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&  
Associates

*Attorneys at law*

## Pappas&Associates – Newsletter April (1) 2007 European Law & Policy

### EU'S 50<sup>TH</sup> BIRTHDAY!

#### EU27 LEADERS SIGN THE BERLIN DECLARATION

"The union is turning shared ideals into reality for its citizens", states the Berlin Declaration which was signed on 25<sup>th</sup> March by European heads of state who met in Berlin for an official ceremony celebrating the 50th anniversary of the Treaty of Rome. The Berlin Declaration paints a vision for the EU, re-asserts shared values, such as respect for the individual, solidarity and equal opportunities, and sets out ambitions for the future. The role of the common market and that of the Euro were also recognised as allowing the EU to build economic relations and ensuring that it remains competitive in an increasingly globalised world. Additionally, the Declaration underlines the European model's ability to unite economic success and social responsibility. Moreover, Commission president Barroso paid tribute to what the EU has achieved in the last fifty years: "Peace, liberty and prosperity beyond the dreams of even the most optimistic founding father of Europe." However, German chancellor Merkel stressed that there is still a lot to be done by using the phrase "to stand still is to fall back". Likewise, the Declaration remains wary on the issue of a European Constitution; it simply mentions that "we are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009". Simultaneously, two hundred young people gathered in Rome to discuss the future of the EU at a pioneering youth summit, thereby demonstrating the growing importance given to the participation of young people in the debate over the EU. Finally, celebrations will continue throughout this year such as music, film, sport and theatre performances held 'across Europe and beyond' to rejoice European ideals.



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### **COMPETITION**

- **Greece fails to adopt new framework for broadcasting services**

Greece is risking bearing an important fine for failing to comply with the European Court of Justice's ruling dated 14 April 2005. The decision ascertains that Greece still has not adequately implemented the Electronic Communications Directive 2002/77/EC of 16 September 2002. Therefore, the third step of the EC Treaty infringement procedure has been triggered, i.e. referral to Court under Article 228 EC Treaty.

The Electronic Communication Directive aims to guarantee competitive market conditions across the EU. Member States were required to communicate to the Commission by 24th July 2003 the national measures taken to comply with it, including those related to broadcasting transmission services. However, the new Greek Electronic Communications Law notified to the Commission on 14 February 2006 explicitly excluded broadcasting transmission services, thereby infringing the Directive.

Competition Commissioner, Ms. Neelie Kroes, summons upon the Greek consumers' right to benefit from the digital economy. Therefore, open and non-discriminatory access for broadcasters to these services is essential for the development and consolidation of this new market, she quotes. Until then she believes that "companies will not invest in Greece, in particular in digital broadcasting".



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- **Spain before ECJ for conditions imposed on E.ON's bid for Endesa**

The Commission has decided to refer Spain to the European Court of Justice for failing to lift illegal conditions imposed on E.ON's bid for Endesa in breach of Article 21 of the EU Merger Regulation (See Pappas & Associates Newsletter 1 Feb 07 article "*Infringement procedure launched against Spain for failing to lift unlawful conditions imposed on E.ON's bid for Endesa*").

The Spanish authorities considered a Ministerial decision was sufficient. This decision modified the Spanish regulators' decision inasmuch as it withdrew, replaced or reduced the duration or the scope of some conditions and clarified the requirements of other conditions for E.ON's acquisition of control over Endesa.

Yet, the Commission found the new conditions, once again to be incompatible with Article 21 of the Merger Regulation and declared them illegal by two decisions with immediate and binding effect. Having failed to adequately respond to the second stage requirements of the infringement proceedings launched by the Commission under Article 226 EC Treaty (See Pappas & Associates Newsletter 1 Mar 07 article "*Infringement proceedings against Spain for failing to lift unlawful conditions on E.On's bid for Endesa*"), Spain must now face the verdict of the European Court of Justice.



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- **E.ON has withdrawn its bid for Endesa**

The German energy company, E.ON has withdrawn its 42.3 billion euro offer for Spanish power company Endesa. E.ON believed that its takeover bid, which was opposed by the Spanish government from the outset, would not be successful.

