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COMPETITION

- **Google/DoubleClick merger given go-ahead amid criticism**

On March 11th, the European Commission cleared under the EU Merger Regulation the proposed acquisition of the DoubleClick by Google. Google, on the one hand, is not only the global leader in search engines, but also active in the online advertisement intermediation market through its network AdSense. It intermediates between publishers and advertisers wishing to trade advertising space on the Internet. On the other hand, DoubleClick is the leader in providing ad-serving technology of the latest technology, placing ads on the most relevant sites, pages and positions.

The relevant markets, within the meaning of the Regulation EC/139/2004, were the one of online advertising intermediation and the one of ad serving. The merger did not pose any competitive threat to any of these markets, since the parties' activities do not overlap, the Commission said. Since DoubleClick is not, for the time being, a significant actor in the intermediation market, the Commission concluded that its acquisition will not deprive the market of an important competitor. The fear that Google would be able to use its new power on the ad serving

market and therefore foreclose competition were dismissed "mainly because such strategies would be unlikely to be profitable".

Several actors expressed their concerns of the personal data use and misuse of users' profiles. However, these concerns were not addressed (cf. *Pappas&Associates Newsletter*, January 2007, "Google/DoubleClick merger raises concerns", p. 2; "European Parliament echoes concerns on Google/DoubleClick merger", p. 3). Since the EC watchdog does not have the remit to judge a merger on grounds of other than purely competitive grounds, the remaining questions about consumer privacy remained unanswered.

Therefore, the recommendation on the use of private data by search engines, which is expected to be issued by Article 29 Working Group in April, becomes increasingly relevant. The Working Group already confirmed that search engines fall under the EU Data Protection Directive 95/46/EC if there are controllers collecting users' IP addresses or search history information, and therefore have to comply with relevant provisions. It remains to be seen whether it will moreover engage in far-reaching recommendations, daring to go beyond instructions to cut down the time during which personal information is being kept.

- **And yet: concerns over Google/DoubleClick remain**

  On March 5th, the Centre for the New Europe organised a Market Insights Luncheon on the controversy raised by the proposed Google/DoubleClick merger. The theme has already been addressed in a Roundtable organised by Pappas&Associates and a debate at the European Parliament (cf. *Pappas&Associates Newsletter*, January 2008, "Google/DoubleClick merger raises concerns", p. 2 and "European Parliament echoes concerns on Google/Doubleclick merger", p. 3).

  Marco Pierrani expressed concerns from his national (Italian) and the European Consumer Organisation that the proposed merger would result in hampering the rapidly evolving nascent internet advertising market. He argued that prices may be manipulated according to previous search results which are been recorded for different users. And even if it is, in principle, good to let the market decide what the competitive outcome will be, this will not be possible if other players are eliminated or unable to react due to – for example – market foreclosure.

  The Dutch Liberal MEP Sophie in't Veld stressed that, due to the relation between competition and data protection policies, the issue cannot be assessed on the basis of the traditional merger analysis criteria. She reproduced the view that data has nowadays

become a commodity, and therefore some principles must apply: Existing legislation should be updated to address these concerns, even though by avoiding overregulation. Consumers should 'own' their personal data. It's in the companies' interest to ensure this, since they have a vital interest to maintain consumer trust.

Wayne Arnold of the Institute of Practitioners in Advertising expounded the threats such mergers might pose in the 'future web' environment. He explained that, in five years' time, almost all applications will be web-based. As a result, companies now seek to acquire as many new distribution points as they can. For whoever gets to define internet content (and advertising) in the future, will have overwhelming market power. He also added that, if Google changes its pricing policy, it is mostly SMEs which will be affected.

Further concerns were echoed by other MEPs, journalists, publishers' and trade associations. The European Commission's Directorate General Competition dismissed the concerns regarding the compatibility of the merger with the common market, however addressing exclusively the competition aspects of the merger and not other possibly problematic aspects.

