Judgements Delivered by the Court of Justice of the European Communities in the Period 1 March – 1 July, 1997

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Judgements delivered in the past few months have concerned a diverse range of topics. This article will review some of the more interesting judgements handed down by the Court of Justice in the aforementioned period.

An interesting **institutional question** arose for consideration before the Court of First Instance in *Case T-105/95 WWF UK (World Wide Fund for Nature) v. Commission*, 5 March, 1997. This case concerned **Decision 94/90** on public access to Commission documents and the Code of Conduct on public access to Commission and Council documents.

The Irish government announced a decision to build a visitors' centre in the Burren National Park in the west of Ireland and proposed using structural funds for the project. The Commission subsequently investigated the project but decided that it would not start Treaty infringement proceedings against Ireland. The applicant in the case then addressed a letter to the Commission requesting access to all Commission documents relating to the examination of the project, and in particular concerning the use of structural funds. The Commission refused to supply the relevant documents and the applicant brought an annulment action before the CFI. The first question concerned the legal force of Decision 94/90, while the second concerned the scope of the exceptions provided. With respect to the first issue, the Court considered that although the Commission voluntarily assumed the obligations contained in the decision, it was nevertheless capable of conferring legal rights on third parties, which the Commission is obliged to respect.

In so far as the exceptions are concerned, the Court considered that it is necessary to interpret these in a restrictive fashion and in such a way that they do not render the objective of the Decision impossible to attain. In so far as the mandatory exceptions are concerned, the Commission is obliged to refuse access to documents falling within their scope. On the other hand, where the Commission has discretion as to whether or not to refuse access, it is under an obligation, when exercising this discretion, to strike a genuine balance between the interest of the citizen in obtaining access to the documents and its own interest in protecting the confidentiality of its deliberations.

In cases where the requested documents relate to infringement proceedings, the Commission may refuse access to the documents. However, the Commission cannot confine itself to invoking the possible opening of the infringement procedure as a justification and it is at least required to indicate the reasons why it considers the requested documents to be related to the possible opening of such a procedure. This does not mean that the Commission must give reasons justifying the confidentiality of every document as this would, in itself, endanger the protection of the public interest.

The principle of non-discrimination embodied in **Article 6 EC** was at issue in *Case C-323/95 Hayes v. Kronenberger GmbH*, 20 March, 1997, which concerned a provision of the German Code of Civil Procedure which provided that foreign nationals who act as plaintiffs in proceedings brought before German courts must give security for costs and lawyers fees. The Court held that such a provision is not in accordance with Community law as it constitutes direct discrimination on the basis of nationality. While the Court recognised that there is a real difficulty in enforcing orders made against non-residents, it refused to consider whether the imposition of security for costs might be necessary in some circumstances as the German rule failed to comply with the principle of proportionality. In particular, the German law imposed different conditions depending on nationality, and failed to secure repayment of judicial costs in all cases, as no security could be imposed on a German plaintiff not residing in Germany and having no assets there. In addition it was disproportionate to the objective pursued as non-German plaintiffs residing and having assets in Germany could also be required to provide security.

Case C-352/95 *Phytheron International SA v. Jean Bourdon*, 20 March, 1997, concerned the application of Article 7 of the Trade Mark Directive 89/104/EEC. The case concerned the cancellation of a contract for the purchase of a plant health product which was imported to France from Germany but which was originally from Turkey. The purchaser cancelled the order on the grounds that the consignment could not be marketed in France as the owner of the trade mark had apparently not agreed to the same. An action for damages on the ground of wrongful termination of the contract was taken in the national court. A number of questions were referred to the Court of Justice, the answer to which depended on the interpretation of Article 7 of the Trade Mark Directive. Article 7 provides that (1) The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent. (2) Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.

In its judgement, the Court pointed out that the Directive reiterates the case-law of the Court to the effect that the owner of a trade mark protected by the legislation

of a Member State cannot rely on that legislation to prevent the importation or marketing of a product which has been lawfully put on the market in another Member State by him or with his consent. In addition, the principle of exhaustion of rights laid down in Article 7 applies when the owner of the trademark in the state of import and the owner of the mark in the state of export are the same person or are economically linked. As long as the product has been lawfully put on the market in the Member State from which it has been imported, by the owner of the mark or with the owner's consent, it does not matter that it was manufactured in a non-member country. This also applies to companies in the same group as the owner.

