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COMPETITION

- **Google/DoubleClick merger raises concerns**

On January 10th, Pappas&Associates organised a roundtable at Cercle Royal Gaulois on the topic of data privacy concerns in competition law cases as it is the case in the recently notified merger of Google with DoubleClick. Commission officials, national authorities' representatives, lawyers, data experts and journalists came together to debate on the merits and dangers of the merger.

The discussion was lively and the results fruitful: A consensus was built on the fact that competition law alone is not sufficient to deal with the serious consumer protection issues involved. It was thus indicated that monopoly ownership and use of Google/DoubleClick's databases raise significant competition, privacy and data protection issues which can be addressed either by blocking the merger or by coming up with remedies that effectively address those concerns.

The Commission, it was argued, in performing its role of protecting the Community interest, should take into account all important policy parameters. That is the reason for the so-called "inter-service consultation" between the different departments of the Commission -something which is fairly unique to the nature of the





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EU. Therefore, the health and consumer protection provisions of the EC Treaty as well as other issues identified by the competent EC services (most notably the Art. 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data) should be considered prior to the final decision.

As to the possible remedies, they could include an obligation to keep the Google and DoubleClick databases operationally and physically separate from one another, or to make the data available to all market players (subject to safeguards in relation to privacy and data protection). An overview of the main arguments and issues of concern and suggested ways to tackle them can be found in our website www.pappaslaw.eu (rubric 'news').

- European Parliament echoes concerns on Google/DoubleClick merger

On January 21st, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) organised a public seminar on Data protection on the Internet on the occasion of the Google–DoubleClick proposed merger.

The European Data Protection Supervisor, Peter Hustinx, clarified the notion of 'personal data' in the internet and stressed that it depends on the information content –individuals should at least be





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identifiable. Marc Rotenberg, the Executive Director of the Electronic Privacy Information Center (EPIC), said that the emerging market for internet ads is not like the other media markets and privacy issues should be considered as part of the competition analysis.

Furthermore, the article 29 Working Group President, Peter Schaar, explained that IP addresses may serve to identify individuals. He also mentioned that privacy issues do not only arise in separate services but also through the possibility to combine different data because “the more information that is gathered about a user, the easier it is to identify them”. Technology provides us with solutions, he added, since we can change default settings so as to deactivate the cookies and the long-term storage of information. And providers should seriously consider minimising data collection.

Peter Fleischer, Global Privacy Counsel of Google, argued that common standards should be found among different global players and the ‘least common denominator’ should be adopted on privacy issues as well. Responding to a question of MEP Stavros Lambinidis, Google’s representative admitted that Google (might be) giving away information to governments if their legal department judges this to be necessary. Yet, he did not have an answer handy to the next question of why the search engine does not have visible policy





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statement and made vague references to privacy policy videos instead.

Thomas Myrup, who represented Microsoft, underlined the importance of transparency, security and consumer information as parameters. Microsoft privacy principles can be monitored by users, he argued. The Commissioner of the US Federal Trade Commission Pamela Harbour, who elaborated on FTC's domestic and cross-boarder enforcement co-operation, also stressed the importance of transparency and consumer control to the whole system. The ability to opt-out for consumers should be guaranteed and the use of sensitive data for advertising should be forbidden, she said. Several LIBE MEPs declared that they plan to continue deliberating on the subject.

- **Commission raids in pharmaceutical companies part of merger inquiry**

In a bid to discover possible anti-competitive practices distorting the sector competition, the Commission raided the offices of several top pharmaceutical companies. Raids are one of the most powerful investigative tools which the Commission may deploy in order to gather significant information while conducting a sector inquiry. Under article 17 of Regulation 1/2003, the Commission is





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authorised to conduct (unannounced) inspections at the premises of companies to discover whether such practices exist and hinder innovation or block the entry of cheap generics. For example, an innovative pharma company may buy a generic one off the market or pay it for not launching a generic.

The Commission's inquiry now has to explore if there are agreements between pharma companies (such as patent dispute settlements) which might qualify as restrictive business practices according to article 81 EC Treaty. Another issue of concern are the artificial barriers of entry to the market, which might arise as a result of e.g. misuse of patent rights. It was noted that abusive patent litigations may have the only purpose of delaying the entry onto the market of cheaper generics.

Indeed, it is believed that the lack of new pharmaceuticals brought to market and the delay of commercialisation of generic drugs might be an indication of market distortion. "Market monitoring suggests that these developments result from anti-competitive practices," said Competition Commissioner Neelie Kroes and went on to add: "Individuals and governments want a strong pharmaceuticals sector that delivers better products and value for money. But if innovative products are not being produced, and cheaper generic alternatives to existing products are in some cases





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being delayed, then we need to find out why and, if necessary, take action."

