The European Court of Justice and social policy case law in the EU: an overview

The Court of Justice of the European Union (CJEC) is often considered to be the driving force behind European integration. The Treaties establishing the European Union bestow on it a crucial role in ensuring that they function properly. The Court is the guarantor of institutional equilibrium: on the one hand the arbiter between Member States and the European Union, and on the other between the institutions themselves. From the outset, the Court has remained true to its vocation and has unfailingly charted a pro-European course towards European integration; hence the case law shaping the development of Community law in areas such as the relationship between Community law and national law, fundamental rights in the Community legal order, the functioning of the single market, and so on. It also plays an important role in social policy. Frequently consulted by national courts for preliminary rulings, it has had the opportunity, through its rulings, of defining fundamental concepts such as equal pay for men and women, the place of family benefits in a co-ordinated framework of social security systems, the concept of transfer of undertakings, employers’ insolvency, working hours, etc. 2005 has been no exception in terms of the CJEC’s activities. This chapter seeks to give an overview of recent case law, albeit based on a fairly small number of rulings. The three-part structure common to previous editions has been retained, but there is greater focus on equal treatment, in order to give the reader an overview of the principle prohibiting discrimination on grounds of age and nationality.
1. The principles of equal treatment and non-discrimination

The principles of equal treatment and non-discrimination are at the heart of the European social model. They are one of the key elements of the fundamental rights and values which are the cornerstone of today’s Union. Great progress has been made over a short period since the Member States agreed on the need for concerted action at European level to combat discrimination on grounds of racial or ethnic origin, religious or other convictions, age, disability and sexual orientation. The action taken in this area has been based on the Union’s experience in combating gender-based discrimination (CEC, 2004a).

1.1 Equal pay for men and women: the Vergani case

The Court of Justice has played a central role in developing the principle of equal treatment of men and women. It ruled that Article 119 of the Treaty of Rome (now Article 141 EC) on equal pay has direct effect, affirming that this article was part of the social objectives of the Community. It has given rulings which have helped to combat discrimination against women, particularly in the area of indirect discrimination, which is defined as the application of a criterion which is neutral in appearance but in fact affects more members of one gender. It defends genuine equality between men and women, thus excluding protective measures which cannot be justified by objective differences between men and women (Joannin, 2004). Despite the legal arsenal it has established both at the heart of the Union and in the Member States, and well-established Community case law, there are referrals to the Court each year for rulings on the parameters of this principle. In this context, we shall look at the Vergani case, decided earlier this year by the Court.

Italian law (1) provides for a system of early retirement particularly for the benefit of employees of firms which have been declared to be in crisis. Women are entitled to seek early retirement as of age 50, whilst the threshold is 55 for men. As a voluntary redundancy incentive, the law provides for tax concessions in respect of sums paid by the

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1 Article 17(4)(a) of decree no. 917 of the President of the Republic, of 22 December 1986, as amended by decree law no. 314 of 2 September 1997.
Mr Vergani (2), aged 51, had ceased employment, received the payment to which he was entitled, and found that he was being denied the tax concession in question to which a woman in his position would have been entitled. He brought proceedings before the Commissione tributaria provinciale di Novara, challenging this decision of the tax authorities, which refused him the concessionary tax rate in respect of personal income tax. The court decided to stay the proceedings and refer to the CJEC for a preliminary ruling the question as to whether Article 141 EC and Directive 76/207/EEC (Council of the European Communities, 1976) preclude the provision of a voluntary redundancy incentive consisting of taxation of sums paid in connection with the cessation of employment relationships at a rate reduced by one half, for workers over the age of 50 in the case of women, and the age of 55 in the case of men.

