Pappas & Associates — Attorneys at law

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COMPETITION

- **Commission to scrutinise Northern Rock restructuring aid**

On March 17th, the UK authorities notified to the Commission the measures adopted to support the restructuring of the mortgage bank Northern Rock. Following this notification, the Commission opened an in-depth investigation on the basis of the EC Treaty's rules on state aid.

On December 5th 2007, the Commission approved preliminary rescue aid provisions adopted by the UK authorities on September 17th and October 9th, which were compatible with the Community Guidelines on state aid for rescuing and restructuring firms in difficulty. Now, the Commission is going to examine the legality of the restructuring plan communicated by the UK government. In order for these measures to comply with the Guidelines on rescue and restructuring aid, it must be shown that: (i) long-term viability of the bank can be restored without further state support; (ii) the aid only amounts to the minimum necessary to enable the restructuring; (iii) there will be no undue distortions of competition.

Reducing Northern Rock's lending operations and the size of its balance sheet are in the heart of the suggested measures. The bank would need to come up with additional funding since the government support (i.e. guarantees on some funding operations)

would gradually phase out. The Commission asked the UK authorities for more details of the conceived long-term rescue plan but other interested parties are equally invited to provide for comments.

- **White Paper on claims for damages in competition infringement cases**

On April 3rd, the European Commission published a White Paper on compensation of victims of antitrust violations. Up to now, no such legal instrument exists -as a result, businesses and consumers suffering from anti-competitive practices are often deprived of any compensation claim due to legal and procedural obstacles.

Current EU law actually implies legal redress to victims of antitrust violations, such as abuses of dominant market positions and price-fixing. Still, in practice, victims of these violations are only rarely compensated for their undergone damages. Indeed, while EU and national antitrust regulators can fine a company, they do not directly compensate the consumers who have been affected by such illegal behaviour.

The Commission's proposal suggests that small firms and individual consumers may introduce collective appeals by grouping together their demands of compensations. The system proposed would see victims bring a final infringement decision of a national competition authority to court within two years. To avoid the potential excesses of an US-style class action, such collective redress is not to be filed by individual firms but only through representatives, such as a recognised consumers' organisations.

According to the Commission's plans, national courts will gain more power to force defendants to disclose evidence. When a decision on compensation is made, a single payment will be made. Therefore, incurred damages including interest will be covered, but not any punitive sum exceeding actual losses. A public consultation on the White Paper will be open until July 15th. Afterwards, the Commission will propose specific measures.

- **CFI upholds Deutsche Telekom margin squeeze decision**

The Court of First Instance upheld, on April 10th, entirely the Commission's decision imposing a fine of 12.6 millions euros upon the Deutsche Telekom AG. The German incumbent was found to have abused its dominant position for more than five years by

charging alternate operators exorbitant prices for the access to its fixed telecommunications network.

The case involved the physical circuit between the customer's and the telecommunications operator's premises, the so-called "local loop". These networks - only one in each country - have been built over centuries and it is acknowledged that it would be economically deficient to try and replicate them. This is the reason why fair access to this essential facility must be ensured for newcomers in the telecommunication markets. Indeed, the Deutsche Telekom provided new entrants access to its local loop and charged them a fee which did not exceed the price ceiling imposed at the time by the German Regulatory Authority. However, it still changed them higher fees for local loop access than what its end users had to pay for broadband or narrowband access.

Moreover, the Court agreed with the Commission that the fact that there was not great difference between the Deutsche Telekom's prices for wholesale access and (a weighted average of) its retail prices for access services proved its abusive pricing policy (the so-called "margin squeeze"). There was no need for the Commission to show that the retail prices were predatory and abusive per se. The Court furthermore also pointed out that there was no fixed network alternative infrastructure in Germany. As a result, the newcomers' costs raised and none of them was able to reach significant market

share and therefore effectively compete with the Deutsche Telekom.

INFORMATION & COMMUNICATION TECHNOLOGIES

- **Digital dividend among economic principles and policy objectives**

In a Parliament hearing on March 27th, MEPs discussed the television's public mission in view of the re-allocation of radio frequencies which will made available thanks to the changeover from analogue to digital TV.

On November 13th last year, the European Commission presented its proposal for a renewed use of the radio spectrum. The digital switchover will free up an unprecedented amount of spectrum in Europe (known as: "digital dividend"). Therefore, new uses, such as high-speed internet access for all, new mobile multimedia services, and high definition TV, will be facilitated (cf. *Pappas&Associates* Newsletter, November 2007, "The framework of e-communications reform: A concise analysis", p.3).

