dismiss a transsexual for a reason arising from the gender reassignment of the person concerned. Ms Grant took her employer, South-West Trains ('SWT'), to court because the company had refused to award her female partner travel concessions. It followed from Ms Grant's contract that: 'privilege tickets are granted to a married member of staff ...'. Furthermore, it was stated that: 'privilege tickets are granted for one common law opposite sex spouse ... subject to a declaration being made that a meaningful relationship has existed for a period of two years or more ...'. (our underlining). Ms Grant applied for travel concessions for her female partner, with whom she had had a 'meaningful relationship' for over two years. SWT refused the request on the ground that for unmarried persons travel concessions could only be granted for a partner of the opposite sex. The Industrial Tribunal referred preliminary questions to the Court on the interpretation of Article 119 EC. Both SWT, the UK and French Governments and the Commission argued that the difference in treatment of which Ms Grant had complained was based not on her sexual orientation but on the fact that she does not satisfy the conditions laid down in SWT's regulations to which her contract refers. The Court followed this argument and held that SWT's refusal did not constitute discrimination prohibited by Article 119 EC or Directive 75/117. The Court simply held that because SWT's condition imposed by its regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex. Community law does not require an employer to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. The Member States are free to adopt legislation in this area. The result of this judgement could be changed in the future. Article 6a of the Treaty of Amsterdam will allow the institutions to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

V

In the field of **social security**, another UK case is of interest. The Court's judgement of 4 November 1997 in Case C-20/96 *Snares* concerned the award of a disability living allowance ('DLA') provided for under UK legislation. Mr Snares was employed in the UK for 25 years and as such paid contributions to the UK social security system. He was awarded a DLA in 1993. In November 1993 Mr Snares decided to settle in Tenerife. The authorities decided that Mr Snares was not entitled to DLA whilst resident in Tenerife. The Court noted at the outset that Mr Snares' case fell within the scope of Regulation 1408/71 and that he satisfied the conditions of the award of a DLA, which is governed exclusively by the system of coordination established by a 1992 amendment to Regulation 1408/71. It follows from this coordination system that Mr Snares was only entitled to receive a benefit like DLA within the territory of the Member State in which he resides, in accordance with the legislation of that state, here Spain. This interpretation, in favour of the UK, urged the Court to continue to investigate whether this situation was valid in the light of Articles 51 and 235 of the EC Treaty. The Court argued that benefits like DLA fall within the category of benefits which, as regards the detailed rules for granting them, are closely linked to a particular economic and social context. The principle of a waiver of residence clauses was considered contrary to the Treaty provisions mentioned.

VI

The full Court set aside the Court of First Instance's judgement in *Ladbroke* in the field of **competition**. The Court's decision (Joined Cases C-359/95 P and C-379/95 P) are of great interest. In 1989 *Ladbroke* lodged a complaint with the Commission against France under Article 90 and against 'PMU', which is an economic interest group created by 10 betting companies in France to manage their rights to organize off-course totalizator betting on horse racing, under Articles 85 and 86 of the Treaty. The Commission rejected the complaint regarding Articles 85 and 86 on the grounds that these articles were not applicable and that there was an absence of any Community interests involved. The Court of First Instance annulled the Commission's decision to reject the complaint on the ground that, by definitively rejecting the part of the complaint directed against the PMU and its members without first having completed an exhaustive examination of the compatibility of the French legislation with the Treaty rules on competition, the Commission had failed to fulfil its

duty to examine *Ladbroke's* complaint. The Court did not follow the Court of First Instance's opinion. The Court reasoned that the question as to whether national legislation is compatible with the Treaty rules on competition is not decisive in the context of an examination of the applicability of Articles 85 and 86 to the conduct of undertakings (PMU) which comply with that national legislation. It follows from this judgement that it is not necessary for the Commission to decide whether national legislation is contrary to the rules on competition before rejecting a complaint. The Commission only has to ascertain whether national legislation prevents undertakings from engaging in conduct which prevents or distorts competition.