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- **Commission imposes new non-compliance fine on Microsoft**

Five months after the judgment of the European Court of First Instance (see: *Pappas&Associates Newsletter* 09/07, "Court of First Instance upholds Microsoft decision", p.2), the European Commission fined Microsoft again for defying sanctions imposed on it for anti-competitive behaviour. The new record fine amounts to 899m euros ($1.4bn); its justification is that the company failed to comply with a 2004 ruling that it abused its dominant market position. It comes on top of earlier fines of 280m euros imposed in July 2006, and of 497m euros (periodic payments for non-compliance) in March 2004.

However, the new Decision concerns the period of non-compliance between the first penalty payment decision of July 12th 2006 and October 22nd 2007, when Microsoft began providing an interoperability information licence and an optional worldwide patent licence. The Commission concluded that Microsoft had not complied within this timeframe, since it found the royalties charged by the company prior to October 22nd 2007 to be unreasonable. The high pricing, in the Commission's view, was not justifiable neither by the unpatented interoperability information, which was lacking innovative features to a great extent, nor by comparing the pricing of similar interoperability technology.

The firm's new policy is to open up the technology of some of its leading software, including Windows, and thus enable them to operate with rivals' products. "As we demonstrated with our new interoperability principles and specific actions to increase the openness of our products, we are focusing on steps that will improve things for the future," a Microsoft representative stated.

INFORMATION & COMMUNICATION TECHNOLOGIES

- **New EU Telecom Authority and network security**

Amid great controversy, Information Society Commissioner Viviane Reding insisted on her proposals to merge security and regulatory functions in a new "European Electronic Communications Market Authority". "It will be more efficient and it makes economic sense," the commissioner said. According to her, networks are vulnerable, as the recent attacks against Estonian strategic electronic infrastructure in April and May 2007 haven shown. And since networks are essential for the delivery of key services, such as banking and information, to the population, their security is of great importance.

For the time being, the European Regulators Group (ERG) and the European Network and Information Security Agency (ENISA), are responsible for the security of the networks at the European level.

The ERG brings together the national network security agencies, whereas the ENISA gives advice, issues recommendations and provides EU institutions and Member States with data analysis on information networks' security issues.

But this is not enough, Commissioner Reding claims. If the new European authority is created, according to the proposal presented last November (see: *Pappas&Associates Newsletter*, November 2007, "The framework of e-communications reform: A concise analysis", p. 5) it may replace the ERG and take over the activities of the ENISA. Yet, the proposal faces growing criticism from MEPs, Member Sates and other stakeholders. MEPs called upon the commissioner "to think about alternatives" which can improve the current situation without establishing yet another EU Authority. The Union Network Europa Telecom, a trade union federation representing one million telecom workers in Europe, pointed out to the fact that 'many questions remain unanswered regarding the new authority's role', such as 'proportionality; subsidiarity; role in national market analyses; additional value to the ERG's current functioning etc.'.

On May 6th the Parliament's Industry, Research and Energy Committee (ITRE) will deliberate on the telecommunications framework's draft reports.

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- **ECJ on conflicting interests of free movement of goods and protection of minors**

On February 14th, the European Court of Justice (ECJ) announced its preliminary ruling on the case C-244/06, *Dynamic Medien Vertriebs GmbH/ Avides Media AG*, referred to it by a Regional German court (Landgericht Koblenz). It answered to the question whether the principle of the free movement of goods precludes a provision of German Law on the protection of young persons (Jugendschutzgesetz) prohibiting the sale by mail order of image storage media (DVDs, videos) that are not labelled as having been examined in Germany as to their suitability for young persons.

The Court clarified that, as a matter of fact, not all Member States share the same conception as regards the level of protection and the detailed rules relating to it. 'As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion', reads the ruling.

Therefore, different countries may opt for different protection systems. The proportionality of the restrictive measures they might adopt will not prevail by comparing those systems between them, but by referring to the pursued objective and the level of protection

each Member State wishes to provide. In the case at hand, prohibiting the sale and transfer by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed constitutes a measure suitable for protecting children against information and materials injurious to their well-being.

Moreover, the German legislation in question does not go beyond what is necessary to ensure its objective, since it is still possible for such image storage media to be imported and sold to adults by way of distribution channels involving personal contact between the supplier and the purchaser. This way, it is ensured that children do not have access to the image storage media concerned.

