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COMPETITION

○ **EU grants Northern Rock rescue aid**

Thousands of UK citizens panicked recently when they found out the financial difficulties faced by ‘Northern Rock’, the UK’s 5th largest mortgage bank with a balance-sheet total of £101 billion (€150 billion). The bank was unable to meet its funding needs and requested the support of the Bank of England for emergency liquidity assistance pending a longer term solution. Thereupon, the UK government addressed the European Commission and asked it to grant a rescue aid as a first step to save the company.

On December 5th, the Commission approved the rescue aid. This short-term aid contained two parts: First, the Bank of England provided for an ‘emergency liquidity assistance’ which did not constitute state aid since it was secured by sufficient collateral and was interest-bearing. Second, the Treasury additionally helped the bank by offering guarantee on deposits and further liquidity. The latter aid measures are compatible with EC guidelines on rescue state aid if they are granted in the form of loans typically for a period no more than six months.

Moreover, the UK authorities committed to delivering a long-term rescue plan for Northern Rock. Future restructuring measures will





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be screened against the criteria of restructuring aids and will be assessed on their own merits.

o Flat glass producers price fixing cartel unveiled

Four major flat glass producers were fined 486,9 million euros after they were found coordinating price increases and other commercial conditions for deliveries of their products. Asahi, Guardian, Pilkington and Saint-Gobain are the main producers of flat glass (used for windows, glass doors and mirrors) in the EEA, with a combined market share of at least 80%.

The cartel agreement was about flat glass for use in the construction sector, mainly processors, which transform this glass into finished products, such as double-glazing windows and fire-resistant glass and mirrors. After receiving information from National Competition authorities of several Member States, the Commission began an investigation thereto on its own initiative. It carried out surprise inspections in the premises of several flat glass producers.

Thereupon, one of the competitors agreed to co-operate with the Commission and provide relevant information in line with the 2002 Leniency Notice. The companies were found to increase prices





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repeatedly, fix minimum prices, engage in other commercial practices to this purpose as well as monitor the implementation of the agreed pricing strategy.

The fine was calculated according to the new 2006 Commission Guidelines, which focus on the impact and significance of the infringement proportionally to the share of each company involved. According to this rules, companies may be fined up to 10% of their total annual turnover. On top of these fines, any competitor who has suffered damages may seek to be compensated, according to the principles set out in the Green Paper on damages actions for breach of the EC antitrust rules [COM(2005) 672, 19.12.2005].

- **New Commission Guidelines on vertical and conglomerate mergers**

Non-horizontal mergers, i.e. the ones between market players operating in different relevant markets, are generally less likely to significantly impede effective competition than horizontal ones since they do result to loss of direct competition between the merging entities in the same relevant market. Moreover, so-called vertical (companies operate at different levels of the supply chain) or conglomerate (companies are active in related markets) mergers provide substantial scope for efficiencies. Thanks to rationalisation and complementary attributes of vertical mergers, prices may





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decrease and output may increase to the benefit not only of the company, which will sell more, but also of the consumers (so called: “internalisation of double markups”). Further positive effects are decreased transaction costs, better co-ordinated terms of product design, better organised production process and selling methods.

The new Guidelines elaborate on what the Commission will be looking into when reviewing vertical and conglomerate mergers in practice, i.e. the main points of scrutiny. These mainly arise because a non-horizontal merger may change the ability and incentive to compete on the part of the merging companies, especially if the latter have substantial market power, as well as their competitors in ways that cause harm to consumers.

The two main problems identified by such mergers are non-coordinated and coordinated effects. Among the former features the possibility of foreclosure, when actual or potential rivals’ access to supplies or markets is hampered as a result of the merger, and in such a way reduces these companies’ ability and incentive to compete. Coordinated effects are likely if there is a new possibility for firms to coordinate (at all or more easily) so as to raise prices or otherwise harm effective competition because of the merger.