In 1994 the Court declared non-admissible the *Job-Centre* case because it had no jurisdiction to rule on questions raised by a court under the '*giurisdizione volontaria*' procedure. Two years later the same question was referred by a Court of Appeal and on 11 December the Court had to decide in the second *Job-Centre* case (C-55/96) on the interpretation of Articles 48, 59, 86 and 90 of the Treaty. The Court ruled that public placement offices are subject to the prohibition contained in Article 86, as long as the application of that provision does not obstruct the performance of the particular task assigned to them. A Member State which prohibits any activity as an employment agency, or as an employment business, unless those carried out by those public offices, is in breach of Article 90(1) of the Treaty where it creates a situation in which those offices cannot avoid infringing Article 86.

VII

In the field of **State aids,** on 9 December 1997 the full Court delivered a judgement involving the question as to whether differences in the level of duties on bets taken on horse races could constitute unlawful State aid. The French PMU (group of racehorse undertakings) entered into an agreement with the Belgian PMU under which the French PMU was authorized to take bets in France on Belgian horse races on behalf of the Belgium PMU. Ladbroke, a bookmaking company taking bets in Belgium on horse races run abroad, complained to the Commission. Ladbroke argued that the agreement gave the Belgian PMU an advantage, which constituted unlawful State aids! It is clear that France allowing the Belgian PMU to have access to its domestic market does not involve State aid. In order for there to be State aid it is first necessary for there to be aid favouring the Belgian PMU and, second, for that advantage to come from a French State resource. The Court agreed with the Court of First Instance and found that there the Belgian PMU was not favoured even though bets on French races was treated differently from bets on Belgian ones.

VIII

The Court is expected to deliver a number of judgements in the field of **public procurement**. The *Mannesmann* case of 15 January (C-44/96) is very interesting for those working within the procurement regime. Because procurement rules are very detailed it is here only possible to set out the results. The Court clarified the term 'body governed by public law' especially by showing clearly what is to be understood by 'needs in the general interest, not having an industrial or commercial character'. The Advocate General's opinion is of particular interest for procurement specialists.

IX

The Court continues to deliver a number of judgements interpreting the **Sixth VAT Directive**. The question in four joined cases was whether the Directive allows a Member State to refrain from refunding substantial VAT credits of its residents, because of the existence of serious grounds for suspecting tax evasion. A number of Member States argued that such a national measure is designed to enable the competent fiscal authorities to retain – as a protective measure – refundable amounts of VAT where there are grounds for presumption of tax evasion. The Court stated that, in principle, this would not be contrary to the Directive. However, in accordance with the principle of proportionality, the Member States must not go further than necessary in order to preserve the rights of the Treasury. It is up to the national courts to determine whether the authorities respect the principle of proportionality. While the result might be correct, there is a risk that the fundamental principle of the right to deduct VAT will be undermined by actions taken by authorities in some Member States.

In Case C-408/95 *Eurotunnel* of 11 November 1997 the Court brought an end to the discussion as to whether the transitional arrangements for tax-free shops under the Sixth Value Added tax Directive are valid. The full Court upheld the validity of the provisions in question.

X

As regards the **implementation of EC law**, the Court held in *Inter-Environnement Wallonie* (Case C-129/96 of 18 December 1997) that if a Member State decides to implement a directive before the end of the period prescribed therein, such implementation must not contain measures liable to compromise the result prescribed in a serious way. It follows from this Belgian preliminary case that a Member State can in principle adopt a provision contrary to a Directive before the period for implementation has expired. However, if such a provision might 'seriously compromise' the aim of the Directive it will be contrary to the Treaty. This is, in our view, not a very pro-Community result. It will be up to the national court in question to assess whether the national measure is to be considered 'contrary', or 'seriously compromising'. Even though the Court sets out in the judgement how the national courts are to assess whether the national provisions in question are compatible with EC law, this assessment will differ from one Member State to another. ❑