In so far as Article 7(2) is concerned, the Court reiterated previous judgements (see e.g.Cases C-427/93, C-429/93 and C-436/93 *Bristol-Meyers Squibb and Others* 1996 ECR I-3457) to the effect that the principle of exhaustion of rights does not apply where there are legitimate reasons for a trade mark owner to oppose further commercialization of the products. However, the mere addition on the label of information necessary to comply with the legislation of the Member State of import does not constitute a legitimate reason within the meaning of Article 7(2) of the Trade Mark, provided that the label is not so altered that it omits important information or gives inaccurate information and provided its presentation is not liable to damage the reputation of the trade mark and that of its owner

The **Free Movement of Persons and Social Security law** was considered in Case 131/95 *P.J. Huijbrechts* 13 March 1997. This case concerned the application of the Netherlands Law on the Provision of Income for Elderly Unemployed Workers and Unemployed Workers suffering from Partial Incapacity to Work. Ms. Huijbrechts had worked in the Netherlands while living in Belgium. After she was laid off, she received unemployment benefit in Belgium. She subsequently moved to the Netherlands where she continued to receive unemployment benefit from Belgium for a three month period. At the end of this time, she applied for an allowance under Dutch law. Ms. Hujbrechts was refused this allowance as she did not fulfil one of the conditions for benefit. This condition specified that in order to be considered as an unemployed person, the applicant must have received benefit under the statutory unemployed provisions in force in the Netherlands, for the whole period for which the benefit was payable. The national court referred a question to the ECJ in order to determine whether this condition was compatible with Regulation 1408/71. In its judgement, the Court of Justice pointed out that Article 71(1)(a)(ii) of the Regulation provides that frontier workers receive benefit in the state of residence as though it was the State where he was last employed. However this merely suspends the obligations of the State where he was last employed, it does not extinguish them. Consequently, where an unemployed frontier worker settles in the Member State in which he was last employed, the derogation in Article 71(1)(a)(ii) ceases to apply and the State in which the frontier worker was last employed must assume its obligations under the Regulation in relation to unemployment benefit. As a result, unemployment benefit received in the State of Residence under Article 71(1)(a)(ii) must be taken into account by the State of Employment as if the benefit had been received in that State.

Advocate General La Pergola agreed with the judgement of the Court but linked his decision more specifically to Article 48 and the Free Movement of Workers.

Freedom of establishment was at issue in *Case C-250/95 Futura Participations SA, Singer v. Administration des Contributions* which was decided on the 15 of May last. According to Luxembourgish law, non-resident taxpayers with a branch in Luxembourg may only carry forward previous losses if they fulfil two conditions. In the first place the losses must be economically related to the income earned in Luxembourg. Secondly, during the financial year in which the losses were incurred, the taxpayer is required to have kept and held in Luxembourg accounts complying with the relevant rules in respect of the activities carried out there. The Court was asked whether these provisions were compatible with Article 52 of the Treaty. In relation to the first point, the Court said that the fact that the losses must be economically linked to the income earned in the Member State was in conformance with the fiscal principle of territoriality and did not constitute discrimination. In so far as the second point was concerned, the Court considered that requiring a firm to adopt accounting practises complying with national rules could constitute a restriction within the terms of Article 52 of the Treaty. The Court then went on to consider whether the restriction was justified. While the Court reaffirmed that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of constituting a justification, it considered that in the present case, the national legislation went beyond what was necessary to achieve this goal. The Court felt that it should be sufficient if the non-resident taxpayer be able to demonstrate the amount of the losses he seeks to carry forward and that the ways of proving this should not be limited to those provided by Luxembourgish law.

Competition law was at issue in *Case C-282/95 P, Guerin v. Commission*, 18 March 1997, which concerned the right to bring an action against the Commission for failure to act under Regulation 17 of the Competition rules. Guerin had written to the Commission requesting that the Commission find Volvo France in breach of Article 85 of the Treaty. The Commission considered that the case did not present sufficient Community interest and refused to take an action. Subsequently, the Commission informed Guerin that it was dealing with the same problem in another case and that it would communicate to them the results of the examination. A year later, Guerin had not received a reply and they addressed a formal letter of notice to the Commission in accordance with Article 175 of the Treaty. Subsequently, Guerin brought the case before the Court of First Instance. Following this, the Commission sent Guerin a notification referring to Article 6 of Commission Regulation No 99/63/EEC and informing them that they did not intend to give their complaint individual consideration. The Court of First Instance rejected Guerin's application on the basis that the aforementioned notification constituted a definition of position within Article 175. In addition, it

ruled that an action for annulment under 173 was inadmissible as the letters sent by the Commission to Guerin did not have binding legal effects. In the appeal, the Court upheld the Court of First Instance on these two points. However, in its judgement the Court went on to point out that, following a notification under Article 6, the complainant is entitled to submit written observations. Once that stage of the procedure is completed, the Commission is under an obligation to either initiate a procedure against the subject of the complaint or to adopt a definitive decision rejecting the complaint. This latter course of action may then be the subject-matter of an action for annulment before the Court.

