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## Introduction

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## INTRODUCTION

THOMAS E. CARBONNEAU<sup>1</sup>

The *Denver Journal of International Law and Policy* does the legal community a great service by providing a report on the significant recent rulings of the European Court of Justice (ECJ). The dedication of the Journal's student staff to this undertaking is important not only to their individual legal education, but also to the general enterprise of transborder law-making and legality. Under the able leadership of Professor Ved Nanda, the University of Denver and the *Denver Journal of International Law and Policy* have made a significant contribution to the study of international law and the elaboration of a world law and legal process.

The reconciliation of national law with a transborder standard is at the heart of the European enterprise to create an integrated legal process. Such reconciliation is also necessary to establish a unified political community with common core values. The various cases that are analyzed in this issue address critical questions of law and policy, and demonstrate the court's progress in elaborating a communitarian practice in the various subject areas.

From the perspective of an academic observer of legal processes, the content of this issue affirms the notion that the European Union is the great contemporary repository of comparative law analysis and doctrine. In its decisional law, the ECJ has the delicate task of building a bridge between the European Community Treaty (EC Treaty), Community directives, and the substantive norms that reign in national legal systems. The final result cannot simply be an eclectic amalgam of rules, but rather, it must be a statement of organic principles that reflect an autonomous communitarian position acceptable to constituent members and to the unifying dictates of the EC Treaty. The work of the ECJ is difficult and important. It is also unique and essential to the development of global law and legal practice.

In the cases that are studied, the ECJ rendered preliminary rulings on previously unresolved issues of Community law. The ECJ has the power under Article 177 of the EC Treaty to issue preliminary rulings

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on questions of Community law presented to a national court.<sup>2</sup> The preliminary ruling has a binding effect on the national courts, which in turn implement the decision into their own decisional law. Ideally, this process provides for the uniform interpretation of Community law and is necessary for its uniform application. Questions regarding protection of television and radio broadcasters' rights, the free movement of persons between and among Member States, state monopolies of employment placement offices, gender-based discrimination in employment, and protection of the image of a luxury perfume for trademark purposes—have all been recently presented to the ECJ, and are analyzed in this issue.

### I. PROTECTING THE RIGHTS OF TELEVISION BROADCASTERS

On June 4, 1997, the ECJ decided a case concerning an English television broadcaster's right to broadcast in Belgium.<sup>3</sup> The decision affects broadcasters throughout the Community who are subject to the television and radio directive contained in the EC Treaty. VT4, a broadcasting company incorporated under the laws of England, transmitted programs via satellite from the United Kingdom to Belgium.<sup>4</sup> The Flemish Minister for Culture and Brussels Affairs refused cable access to VT4. Belgian national legislation provides that the Flemish Executive can only license one entity to broadcast to the Flemish community.<sup>5</sup> A license had already been issued to VTM, a Belgian company, resulting in a virtual monopoly in commercial television and radio advertising for VTM.<sup>6</sup>

The television directive in the EC Treaty provides that each Member State must ensure that all television broadcasts within its jurisdiction comply with the law applicable to broadcasts intended for the public of that Member State.<sup>7</sup> The ECJ addressed the question of which Member State had jurisdiction over VT4. The ECJ cited the well-established rule that a television broadcaster comes under the jurisdiction of the state in which it was established.<sup>8</sup> The ECJ noted that "establishment" had been consistently held to involve actual pursuit of an economic activity through a fixed establishment for an indefinite period. Therefore, when a broadcaster has an establishment in more than one Member State, the Member State with jurisdiction is the state where

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2. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 177, 298 U.N.T.S. 11.

3. Case C-56/96, VT4 Ltd. v. Vlaamse Gemeenschap, [1997-1998 Transfer Binder] CEC (CCH) 1,309 (1997).

4. *Id.* at 1,320.

5. *Id.* at 1,320-21.

6. *Id.* at 1,320.

7. *Id.* at 1,321.

