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**COMPETITION**

○ **Formal investigation of Google/DoubleClick acquisition**

On November 13<sup>th</sup>, the European Commission announced its decision to open a formal investigation in the case of Google's proposed acquisition of the online advertising market-leader DoubleClick. This investigation will focus upon the threats to consumer privacy and possible competition distortion as a result of the merging companies (see: Pappas & Associates Newsletter October 1/07 article "*European Commission reviews Google's acquisition of DoubleClick*", p. 1 and article "*There's a spy on your desktop*" by Spyros Pappas in: European Voice of November 8<sup>th</sup>, p. 9).

One of the markets which will be examined is the one comprising so-called 'intermediation services'. Google sells through its "Ad Sense" network online advertising space to the websites of publishers or advertisers. Furthermore, other possible adverse effects of the acquisition in the ad serving market of online advertising will be examined. Such services comprise the technology and the targeted marketing which allow for ads to be posted on relevant websites and leave feedback on the consumers' responsiveness.





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The Chief European Competition Authority will evaluate the possible anti-competitive effects from which the consumers might suffer in the future if the go-ahead is given to the two online giants. It will also consider whether, in the absence of the proposed deal, DoubleClick would set foot and thus challenge Google's activities in neighbouring markets (more specifically the one of intermediation services), in a way that would further drive competition up and prices down. The final decision on prohibiting or granting the acquisition will be taken until April 2<sup>nd</sup> 2008.

### o Energy cartel detected in Germany

The German cartel office, Bundeskartellamt, reported that there is clear evidence that the country's major energy companies secretly colluded on a number of strategies such as price-fixing and schemes to supply certain regions. E.On, RWE, EnBW (partially hold by France's EDF) and (Swedish) Vattenfall, which collectively control about 80 % of the German energy market, appear to have secretly exchanged sensitive information in order to push up electricity prices.

Bundeskartellamt and EU officials conducted raids in 2006 and seized evidence on the issue. Relevant information is presented in the Agency's 30-pages' report on the matter.



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Competition Commissioner Mrs Nellie Kroes favours the liberalisation of the energy market and aims which make it more competitive and result in price cuts (see: Pappas & Associates Newsletter September 1/07 article *“Unbundling Europe’s Energy map”*, p. 8). Germany, which was opposing the big liberalisation plans, might now change its mind, with two of its ministers for Economy pointing out the benefits resulting from such a move.

Last but not least, the European Commission is also investigating the numerous (some 60,000) pieces of evidence, which include files, minutes of meetings, draft decisions, internal e-mails and strategy papers, in a case which will set a precedent for all Member States’ energy markets.

### INFORMATION & COMMUNICATION TECHNOLOGIES

- The framework of e-communications reform: A concise analysis

On November 13<sup>th</sup>, the Commission announced the scheduled reform of the Regulatory Framework on E-Communications and E-Networks. Its proposal focuses on less but more effective regulation which will prompt investment and better competition results while securing universal supply. The suggested changes can be summarised as follows:



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**Ex-ante regulation markets:** In the market segments falling in ex ante regulation, ten out of the eighteen have been removed and two have been merged, for reasons culminating from simplification (since there was no further need for regulation) on to less bureaucracy and better targeting. Among the scrapped markets are most of the retail markets: The regulators are to focus, from now on, to the wholesale markets instead, since it is believed that competition in these will secure effective competition at retail level as well.

**Spectrum allocation:** Another area upon which the Commission will focus its efforts is the digital switchover. This will free valuable bandwidth from analogue broadcasting and make it available for new uses, such as high-speed internet access for all, new mobile multimedia services, and high definition TV. This is in line with the decision of the World Radiocommunications Conference in Geneva on November 15<sup>th</sup> to give mobile service providers access to bandwidth currently reserved for terrestrial television broadcasts. This provision will not materialise until 2015 for certain parts of the world, such as Europe, since there is a fear of interferences which could harm remaining digital terrestrial TV viewers. However, it is also seen as the hope to deliver high-speed Internet access on-the-move anywhere in the world.

**New European Agency:** The Commission also wants to better inform consumers who will then have more freedom to choose and pay lower prices.