The Court first of all considers whether the grant of an age-related tax concession, in respect of the taxation of a voluntary redundancy payment, is covered by Article 141 EC or Directive 76/207. The concept of pay, referred to in Article 141 EC, comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer (3). A tax concession is not being paid by the employer and therefore is not a consideration within the terms of Article 141. The Court then affirms that under Article 5(1) of Directive 76/207, application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of gender. This Article also applies to the conditions governing dismissal which obtain in those States. The term “dismissal” must be widely construed, so as to include termination of the employment relationship between an employee and his employer,

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2 CJEC, Case C-207/04, Vergani, 21 July 2005, not yet published.
3 Judgment of 17 May 1990, Case C-262/88, Barber, ECR I-1889, point 12, and of 9 February 1999, Case C-167/97, Seymour-Smith and Perez, ECR I-623, point 23.
even as part of a voluntary redundancy scheme. A tax rule determined by reference to a worker’s age, constitutes a condition for dismissal within the meaning of Article 5(1) of Directive 76/207. A difference in treatment resulting from the taxation, at a rate reduced by half, of sums paid on the cessation of the employment relationship, which applies to workers over 50 in the case of women and 55 in the case of men, constitutes unequal treatment on grounds of a worker’s gender.

Is such a difference in treatment covered by the derogation provided for in Article 7(1)(a) of Directive 79/7/EEC (Council of the European Communities, 1979), by virtue of which the Directive is without prejudice to the right of Member States to exclude from its scope the determination of pensionable age, for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits? This exception to the ban on discrimination on grounds of gender must be strictly interpreted. It can only apply to the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other social security benefits. It does not therefore apply to a tax concession which is not a social security benefit. The difference in treatment therefore constitutes direct discrimination on grounds of sex, contrary to Directive 76/207 (4).

1.2 The principle of non-discrimination on grounds of age and nationality: the cases of Mangold and Ionannidis

In the Mangold case, the CJEC deals with the question of differences in treatment based on age (5). The principle of prohibiting discrimination on grounds of age is a general principle of Community law. Directive

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4 We refer the interested reader to the following judgments: the case of McKenna deals with equal treatment in the context of illness occurring prior to maternity leave and pregnancy-related illness, CJEC Case 191/03, McKenna, 8 September 2005; not yet published. In the case of Nikoloudi the Court deals with positive action in the context of part-time work. The judgment in Mayer covers the inclusion of periods of maternity leave for the purpose of the calculation of rights to an insurance annuity, CJEC Case C-356/03, Mayer ECR I-295, 13 January 2005; CJEC Case C-196/02, Nikoloudi, 10 March 2005, ECR I-1789.

5 CJEC, Case C-144/04, Mangold, 22 November 2005, not yet published.
2000/78/CE (Council of the European Union, 2000) seeks to lay down a general framework for combating certain forms of discrimination in respect of work and employment, particularly discrimination on the grounds of age. Differences in treatment directly based on age are in principle prohibited by Community law. However, the Directive does state that Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy and labour market objectives, and if the means of achieving that aim are appropriate and necessary.

The Arbeitsgericht München referred several questions to the Court for a preliminary ruling on the interpretation of Directive 2000/78, in the context of a dispute regarding a German law on part-time work and fixed-term contracts (6). This law authorises the conclusion of a fixed-term contract without restriction up until 31 December 2006, if a worker has reached the age of 52, except in the case where there is a close connection with a previous employment contract. The case concerns Werner Mangold, aged 56, who had been offered a seven-month employment contract with a lawyer. He was unable to negotiate on the duration of the contract because of the law in force, but subsequently challenged it before the courts.

The Court of Justice recognises that the purpose of the legislation is plainly to promote the vocational integration of unemployed older workers, insofar as they encounter considerable difficulties in finding work. Such an objective therefore in principle justifies, objectively and reasonably, a difference of treatment on grounds of age. However a national regulation such as that contained in the TzBfG goes beyond what is appropriate and necessary to the attainment of the legitimate objective. The Member States unarguably enjoy broad discretion in their choice of measures conducive to attaining their objectives in the field of social and employment policy. However, the view of the Court is that the application of national legislation such as that at issue here, leads to

6 Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen (TzBfG).
a situation in which all workers who have reached the age of 52 may lawfully be offered indefinitely renewable fixed-term contracts of employment until the age at which they may claim their entitlement to a retirement pension. This applies without distinction, irrespective of whether they were unemployed before the contract was concluded and whatever the duration of any period of unemployment. This substantial category of workers, defined solely on the basis of age, is thus in danger, during a substantial part of its members’ working life, of being excluded from the benefit of stable employment which, in fact, constitutes a major element in the protection of workers. Moreover, it has not been shown that fixing an age threshold as such, regardless of any other consideration linked to the structure of the labour market in question, or the personal situation of the person concerned, is objectively necessary to the attainment of the objective, namely the vocational integration of unemployed older workers.