The Commission's proposal adopts a common European approach based on economic grounds, albeit at the same time underlining

the importance of reserving frequencies to pan-European services. Even though many MEPs welcome the spectrum reform, the allocation of the released frequencies according to economic principles is still heavily debatable. The latter guarantee a more efficient use, but on the other hand other voices suggest that this or public policy objectives should be taken into account instead. The Parliament's rapporteur on the reform, Italian MEP Patrizia Toia, said: "The bottom line is that at the moment we must work for a reform that favours all the economic sectors, both broadcasting and telecoms, while also bearing in mind that public services have to be protected".

In any event, there is strong support for a harmonised European approach notwithstanding national borders and the allocation of frequencies to pan-European services. In June, the Commission's proposals will be discussed at the Council and in July, the Parliament will vote upon the Toia report.

- **Art. 29 Working Party on search engines' data retention policy**

On April 4th, the Art. 29 Working Party, the European Commission's advisory body on data protection, published its opinion on data protection issues related to search engines. Therein it highlighted the need to strike a balance between the open nature of the internet and the protection of the personal data of internet users.

Search engine providers control user data (such as the IP addresses they collect from users and their individual search history) – thus falling under article 4 of the Data Protection Directive – and provide of content data (such as the data in the index). In the latter case, they are only liable for 'cache' and value added operations on personal data, i.e. if profiles of natural persons are created.

As to the territorial scope of the Directive, its provisions may also apply to search engine providers without an establishment on Community territory, if they make use of equipment situated on the territory of a Member State for purposes of processing personal data. One of the Working Party's suggestions is for webpage editors to develop measures to automatically inform search engines of any request they receive to delete personal data. Search engines may only retain the amount of personal data necessary and relevant for legitimate purposes and must delete or anonymise (in an irreversible and efficient way) personal data once they are no longer necessary for the purpose for which they were collected. As far as the periods of data retention, the Working Party did not see a basis for a retention period beyond 6 months. Anyhow, the information about the data retention period should be easily accessible from the search engine's homepage.

The lifetime of 'cookies' – both web and flash – used should be no longer than what is demonstrably necessary for the claimed

purpose. Also, the possibility and relevant information on how to access, edit and delete this information must be given. Also, sufficient information must be given about the data collected, stored or transmitted, as well as the data collection purpose. Each user's consent is also needed in order to retain the individual search history. Also, data originating from different services belonging to the search engine provider may only be cross-correlated if the user has given his/her explicit consent for that specific use.

Moreover, on April 17th, the European Commission's Eurobarometer poll on data protection showed that 82% of European internet users do not trust their personal data being managed over the web. And although more and more citizens know and use privacy-enhancing technologies (PETs), such as encryption tools and cookie-cutters, many EU citizens (e.g. more than two thirds of internet users in Ireland or France) say they have never heard of such technologies. "It is our intention to fully analyse and understand the feedback we have been given by Europe's citizens in this survey and we will ensure these comments inform the work we are doing in this area this year," Jacques Barrot, Commission Vice-President, said on the subject.

The debate on this issue acuminated the past few months on the occasion of the Commission's merger investigation of

DoubleClick's acquisition by Google (cf. *Pappas&Associates* Newsletter, January 2008, "Google/DoubleClick merger raises concerns", p.2). It remains to be seen what the practical impact will be on this and other mergers in the field as it is expected that the Member States follow up this development and the Commission develops legislation along the lines of the recommendations.

- **EDPS seeks to further improve the e-Privacy Directive**

On April 14th, the European Data Protection Supervisor (EDPS) adopted an opinion on the amended proposal of the Directive on Privacy and electronic communications (so-called "e-Privacy Directive").

Even though the Supervisor welcomed the proposal on principle, he also suggested that the proposed changes may not be going far enough to adequately protect personal data and privacy. "I welcome the approach followed by the proposal which is in line with views expressed in previous opinions. However, the proposed amendments to the Directive are not as ambitious as they should be. In dealing with new issues, such as the setting up of a mandatory security breach notification system, the proposal remains too restrictive in its scope", Peter Hustinx said.

Regarding the security breach notification mechanism, which is foreseen as a mandatory instrument, it is underscored that the obligation to notify any breach of security should not only apply to providers of public electronic communication services in public networks but also to other actors. Among the latter should be providers of information society services which process sensitive personal data (e.g. online banks and insurers, on-line providers on health services etc.).