In *Case C-343/95 Diego Cali &Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG)* March 18, 1997, the Court considered the application of Article 86 to a body responsible for the surveillance of water pollution and for providing rapid intervention in order to protect maritime areas against any pollution caused by accidental discharges of hydrocarbons into the sea. These activities were carried out under an exclusive concession granted to SEPG by the Port Authorities and fees were collected from the users of the service i.e. vessels which docked at the wharves in order to carry out operations of loading and unloading petroleum products. The Court considered that the SEPG was not an undertaking within the meaning of Article 86 as the task of anti-pollution surveillance is a task in the public interest and forms part of the essential functions of the State. The Court was of the opinion that such surveillance is connected by its nature, its aim and it rules with the exercise of powers relating to the protection of the environment which are typically those of a public authority and which are not of an economic nature justifying the application of the Treaty rules on competition. The fact that SEPG charged fees for its services did not affect the legal status of the activity.

The question of **State aid** was considered by the Court in *Case C-24/95 Land Rheinland-Pfalz v. Alcan Deutschland GmbH*, 20 March 1997. This concerned the extent to which the application of national rules may be relied upon to prevent the recovery of unlawful state aid. The first question dealt with by the Court concerned whether national authorities are required to revoke a decision granting unlawful aid even if the authority has allowed national time limits to elapse. In response to this question, the Court pointed out that the recipient of aid is not in a position of uncertainty after the Commission has taken a decision to the effect that the aid is illegal. As the national authorities have no discretion concerning this matter, the principle of legal certainty cannot be relied upon to preclude repayment of the aid on the grounds that the national authorities allowed national time-limits to elapse

The second question concerned whether the national authority is obliged to demand recovery of aid even it is responsible for the illegality of the aid decision to the extent that revocation appears to constitute a breach of good faith towards the applicant. The Court considered that the national authority was obliged to demand recovery on the grounds that the recipient could not have a legitimate expectation that the aid was lawful because the procedure laid down in Article 93 of the Treaty had not been followed.

Case C-355/95 Textilwerke Deggendorf GmbH (TWD) v. Commission, 15 May, 1997 concerned aid granted to TWD by the Federal German Government and by the *Land* of Bavaria. The Commission held that the original aid granted was unlawful as it had not been notified and did not satisfy the conditions set out in Article 92(2) and (3) of the EEC Treaty. However it exempted a subsequent aid plan but instructed the German government to suspend payment until the original illegal aid had been reimbursed. A case was brought against the Commission on the basis that it lacked competence to set out such a condition and that it had breached the division of powers between the Community and the Member States. The judgement of the Court of First Instance subsequently went to the Court of Justice on appeal. The Court upheld the judgement of the CFI and agreed that the new aid could not be compatible with the common market as long as the old unlawful aid had not been repaid, since the combined effects of all the aid was to significantly distort competition in the common market. The Court concluded that in such circumstances, the suspension of payment of the new aid could not be treated in the same way as a simple demand for payment and that the Commission had not acted outside its powers in imposing such a condition.

A number of decisions were handed down in the field of **social law**. The distinction between statutory and occupational pension schemes was considered in Case C-147/95 *Dimosia Epicheirisi (DEI) v. Evithimos Evrenopoulus* of the 17 April, 1997 which concerned the application of Article 119 EC and Directive 79/7, to the Greek State Electricity Company (DEI). Under Greek law, the DEI is a State *body sui generis*, it enjoys legal personality and for most purposes, it is governed by private law. The DEI insurance scheme was directly created and exclusively regulated by law. DEI and the Greek Government argued that the scheme was a statutory scheme and that Article 119 could therefore not apply to it. In support of this argument, they pointed out that the scheme was directly created and exclusively regulated by statute; that in operating such a scheme the DEI acts as a body governed by public law; the scheme was not created by a unilateral decision on the part of the employer or after negotiation or agreement between management and staff; that the detailed rules for its operation are linked to social policy and not to an employment relationship; that its role is not to supplement another general insurance scheme. However, the ECJ did not accept these arguments and considered that the scheme did fall within Article 119 as the right to a survivors pension under the scheme depended on the beneficiary's spouse being employed by the Company and was therefore linked to the latter's pay.

In this case, the ECJ also dealt with the question of the temporal limitations set out in Case C-262/88 *Barber* 1990 ECR I-1889. In relation to this matter, the Court pointed out in order for the temporal limitations not to apply, the action must have been initiated in accordance with the procedural rules applicable in the Member State concerned.

