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### EU INSTITUTIONS

#### Competency of European Supreme Court is questioned

On 27 November 2000, Directive 2000/78/EC, adopted by the Council under article 13 of the EC Treaty, was adopted and established a general framework for equal treatment in employment and occupation. Article 13 of the EC Treaty gives the Council competence to take action to combat discrimination on grounds of sex, racial and ethnic origin, religion and, among other things, age. According to article 6 of Directive 2000/78/EC, “differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, (...) and if the means of achieving that aim are appropriate and necessary”.

In its judgment of 22 November 2005 on case C-144/04, *Mangold*, the ECJ examined the compatibility with Community law of a German law allowing workers over 52 to be hired on a succession of short-term contracts, whereas the reasoning behind it was to encourage recruitment by employers. The Court found that the aim of increasing the employability of older workers was legitimate, but the measure was too wide in scope and the aim could have been achieved in a less discriminatory way.





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Three years on, the Bundesverfassungsgericht (German Federal Constitutional Court) is now dealing with a complaint questioning this European jurisprudence (which was the ground for dismissal of a new national Court case by the German Federal Labour Court). It will examine, according to the criteria elaborated upon in its "Maastricht Judgement", whether the ECJ at the case of hand respects the limits of competences granted to it by the EC Treaty which was approved by the German national Parliament by the German Federal Constitutional Court of 1993 and is therefore binding for the German law makers and enforcers.

Roman Herzog, former president of the Bundesverfassungsgreicht, and Lüder Gerken, Director of the Centre for European Policy, in their article at EUobserver, openly question the European Court's competence in this respect. They also refer to other instances on which, according to their view, the ECJ has transcended its competencies, such as in the case of the EU ban of tobacco ads.

This was when the EU decided to ban tobacco ads in local papers in the light of health care policy. Since there is not sufficient legislative competence for the Community in the field of health care, the authors argue, the single market argument was employed: Without an EU-wide ban, a national tobacco ad ban in one single member state would lead to foreign newspapers containing





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tobacco ads not being allowed to be sold in that state, was roughly the reasoning.

Despite the Federal Republic of Germany taking action against the measure, which it claimed was based on an “artificial argument”, the ECJ upheld the legislation. Its reasoning was, indeed, that different tobacco ad rules in the member states risk impeding the single market. And that despite the fact that the national tobacco ad bans expressly excluded foreign newspapers, so that foreign newspapers containing such ads could still circulate freely –say the authors of the article.

Herzog and Gerke furthermore argue that the ECJ is unsuitable to judge whether the principle of subsidiarity is been respected and thus protect the citizens interests. The radical proposal put forward is to create promptly an ECJ independent court which will clear the Community Courts competence issues. For the time being, one can only expect with great interest the decision of the German Constitutional Court on the above–mentioned pending case.





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### COMPETITION

#### Single European Payments'Area payment card schemes clarified

On August 21<sup>st</sup>, the association of banks and banking associations which is setting up the Single Euro Payments Area, European Payments Council (EPC), addressed to the European Commission and the European Central Bank a document regarding its compliance with the SEPA Cards Framework (SCF) for payment card schemes and banks. This document, structured in a Questions and Answers form, also refers to the conditions for geographical coverage of card schemes within the SEPA. The ultimate goal is to overhaul the fragmented national payments markets towards a SEPA-wide competitive payment cards market in which economies of scale would materialise and contribute towards an increased and more efficient competition.

The document comes as a response to the concerns of Commissioners Neelie Kroes for Competition and Charlie McCreevy for Internal Market, who, together with Mrs Tumpel-Gugerell of the Executive Board of the ECB, have questioned whether some of the provisions in the SEPA Cards framework have been understood correctly. For example, regarding the rules for migration of cards to SEPA, instead of clear applicable rules and standards, three options were proposed. Therefore, the interpretation of these





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options by market participants was that a card scheme is only 'SCF compliant' if it covers all 31 states which form the SEPA territory.

When it comes to the geographical dimension, the EPC confirmed that, in order to comply with the SCF, the SEPA Cards Framework only requires the cards to be technically and commercially capable of being accepted in all states where SEPA is applicable. The important criterion is that the scheme is – inter alia – technically and commercially capable of admitting banks from other SEPA countries. Thus, it is an opportunity even for national or regional schemes to become SCF compliant –a clarification which the Commission and the ECB welcomed, since it would drive up competition between them to the consumers' benefit.