Since semi-public and private networks are becoming more and more important in every day life, it would be useful for such services to be subject to the same set of rules which are applicable to public electronic communication services. The current scope of application of the directive should thus moreover include providers of electronic communication services also in mixed (private/public) and private networks.

Another measure foresees that legal persons, such as consumer associations and Internet service providers, are enabled to take legal action against spammers. The Data Protection Supervisor suggests this provision should be extended so as to cover all infringements of the ePrivacy Directive. It is now up to the EU institutions taking part in the legislation process to consider the comments and recommendations set out in this opinion by modifying the proposal.

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INTELLECTUAL PROPERTY

- **European Parliament rejects Internet Service Providers obligation to cut off file-sharers**

Earlier this month, the European MEPs voted against the plan for ISPs to automatically disconnect suspected illicit file-sharers and forbid them from accessing the net if music companies repeatedly accuse them of downloading infringing content. This vote comes after a French bill, which passed last November, approved such an obligation and the British government is still considering to follow this policy line. However, the European Court of Justice rejected the idea of a similar obligation – i.e. to reveal identities of illegal file-sharers – for ISPs, at least at EU level (cf. *Pappas&Associates* Newsletter, February 2008, "Court of Justice says no to personal data disclosure in copyright cases", p. 13).

On April 10th, the majority of MEPs backed, in a narrow vote, the European Parliament resolution on cultural industries in Europe. The amended report by French MEP Guy Bono abandons the idea of cutting off persistent web pirates. The amendment calls on the Commission and the Member States to recognise that the Internet

is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society.

This is the reason why the Commission and the Member States have to avoid adopting measures which might conflict with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access. "[Such a measure] goes against people's freedoms and human rights: to cut internet access for those who illegally download material we would need to access their computers and to filter their data, which is an attack on privacy", Bono said to justify his stance. The International Federation of the Phonographic Industry (IFPI), which represents Europe's music industry, strongly opposed the amendment, which it found was "badly drafted" and contradicted the rest of the report.

The Rapporteur went on to add: "Illegal downloading is done by only 13% of population – it is not as catastrophic as they say. The CD/DVD industry is in crisis, there's no doubt about it, and downloading contributes to it. However, it is not the only cause. Criminalising internet users won't solve the industry crisis". The report suggests other measures can help tackle the problem, such as IPR awareness-raising campaigns, programs supporting the disc industry and decreased VAT rates for cultural products. It must be

noted that, from a legal point of view, the report has no binding effect and leaves national governments free to implement their own anti-piracy plans.

CHEMICALS

- **Pre-registration of chemicals strongly advisable**

On April 14th, the European Commission and the European Chemicals Authority (ECHA) organised a workshop to raise awareness on the importance of pre-registration of chemicals. The industry was urged to pre-register their chemicals before the new restrictive legislation REACH (Registration, Evaluation, Authorisation and restriction of Chemicals) becomes operative on June 1st.

All chemicals will have to be pre-registered to ensure these may continue to circulate in the Common market without problems as of 2009. The obligation affects all EU-based companies that manufacture in, or import chemical substances into the EU if the quantities of the substance are at least one tonne per year. The main objective of pre-registration is to share data and information regarding the health and environmental properties and risks of chemicals, which demonstrate that it can be used safely. It will also result in registration related cost savings.

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"REACH will make an invaluable contribution to safe management of chemicals in the EU. We will soon enter the crucial stage of pre-registration, and we strongly encourage every manufacturer and importer of chemicals, to pre-register as soon as possible. To be safe, please do not miss the deadline of 1 December 2008" Günter Verheugen and Stravros Dimas, Commissioners responsible for Enterprise and for the Environment, said in a common statement.

Companies which pre-register their products will be granted until 2010, 2013 or 2018 (depending on the case) to submit their complete registration dossiers. Companies which do not pre-register a chemical will be forbidden from manufacturing or importing it after 1 December 2008 until they made a full registration with ECHA. A pre-registration can only be carried out electronically via the REACH-IT portal on the multilingual ECHA website, where more guidance and tools, such as the REACH-IT pre-registration module, can be found.