8. *Id.* at 1,322.

the broadcaster has the center of its activities—in particular, the place where decisions concerning the program policy are made and where the final mixing and processing of the programs takes place. The national court can take other criteria into account: the head office of the broadcaster, the place where decisions concerning program schedules are made, the place where the programs are finally mixed and processed, and the place where a significant part of the workforce is employed.<sup>9</sup> If the issue remains unresolved after this analysis, the Member State where the television broadcaster began transmission activities in the technical sense has jurisdiction.<sup>10</sup>

## II. FREE MOVEMENT OF PERSONS BETWEEN AND AMONG MEMBER STATES

On May 29, 1997, the ECJ interpreted Article 164 of the EC Treaty and certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).<sup>11</sup> Freidrich Kremzow, an Austrian citizen, was found guilty of murder by an Austrian court. On appeal and in Kremzow's absence, the appeals court changed the sentence from placement in a psychiatric hospital to life imprisonment.<sup>12</sup> After the European Court of Human Rights concluded that the Austrian Appeals Court breached Article 6 of the Convention, Kremzow sought damages for the appellate court's actions.<sup>13</sup> The ECJ agreed that the fundamental right of freedom of the person was at issue in the case; however, it rejected Kremzow's argument that his incarceration infringed upon his freedom of movement.<sup>14</sup> The court stated that, while deprivation of liberty may impede a person from exercising his right to free movement, a purely hypothetical prospect of exercising that right does not establish sufficient connection with Community law to justify application of Community provisions.<sup>15</sup> The ECJ held that the national legislation in question did not fall within the scope of Community law; therefore, it could not give the interpretative guidance necessary to determine whether the national legislation conformed to fundamental community rights.<sup>16</sup>

The decision evidences the lack of effective Community law governing the protection of human rights. The ECJ gave great deference to the authority of national criminal laws, and refused to recognize the

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9. *Id.*

10. *Id.* at 1,322-23.

11. Case C-299/95 Kremzow v. Republik Osterreich, 3 C.M.L.R. 2637 (1997).

12. *Id.* at 2640.

13. *Id.* at 2640-41. Article 6 guarantees the right to a personal defense. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 221.

14. *Kremzow*, 3 C.M.L.R. at 2645.

15. *Id.*

16. *Id.* at 2646.

impediment upon the freedom of movement. Ultimately, the ECJ ignored the European Court of Human Rights' decision that Kremzow's human rights were violated. This decision severely limits the human rights protections available to wrongly convicted criminals in Member States.

### III. PUBLIC GRANT OF MONOPOLY FOR EMPLOYMENT PLACEMENT OFFICERS

On December 11, 1997, the ECJ issued an opinion concerning a decision by the *Tribunale Civile e Penale*, in which the Italian court refused to confirm the document establishing Job Center Co-Op ARL (Job Center).<sup>17</sup> Job Center is an employment placement center and, under Italian law, private placement centers are prohibited. The state and its entities have the exclusive legal right to engage in job placement activities.<sup>18</sup>

The ECJ considered whether public job placement offices were undertakings within the meaning of Articles 86 and 90 of the EC Treaty.<sup>19</sup> The ECJ concluded that they were, because providing employment is an economic activity that is subject to competition rules.<sup>20</sup> The market for supplying employee placement services is extensive and extremely diverse.<sup>21</sup> It covers all sectors of production and involves a wide range of jobs.<sup>22</sup> Limiting the exercise of these functions to public agencies, however, could make it impossible to respond to a significant portion of the market demand.<sup>23</sup> The ECJ found that, by establishing a state monopoly, the Member State creates a situation in which the provision of the service is limited—circumstances that are contrary to Article 86, if the state agency is manifestly unable to satisfy the market demand.<sup>24</sup> Accordingly, a Member State violates Article 90(1) when it creates a situation in which its agencies cannot avoid infringing upon Article 86 of the EC Treaty.<sup>25</sup>

### IV. DISCRIMINATION BASED ON SEXUAL ORIENTATION

On February 17, 1998, the ECJ ruled on a case concerning equal

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17. Case C-55/96, *Job Center Coop ARL*, 4 C.M.L.R. 708 (1998), CELEX LEXIS [1997], at \*1.

18. *Id.* at \*21.

19. *Id.* at \*22-23.

20. *Id.* at \*26.

21. *Id.* at \*25.

22. *Id.*

23. *Id.*

24. *Id.* at \*25-26.