Effective competition in this sector is vital and complementary to intellectual property law since both systems seek to foster innovation and increase consumer welfare by ensuring both access by patients to state-of-the-art medicines, and value for money for health in line with article 153 of the EC Treaty. An interim report is planned for autumn 2008 and final results are expected in the spring of 2009. The inquiry's findings will determine whether the Commission or national competition authorities should be proactive and deal with those serious competition concerns. If that is the case, specific investigations will be opened and remedies might be ordered to resolve the specific competition problems at hand.

- **New formal investigation against Microsoft**

The Commission has opened a new formal investigation following two complaints targeting Microsoft, on grounds of interoperability and tying. The first complaint is submitted by the European Committee for Interoperable Systems (ECIS), which claims that Microsoft has not disclosed information necessary to make several





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of its products (notably some server products, its Office suite etc.) interoperable with those of other companies.

The second one is brought forward by a competitor, who, after the Court of First Instance condemned a case of illegal tying in its Microsoft September decision, is in for capitalising from this case law if possible. Opera is a Norwegian competing browser vendor who is accusing Microsoft of illegally tying its Internet Explorer product to its dominant Windows operating system.

According to Opera, the dominant company's practices result in ongoing competitive harm since its new proprietary technologies reduce compatibility with open internet standards, and therefore hinder competition. Also, it alleges that other stand-alone software products, such as desktop search and Windows Live are being unlawfully tied to sales of Microsoft's dominant operating system.

The Commission, who has opted for open procedures from the beginning on this occasion, will now further investigate to see if there is an infringement and either issue a statement of objections or a preliminary assessment notice in a settlement procedure.



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INFORMATION & COMMUNICATION TECHNOLOGIES

- Rules on public broadcasters subsidies to be reviewed

Following a number of complaints against state funding of national public broadcasters, the European Commission launched, on January 10th, a public consultation on the future of public television and radio stations' subsidies. The state-aid broadcasting sector has not been reviewed since the broadcasting communication back in 2001. The Commission's investigations on the use of public monies by several Member States' public broadcasters revealed that it is imperative to review this framework in order to increase transparency and legal certainty, most notably by monitoring the role of public broadcasters in the new media environment.

This will be achieved in two ways: First, the remit of "public service mission" in this context has to be defined. Second, the aid must be limited to what is necessary to fulfil the mission at stake. And while Member States have wide discretion to define public service broadcasting, the Commission must preserve fair competition in the market. Public broadcasters should not be overcompensated and the monies can not be used to cross-subsidise commercial activities to the disadvantage of their competitors.





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"Do the EU guidelines published in 2001 on the application of state aid rules to public service broadcasting need to be revised in the light of jurisprudence and technological change?" This is the crucial question, according to a BBC spokesperson. The consultation documents include a questionnaire, an overview of the current rules, the relevant Commission decision-making practice and the possible scope for amendments. Comments should be submitted by March 10th, and the new Broadcasting Communication is expected to be adopted in 2009.

- **Towards a consumer-friendly European Single Market for Online Music, Films and Games**

Online content is a new, dynamic sector which represents many opportunities for European players. But the Commission has identified a number of obstacles which stand in the way to its full deployment. "Europe's content sector is suffering under its regulatory fragmentation, under its lack of clear, consumer-friendly rules for accessing copyright-protected online content, and serious disagreements between stakeholders about fundamental issues such as levies and private copying", said Viviane Reding, EU Commissioner for the Information Society and Media.

The Commission has adopted a Communication on "Creative Content Online in Europe's Single Market" and is planning a





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Recommendation by mid-2008 on new ways for achieving a single market for online content. What is asked for is high value 'creative content' for radio, online games, online publishing and educational content. Also, users should be stimulated to generate content themselves, which will be copyright-protected.

The main challenges in this domain are the following: Creative content should be made available without fear that it will be the victim of online piracy. In this respect, facilitating trade between right owners and online distributors is essential. Furthermore, a multi-territory copyright regime would create synergies in form of economies of scale which will benefit all stakeholders. Digital Rights Management Systems (DRMs) should, on principle, be interoperable and user-friendly. Creators should get a fair remuneration. DRMs should state clearly what the consumers are allowed to do with the content. Tackling piracy remains the main priority to be dealt with through co-operation (may be via "codes of conduct") between access/service providers, right holders and consumers.