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This presupposes independent regulatory authorities ensuring effective competition, the Commission underlines. It has therefore brought forward a yet controversial proposal to set up a ‘European Telecom Market Authority’. European organisations and regulators are very skeptical thereto, considering that such an initiative would result in higher administrative barriers and bureaucracy. The Commission retorts that this is essential to fill existing regulation gaps and disharmonised existing approaches within Member States. In this respect, the Agency would be ‘time-limited’; its tasks would cease to exist once effective competition is put into place.

**Functional separation:** Former telecommunications monopolies, the so-called ‘incumbents’, are now urged to functionally separate their networks and services. The proposal does not go as far as to exceed ownership unbundling. However, a milder alternative is being promoted in the form of a ‘functional’ separation. This means that the incumbent operator will separate its network infrastructure from the units offering services using this infrastructure.

This should be a last resort solution, which would only take place on the basis of a sound market analysis pointing out its necessity and proportionality while dealing with persisting competition problems in the national market at stake. The effect of such a measure on investments – especially in broadband networks – by both incumbents and new market entrants should also be taken into account.



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The EU Commissioner responsible for Information Society, Mrs Viviane Reding, summed up the new initiative as follows: "Dominant telecoms operators, often still protected by government authorities, remain in control of critical market segments, especially of the broadband market. This restricts consumers' freedom of choice. 10% of EU citizens still have no broadband access at all. This is why new consumer rights, a new dose of competition, an effective system of independent telecoms regulators, new investment into competitive infrastructures and more space for new wireless services are needed to put Europe's digital economy on track."

- **ENISA on the challenges of social networking sites**

On October 25<sup>th</sup>, the European Network and Information Security Agency, ENISA, published an initial position paper on the role and function of so-called 'social networking sites'. The popularity of these websites, the most prominent of which are Facebook and MySpace, rose dramatically the past few years. They enable users to post personal information and preferences, to interact with others and define who has access to one's profile and may communicate with one and how.

After elaborating on the commercial and social benefits of social networking, the position paper also set out fifteen threats related to them, mainly possible interventions in users' privacy, information security, identity theft and social issues.





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The so-called “digital dossier aggregation” arises when third parties can easily access the user’s profile. That way, potential employers may look up their future employee’s profile and decide to exclude someone because of the information listed there.

Another threat is phishing, where sensitive information, such as credit card details, is criminally and fraudulently acquired by somebody masquerading as a trustworthy user. Further risks include problems which may result from identification, spreading of worms and viruses, spamming and stalking.

Some of the nineteen recommendations on how to deal with the above mentioned threats include awareness-raising campaigns placed on the social networking sites, not only for users but also for software developers to encourage security-conscious development practices. The main emphasis of this paper, however, is to raise awareness among political and corporate decision-makers who should rethink legislation regulating social network sites and if necessary adapt it especially in the field of data protection.



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**INTELLECTUAL PROPERTY**

○ **New international anti-counterfeiting pact**

On October 23<sup>rd</sup>, the Commission announced that it is seeking a mandate from its Member States to negotiate a new agreement called Anti Counterfeiting Trade Agreement (ACTA). This agreement between the EU and its main trading partners aims at increasing intellectual property rights' (IPR) protection. This agreement would strengthen the cooperation between the countries involved, build towards harmonised standards, establish common enforcement practices and, ultimately, create a modern legal framework which takes into account the new sly forms which the infringement of IPR has taken nowadays.

The volume of counterfeit products has risen significantly, according to OECD sources. The annual value of counterfeit goods amounts to some 200 billion dollars, which equals 2 % of world trade –and the tendency is increasing. Besides its negative impact on trade, this development can also cause serious health and safety problems.

The EU and its trading partners do not seek to exclude other trading partners with weaker IPR rules or enforcement record, such as China. On the contrary, the challenge is to encourage the latter



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to join the agreement and, in that way, achieve stricter standards and anti-counterfeiting action.

The Union of Industrial and Employers' Confederations of Europe, 'BusinessEurope', and the International Federation of the Phonographic Industry (IFPI), welcomed the Commission's initiative and share its views that cooperation with major trade partners will be a key move in the fight against counterfeit products.