However, banks should not only sell the national debit card scheme to existing schemes. Instead, specific technical standards should be developed in order to enable the use of any card in the whole SEPA area. Only then will the existing debit card schemes expand across the SEPA area and one or more new European card scheme(s) will emerge and help consolidate the market. This initiative should ultimately enable citizens to make payments and cash withdrawals in euros throughout the block of 31 countries as easily, cheaply and conveniently as they do in their country of residence.



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### Public consultation on procedural rules of EC treaty antitrust rules enforcement

On July 24<sup>th</sup>, the Commission launched a public consultation on the functioning of Council Regulation 1/2003 which sets out the procedural enforcement rules of articles 81–89 of the EC Treaty (competition rules). This Regulation, barely four years' old, was revolutionary since it decentralised the application of EC competition rules by entrusting their application by Member State competition authorities and courts.

At the time, it was widely criticised because there were concerns it would result to forum shopping and legal uncertainty. However, there was a need to decentralise since the case

The results of the consultation, to which all stakeholders are welcomed to contribute, will be taken into account for the Report on the functioning of Regulation 1/2003 which is foreseen in article 44 of the Regulation (obligation of the Commission to report on functioning five years after its entry into force) and will be presented before the Council and the Parliament by May 1<sup>st</sup> 2009. The stakeholders, both of the private as well as the public domain (businesses but also courts, competition authorities, associations etc.), will be able to participate by sending their opinion until the





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end of September. The questionnaire for stakeholders can be found at the Commission's website at:

<http://ec.europa.eu/comm/competition/consultations/open.html>

### TELECOMMUNICATIONS

#### **Roaming Regulation prepares to enter in a new phase**

One year from the introduction of the Roaming Regulation, on August 30<sup>th</sup>, the European Commission will further reduce the price ceiling for roaming calls. One year after its introduction, the so-called "Eurotariff" will be lowered from €0.49 to €0.46 per minute for making, and from €0.24 to €0.22 for receiving a call.

But there might be further developments regarding SMS and data exchange charges. Indeed, the Commission has been closely monitoring the prices charged for those services for some time now. On August 28<sup>th</sup>, EU Information Society Commissioner Viviane Reding said on the issue: "The further reduction of the Eurotariff on 30 August will reaffirm the trend for lower roaming prices. The next challenge is now to bring about a single market for roaming text messages and data services. I count on the French Presidency and on the European Parliament to help the Commission solve this problem very soon."





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This reaction comes on top of an announcement of the European Regulators Group (ERG), which consists of the EU national telecom authorities, that consumers are frequently overcharged (some 24% for cross-border calls and 19% for received roaming calls) for using their mobile. To solve this problem, the Commission might propose to introduce per-second tariffs for calls across the EU; that way, calls will not be rounded up to the next minute.

However, the industry is vehement against this suggestion, which would amount to “micro-management”, the main mobile phone operators’ association, GSMA, said. It went on to add that a possible abolition of per-minute tariffs “would risk further erosion of competitive differentiation in the market”. “Billing increments are a point of differentiation that operators can use to appeal to customers with different preferences” the GSMA spokesperson said to justify different paying patterns, which are part of different tariff packages.

In the meantime, it looks as if the price ceilings will be maintained even beyond 2010. As to the other mobile roaming services, we will have to wait for the concrete proposal, which is expected at the beginning of next month, when the Information Society Commissioner will present the new version of the Roaming Regulation.



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### **Telecom reform shortly before the first voting at the Parliament**

The European Parliament, in its plenary session on September 2<sup>nd</sup>, debated on the proposed Commission reform of the Regulatory Framework of Electronic Networks and Services. The Commission wants the European industry to be on the cutting edge of the global market by introducing further innovative cross-border services and wireless high-speed broadband for all.

The Commission's proposal wants to include an obligation for operators to produce comprehensive information about prices, tariffs and other conditions. Another issue is the reform of radio spectrum management in order to facilitate the roll out of wireless services, particularly high speed wireless broadband connections which would be able to provide universal service. The digital dividend (the radio spectrum freed as a result of the switchover from analogue to digital TV) could be allocated to new wireless services and high definition TV.

Furthermore, "net freedoms" should be recognised and constitute a benchmark by regulators and policy makers when evaluating cases at hand. These are the users' rights to access and distribute – lawful – content, to run applications and connect devices of their choice. Another point at the reform is to enhance the convenience of consumers regarding number portability; these should be able to





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change their fixed or mobile operator while keeping their phone number within one working day.