Indeed, the battle for the control of Endesa, which has been going on for almost a year, has brought about criticism against the Spanish government which is suspected of 'trying to keep Spain's largest power company out of foreign hands'. In fact, the European Commission decided to take legal action against Spain for interfering in E.ON's bid and imposing conditions in violation of EU Competition rules (cf. the article above).

Finally, the German firm withdrew its offer in the light of an agreement by rival firms, namely Italian energy company Enel and Spanish construction company Acciona. The latter two companies are already Endesa's biggest shareholders since they jointly own 46% of the company. The offer they recently made was of 43.4 billion euro, i.e. slightly more interesting than E.ON's. The aim of the agreement is to split up Endesa's assets and to end the currently uncertain situation. The agreement reached means the door is now open for Enel and Acciona.



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### ENVIRONMENT

- [The Commission warns Member States about water pollution](#)

On 22<sup>nd</sup> March 2007, World Water Day, a series of reports were published which revealed that Directives on nitrate pollution from agriculture and urban waste water have not been properly implemented. This reduces the quality of European rivers and groundwater. For example, the Commission has asked the European Court of Justice to charge France more than 28 million euro plus a daily fine of 117,882 euro for continued pollution of drinking water by nitrates in Brittany. France is accused of ignoring a 2001 court ruling that it was in breach of the Drinking Water Directive. In light of the critical character of the situation, the Commission is organising a conference to discuss the progress made by member states in implementing the EU legislation on clean water.

Even though member states have come a long way since the first water directives were introduced, thirty years ago, more needs to be done in order to reach “good quality” waters in all EU member states by 2015 as laid down in the Water Framework Directive. Among other deficiencies, national laws have been criticised for their ‘poor quality’ in 19 member states, the data submitted as ‘inconsistent’ and pricing policies as not reflecting the true costs of water usage by agriculture and industry. Moreover, the Nitrates Directive’s implementation is incomplete in a number of member states. Many monitored sites show concentrations above the 50mg per liter threshold according to the Commission progress report.



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Additionally, a limited number of treatment plants in the EU meet the standards laid down in the 2000 Urban Waste Water Treatment Directive. As such, waste water discharges and nitrates pollution from agricultural origin represent "one of the key challenges for water protection across Europe". According to Stavros Dimas, the Environment Commissioner, "Water is fast becoming a scarce resource. We must make sure that all users use water as efficiently as possible." As such, the Commission plans to issue a Communication on water scarcity and drought by this summer and to launch a public consultation on climate change by the end of this year.

- Council and Parliament agree on LIFE+ and environmental funding

A compromise has been reached between the Council and the Parliament over the funding of LIFE+ environmental programmes. This brings the total of the Financial Instrument for the Environment up to approximately 2 million euro for the 2007–2013 period. LIFE+, which was set up in 1992, co-finances environmental initiatives in the EU and in some candidate, accession and neighbouring countries.

MEPs have ceded 78% of the budget to the responsibility of member states and the Commission will retain centralised control of the programme with proposed projects being subject to its final approval. LIFE+ will draw together a number of funding arrangements, such as the former LIFE+ programme Forest Focus, the programme for sustainable urban development and the support programme for NGOs.



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Additionally, 50% of the budget will be reserved for the “nature and biodiversity” part of the programme. According to Sacha Cleminson, an advocacy officer with NGO Birdlife, “these EU-funded projects will help keep birds such as Spanish Imperial eagles soaring over our countryside, enriching our lives. But [the projects] can also do more, by allowing natural systems to help safeguard and purify our drinking water and to keep us healthy by tempting us out to walk in an enriched countryside.”

### **EUROPEAN CIVIL SERVICE – STAFF REGULATIONS**

- [New jurisprudence regarding termination of temporary agent's employment contracts of indefinite duration](#)

In the *Landgren* decision (Case F-1/05, *Landgren v European Training Foundation*), dated 26 October 2006, the European Civil Service Tribunal delivered a judgment which reversed previous jurisprudence in the field of temporary agents' contracts of unlimited duration. For the first time, it was held that the indefinite contracts constitute the general form of relations between the community institutions and their agents; hence, the competent authority concerned was obliged to motivate its decision to unilaterally dismiss a temporary agent employed under a contract of employment of indefinite duration. In the case at hand, the temporary agent worked for a Community agency: the European Training Foundation.