### o On the future of biotechnological patents in Europe

On November 8<sup>th</sup>, the European Patent Office (EPO) organized a Conference on patenting biotechnological inventions in Europe. Almost ten years after the adoption of Directive EC 98/44 on the legal protection of biotechnological inventions, stakeholders and practitioners came together to discuss to what extent harmonisation has been achieved and which particular problems remain.

The focus of the discussion was placed on the ethical aspects of this issue as well as the procedure of granting such patents by the EPO. The Member of the European Parliament Mrs Sharon Bowles elaborated on the difficulties of reaching a consensus and the watering down of legislative initiatives of controversial nature. She also mentioned that much is 'lost through translation' and pointed at the difficulty of reaching a good compromise while pleading for quality of patents and examination processes on the one hand and



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on affordability on the other hand. Remaining issues, such as precision of termini or legislation gaps, can be solved by a ‘Court’ specialised thereto, Mrs Bowles suggested.

Greenpeace representative Mr Christoph Then spoke of a ‘patent inflation’ which will only get worse in the future. Legally, many issues remain unclear, he stated, such as patents on genes and stem cells. In his view, the directive EC/44/98 is problematic in many aspects and does not provide a solution when it comes to biotechnological patents.

EPO’s Director of Patent Law, Mr Ingwer Koch, presented some legal aspects of the patent granting procedure, which follows binding regulations, guidelines and case law. He also outlined the possibility given to any third party to investigate every patent application and file free of charge at any time.

Prof Julian Kinderlerer, Member of the European Group on Ethics (EGE), while presenting the tasks of EGE, which mainly consist in drafting opinions on specific issues, argued that a ‘new balance’ needs to be found. He also argued that the procedure and the drug should not be blurred and criticised the unavailability of drugs and treatments to patients who cannot afford them (e.g. in developing countries).



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**ENERGY & ENVIRONMENT**

- Commission is competent to adopt criminal measures on ship-source pollution

The European Court of Justice acknowledged, with its judgement C-440/05 of October 23<sup>rd</sup> 2007, the Commission's competence to adopt criminal measures in the subject matter of environmental sea pollution. It therefore annulled a framework decision adopted by the Council of the European Union in 2005.

The framework Council decision of July 12<sup>th</sup> 2005, adopted within the remit of article 34 par.2 (b) of the Treaty of the European Union in the framework of police and judicial cooperation in criminal matters, aimed at supplementing the Community Directive on the protection of the environment through criminal law (Directive 2005/35/EC) and strengthening the criminal-law framework for the enforcement of the provisions against ship-source pollution. It stated that Member States had to provide for effective, dissuasive and proportionate penalties for those who committed, aided, abetted or incited one of the offences referred to in the aforementioned directive.

However, the European Commission referred to the European Court of Justice arguing that such measures lie within its sphere of competence and should therefore be included in the directive.



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Since common transport policy is one of the foundations of the Community (see: articles 70–80 ECT), within the scope of the competence conferred on it by the EC Treaty, it should therefore be possible for Community legislature to adopt measures aimed at improving maritime transport safety.

The Court of Justice endorsed the Commission’s point of view. Since the EU Treaty, if competing spheres of competence arise between the EC Treaty (3<sup>rd</sup> pillar) and the EU Treaty (1<sup>st</sup> pillar), gives priority to the former, the Court of Justice endorsed the Commission’s view in this subject matter. However, the Court explained that the type and level of these penalties remain within the competency of the Member States.

- Towards a “Post-Carbon Society”

Research is strongly connected to climate change and plays a key role in moving towards a post-carbon society by increasing knowledge and providing economically feasible solutions thereto. On 24 October 2007, the European Commission’s DG Research organised a conference which brought together actors from different research areas to exchange findings, ideas and proposals on this issue. Its aim was to mobilise scientists to produce post-carbon-related research and analyse the role of key players like politicians, companies and the society.





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One of the main points raised was that the EU has to react against climate change since the Western world is mainly responsible for the climate change phenomenon. However, there are also huge concerns about activities of new emerging economies, such as China and India, which do not take the climate change parameter into account in their rapid economic growth.

