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COMPETITION

- **European Commission objects Intel's anticompetitive strategies**

  At the end of July, the Competition Directorate-General of the European Commission sent a Statement of Objections to the major global chip-producer Intel. The Commission is investigating Intel's activities in the mainboard processor market, where it is allegedly tried to exclude its rivals, most notably AMD. First of all, substantial rebates to several Original Equipment Manufacturers (OEMs) under the condition that those will purchase their CPU requirements from Intel are put into question. Also, there is a severe allegation that Intel effectuated payments to delay or cancel the launch of products incorporating CPUs made by AMD, even though the latter were cheaper and more advanced than Intel chips. A third big issue is whether Intel has, indeed, made a bid for CPUs on average below cost in order to unlawfully bypass AMD competition.

  The Commission, as a guardian of the Treaties, takes its role seriously by punishing abuses of dominant position and thus safeguarding consumers' benefits. After the 'green light' it was given by the Court of First Instance in the Microsoft case, the European watchdog will now meticulously examine if and in what extend market leader Intel is distorting the competitive conditions in the microprocessor market. Intel has to respond to the Statement of Objections until December 6th.

If its justifications do not convince the Commission, the latter will order for the above-mentioned practices to be ended and may impose a fine up to 10% of the company's yearly global turnover i.e. more than 3 billion euros.

- **Court of First Instance upholds Microsoft decision**

On September 17th, the long-running dispute between Microsoft and the European Commission reached its peak with the announcement of the judgment of the Court of Fist Instance. The Court upheld the Commission's decision. Microsoft was found guilty of abusing its dominant position in order to 'freeze out' rivals in the server software and media player markets.

Both of the grounds on which the Commission's decision has been taken, namely the refusal to supply adequate interoperability information and the abusive tying of the media player, have been confirmed by the Court. Microsoft's refusal to license intellectual property rights to a rival was considered to be abusive for two reasons: Firstly, "it took place in exceptional circumstances such as those envisaged in the case-law, which, in the public interest in maintaining effective competition on the market, permitted an interference with the exclusive right of the owner of the intellectual property right". Secondly, there was no objective justification for this denial.

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Thereby, the "*Magill*" case law on refusal to grant a licence was evoked. According to this jurisprudence, the exercise of an exclusive right by the owner who has a dominant position in the market may, in exceptional circumstances, give rise to abusive conduct even though the owner is, in principle, entitled to choose whom to grant a licence to. As to abusive tying practices, the Court followed the line of case law set by "*Hilti*" and "*Tetra Pak II*" and affirmed that the conditions of illegal tying (most notably the foreclosure condition) were met.

Internal Microsoft documents (e-mails) served as proof of the intention of the company to leverage its position on the client PC operating systems' market in order to strengthen its position on the work group server operating systems' market. The 497 million euros fine was not rescinded after the Commission explained the way in which the fine was calculated. Thereby, the nature, the gravity and the duration of the infringement as well as its impact on the market and the size of the relevant geographic market was taken into account.

The Commission affirmed that it will continue to monitor Microsoft's behaviour to make sure the latter complies with the imposed obligations. The most important consequence is the fulfillment of the interoperability condition. This means that the software giant must enable its products to operate with other computer systems, most notably by sharing information with rival software companies.

Microsoft, on the contrary, claimed this to be indefeasible, i.e. protected under intellectual property laws. It is worth noting that this landmark case even aroused the reaction of the U.S. Department of Justice. Thomas Barnett, the head of its antitrust division, commended in Washington: "We are concerned that the standard applied to unilateral conduct by the Court of Fist Instance, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition."

However, irrespective of any criticism and even though there might be an appeal, it remains a fact that this judgment has far reaching effects beyond Microsoft: It reaffirms, at a critical stage, the Commission's approach towards companies with market power. Moreover, it is a stimulus to further follow up the policy line drawn so far by its services.

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INFORMATION & COMMUNICATION TECHNOLOGIES

- **Lower mobile termination rates in sight**

On September 14th, the European Commission granted the French Telecom Regulator's (Autorité de Régulation des Communications Electroniques et des Postes – ARCEP) intention to reduce mobile termination rates by modifying the price control obligations it imposes. This is a step taken within the national authority's duty to monitor effective competition in e-communications' market segments as foreseen in Article 7 of the Framework Directive of the EU Telecom Rules. Termination rates should therefore be justified by an efficient operator's real costs. This is considered to be a safe benchmark for setting price caps for mobile termination rates.

The Commission, which has seen a positive feedback after its 'Eurotarrifs' Regulation entered into force on August 1st, welcomed this intervention set at further lowering the wholesale rates charged by French mobile operators. It is expected that further price reductions will follow, especially if ARCEP's plan to adopt a common European approach for calculating cost-oriented mobile termination rates comes about.