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Yardstick for the evaluation are the competitive conditions which would result if the notified merger was given the go-ahead as opposed to the ones prevailing in absence of the merger. In this assessment, potential efficiencies arising by the merger will be taken into account. Last but not least, the Guidelines also indicate levels of market share and concentration below which competition concerns are unlikely to arise (so-called "safe harbours"). This legal instrument will therefore be helpful and provide legal certainty for companies keen to merge and operating in complementary or neighbouring markets.

INFORMATION & COMMUNICATION TECHNOLOGIES

- **Broadband internet access take-off**

A new study by the Statistical Office of the EU (Eurostat) reports that more than 40% of EU households now have broadband internet access. In the EU27 Member States, as well as in Norway and Iceland, there were rising trends of internet usage in general, of broadband connections in particular as well as more generalised use of search engines. However, there are great discrepancies between citizens of different Member States (with higher percentages in Nordic former EU15 Member States) but also





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between people in urban areas as opposed to those in more rural regions in the use of new internet technologies.

The full deployment of broadband for all is treated as a priority by the Telecoms Reform proposed by the Commission. The latter also plans to further boost this trend by enabling co-ordinated enhanced use of radio spectrum, which will allow for a more systematic use of this scarce resource for new services. The switchover to digital television broadcasting, which is to materialise by 2012, will furthermore make a large amount of spectrum available for other uses, therefore also potentially for broadband internet access (using wireless or radio networks) in regions where existing (cabled) networks cannot provide this.

- **Mobile TV standard adopted by Council**

On November 29th, the transport, communications and energy Council endorsed the Commission decision to set Digital Video Broadcasting – Handheld (DVB-H) as the common standard for terrestrial mobile TV in Europe. The mobile TV market is still at its nascent period, since the roll out of 3G and 3G+ services has been very slow in Europe (as opposed to Asian countries).





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The Commission has established a Mobile TV Working Group and, in July, published a Communication aiming at speeding the take-up of mobile tv services. Therein, it already pre-announced that it would favour DVB-H technology as a standard, since it mentioned the latter was “the strongest contender for future mobile TV, with successful commercial launches and trials in 18 European countries, and increasingly worldwide”.

However, this decision was contested by many. It is true that the preferred standard is mainly supported by major European companies such as Alcatel, Motorola, Nokia and Siemens. On the other hand, operators such as Microsoft, Samsung, Deutsche Telekom and many major TV operators back the competing Digital Media Broadcasting (DMB) standard, which is used in Asian countries. The argument put forward is that, just like in other case studies (i.e. video format), the two standards should be allowed to compete simultaneously and the best should prevail at the marketplace.

The ones happy with the established standard argue that this will provide for certainty needed to roll-out mobile TV services across Europe in 2008. According to Information Society and Media Commissioner Viviane Reding, this would allow Europe to become “a world leader in mobile TV”. However, the Council played down its favouring of the standard by mentioning the “importance of





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- innovation, technology neutrality and a market-led approach" to the deployment of mobile TV services, as well as the need to ensure "maximum pan-European interoperability of services [and] consumer devices" in order to "improve freedom of choice for users".

- **More flexible audiovisual advertisement provisions**

On November 29th, the European Parliament endorsed the Commission's proposal on a new "Audiovisual Media Services Directive" (also known as "Television Without Frontiers Directive") which initiates several changes to the existing EU advertisement rules. The new rules will apply to all "tv like services", meaning also web-streamed tv programmes, and have to be implemented by the Member States by the end of 2009.

"Hidden ads", i.e. advertisements within the course of a programme which form integral part of it (such as product publicity arising from the plot of the programme) are allowed as long as this is signalled at its beginning and end and it does not involve certain products such as tobacco or medicines. Exempted are also childrens' programmes, news etc. Moreover, shorter breaks during film broadcasting will be allowed, and the daily maximum ad limit of three hours is scraped -even though the limit of maximum twelve ad minutes per hour still stands. As to advertisements





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targeting children, these should be subjected to a Code of Conduct limiting their scope.