The Court, in this judgment, comments on the interpretation of Directive 2000/78 and the effect thereof on national law, even though the period allowed for the transposition of the Directive into national law had not expired when the fixed-term contract in question was concluded. It is the view of the Court that these circumstances are not sufficient to call into question the finding that the German legislation is without justification under Article 6 of the Directive. The Court refers to the judgement in the Wallonie (7) case in 1997 when it held that Member States to which a Directive is addressed must refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed. This view applies to provisions of national law adopted after a Directive comes into force, irrespective of whether they pertain to its transposition. Directive 2000/78 implies that the Member States must progressively take the measures necessary to ensure the approximation of their national legislation in line with the provisions of the Directive. This obligation would be rendered ineffective if, during the period for implementation of the Directive, Member States were able to take measures inconsistent with the objectives of that Directive.

7 CJEC, Case C-129/96, Wallonie, ECR I-7411, 18 December 1997.
The exception provided for by German legislation expires on 31 December 2006, essentially at the same time as the period for transposition (2 December 2006). However, workers subject to the system introduced in Germany during the period for transposition will continue to be subject to this exception even after the expiry of the period in 2006. A worker in this category is thus in danger, during a substantial part of his or her working life, of being permanently excluded from the benefit of stable employment, irrespective of the fact that the age restriction ceases to apply in 2006. For these reasons, the Court of Justice has concluded that Directive 2000/78 precludes the application of national regulations which authorise the conclusion of fixed-term employment contracts without restriction once the worker has reached the age of 52, even if the period for transposition of the Directive has not expired. The judgment in *Mangold* illustrates the Court’s commitment to ensuring effective protection of individuals against violations of the principle prohibiting age-related discrimination enshrined in Directive 2000/78, which was adopted pursuant to Article 13 EC. This judgment also indicates a degree of flexibility in the Court’s approach to two issues pertaining to the application of Community Directives, namely the effect of a Directive prior to the expiry of the period for transposition, and the right to rely on a Directive in a dispute between private parties when it has not been transposed, or has been incorrectly transposed. In recognising that a Directive is directly effective in a dispute between individuals prior to transposition, the Court has gone a step further than it did in the judgment in the *Wallonie* case which only involved one Member State. It would appear that henceforth, in a dispute between individual parties, national jurisdictions are obliged to set aside national provisions which run counter to a Community Directive, even prior to the expiry of the period for transposition.

The *Ionannidis* case involves a Belgian regulation (the Royal Decree of 25 November 1991 on unemployment benefit), which provides unemployment benefit in the form of an “allocation d’attente” or jobseeker’s allowance to young people who have just completed their studies and are seeking their first job. In order to be eligible for the allowance, a young person who has completed a course of study or training in another Member State of the European Union must be able to prove
that the course of study or training course was of a level equivalent to
one available at an institution run, funded or recognised by one of the
Communities in Belgium. At the time of applying, he or she must also
be a dependent child of migrant workers residing in Belgium. Having
completed his secondary schooling in Greece, Mr Ionannidis, of Greek
nationality, arrived in Belgium in 1994. His Greek secondary leaving
certificate was recognised as equivalent to an authenticated higher
leaving certificate which in Belgium gives access to the shorter type of
higher education courses. After three years of study, he obtained a
graduate diploma in physiotherapy. He also took a grant-funded course
in France on rehabilitation of the vestibular system. On his return to
Belgium in 2001, he applied to the National Employment Office
(ONEM) for a jobseeker’s allowance. His application was rejected on
the grounds that he had not completed his secondary education in an
institution organised, funded or recognised by one of the three
Communities in Belgium. The Cour du Travail (Labour Court) in Liège
referred to the CJEC the question as to whether European Community
law precluded a Member State from refusing to pay a jobseeker’s
allowance to a national of another Member State seeking their first job,
for the sole reason that he or she had completed their secondary studies
in another Member State.