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This decision not only helped clarify the legal regime of termination of indefinite contracts of employment, but also went further into the reasoning of the long standing case law in the field (Case T-51/91, *Hoyer v Commission*, 17 March 1994, 27, Rec. p. II-341; Case T-52/91, *Smets v Commission*, 17 March 1994, 24, Rec. p. II-353). Therefore, it raised the level of legal certainty in the EU civil service.

Indeed, according to previous EU jurisprudence, putting an end to a contract of indefinite duration derived from the competent authority's freedom of appreciation, so long as it respected the contractual notice period. Moreover, contrarily to civil servants, the employment stability of which is guaranteed by their status, temporary agents were subject to a specific regime on the basis of their contract of employment.

The *Landgren* judgment marked a shift in the case law: The Tribunal based its judgment on the fundamental EU principle of stating the reasons, as well as on the international standards and the evolution of law with respect to the protection of employees against dismissal. In this regard it referred to the CJEC case law (C-212/04, *Adeneler e.a.*, 04.07.2006) that the stability of employment constitutes a major element of the protection of employees, to article 30 of the Charter of Fundamental Rights of the European Union, which protects employees against all unjustified dismissal and to article 4 of the Convention n° 158 ILO. In this context, it is worth mentioning that, as of March 1<sup>st</sup>, the European Union Agency for Fundamental Rights (FRA) became operational. It is based in Vienna and is being built on the European Monitoring Centre on Racism and Xenophobia (EUMC).





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### **INFORMATION & COMMUNICATION TECHNOLOGIES**

- **The ‘watering down’ of the EU Roaming Regulation**

The European members of Parliament recently watered down the EU Roaming Tariffs Regulation. The Internal Market Committee adopted an amendment allowing mobile operators to uphold current higher prices for all present contracts except if consumers specifically claim that they want to be part of the price-cap scheme.

Additionally, MEPs adopted an amendment which introduces a ‘sunset clause’, a provision of a law which causes the law to in effect repeal itself automatically and is especially used when debating controversial proposals, after which the regulation will stop being effective.

Information Society Commissioner, Vivian Reding, finds it “regrettable that only new customers would profit from cheaper roaming tariffs”. She warns against the fact that operators may unfairly take advantage of unprotected consumers and points out the negative effects this may have on the European taxpayer. The consumers’ passivity and the costs of informing the subscribers of the opt-in possibility might hamper the advantages. Many hope that when the Parliament votes in plenary session in May, MEPs will favour the protection of mobile-phone customers over the proposed ‘opt-out clause’.



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The Economic and Monetary Committee, the Internal Market and Consumer Protection Committee, the Culture and Education Committee and the Industry, Research and Energy Committee will vote next upon the draft Regulation before the plenary. The report will finally be dealt with and probably adopted at the Telecom Council on 7 June 2007, so that the Regulation enters into force before the summer holidays' travel season.

### INTELLECTUAL PROPERTY

- Adidas versus H&M – three stripes versus two

The Dutch Supreme court has asked the European Court of Justice for a preliminary ruling (Case C-102/07) on the scope of protection that the Adidas 3-stripe pattern should enjoy. The case was brought against traders that insist on using 2 stripes supposedly for decorative purposes.

This question is central in the interesting case of *Adidas Benelux BV v Marca Mode, C&A Nederland, H&M Hennes & Mauritz Netherlands BV and Vendex KBB Nederland BV* and consists in the following: Should the use of a trade mark, formed by a sign which does not in itself have any distinctive character but has become a trade mark through the process of becoming customary and has been registered, limit the use of a similar sign by other traders? Additionally, does it make any difference whether the sign is seen by the relevant public as being used to distinguish goods or simply to decorate them?