Stricter rules by the Member States are possible on principle. In this respect, the so-called "country-of-origin" principle is applicable. This means that broadcasters are bound by laws of the country where they are based, and not those of the ones to which they broadcast. This might, in effect, lead to some inconsistencies and forum shopping towards countries with less stringent regulatory regimes.

INTELLECTUAL PROPERTY

- Patent for “electronic ordering system” revoked

On December 7th, the European Patent Office (EPO) announced that it is revoking the electronic marketplace’s Amazon patent relating to a method for placing orders via a computer system. The above mentioned application involved a computer system-based method for ordering a gift whereas the delivery is managed by use of the recipient’s email.

As a more sophisticated version of the famous “1-click” purchasing method (whose filed patent was withdrawn by Amazon back in 2001), this was conceived as a so-called ‘divisional’ application.



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Divisional applications are later applications for an independent or distinct invention which are carved out of a pending application and disclose and claim only subject matter disclosed in the earlier or parent application.

After the patent was granted back in April 2003, the Deutsche Gesellschaft für Informatik, Fleurop and the Foundation for Free Information Infrastructure (FFII) objected it by addressing EPO's opposition division. The latter, composed of three patent examiners and a legal expert, after having heard both sides at 'oral proceedings' (which are similar to a court hearing), concluded the invention did not meet the patentability requirements under the European Patent Convention (EPC). Now, Amazon is entitled to lodge an appeal at the technical board of appeal, the appellate body of the EPO ruling at second instance.

- **New European Patent Convention enters into force**

Subsequent to the European Patent Convention 2000 Final Act, which aimed at modernising the European patent system, the new European Patent Convention came into force on December 13th, two years after the 15th contracting state ratified it (Greece on 13/12/2005). "The new EPC can also be adapted to new legal developments, and in particular to future Community law, more





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easily than the old convention," emphasised EPO President Alison Brimelow.

The revised Convention's added value consists in simpler administrative procedures which are expected to lead to less bureaucratic burdens, lower overall costs and enhanced legal certainty. Moreover, application filing is now possible in any language, even though a translation will have to follow in due time in one of the EPO's official languages (English/French/German). If time limits are not met during the examination procedure, new simple and effective means of redress are established to avoid delays in proceedings.

Also, according to the new generalised limitation procedure, which is valid in all the contracting states, the patent owners can limit the scope of their patents of their own accord in a single central proceeding before the EPO. Last but not least, the Organisation's Administrative Council is, from now on, entitled to issue some amendments directly, without all the contracting states convening to this purpose.



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- Online music market escapes immediate regulation

Just as the European Year of Intercultural Dialogue, 2008, is about to begin, the Commission announced its plans to refrain from regulating the online music market, despite the requests of Members of the European Parliament thereto. This means that there will be no framework directive proposal on the market of copyright, which will continue to be exclusively market-driven. In the relevant consultation most of the stakeholders pointed out that there was no need for regulation, the Maltese Commissioner Joe Borg mentioned.

On the other hand, certain MEPs feel that the cultural diversity might be at stake, especially if dominant music players from bigger countries prevail at the expense of smaller national firms who support local talents at niche markets and who might then be driven out of the market. They also insist that Collective Rights' Management societies (CRMs) should offer a culturally diversified range of music and not only focus on promoting popular songs. Currently, CRMs grant national-wide distribution licences for record labels and online shops and collect royalties per download.

And while Greek singer and former MEP Nana Mouskouri asked to give creators priority over businessmen and to heed the non-commercial (mostly local) repertoire, Mr Jose Manuel Barroso



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differentiated his stance. "We should give ourselves the necessary time to wait up all the information to reach a balanced, fair and sustainable consensus [between all stakeholders]," he said at a conference on creative rights and cultural diversity. However, the President of the Commission added: "It's clear for me that we should not allow monopolistic licensing structures to emerge in the internet. The repertoire available in the internet must adequately reflect Europe's cultural diversity. (...) If the market place alone does not deliver on these objectives, then in fact we need to consider adequate alternative means for achieving them".