According to the Court, nationals of a Member State seeking a job in
another Member State fall within the scope of the EC Treaty and
benefit from equal treatment. The principle of equal treatment prohibits
ostensible discrimination on grounds of nationality and any form of
covert discrimination which through the application of other criteria,
leads to the same result. The Belgian regulation introduces a difference
in treatment between citizens who have completed their secondary
education in Belgium as opposed to another Member State: the former
alone are entitled to a jobseeker’s allowance. This condition is likely to
be more easily met by nationals, and therefore threatens to penalise
nationals of other Member States. Such a distinction could only be
justified if it were based on objective criteria, independent of nationality
and proportionate to a legitimate objective in national law. It is
legitimate for the national legislator to seek to ensure that there is a real
connection between an applicant for a benefit and the geographical
labour market. Nevertheless, the condition based solely on the place
where the secondary leaving certificate was obtained is too general and too exclusive. It gives undue weight to a factor which is not necessarily representative of the real and effective connection between the applicant for the benefit and the geographical labour market, to the exclusion of any other more representative factor, and goes beyond what is necessary to reach the desired objective. The fact that Mr Ionannidis’ parents were not migrants resident in Belgium could not be grounds for refusing the application. Nor could this condition be justified by the aim of ensuring a genuine connection between the applicant and the geographical labour market, since it would serve only to exclude someone who had completed their secondary studies in another Member State, had obtained a diploma there, was able to demonstrate a genuine connection with the labour market of that State, but was not a dependent of migrant workers residing in that State (8).

2. Social security and migrant workers

Social security for migrant workers is a necessary and inevitable corollary of the principle of freedom of movement for workers, which is one of the cornerstones of the European Union. Regulation No. 1408/71/EEC, adopted on 14 June 1971, effectively codified the law in this area, incorporating new information, the benefit of experience and CJEC case law. The implementing provisions are contained in Regulation No. 574/72/EEC of 21 March 1972. These regulations do not seek to establish an independent social security system based on harmonisation of the very disparate systems in force in the Member States, but rather to establish mechanisms coordinating these national systems. The Court of Justice is frequently consulted for a preliminary ruling on the scope and application of these provisions.

8 The interested reader may also wish to refer to the case of Bidar, in which the Court held that student maintenance grants also fell within the scope of the EC Treaty in terms of prohibiting discrimination on grounds of nationality, CJEC, Case C-209/03, Bidar, ECR I-2119, 15 March 2005.
2.1 The reimbursement of health care costs incurred in a third country: the case of Keller (9)

Ms Keller, a German national resident in Spain, applied to the Spanish body responsible (Insalud) for an E111 form valid for one month for the purposes of travelling to Germany. During her stay there, she was diagnosed with a malignant tumour likely to prove fatal at any moment. She applied to Insalud for an E112 form in order to be able to continue her medical treatment in Germany. The period of validity of this form was extended on several occasions. Following an in-depth analysis of possible treatments, the German medics decided to transfer Ms Keller to the University Clinic in Zürich, which was the only hospital where there was a realistic chance that the operation she needed could be carried out successfully. Ms Keller paid the costs of her medical care in Zürich herself, and subsequently applied to Insalud for reimbursement. Her application was refused, so she initiated court proceedings. The national Court sought a ruling from the Court of Justice on the interpretation of the 1971 Regulation (Council of the European Communities, 1971) in respect of the possibility of reimbursement of hospital costs incurred in a third country. The Court firstly recalls that one of the purposes of the Directive is to facilitate freedom of movement of insured persons who require medical care during a stay in another Member State, or who have been authorised to receive care in another Member State.

In this context, Forms E111 and E112 are intended to assure the institution of the Member State of stay, and the doctors authorised by that institution, that the holders of those forms are entitled to receive in that Member State, during the period specified in the form, treatment whose cost will be borne by the Member State of which he or she is a national. The Court recalls that the doctors established in the Member State of stay are clearly best placed to assess the treatment required by the insured. During the period of validity of the certificate, the institution of the Member State of which the insured is a national relies on the institution of the Member State in which it has allowed the insured person to stay for medical purposes, and on the doctors