In order to prepare the EU Recommendation on Creative Content Online, stakeholders are welcome to express their views by participating in the consultation launched thereto (which takes place until February 29th). Further discussions will be held within an





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open Forum called "Content Online Platform", which the Commission plans to set up soon.

- **Apple equalises iTunes prices after Commission's incitement**

Apple found itself with the back against the door when questioned by the European Commission on the grounds of the different prices of its digital music store iTunes throughout Europe. 'Which?', a UK consumer protection organisation, filed a formal complaint, bringing to the Commission's attention the fact that British users were charged more (nearly 10%) more than the rest of the consumers downloading in the euro-zone.

In response to the Commission's investigation, the company quickly decided to adopt a "pan-European music marketplace" approach, as Steve Jobs, Apple's CEO put it. It therefore announced that it will drop the iTunes' prices in the UK within six months so as to balance prices with the rest of the European countries. Thereupon, the Commission decided to drop the investigation.

According to the iTunes payment system, consumers can only buy its music downloads in their country of residence. This is being checked through their credit cards, which must be issued by a bank with an address in that country.





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Moreover, the Commission clarified that the structure of iTunes is not the result of agreements between Apple and major record companies (Sony BMG, EMI, Warner Music and Universal Music). This is rather defined unilaterally by Apple by taking into consideration the country-specific aspects of copyright laws. "Some record companies choose not to make available their content on a pan-European basis. They do so in full respect of copyright regulation. There is no violation of antitrust regulation", affirmed Commissioner Kroes's spokesperson.

ENERGY & ENVIRONMENT

- New rigorous green legislative package

On January 23rd, the Commission presented a controversial package of legislative proposals against global warming and increasingly imported energy. Proposals include a mandatory cap on greenhouse gas emissions for all EU-27 states in order to contribute to the EU goal of reducing them by 20 percent by 2020 (from levels of 1990). Moreover, each Member State has to set a target for the share of renewable energy in total energy consumption so as to reach a 20 percent share of renewables in EU energy consumption by the end of the next decade. For example, biofuels should account for at least 10 percent of transport needs





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by 2020 –a goal which should be attained without endangering the environment.

The Commission will also reappraise the emissions trading scheme with a tendency to toughen it further by planning emission permits auctions (as of 2013, whereas today they are distributed for free). Some exemptions are foreseen for energy-intensive sectors (steel, aluminium and cement) as well as for central and eastern European countries. As a matter of principle, each Member State will face its individual targets, according to a number of factors such as its economic potential to produce energy from sources such as wind, solar, geothermal or hydropower, based on GDP per capita.

The current state aid rules for funding green projects will also be revised. Another legal instrument will build on carbon capture and storage, an alternative way of storing carbon dioxide underground instead of releasing it into the atmosphere. Many Member States and industry associations criticised these proposals of ‘going too far’. They argue that, if they become binding laws, the European industry would suffer while complying with much stricter conditions than its US or Chinese rivals. Also, electricity prices for consumers are expected to increase since the companies will probably pass most of the cost of emission permit costs on to them.





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- Plan on less emissions by cars is heavily contested

At the end of last year, the Commission announced, amid great controversy, concrete measures for reducing CO2 from passenger vehicles. The much contested measures involve reducing carbon dioxide emissions from cars up to 120 grams per kilometer by 2012. By 2015, manufacturers who fail to comply would have to pay €95 per gramme over the limit.

Mainly German car producers, who manufacture high-end luxury cars, have strongly opposed this plan, saying they are being unfairly penalised. They argue that Italian and French manufacturers who produce smaller cars are favoured over them. The German Chancellor, Angela Merkel, reacted fiercely: "This is industrial policy at Germany's expense", she said. Also, the German Commissioner for Industry, Günter Verheugen, addressed the Parliament stating: "All industries should be made as environmentally-friendly as technologically possible, but I don't think we should do it in a way that our international competitiveness is undermined".

On the other hand, EU environment commissioner Stavros Dimas told a German newspaper that the plans actually represent "a chance for the German industry" for "[t]hey help climate protection





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while leading to more competitiveness for German cars on international markets".

In response to those criticisms, Members of the European Parliament asked, in a non-binding legislative report, for three more years so that car makers have time to implement reductions in carbon dioxide emissions. Since it usually takes some 5–7 years for new vehicles to be developed, MEPs suggest to allow car manufacturers until 2015 to achieve an average output of 125 grams of CO₂ per kilometre driven (as opposed to the 130 grams per kilometre by 2012 target set by the Commission).