Case C-66/95 *The Queen v. The Secretary of State for Social Security, ex parte Eunice Sutton* 22 April 1997, concerned the right to obtain interest on arrears of social security benefit falling within the scope of Council

Directive 79/7. Mrs. Sutton had been discriminated against under the British Social Security regime and had received arrears of payment backdated to 1986. However she was not paid any interest in respect of this sum. The national court asked the Court of Justice whether this was compatible with Article 6 of the Directive. In its response, the ECJ drew a distinction between the current case and Marshall II. In this respect, the Court pointed out that Marshall II concerned the award of interest on amounts payable by way of reparation for loss and damage sustained. The award of interest in such an instance is necessary in order to ensure full compensation of the loss and damage. These considerations do not come into play in cases concerning the right to receive interest on amounts payable by way of social security benefits, as these amounts do not constitute reparation for loss or damage. However the Court did point out that the Member State may remain liable under the Francovich doctrine for any loss suffered as a result of the belated payments.

Case C-180/95 Draehmpael v. Urania Immobilien-service ohG, 22 April 1997, concerned the right to reparation in the event of discrimination as regards access to employment. Mr. Draehmpael was discriminated against in the decision on an appointment to the post of assistant. However his right to compensation depended partially on Community law. The first question referred by the national judge asked whether Directive 76/207 precludes provisions of domestic law which make reparation of damage suffered as a result of sexual discrimination subject to the requirement of fault. The ECJ held that the directive precludes making reparation subject to such a requirement. The national court also raised the issue of whether the Directive precludes provisions of domestic law which place a limit of three months salary on the amount of compensation which may be awarded in sexual discrimination cases. In responding to this question, the Court referred to its judgement in the *Von Colson* case 1984 ECR 1891, where it ruled that if a Member State chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must not be purely nominal and must in any event be adequate in relation to the damage sustained. While the German government sought to argue that three months salary was not purely nominal, the Court refused to accept this argument. The Court pointed out that the three month ceiling was not imposed for other provisions of domestic civil and labour law and that it consequently breached the requirement that infringements of Community law be punished under conditions analogous to those applicable to infringements of domestic law.

In so far as applicants who were discriminated against in the recruitment procedure but who would not have obtained the position even if the selection process had been free of discrimination are concerned, the Court ruled that reparation may take account of the fact that they would not have been selected anyway and that such applicants cannot claim that the extent of the damage they have sustained is the same as that sustained by applicants who would have obtained the position in the absence of discrimination. In such a situation, the Court did not think that it would be unreasonable for a Member State to lay down a statutory presumption that the damage suffered may not exceed a ceiling of three months salary. However it is the employer who must adduce proof that the applicant would not have obtained the vacant position even if there had been no discrimination.

Finally the Court held that provisions of national law which placed a limit on the aggregate amount of compensation payable to several applicants discriminated against on grounds of sex, were also in conflict with Community law as similar conditions were not applied to other provisions of domestic civil and labour

Case *C-400/95, Elisabeth Larsson*, 29 May, 1997 concerned the treatment of illness resulting from pregnancy. Ms. Larsson became ill following her pregnancy, as a result of her pregnancy. Her employer terminated her employment contract on the basis that she would not be able to carry out her work in a satisfactory manner in the foreseeable future. Mrs. Larsson claimed that her dismissal was contrary to Council Directive 76/207 on the implementation of the equal treatment principle as regards access to employment, vocational training and promotion, and working conditions. In its judgement, the Court confirmed its decision in the *Hertz* case 1990 ECR 3979 and held that there is no reason to distinguish between illness attributable to pregnancy or confinement from any other illness and that illness resulting from pregnancy should be treated according to the general rules applicable in the event of illness. Consequently, the Directive does not prevent dismissal based on periods of absence due to illness attributable to pregnancy or confinement.

Case 13/95 *Suzen* of the 11 March, 1997 concerned the definition of the **term 'transfer of undertaking'** in Directive 77/187/EEC. The Court was asked whether a situation where a school terminated a cleaning contract with one undertaking and subsequently awarded the contract to another undertaking could constitute a transfer within the meaning of the Directive. The Court considered that the Directive did not apply to such a situation as there had been no transfer of an economic entity. In this respect, the Court pointed out that the mere loss of a service contract to a competitor does not mean that the service undertaking previously holding the contract ceases fully to exist and that there were no grounds for concluding that a business or part of a business belonging to it had been transferred to the new awardee of the contract.

The relationship between Community law and the **European Convention on Human Rights** was considered in *Case C-299/95 Kremzow v. Republic Osterrich* 29 May, 1997. In this case, a number of questions referred by the Austrian court concerned the competence of the Court to give a preliminary ruling with respect to the interpretation of all or some of the substantive provisions of the European Convention for the Protection of Human Rights and Fundamental Rights. The Court held that it is not competent to give a preliminary ruling on the interpretation of the Convention when the case at issue before the national court does not fall within the field of application of Community law. ❑