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(9) CJEC, Case C-145/03, Keller, ECR I-2529, 12 April 2005.
authorised by the latter institution, as offering a guarantee of professionalism equivalent to those of doctors established in its own territory. That institution is bound by the findings as regards the need for urgent, vitally necessary treatment made by doctors authorised by the institution of the Member State of stay, and by the decision of those doctors to transfer the patient to another State for urgent medical treatment, even if that State is a not a member of the European Union. The competent institution is not entitled to require the person concerned to return to the competent Member State in order to undergo a medical examination there, nor to have him examined in the Member State of stay, nor to make the above findings and decisions subject to its approval. As to the issue of costs incurred in respect of medical treatment received in a third country following a decision by doctors to transfer a patient, the Court recalls that the governing principle is that the cost of the treatment is initially borne by the institution of the Member State of stay, in accordance with its own legislation, and that it is then for the competent institution of the Member State of residence to reimburse the institution of the Member State of stay. Given that the cost of medical treatment received in Switzerland by Ms Keller had not been borne by the German medical insurance company, but it is established that Ms Keller was entitled to have the cost paid, and that the treatment is among the benefits provided for by Spanish social security legislation, the Court ruled that it was for the competent Spanish social security body to reimburse the cost of that treatment directly to Ms Keller’s heirs.

2.2 The concept of family benefits: the case of Dodl & Oberhollenzer (10)

In order not to deter workers who are nationals of the Member States from exercising their right to freedom of movement, Regulation No. 1408/71 guarantees them equal treatment in the context of differing national legislation and social security benefits, irrespective of their place of employment or residence. The general rule is that the Member State in which the worker is employed is responsible for the payment of family benefits to a salaried worker, even if he or she and their family

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10 CJEC, Case C-543/03, Dodl & Oberhollenzer, 7 June 2005, not yet published.
are resident in another Member State. However, in the event that benefit entitlements from the State of employment might overlap with those of the State of residence, there are rules to avoid overpayment of family benefits. Ms Dodl and Ms Oberhollenzer, both Austrian nationals, work in Austria but live in Germany, with their husband and partner respectively, both of whom have German nationality and work full-time in Germany. Following the birth of their children, Ms Dodl and Ms Oberhollenzer took unpaid parental leave for the duration of which their contract of employment was suspended. In their capacity as fathers, their husband and partner respectively received family allowance in Germany, which was equivalent to Austrian family allowance. However, they did not receive the German child-raising allowance (AFE), since they were working full-time. Ms Dodl and Ms Oberhollenzer had their applications for the child-raising allowance in Germany and the corresponding childcare allowance in Austria refused, on the grounds that the other Member State was responsible. They brought proceedings before the Austrian courts, and the Oberlandesgericht Innsbruck stayed proceedings and sought a preliminary ruling from the Court of Justice on two questions: firstly, whether Ms Dodl and Ms Oberhollenzer had lost the status of “employed persons” within the meaning of Regulation No. 1408/71 as a result of the suspension of their employment relationship, during which they were not required to pay social security contributions, and secondly which Member State is primarily responsible for paying the family benefit in question.

The view of the Court is that a person has the status of “employed person” within the meaning of Regulation No. 1408/71 where he or she is covered on a compulsory or optional basis by a general or special social security scheme, irrespective of the existence of an employment relationship. The Court handed down this judgment on the facts to the referring court. It furthermore observed that in Austria the mother, in her capacity as an employed person in that Member State, is entitled to childcare allowance. Assuming that Ms Dodl and Ms Oberhollenzer, who were living with their respective families in a Member State other than the State of employment, were deemed to be “salaried workers”, then under Community law they would also acquire the right to family allowance in the State of employment, in this case Austria. Ms Dodl and Ms Oberhollenzer are also entitled to comparable family allowances in
Germany, their State of residence. In Germany, any parent is entitled to receive a child-raising allowance on the basis of the fact that the parent and his or her child are resident there. In the case of overlapping entitlements to family benefits, for the same member of the family and the same period, the Member State of employment (Austria) is in principle responsible for making the payments. However, where a person having the care of children, in particular the spouse or partner of the employed person, carries out a professional or trade activity in the Member State of residence, the family benefits must be paid by that Member State. The activity need not necessarily be carried out by the individual personally entitled to these benefits. In that situation, the payment of family benefits by the Member State of employment is to be suspended up to the sum of family benefits provided for by the legislation of the Member State of residence (11).