A further 10g/km reduction could then be the result of improvements in other areas such as tyres, fuels and eco-driving. The report also asks the Commission to develop a system according to which additional CO₂ emissions are tolerated if they are a result of legally binding safety measures.

ENERGY & ENVIRONMENT

- [Two opposing reports on cloned products spark debate](#)

The European Commission has asked the European Food Safety Authority (EFSA) to look into the implications of animal cloning on food safety, animal health and the environment. In its draft





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scientific opinion thereto, EFSA found cloned food products such as meat and dairy products to be safe for consumption. There is hardly any difference in terms of food safety between food products originating from clones and their progeny compared with those derived from conventionally bred animals, the report states.

However, the death and disease rates of clones are significantly higher than those of conventionally bred animals, the report mentions. According to Helen Holder, GMO campaign co-ordinator at Friends of the Earth Europe, this and the fact that there is insufficient data to understand the environmental impacts does not automatically mean that cloned meat is safe.

At the same time, President Barroso asked the European Group on Ethics of science and new technologies (EGE) its opinion on the ethical implications of cloning animals for food supply. In the latter opinion, issued on January 16th, this independent Group expressed serious doubts as to whether cloning animals for food is ethically justified, especially given the current level of suffering and health problems of surrogate dams and animal clones.

EGE has also put forward a number of requirements in case cloned animals' products are imported into the European market. These involve guarantees and scientific updates regarding the safety of food products for human consumption, as well as safeguards when





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it comes to intensive animal breeding (protection from hunger, thirst and malnutrition; from fear and distress; from physical and thermal discomfort; from pain, injury and disease). What's more, animals and their food products should be clearly traceable and the import of cloned animals and materials derived thereof (e.g. semen and food products) should be made conditional on proper documentation. Further suggestions include promoting new analyses and studies on long-term animal welfare and health implications for clones as well as involving the public in this discussion (e.g. via public debates on the impact of farm animal cloning on agriculture and environment and Eurobarometer surveys so as to measure and qualify public perception to this issue).

A public consultation on EFSA's draft opinion is now open until February 25th. Following the input provided for by Member States, NGOs, the industry and the public, EFSA will deliver a revised draft of the opinion for adoption which will be published around May.

SPORTS

- [New legal basis for sports in the Lisbon Treaty](#)

Last October, the EU leaders agreed to maintain the reference to sport which was included in the Constitutional Treaty in the Lisbon (Reform) Treaty. The latter is expected to enter into force as of 2009 if all member states ratify it.





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The new approach towards sports means that it will include more than the economic dimensions of professional sport (most notably football). It will therefore constitute a legal base meant to support member states in the social, educational and cultural aspects of sport. Some of the issues include the need to protect young athletes from commercial pressures, controlling the economic power of someone who's in control of several sports clubs, sporting opportunities for handicapped people and solidarity also in terms of sharing income from TV broadcasting rights.

Article III-184 of the Lisbon Treaty excludes harmonisation of laws and regulations, but foresees a European framework establishing incentive actions, such as initiatives encouraging mobility of students and teachers, inter alia by means of the academic recognition of diplomas and periods of study and enhanced cooperation between educational establishments, such as via youth and instructor exchanges etc. Furthermore, the Council of Ministers, on a proposal from the Commission, shall adopt recommendations in this respect.

"The Olympic Movement has fought for a legal basis for sport in the EU for more than 12 years. The reference to the specificity of sport will strengthen the role of sport in Europe. Sport cannot be approached only as an economic activity. The biggest part of sport,





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taking place at grassroots level, is based on voluntary structures. With the reference to sport in the EU Reform Treaty, it will be easier for sports organisations in Europe to fulfil their educational and social role in society," said Jacques Rogge, the President of the International Olympic Committee (IOC).

We also welcome you to read the interesting relevant article in our webpage <http://www.pappaslaw.net/images/rationa.pdf>.

- **New European Association of professional football clubs**

On January 15th, the biggest European football clubs, UEFA and FIFA announced the creation of a new, independent European Clubs Association. Thanks to this, football governance will be improved, according to G-14, the Association of the 18 top football clubs in Europe. Through the new association, clubs will be appropriately represented in UEFA and FIFA decision-making bodies. They will therefore jointly decide on issues such as the players' participation in European Championships and World Cups and the compensation related thereto.

Once this Association is put in place, it is expected to represent independently and exclusively the interests of all clubs at European and international level. Therefore, G-14 will be made 'redundant'.





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The future of G-14 association will be decided upon at the next General Assembly on February 15th.