Better data protection would be ensured via an obligation of the telecom operators to inform their customers without delay whenever their personal data has been illegally accessed, copied, or lost as a result of a security problem. Users with disabilities should gain better access to computers and mobile phones and benefit from special services such as the 112 emergency services or TV channels with attributes such as subtitles, sign language etc. The single European emergency number 112 should become a mandatory feature provided by all means and all providers of outgoing calls, so that emergencies are more effectively dealt with.

However, some other issues of the reform, such as the power of the EU's executive body over national regulators, remain thorny. After rejecting the idea of a new EU Telecoms Agency, the Parliament listened to Information Society Commissioner Viviane Reding's idea to grant a kind of veto power to the Commission against regulatory measures adopted at national level which would not conform with the latter's approach. Also, she asked for more powers for the body coordinating the national regulators, either the current European Regulators Group or a new one. She went on to elaborate: "It surely makes sense that when the body warns that there is an internal market problem, in conjunction with the concerns raised by the





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Commission, then there should be real consequences. In the interests of the internal market, and of legal certainty, there must be a power for the Commission to require the notifying national regulator to change its approach in such a case." Yet, the Parliament was very critical to this latter proposal. The MEPs questioned the body's independence from the Commission and highlighted the budgetary constraints which were immanent to the idea of creating yet another regulators team.

The European Parliament's Internal Market Committee insisted on informing customers about costs related with early termination of the contract when handsets or other terminal equipment are included free, (or at a subsidised price), directly providing and enabling independent companies to use transparent pricing information, as well as information about any restrictions on access to services (such as Skype), cutting contract lengths up to a maximum of 24 months to avoid consumers being locked into long contracts and enhancing access conditions to disabled users.

Another much contested issue is whether the Directive Package should include some copyright enforcement provisions, as some lobbyists' groups are purporting. MEP Malcolm Harbour, EPP-ED Spokesman on the Telecoms Package, said on this: "Unfortunately, the real benefits of this package risk being undermined by alarmist scare mongering that it will cause certain websites to be blocked,





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and consumers prosecuted for copyright abuse. (...) This is not, and has never been, the intention of this proposal. The Directive adopts a light touch to the Regulation, so that innovation in the telecoms sector can continue to develop according to consumers' demands."

The plenary vote in first reading on the matter is due on September 23<sup>rd</sup>. Two months later, on November 27<sup>th</sup>, the Council of Telecommunications Ministers will discuss further the open issues with a view for all three institutions to reach a political agreement on the amended legislative texts around the end of the year.

### **HEALTH & CONSUMERS**

#### **European Parliament on banning food by cloned animals**

On September 3<sup>rd</sup>, the European Parliament yesterday asked the Commission to prohibit, by means of a proposal, the use of cloned animals in food products following the publication of a highly cautious report by the EU's food safety authority on the issue. On July 15<sup>th</sup>, the European Food Safety Authority (EFSA) communicated the results of its analysis on the issue of Food Safety, Animal Health and Welfare and Environmental Impact of Animals derived from





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Cloning by Somatic Cell Nucleus Transfer (SCNT) and their Offspring and Products Obtained from those Animals. Even though the expert opinion mentioned that "for cattle and pigs, food safety concerns are considered unlikely," it also acknowledged the lack of data on this issue as well as the limited scope of the research undertaken. Another concern mentioned in the report was the potentially "significant animal health and welfare issues" faced by cloned animals compared to conventionally bred ones.

Now, 622 Members of the European Parliament (against only 32 and 25 abstaining) call in a resolution for an EU-wide ban on food from, on farming cloned animals for food supply purposes and on placing products derived from such animals or their offspring on the market. Also, they want imports of such animals, their offspring, semen or embryos as well as products derived thereof to be forbidden.

MEPs pointed to the Council Directive 1998/58/EC of July 20<sup>th</sup>, 1998 concerning the protection of animals kept for farming purposes, whose article 3 in conjunction with Annex numbers 14 and 20 which ban any natural or artificial breeding procedures likely to cause suffering or injury. This could serve as the basis of a ban, they reckon and ask for an EU-wide ban as opposed to the US, where the Food and Drug Administration stated, last January, that meat and milk from clones of cattle, pigs and goats and their





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offspring "are as safe to eat as food from conventionally bred animals".

EU Commissioner for Health and Food Safety, Androula Vassiliou, "is aware that even though the efficiency of animal cloning has improved over recent years, adverse health effects on animal health and welfare still occur today". The Commission "is now evaluating the necessary steps to be taken" and will carefully consider the opinion of the European Group of Ethics, which concluded that "at the moment there are no convincing arguments to justify the production of food from clones and their offspring" (see: *Pappas&Associates Newsletter*, January 1/2008, p. 16: "Two opposing reports on cloned products spark debate").