3. Rights and obligations of employers and workers

3.1 The concept of the date of transfer of an undertaking: Celtec Ltd (12)

Until 1989, the Department of Employment ran training programmes for young and unemployed people in England and Wales through local agencies. In 1989, the Government decided to transfer some of their professional training responsibilities to the Training and Enterprise Councils (TEC). The staffs employed by local agencies were invited to volunteer for a temporary three-year secondment to a TEC, during which they would retain their status as civil servants. In December 1991, the government proposed that, by the end of their fifth year of operation at the latest, the TECs should take over the status of employer of the staff working for them. In Wales, the activities, premises, information

11 The interested reader is referred to the case of Effing in which the Court of Justice decided that national legislation making the grant of family benefits to the members of the family of such a Community national subject to the condition that he remain a prisoner in that State did not run counter to the principle of equality, CJEC, Case C-302/02, Effing, ECR I-553, 20 January 2005; see also CJEC, Case C-101/04, Noteboom, ECR I-771, 20 January 2005; CJEC, Case C-153/03, Weide, 7 July 2005, not yet published.

12 CJEC, Case C-478/03, Celtec Ltd, ECR I-4389, 26 May 2005.
systems and database of the local agency in Wrexham were transferred to North East Wales TEC. Newtec opened in September 1990. Another TEC, Targa, took over the activities and premises of the local agency in Bangor. On 1 April 1997, Newtec and Targa were merged to form Celtec. When Newtec was established, the local agencies from Wrexham and Bangor seconded 43 civil servants to this TEC for a three-year period. At the end of their period of secondment, eighteen of them left the public service and became Newtec employees.

Mr Astley, Ms Hawkes and Ms Owens respectively entered public sector employment on 31 August 1973, 4 November 1985 and 21 April 1986, and were seconded to Newtec. At the end of their period of secondment, they chose to resign from the public service and to work for Newtec. The date of their resignation was identical to the date of their recruitment by Newtec. Their contract of employment commenced on 1 July 1993 in the case of Ms Hawkes and Ms Owens, and on 1 September 1993 in the case of Mr Astley. In 1998, Ms Hawkes was dismissed by Celtec, which refused to accept that she had been in continuous employment since the date on which she joined the Civil Service. The other two respondents feared they would be dismissed shortly as well. All three therefore sought a determination by the Abergele Employment Tribunal as to the length of the period of continuous employment on which they are able to rely, arguing that this should include their periods of service with the Civil Service as well as those with Newtec and Celtec. After losing the appeal, Celtec then went to the House of Lords on appeal, arguing that the transfer of undertaking was completed in the month of September 1990, which was well before the respondents were recruited by Newtec. The House of Lords decided to stay proceedings and make a referral for a preliminary ruling to the Court on the following question: Within the terms of Article 3(1) of Directive 77/187/EEC (Council of the European Communities, 1977), is there a particular point in time at which the transfer of the undertaking concerned, and that of the rights and obligations of the transferor arising from employment relationships linking the latter with the workers it employs, is deemed to take place and, if the answer is in the affirmative, how can that particular point in time be identified?

The Court recalls that Directive 77/187 seeks to uphold workers’ rights in the event of a change of the company management, by enabling them
to continue to work for the new employer subject to the same conditions as those agreed with the transferor. Article 3(1) covers the transferor’s rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, in order to carry out their duties, were assigned to the undertaking transferred or to the part of the undertaking or business transferred. The reference to “date of transfer” in Article 3(1) is intended to identify the workers who may rely on the protection established by that provision. That protection therefore covers workers assigned to the unit affected by the transfer whose contract of employment or employment relationship is in force on the “date of a transfer” and not those who have ceased to be employed by the transferor on that date nor those who were recruited by the transferee after that date. For reasons of legal certainty, these workers must be identified at a particular point in the transfer process and not in relation to the length of time over which that process extends.