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- **European Telecommunications Regulator up-and-coming**

A new Agency might come to life in order to deal with thorny telecommunications issues at a European level. Information Society Commissioner Viviane Reding envisions a new "European Electronic Communications Market Authority" which will closely co-operate with national telecom regulators and the Commission alike.

This initiative aims at a closer cooperation and streamlining of decision-making between national authorities and the Commission as well as better enforcement of pan-European provisions. It is also expected to enable a pooling of expertise, particularly in the difficult task of market definition, analysis and geographical cross-market issues. The aspiring new authority is expected to assist the Commission in several issues, such as market analysis in problematic cases (esp. transnational markets), the allocation of European radio spectrum, issues related to cross-community services which can be dealt with better at European level etc. Also, it will give its opinion to the Commission when the expedience of a measure proposed by a national regulator is in doubt.

The proposal, which is still with the Commission's inter-service and undergoing the consultation procedure, is expected to be part of the Commission's overall review of the e-communications' regulatory framework, which is due in October.

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INTELLECTUAL PROPERTY

- **'Grana' cheese is not generic**

On September 12th 2007, the Court of First Instance annulled the decision of the Board of Appeal of the Office of Harmonisation of the Internal Market (OHIM) in Case T-291/03, *Consorzio per la tutela del formaggio Grana Padano v OHIM*. The Board of Appeal's decision found that the word 'grana' was generic since it 'described an essential quality of the goods'.

For the generic nature to be established, a detailed analysis of several factors should take place: According to the Court of Justice's case-law, all relevant evidence, of legal, economic, technical, historical, cultural and social nature should be taken into account. Thereby, the perception that the average consumer has of the name as well as relevant marketing data in all Member States are important. However, the Board of Appeals, in this case, failed to consider opinion polls of consumers and the opinion of experts qualified in the subject area.

Furthermore, the Regulation on the Community trade mark does not affect the Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, explained the Court. The latter regulation postulates that, if the trademark is meant to cover a name registered for products which are not covered by the registration themselves or are evoking a protected name, the application must be refused.

If the trademark is already registered, the Office of Harmonisation of Internal Market must declare the registration to be invalid. Therefore, the registration of the word mark 'Grana Biraghi' by the cheese producer Biraghi Spa cannot be accepted as a valid trade mark for various kinds of cheese.

ENERGY – ENVIRONMENT

- **Unbundling Europe's Energy map**

On September 13th, the European Commission presented its new energy legislative proposals. These consist of two directives, the Electricity Directive amending the existing Directive 2003/54 and the Gas Directive amending the existing Directive 2003/55, and three regulations, one of which is establishing the EU Agency for the cooperation of National Energy Regulators while the other two are the Electricity Regulation amending the existing Regulation 1228/03 and the Gas Regulation amending the existing Regulation 1775/05.

The Commission has therefore taken the view that, in order for real competition to see the light of day in electricity and gas markets, energy transport networks should be unbundled from the supply and generation activities. Ownership unbundling means that energy transmission should be legally separated from its production and supply.

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As plan B, an "independent system operator" could be set up to enable vertically integrated companies to retain network ownership, under the condition that the assets are operated by a completely independent company.

The new 'Energy Legislation Package' means more information for customers to choose a supplier other than the incumbent, less red tape when changing energy suppliers and enhanced protection against unfair selling practices. A new Energy Customers' Charter is expected to be launched in 2008.

EUROPEAN CIVIL SERVICE – STAFF REGULATIONS

- **Court of First Instance confirms: restrictions on transfer of officials' national pension rights are invalid**

The Civil Service Tribunal decided that an official who enters the service of the Commission after having contributed to a national pension regime can ask for his national pension rights to be transferred into the Community system. In case F-100/05, it questioned the Commission's ability to take advantage of the introduction of the euro in order to implicitly modify its method of calculation of the national pension rights which can be transferred into the Community system. Thereupon, the Commission appealed against this judgment but the Court of First Instance confirmed the reasoning of the Civil Service Tribunal.

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According to Article 3 of Council Regulation 1103/97, the introduction of the euro should not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument. This article lays down the principle of the continuity of legal instruments and the objective of a "neutral" transition to the euro. Indeed, the Staff Regulation and its implementing texts regarding the method of calculation of the pension rights recognised by the Community system constitute legal instruments within the meaning of Article 3 of Regulation 1103/97.

Whilst Regulation 1103/97 has in no way undermined the ability of the Commission to modify its Staff regulation and implementing texts, it is no less true that any legal modification simultaneous to the introduction of the euro must meet the requirement of legal certainty and transparency guaranteed by Regulation 1103/97. In other words, the modification of any term or payment provided in a legal instrument must be explicit.

The Court of Fist Instance sustains that the Commission breached the aforementioned principles when it decided to modify the calculation method of the number of annual installments transferred into the Community system since the Commission did not inform its officials properly. However, the new calculation method it used is valid from its formal publication onwards.