25. *Id.* at \*26.

pay for men and women.<sup>26</sup> Lisa Grant signed an employment contract with SouthWest Trains, which contained a clause granting reduced rate travel concessions to the legal spouse and dependents of the employee. Privilege tickets were also granted to a common law spouse of the opposite sex, if a meaningful relationship existed for at least two years.<sup>27</sup> SWT refused to afford a travel concession to the same-sex partner of Grant, stating that travel concessions could only be granted to a partner of the opposite sex.<sup>28</sup>

The ECJ noted that it had already decided travel concessions were considered "pay."<sup>29</sup> Further, the ECJ stated that the refusal to grant travel concessions was not discriminatory because the conditions for granting them applied equally to male and female employees. Travel concessions would be refused to the male partner of a male employee and to a female partner of a female employee.<sup>30</sup> Community law, according to the ECJ, does not view stable same-sex relationships in the same light as those between persons of the same sex.<sup>31</sup> Joining the European Court of Human Rights, the ECJ noted that the prohibition against gender-based discrimination does not extend to matters of sexual orientation.<sup>32</sup> The ECJ held that a refusal by an employer to allow travel concessions to a person who is the same-sex partner of an employee, when such concessions are allowed to an employee's spouse or to a person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination under the EC Treaty.<sup>33</sup> The ECJ noted, however, that changing times might eventually dictate a different policy.<sup>34</sup>

#### V. PROTECTION OF TRADEMARKS BY THE OWNER OF THE TRADEMARK

On November 4, 1997, the ECJ issued a preliminary ruling concerning the Uniform Benelux Law on TradeMarks.<sup>35</sup> Christian Dior entered into distribution contracts with entities in various Member States to distribute its products.<sup>36</sup> Kruidvat, a Dutch importer of Dior, promoted Dior perfumes by using depictions of Dior bottles in leaflets. Dior brought an action against Kruidvat, alleging that Kruidvat violated the

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26. Case C-249/96, *Grant v. South-West Trains, Ltd.*, 1998 All E.R. (E.C.) 193.

27. *Id.* ¶ 5.

28. *Id.* ¶ 8.

29. *Id.* ¶ 14.

30. *Id.* ¶¶ 27-28.

31. *Id.* ¶ 35.

32. *Id.* ¶ 33.

33. *Id.* ¶ 50.

34. *Id.* ¶ 48.

35. Case 337/95 *Parfums Christian Dior SA & Parfums Christian Dior BV v. Evora BV*, 1997 ECJ CELEX LEXIS 4641.

36. *Id.* at 107.

Benelux trademark law by publishing the images in their leaflets.<sup>37</sup>

The general rule in Community law is that when the owner of the trademark places or consents to placing trademark goods on the market, the retailer is free to make use of the trademark to commercialize the goods.<sup>38</sup> Under Benelux law, the owner of a trademark can object to a retailer's advertising if the latter creates the impression that the retailer's business is identified with the product, thereby taking advantage of the reputation and goodwill associated with the trademark.<sup>39</sup> The ECJ held that the owner of a trademark or copyright may not object to a retailer's use of the trademark or copyright when the retailer is engaged in the business of selling goods that are similar to those of the trademark owner and the advertising techniques in question are common to the trade.<sup>40</sup> To successfully thwart the retailer's conduct in these circumstances, the trademark owner must establish that the use of the goods for that purpose seriously damages their reputation.<sup>41</sup>

As to trademarks for prestigious luxury perfumes, the ECJ recognized that the trademarks might symbolize and stand as a guarantee of the consumer expectations associated to the goods.<sup>42</sup> Retail advertising that detracts from these expectations can damage the trademark.<sup>43</sup> Accordingly, a trademark owner can prevent such advertising if s/he can establish a risk of significant damage to the trademark interest. The ECJ listed several factors that national courts should assess in evaluating whether a risk of significant damage has been shown; all indicated that establishing the existence of such a risk is a difficult and burdensome process.<sup>44</sup> The ECJ shifted the burden to trademark owners because, as a general rule, they should not be able to object to respectable advertising by respectable retailers even when some damage is done to the image associated with the trademark.

#### CONCLUSION

National courts continue to seek clarification on Community law from the ECJ. These requests mandate that the ECJ balance Community laws with Member States' regulatory rights in the affected areas. This is a delicate task of comparative law and comparative politics. It sometimes requires the ECJ to sidestep some critical issues (at least partially). As national decisional law develops more radical conflicts

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37. *Id.*

38. *Id.* at 112.

39. *Id.* at 95.

40. *Id.* at 92.

41. *Id.*

42. *Id.* at 103.

43. *Id.*

44. *Id.*

with Community law, the ECJ, however, will be forced to take a more direct stand on sensitive questions—for the sake of providing the EU with the necessary substantive uniformity. At this juncture, the full implications of transborder and globalized law for national sovereignty and law will be realized.