Under Article 3(1), the term transfer in the expression “date of transfer” to which that provision refers is to be understood within the meaning of Article 1(1). The deciding factor in defining a transfer is whether the new employer continues or resumes operation of the business, and whether its identity is retained. The term “date of transfer” in Article 3(1) of Directive 77/187 must therefore be understood as the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. Contracts of employment or employment relationships existing on the date of transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over as of right from the transferor to the transferee, by virtue of the transfer alone. The Court has moreover already ruled that allowing the transferor or the transferee any choice in respect of the date of transfer of the contract or employment relation would amount to an acceptance that employers may derogate from the provisions of Directive 77/187, whereas in fact these provisions are mandatory and allow no derogation which might be detrimental to workers.
Thus, the date of a transfer is the date on which responsibility as employer for carrying on the business of the entity transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee. Contracts of employment or employment relationships existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred, are deemed to be handed over from the transferor to the transferee on the transfer date, irrespective of any arrangements made between the parties in this respect (13).

3.2 **The classification of on-call duty: the case of Dellas** (14)

Night duty carried out by a teacher in an establishment for persons with a disability must be taken into account in its entirety for the purpose of ascertaining whether the rules of Community law laid down to protect workers – in particular the maximum permitted weekly working time – have been complied with.

Directive 93/104/EC on working time sets down minimum health and safety standards in this field (15) (Council of the European Union 1993). It sets down minimum rest periods to which workers are entitled on a daily and weekly basis, and also defines adequate breaks. It also fixes the maximum weekly working time at 48 hours, including overtime. For these purposes, the Directive distinguishes between “working time” and “rest periods”. It does not provide for any intermediate category, and strikingly the definition of “working time” does not depend on the intensity of the work done (16).

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13 The reader is referred to the judgment in Junk on collective redundancy, a subject which is not covered in this year’s review: CJEC, Case C-188/03, Junk, ECR I-885, 27 January 2005.

14 CJEC, Case C-14/04, Dellas, 1 December 2005, not yet published.


16 The Court of Justice has already ruled that, under the Directive, on-call services of doctors, nursing staff of emergency services, emergency workers and firefighters which are carried out at the place of work should be considered in their
In France, periods of night duty by workers in certain social and medico-social establishments are determined in accordance with a decree, which establishes a weighting mechanism for the purpose of calculating pay and overtime. It is intended to take into account the fact that there are periods of inactivity during on-call duty. The decree establishes a ratio between the hours of attendance at work and hours actually worked, a 3 to 1 ratio for the first nine hours followed by a 2 to 1 ratio for subsequent hours. Mr Dellas, a special needs teacher in residential establishments for young people with disabilities, was dismissed by his employer as a result of disagreements relating to the definition of actual work and remuneration due for hours of night duty on-call in a room on the premises. Mr Dellas and a number of trades unions brought proceedings before the Conseil d'Etat (Council of State) seeking the annulment of the decree in question. The Conseil d'Etat referred the issue to the Court of Justice, for a ruling as to whether such a regulation is compatible with the Directive.

The Court first of all finds that the Directive does not apply to the remuneration of workers. On the other hand, the hours of presence at work in question must be counted in their entirety as working time for the purpose of ascertaining whether there has been compliance with all minimum requirements laid down by Directive 93/104, to protect the health and safety of workers effectively. The flat-rate weighting mechanism in question takes the hours of presence of workers into account only in part. The total working time of a worker may thus amount to or even exceed 60 hours a week. Consequently, such a national system of calculating on-call time exceeds the maximum weekly working time set by the Directive at 48 hours.

The French Government had already anticipated the decision, as it had rescinded the disputed legislation in October 2004, before the Court ruling and the Decision of the Council of State had even been issued.
As to the Community Directive, it is currently the subject of a proposal for amendment by the Council and the European Parliament (CEC, 2004b). This proposal provides, inter alia, for new definitions of on-call duty and of the inactive part of on-call duty. The latter periods will not be considered as working time unless national legislation, a collective agreement or an agreement between the social partners provides to the contrary. The periods during which a worker is actively carrying out his duties or activities will, in their entirety, be considered as working time within the meaning of the Directive. The new proposal has also provided for an “opt-out” in Article 22 which allows Member States to opt out of applying Article 6 on the maximum duration of the working week by virtue of a collective agreement, or an agreement concluded at an appropriate level between the social partners with the agreement of the worker. On 19 April 2005 the Employment and Social Affairs Committee of the European Parliament voted by a majority to abolish the opt-out and to consider on-call time, including rest periods, to be working time. After an initial rejection at the Employment and Social Affairs Council on 3 March 2005 (Council of the European Union, 2005a), the Ministers failed to agree on the revision of the Directive at the Council on 8 December (Council of the European Union, 2005b; Lhernould and Moizard, 2005). The torch will now be handed over to the Austrian Presidency.