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PUBLIC AFFAIRS

- Parliament proposes joint obligatory lobbyists' register

On April 1st, a report approved by the parliament's Constitutional Affairs Committee aiming at making it obligatory for all lobbyists to be listed in a joint register covering the European Parliament, the European Commission and the Council. This is the next step of the European Transparency Initiative which was launched last year (cf. *Pappas&Associates* Newsletter, October 2007, "The European Transparency Initiative", p.12). Jose Lalloum, the chairperson of the European Public Affairs Consultancies Association (EPACA), the trade association representing commercial lobbyists, said that a 'one-stop shop', is a step in the right direction.

In February 2008, the Rapporteur on the Transparency Initiative, Finnish MEP Alexander Stubb proposed, in a report on the subject, that lobbyists are defined in a broad sense, including all interest group representatives seeking to influence legislation (cf. *Pappas&Associates* Newsletter, February 2008, "Controversy over transparency initiative", p.21). The amended suggestions include a "full financial disclosure" of public affairs consultancies as well as law firms which would cover their turnover, lobbying-related expenditures and, in the case of NGOs and think-tanks (previously excluded by the report), their budget and sources of funding. Still,

the exact depth of the register's financial disclosure and whether this should include names and precise spending figures for individual lobbyists remains controversial.

"By recognising these are key lobbying channels in Brussels, MEPs have closed an important loophole in the proposal," said Green MEP Claude Turmes. Yet, these oral amendments tabled by Green MEPs are far-reaching so as to require lawyers to be included in the register not only when their purpose is to influence policy, but also when they give legal advice, which, according to their arguments, might still be a form of lobbying activity. Thereby the special nature of lawyers' profession (oath and public function status recognised in several EU countries) is overseen.

At the same time, the European Commission is not ready to wait for the lengthy Transparency Initiative efforts to come to fruition and plans to introduce a less controversial, 'lighter' voluntary register and a code of conduct for lobbyists in the coming few months. The Parliament's plenary will be voting on the Stubb report in May.

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SPORTS

- **Parliament's report on future sport policy**

On April 1st, the Parliament's Committee on Culture and Sport voted overwhelmingly in favour of the presented report on the Commission's White Paper on Sport. The Rapporteur, MEP Manolis Mavromatis, commented: "I am very happy that the Committee has adopted my report on the White Paper, which already gives basic guidelines for this policy, by underlining the need for continuing financing for professional and amateur sports, the recognition of collective selling of media rights and of course a more efficient fight against doping". The inclusion of sport in the Lisbon Treaty is "a very big step towards a European policy in the field of sport", the Greek MEP said.

On the doping issue, the report suggests professional clubs and sports organisations should adopt a strategy to combat doping and the Commission should consider treating trade in illicit doping substances in the same way as trade in illicit drugs. While lottery profits may be used to achieve public interest goals, national governments and the EU should not allow a possible deregulation of gambling markets to improperly influence sporting activities, the MEPs emphasised. On the issue of media rights, their collective selling and the equitable redistribution of the income between the

clubs within and between the leagues and between professional and amateur sport were favoured.

Furthermore, the report calls for clear guidelines to clarify how EU rules on competition and internal market should apply to sport. This way the role of sport in Europe will be given a "strategic orientation", the Committee suggested. Also, a special provision in the budget 2009 should be dedicated to preparatory actions in this field, since the (hopefully ratified by then) Lisbon Treaty foresees incentive measures in the area of sport.

The MEPs made the point that the best way to achieve the desired results by keeping intervention to a minimum would be by means of industry self-regulation which would not contradict EU law. The European Parliament will vote on the report at its plenary session on May 7th.

- **FIFA is pushing for foreign players caps**

The federation of international football associations (FIFA) wants to put the issue of quotas on foreign players in football clubs back into the negotiations' table. After the Bosman ruling back in 1995, there are practically unlimited foreign players since all players with EU nationality are allowed to participate without restrictions in the EU club of their choice (due to the free movement of workers).

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According to news agencies, the FIFA now seeks to restrain the number of non-national players on the pitch to no more than five at any time. Sepp Blatter, the association's president, would like to see a "gentleman's agreement" materialise. This would involve the national associations and representatives of European football clubs and could be discussed at the top annual congress of the federation in Sydney in May. For such a proposal to go through, 75% votes in favour are needed in the congress where each of the 208 national associations are voting.

However, such an agreement would challenge the settled case-law, since EU legislation does not allow any discrimination on workers based on their nationality. Therefore, UEFA, the European branch of the football organisation, and the European Commission, oppose these plans. UEFA is suggesting applying quotas on locally trained players at clubs but discriminating on the grounds of their nationality. The counterargument, put forward by Blatter, is that the clubs would still be able to exploit young foreign players despite this measure.