The conference further emphasised the necessity to change current cities and to design new ones, which will function on the basis of sustainable and renewable energies. However, not only infrastructure, but also legislation and policies have to change, as well as the social behaviour of individuals. This is, actually, an important non-economic barrier to the diffusion of renewables and is often the result of lack of knowledge and awareness, people's inertia to change and an overflow of different environmental criteria.

Therefore, new EU-wide standards should reflect the priorities set by the Green Paper on a Common Energy Policy in Europe. The ideas put forward at the conference will be taken into account in a study on socio-economic factors and actors that shape the post-carbon society, which will probably be included in the 7<sup>th</sup> Framework Programme.



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**CONSUMERS AND HEALTH**

○ **Cervical cancer prevention: a European health policy priority**

On November 7<sup>th</sup>, a lunch briefing was organised at the European Parliament on cervical cancer prevention. The event was attended by several Members of the European Parliament, as well as the Presidents of the Club Européen de la Santé and the European Cervical Cancer Association. Professor Sergio Pecorelli of Brescia University reported on the key facts of cervical cancer, which is, after breast cancer, the most serious death threat for young women. This, together with the fact that the instruments to fight against it exist today, makes it imperative to act, several speakers suggested.

Besides treatment at a later stage, preventive measures include not only secondary prevention (i.e. recommendations on adopting a healthy life-style) but also primary prevention: Pre-adolescent girls vaccinated against cervical cancer have a 75% probability to escape the disease. Vaccination should, therefore, be considered at schools EU-wide.

From the European Commission, Mr Philippe Brunet, Head of Cabinet for Health Commissioner Mr Markos Kyprianou, highlighted the need of quality screening when it comes to this form of cancer, which can be effectively prevented if diagnosed at an early stage.



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Also, a cost-benefit analysis should be conducted to specify the optimal use of the vaccines.

Moreover, a communication strategy is essential, which will set out a clear approach on the target group involved and the different needs throughout the Member States. It is a challenge as well as a necessity to agree on a common set of criteria in all Member States, since the costs are carried by different actors in some of them, Mr Brunet said.

The Member of the European Parliament, Mr Adamos Adamou, criticised the fact that Member States have not or have only badly coordinated action in this respect. He argued that radical measures are needed to fight the disease and that investments in prevention will be profitable. “We may not evoke the subsidiarity factor every time high costs incur and thus push aside altogether such an important initiative”, Mr Adamou said. Dr Marija Seljak, Director General for Public Health at the Slovene Ministry of Health, mentioned that fighting against cancer will be one of the main priorities of the upcoming Slovenian Presidency.



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**PUBLIC AFFAIRS**

○ [Court of First Instance judgement on transparency by European institutions](#)

On November 8<sup>th</sup>, the Court of First Instance annulled a decision of the European Commission not to disclose the names of the participants of a meeting on beer market trading. To begin with, the German beer importer Bavarian Lager Co. Ltd filed a complaint to the European Commission against the British legislation which allowed for exclusive purchasing contracts. The latter obliged a number of operators of pubs and bars in the United Kingdom to order beer from only some breweries.

Thereupon, the European Commission organised a meeting to investigate the case. In this meeting were present, besides the Commission members, the UK department of trade and Industry and representatives of the Confederation des Brasseurs du Marche Commun. Despite its explicit request, the German competitor was neither allowed to participate in this meeting nor was it given information in form of a list of the participants. The Commission argued that the company had neither an 'express and legitimate purpose' nor a need for this data disclosure and thus, the personal data of the participants had to be protected.





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However, the Court of Justice disagreed with the Commission's justification. It dismissed the data protection argument, since the disclosure of this data would in no way have undermined the privacy and integrity of the participants. The Court's argumentation thus confirmed the direction taken by the European Transparency Initiative (see: Pappas & Associates Newsletter October 1/07, article "*The European Transparency Initiative*", p. 12).

In response to the Court's decision, the Commission will now propose a new regulation on document access which will take into account the findings of the Court. Lobbying associations, like the Corporate Europe Observatory, welcomed the Court's decision, saying that it constitutes an important step towards improving transparency in the sector. The Commission's lobbyist register is expected to be launched next spring as part of the Transparency Initiative.