Conclusions

The pace of activity at the Court has been intense to say the least. Whilst there have been no sensational decisions, the rulings which have been given afford us greater insight into the social policy dimension of Community law. Other issues will be decided in 2006. They will be many and varied. The following is a brief overview. The case of 

Herrero (17) concerns a contract worker who is on maternity leave when she obtains a permanent post and becomes entitled take it up. The issue is whether she is entitled to become a civil servant with all the concomitant benefits which that position carries, such as the calculation of seniority with effect from that point, subject to the same conditions

17 Opinion of AG Stix-Hackl delivered on November 10th 2005, Case C-294/04, Herrero.
as all the other applicants who have obtained posts. Is she entitled to do this notwithstanding the fact that the exercise of the rights associated with the actual performance of work may be suspended until such time as she actually commences work? On the question of working time, the Court will have to rule on the following question: does Directive 1999/70/EC (on the Framework Agreement between ETUC, UNICE and CEEP on fixed-time working) preclude provisions of national law (which pre-date the implementation of the Directive) which differentiate between employment contracts signed with the public authorities and contracts with private sector employers, by excluding the former from the protection afforded by establishing an employment relationship of indefinite duration in the event of an infringement of binding rules on successive fixed-term contracts (18)?

Finally, the case of Laval (19), which was already centre-stage in 2005, will again be the focus of great interest in 2006. In June, a Latvian company Laval un Partneri Ltd, recruited Latvian workers under Latvian law to carry out renovation works on an old school in the community of Vaxholm in Sweden. The company refused to sign the construction sector collective agreement with the Swedish trade union Byggnads, though this was a precondition to the carrying out of any economic activity in Sweden. Laval brought proceedings before the Swedish Labour Court, the court of highest instance in respect of labour disputes, arguing that the trade union action and sympathy action, which had resulted in a blockade of the site, were illegal. The company also sought an interim order pending the final resolution of the dispute, to the effect that the trade unions concerned must suspend their union action. The Labour Court rejected the application for a provisional order, but made a referral to the Court of Justice for a preliminary ruling.

One of the main issues in this case concerns the implementation in Sweden of the Directive on the posting of workers. The problematic article is Article 3.1.C, on the minimum wage. Laval maintains that

18 Opinion of AG Maduro delivered on 20 September 2005, Case C-53/04, Marroso & Sardino.
19 CJEC, Case C-341/05, Laval, pending case.
Sweden is not applying the rules adequately, and that there is therefore no obligation on Laval to pay the minimum wage laid down in the collective agreement negotiated with Byggnads, even if it is the trade union most representative of construction workers in Sweden. Laval calls into question the right in Swedish law of Byggnads and other trade unions to embark on union action in order to conclude a collective agreement in Sweden with a company which already has a collective agreement in another country, in this case Latvia. Laval cited the EC Treaty: Article 12 (prohibition on discrimination on grounds of nationality) and Article 49 (prohibition of restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended).

However, the most important aspect, which may have more serious repercussions, is the question as to whether the system operating in the Swedish labour market is compatible with the EC Treaty. During a recent visit to Sweden, on 5 October 2005, the Commissioner for the Internal Market, Charlie McCreevy, criticised Swedish collective agreements. He expressed the view that they are incompatible with the European Treaties, and that they represent a barrier to freedom of movement of workers within the internal market. He stated that he would refer the Vaxholm case and the question of Swedish collective agreements to the Court. When asked to expand upon his comments at the European Parliament on 25 October 2005, he altered his position slightly, and stressed that the Commission was not taking issue with collective agreements which were a matter for Member States, but that the Commission did have to ensure that the freedoms established under the Treaties were respected, and also to reconcile the internal market with the social models in place. He expressed the view that the debate should not focus on whether a social model is under threat, nor whether it should be replicated by others, but rather on the issue of what the internal market actually is, since maintaining barriers and holding back competition behind national frontiers is not an option (20).

References


treatment in employment and occupation, OJ L 303 of 2 December 2000, pp.0016-0022.