The Court concluded that article 28 EC Treaty does not preclude more restrictive national rules seeking to protect minors. The sale and transfer by mail order of image storage media which have not been examined and classified by the competent authority for the purposes of protecting young persons may be prohibited. However, this is not the case if the procedure for examination, classification and labelling of image storage media established by those rules is not readily accessible or cannot be completed within a reasonable

period, or the relevant decision cannot be challenged before the courts.

ENERGY

- **Energy efficiency ICT-standards to become mandatory?**

As presented in our last Newsletter, (cf. *Pappas&Associates Newsletter*, February 2008, "Note on best practices: Green initiative to cut on consumption and waste", p.19) energy-efficiency and global climate protection will be considered in several different EU policies in the future. Until the end of the year, the Commission is set to propose a range of measures in order to increase the use of Information and Communication technology (ICT) in the fight against climate change and energy waste.

New technologies can help reduce energy consumption and, as a consequence, also greenhouse emissions. For instance, the Commission already favoured the use of smart technologies in buildings in its energy efficiency action plan of 2006. Another relevant initiative is the European Patent Forum on May 6th-7th. "Inventing a cleaner future" is the theme of the conference which seeks to identify the main technological challenges posed by climate change and to contemplate ways in which the patenting of inventions can address these issues.

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During the European business summit on February 21st–22nd, Commissioner for Information Society Viviane Reding announced a range of actions to help tackle climate change issues caused by ICT technologies. Suggestions include the adoption of compulsory public procurement standards for more energy-efficient use of ICT, in particular to stop excess energy consumption in cities, buildings and cars. Another idea, according to the Commissioner, is that of a new 'polluting activities'-tax scheme (such as polluting cars). However, Member States are bound to oppose such a measure since it would involve abandoning their sovereignty over sensitive issues such as tax policy. After an initial document depicting the problem, a stakeholders' forum will further address the issues. Thereupon, the Commission is expected to draft a recommendation on the subject.

- ECJ on the illegality of Spanish company law in the energy sector

The European Court of Justice ruled, on February 14th (Case C-274/06), that Spain has failed to fulfil its obligations under Article 56 of the EC Treaty by maintaining in force national measures limiting voting rights in Spanish energy companies. The Spanish legislation which was declared illegal (Supplementary Provision 27 to Law 55/1999) restricted the voting rights in energy sector undertakings when the shareholder is a public entity.

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After the European Commission initiated a procedure against Spain on October 23rd 2002, Spain modified the original provisions governing those voting rights. But the Commission's estimate was that the changes were not sufficient since the authorities still had the discretional power to decide if public shareholders can or cannot exercise their voting rights in Spanish energy undertakings. It also criticised the fact that the Spanish law went beyond what was necessary to reach the objective pursued, i.e. to safeguard the national energy sector, especially since other, more suitable means thereto were thinkable.

Even after a new modification of the law, on February 7th 2005, the Commission found it to be the modifications still insufficient and therefore sent, on July 13th 2005, a Statement of Objections to Spain. Finally, on June 23rd 2006, an action against Spain for failure to fulfill its obligations under article 56 EC Treaty was brought before the ECJ.

On February 14th, the Court declared that this Spanish law prohibited public entities established in other member states from acquiring shares in Spanish energy undertakings. Even though the measure didn't limit the acquisition of actions, it ultimately amounted to a restriction of free movement of capital. The Court followed the Commission's justification and rejected Spain's allegations, that the provision was necessary to safeguard national

energy supply, since this measure was disproportionate. Indeed, the limitation of the voting rights concerns all the decisions subject to a vote, and not only the ones which can influence the safeguard of national energy supply. Moreover, the Court added that other measures, less restrictive to free movement of capital, would be sufficient to reach the objective at stake.

INTERNAL MARKET

- **Authorisation for the parallel import of plant protection products**

  On February 21st 2008, the European Court of Justice found it not contrary to article 226 EC Treaty to require a national "market authorisation" for a parallel imported plant protection product, which is of common origin with a similar product already commercialised in a Member State.