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The response of the Court should pick up on the following points. If a sign, however indistinctive it is when it is launched, has become truly distinctive for particular goods or services, there is a general interest in guaranteeing that it is *not* used by others if this would confuse consumers. However, if consumers view use of the sign in question by third parties as a simple ‘embellishment’ and not as a trade mark, the trade mark owner should not be allowed to contest its use.

- **Commission’s proposals for a future European patent system**

In a recent Communication, the Commission proposed to base the EU’s future patent system around an “integrated EU-wide jurisdictional system for patents”. The latter would contain elements from the European Patent Litigation Agreement, aimed at reducing litigation costs, and of specific Community jurisdiction for patent litigation based on the EC Treaty. The Commission’s new approach plans to speed up the work in the Council on the Community patent and jurisdictional arrangements. This move derives partly from the comments of the stakeholder consultation held in spring 2006.

Notwithstanding extensive support for the idea, MEPs and members states have not managed to reach agreement mainly on what language the patent should be written in. At the moment, translation and dispute settlement costs in 27 different national legal systems make patenting in Europe far more expensive than in the US or Japan, thereby slowing down innovation. This especially affects small and medium-sized enterprises.



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The unified and specialised patent judiciary encouraged by the Commission would set up a number of tribunals to handle patent disputes across the EU. Their role would include infringement related claims. Appeals would be heard by a single court, the European Court of First Instance for example. And the final judgment on patent jurisdiction would be provided by the European Court of Justice. The Commission does not intend to create an over-centralised EU jurisdiction for patents.

A separate Communication on intellectual property rights is planned for 2008 to complement the Patent Communication and address the remaining non-legislative and horizontal issues in all fields of intellectual property.

### **TRADE & INDUSTRY**

- **The EU questions India's alcohol taxation regime before the WTO**

After months of failed negotiations and as a result of a Commission investigation, the EU asked the World Trade Organisation to set up a dispute-settlement panel on 26 March 2007 to consider whether the high duties India imposes on imports of wine and spirits are lawful.

According to the EU producers, these levies, which are over and above ordinary customs tariffs, negatively affect Europe's wine and Scotch-whisky trade and violate WTO obligations. The issue will be difficult to resolve as duties on alcohol are the responsibility of Indian state-level governments. Nevertheless, an amicable solution is still possible.



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Yet, “the ball is now on India’s courts” said EU Trade Commission Peter Mandelson. The referral to the WTO forms part of a new trade strategy for the EU which consists in adopting a tougher approach to trade issues in order to open up new markets for European businesses. And whilst non-EU wines are more and more present in European households, the EU is trying to revive the sector by accessing the huge business opportunities which the Indian rapidly expanding alcohol market represents.

### **SPORTS**

#### ○ [Adoption of Belet Report on professional football in Europe](#)

Recently, football featured on the plenary agenda of the European Parliament in Brussels. The Parliament discussed and adopted with wide majority Ivo Belet's (Belgian, EPP-ED) report about the future of professional football in Europe. Mr. Belet's report has a broad foundation, since three different Parliamentary Committees, besides the Committee on Culture and Education, were involved. It pays attention to the specific position of professional football today, which is a business as well as a social phenomenon.

One of the main issues of the report concerns television rights. It is argued that some solidarity should be shown towards smaller clubs which lack negotiating power. Joint selling of media rights is, therefore, considered as fundamental to protect the financial solidarity model of European football.



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After taking three important decisions on media rights, the European Commission is asked to evaluate their impact and effectiveness and investigate how this model can be adopted across Europe on the basis of the evaluation of the media rights decisions (impact and effectiveness). A doubt was expressed as to whether the current distribution of television rights in the UEFA Champions League favours all countries or only large ones and should therefore be reviewed.

Other major topics dealt with by the report include the need to invest in young talents. Also, by considering the voice of clubs' supporters, a close link to community can be established. Last but not least, unambiguous EU-wide criteria and strict rules should be set when it comes to professional players' agents, as the Stevens report (issued in the U.K.) points out.

The Parliamentary report is not a binding legal text, since its text merely contains recommendations. Yet, it is an instrument which will influence the developments of European professional sport (football), just like the scheduled EU White Paper on Sport which is expected to be published in July 2007.