CHEMICALS

- **REACH exemption procedure raises concerns**

According to article 138 (4) REACH Regulation, the Commission has to carry out a review of Annexes IV and V by 1 June 2008, with a view to proposing appropriate amendments to them. These Annexes should include the substances which will be exempted from registration because (1) sufficient information is known about them (2) they cause only minimal risk because of their intrinsic properties. These criteria are exhausting; neither can more additional criteria be added retrospectively, nor may the existing two criteria be refined.





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The Commission has established a so-called “Competent Authorities Sub-Group” to deal with the revision of Annexes IV and V of REACH Regulation, which consists of Commission’s civil servants, some of the Member States representatives as well as two major industry associations. Last month, this body, whose main input is produced by a contractor, has issued a list of elaborations on the exemption criteria, which are heavily criticised by the industry. What is being proposed seems to qualify as ‘additional criteria’, some argue, and they go on to add that these are, furthermore, ‘unnecessarily restrictive’.

Also, the information requirements for granting an exemption are excessive and the timeframe given for collecting, screening and interpreting the required data is very limited. This is most notably the case for commonly known substances which, in spite of prolonged daily and continuous human and environmental exposure, have not given reasons for any concerns. Thus, for these substances, as a rule, there will be no data available on many health and environmental effects.

The industry came up with a proposal for an alternative approach, which was not taken into account by the Sub-Group. Irrespective of the status of this ad hoc set up Sub-Group, the Competent Authorities and the industry associations were given until January





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10th to put forward suggestions on substances which should be exempted.

FREEDOM, SECURITY & JUSTICE

- Schengen zone enlargement

On December 6th, the 27 EU ministers formally endorsed their decision to allow nine further EU Member States to join the Schengen zone. Currently, the Schengen zone embraces 13 Member States of the European Union plus Norway and Iceland. The UK and Ireland had chosen not to participate and only partially do so in the area of police and judicial cooperation. Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia and the Czech Republic, which all joined the European Union in 2004, will be part of Schengen as of December 21st.

Originally, the enlargement was planned for October this year. However, it had to be postponed due to technical problems with the database SIS II, which connects member states' databases to information related to border security, like stolen documents, cars and firearms. Next to join will probably be Switzerland in 2008 and Cyprus, which may have fulfilled the requirements by 2009. Bulgaria and Romania are not expected to fully participate before 2011.



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SPORTS

○ **'Bosman' revisited?**

The president of the World Football Association (FIFA), Sepp Blatter, announced a plan to limit the foreign players allowed in a football team, even if these players come from another EU Member State. He argues that this would not only protect the national identity of a club, but it is also important for the development of young home-grown players. However, such an approach contradicts the dispositions of the 'Bosman' decision (of 15.12.95 on Case C-415/93), which considers footballers to be workers and thus recognises their free movement according to the EU treaty.

This established case-law, named after the Belgian football player Jean-Marc Bosman, does not allow for limitations of the number of professional football players having the nationality of other Member States who may be fielded in a match, since these are covered by the free movement of workers (art. 39 EC treaty). Contrary to this, Blatter considers football players to be more of 'artists' than workers and thus pleads for an ex ante exemption for sports from EU rules and calls for an article in the new EU treaty emphasising the special status and autonomy of sports, therefore allowing for exemptions from the free-movement EU principle.





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These plans will be finalised with a special FIFA committee and further discussed at the FIFA congress in Sydney coming May.

Two seasons ago, the UEFA was criticised for imposing on teams the mandatory use of four home-grown players who have trained within a certain country or team for a number of years. The argument against this rule is that it could indirectly lead to nationality-based restrictions.

The UEFA and the EU work closely together on issues such as stadium security, doping and corruption. On November 28–29th, they discussed a possible EU strategy against violence in sport and agreed on working closely together in four main directions to combat sport-related violence: a co-ordinated, multidisciplinary approach, responsibility, real commitment and local action. If the role of the EU should be restricted to these policy priorities, remains to be seen.