  As a matter of course, a plant protection product needs a "market authorisation", delivered by the national authorities, to be commercialised in a Member State. This procedure, which is foreseen by Directive EC/91/414, guarantees that the product fulfils the requirements set out in a series of tests and analyses which aim at ensuring a high level of protection of human and animal health and of the environment. Yet, the Directive does not

contain any provisions regarding authorisations in the case of parallel imports.

In France i.e. the Member State concerned, such authorisations are ruled by Decree No 2001-317 of April 4th 2001. In order to authorise an imported plant protection product according to this law, this product should have common origin with a similar product already commercialised in France. As long as this condition is fulfilled, no additional tests and analyses need to be performed. 'Common origin' means that the products are being manufactured using to the same formulation by the same company or by an associated undertaking or another company which has been granted a relevant licence.

On July 5th 2005, the European Commission brought the matter to the ECJ claiming that the common origin requirement is not necessary for the protection of public health, animal health and the environment and therefore constitutes a restriction on the free movement of goods as foreseen by Article 28 EC.

However, the Court dismissed the Commission's line of argument by elaborating that the notion of common origin constitutes an important indication that the products at issue are identical. And when those products are not of common origin (since e.g. they were manufactured by two competitors), the imported product

must be considered as different from the reference product. Consequently, the former is been placed on the market of the Member State where it is being imported for the first time. Under these circumstances, the common origin requirement for parallel imports is necessary for the protection of public health, animal health and the environment, the Court concluded.

PUBLIC AFFAIRS

- **European Ombudsman's enhanced rights to gain access to documents**

On March 10th, the MEPs approved several propositions to modify the status of the European Ombudsman by enabling better access to EU institutions' documents while conducting an enquiry. The changes of the Ombudsman's statute, which were approved bz the EP's Committee on Constitutional affairs, will make it easier to obtain the information required from the EU institutions.

In order to improve transparency, the so-called 'secrecy clause', which permits the Institutions to refuse the disclosure of certain information on the ground of secrecy, should be abolished. Furthermore, the rule according to which the EU officials have to testify "in accordance with the instructions of their administrations"

is also to be abolished. However, the Ombudsman is not to divulge any classified information during his enquiry.

"With this new power, the Ombudsman will be in a stronger position to fight bad administration and protect the interest of the citizen", said British MEP Andrew Duff, ALDE coordinator on the Committee. Yet the author of the Report, Finnish MEP Anne Jäätteenmäki, was disappointed that the statute improvements did not go as far as to moreover abolish confidentiality rules regarding the protection of personal data of EU officials. "I had hoped for a more transparent text but this was the only compromise possible".

SPORTS

- **EU Ministers' joint declaration on social impact of Sport**

On March 17th, the EU ministers responsible for sport, joined by representatives of the National Olympic Committees and the European Olympic Committee met informally in Brdo, Slovenia, to discuss and adopt a joint declaration on 'Social Significance and Dialogue in Sport'. The Ministers and other representatives undertook to strengthen intercultural dialogue and touched upon the importance of education and the role of sport in social

integration, as well as the social importance of sports organisations themselves.

The Ministers highlighted the need to implement the White Paper issued in July 2007 as well as the 'Pierre de Coubertin' Action Plan included therein. Moreover, they emphasised the importance of drafting the programme for sport to provide for new impetus and opportunities to progress. Furthermore, they asked for the EU to be represented in the World Anti-Doping Organisation and considered a new working group against doping, which would help coordination, cooperation and efficiency of combating doping at EU level.

Two weeks earlier, on February 29th-March 2nd, the Executive Committee of the International Sport and Culture Association (ISCA) convened in Prague in order to prioritise topics for the future. ISCA brings together sport, culture and youth organisations from across the globe. Its president, Mr Mogens Kirkeby, asserted that partnerships are needed to help materialise the social agenda of sports. "I have noted the declaration issued by the Sport Ministers' Meeting, and am happy to see its alignment to the priorities of ISCA. However, I must stress that if concrete results are to be achieved, it requires broad cooperation between governments and the many diverse actors in the field of Sport for All on national and international level. I look forward to this cooperation", he said.