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COMPETITION – NEW COMMISSION GUIDANCE ON EXCLUSIONARY CONDUCT BY DOMINANT FIRMS

Communication from the Commission of 3 December 2008 C(2009)864 – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

On 3 December 2008, the European Commission published new guidance on its enforcement priorities in applying EC Treaty rules on abuse of a dominant market position (Article 82 EC Treaty) to abusive exclusionary conduct by dominant undertakings, i.e. behaviour aimed to exclude actual competitors from expanding or would-be competitors from entering a market. In line with recent Commission's trend of economic and effect-based approach to application and enforcement of competition rules, the Commission claims in the Guidance to prioritise cases where the exclusionary conduct of a dominant undertaking is having actual harmful effects on consumers. The primary goal of the Commission is then to protect consumers and the process of competition and not individual competitors. Adverse impact on consumers may be in a form of potential depriving customers of more choice, more innovative goods or services and/or lower prices, while the Commission does not need to establish that the conduct in question actually harmed the competition, only that there is convincing evidence that the harm is likely.

The document describes forms of assessment by the Commission of existence of dominant position, as well as the most common types of exclusionary conduct, such as exclusive dealing, rebates, tying and bundling, predatory practices, refusal to supply and margin squeeze.

<http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>

COMPETITION - SLOVAK COMPETITION ACT IN CONFLICT WITH EU LAW

The European Commission has initiated infringement procedure against Slovakia for provisions of the Slovak Competition Act being incompatible with the EC Treaty.

The European Commission has formally requested the Slovak Republic by the reasoned opinion, the second step of the EC Treaty infringement procedures (Article 226 EC Treaty), to amend regulation contained in Act No. 136/2001 Coll. on Protection of Economic Competition, as amended. This step follows after delivery of a letter of formal notice to the Slovak Republic from the Commission on 6 June 2008.

The Slovak Competition Act in its current wording contains limitation of the Slovak national competition authority, the Antimonopoly Office of the Slovak Republic, to act in specific economic areas, such as electronic communications, energy and postal services, in which powers to control anticompetitive behaviour are vested to regulatory authorities in those specific economic sectors. The Commission requests to cancel limitations of the powers of the Antimonopoly Office, in order to allow it to apply relevant provisions of the Slovak competition regulation and EC Treaty (Articles 81 and 82) in all sectors of the economy.

The Slovak Republic is obliged to bring its legislation into conformity with EU law within two months of receipt of the reasoned opinion, otherwise the Commission may decide to refer the case to the Court of Justice of the European Communities. The Slovak Republic has informed the Commission that the consultation procedure on a draft amendment to the Competition Act has been initiated. According to publicly available draft law its effectiveness is proposed to 1 June 2009.

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STATE AID - LIMITATION OF STATE AID IN RELATION TO FINANCIAL INSTITUTIONS

Communication from the Commission (2009/C 10/03) – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (Text with EEA relevance)

Purpose of this Communication is to provide guidance for new recapitalisation schemes¹ and to open the possibility for adjustment of existing recapitalisation schemes for financial institutions (banks). Such more detailed guidance has been called for by both the European Economic Area (EEA) Member States and potential beneficiary institutions as to whether specific forms of recapitalisation would be in compliance with the state aid rules. Until now, the European Commission has approved recapitalisation schemes in the United Kingdom, Germany and Greece, as well as individual recapitalisation measures in the Netherlands and Latvia.

The European Commission has defined common objectives of recapitalisation schemes or recapitalisation measures as follows: (i) restoring financial stability, (ii) ensuring lending to the real economy, and (iii) dealing with the systemic risk of possible insolvency. On the other hand, each provision of state aid through any recapitalisation scheme or measure must take into account possible distortions of competition at three different levels stipulated in the Communication.

First level should ensure that recapitalisation by one Member State of its own financial institutions would not give such financial institutions an undue competitive advantage over financial institutions of other Member State (“ensuring fair competition between Member States”). Second level should ensure that recapitalisation schemes which are open to all financial institutions within a Member State without an appropriate degree of differentiation between beneficiary financial institutions according

to their risk profiles would not give an undue advantage to distressed or less-performing banks compared to banks which are fundamentally sound and better-performing (“ensuring fair competition between banks”). Third level should ensure that public recapitalisation schemes would not frustrate the return to normal market functioning.

Official Journal of the European Union, C 10/2, 15 January 2009, p. 2 - 10

STATE AID – ABSOLUTE IMPOSSIBILITY FOR MEMBER STATE TO GIVE EFFECT TO A COMMISSION’S DECISION

Judgement of the Court of Justice of the European Communities of 13 November 2008 in Case C-214/07 Commission v France

On 13 November 2008, the Court of Justice of the European Communities ruled that France had failed in its duties under Community law by failing to recover illegally provided tax aid granted to struggling industrial companies.

The case concerns the decision of the Commission (2004/343/EC), which in 2003 found a provision in the French General Tax Code, providing a two year exemption from corporate and property tax for companies acquiring firms in difficulty, incompatible with the state aid rules under the EC Treaty. The Commission’s decision required the French Government to identify the companies benefiting from the scheme and seek recovery of the aid. Although the beneficiaries were identified, no recovery orders were issued by 2006, and the Commission initiated an infringement procedure before the Court of Justice.

The Court of Justice confirmed its previous rulings that the only defence available to a Member State in opposing an application by the Commission for a declaration that it had failed to fulfil its obligations under Art. 88(2) EC Treaty was to plea that it was absolutely impossible for it to properly implement the concerned decision. This

¹ Plans for restructuring financial institutions’ debt with the aim of making their capital structure more stable.

defence is not available where the Member State merely informs the Commission on practical difficulties involved in implementing the decision, without taking any real steps for it and without proposing alternative arrangements, which could have enabled those difficulties to be overcome. The Member State must in particular assess each specific individual case and analyse it in the light of aim for proper implementation of the decision. The Court of Justice stressed that, in the event of difficulties, the Commission and the Member State must work together in good faith with a view to overcome those difficulties.

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FREEDOM OF ESTABLISHMENT – TRANSFER OF COMPANY SEAT TO ANOTHER MEMBER STATE

Judgement of the Court of Justice of the European Communities in Case C-210/06 *Cartesio Oktató v Szolgáltató bt.* of 16 December 2008

On 16 December 2008, the Court of Justice of the European Communities issued a judgement concerning transfer of a company seat to another member state in case of absence of uniform Community legislation.

The Court of Justice points out that, in the absence of uniform Community legislation, a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

Therefore, in its judgement, the Court of Justice held that, as Community law

currently stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

The situation where the seat of a company is transferred to another Member State falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with a change as regards the national law applicable, since that company is converted into a form of company which is governed by the law of the Member State to which it has moved.

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INTELLECTUAL PROPERTY – TRADEMARKS WITH REPUTATION

Judgement of the Court of Justice of the European Communities of 27 November 2008 in Case C-252/07 *Intel Corporation Inc. v CPM United Kingdom Limited*

This reference for a preliminary ruling relates to the interpretation of Articles 4(4)(a) and 5(2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. Reference was made in the context of a dispute between Intel Corporation Inc., holding several UK and Community trademarks containing the word “Intel” and registered in Classes 9, 16, 38 and 42 of the Nice Classification (essentially, computers and computer linked goods and services), and CPM United Kingdom Limited who owns the UK trademark “Intelmark”, registered in 1997 for the class 35 of the Nice Classification (marketing and telemarketing services). Intel began proceedings against CPM for a declaration of invalidity against registration of the trademark “Intelmark” and its deletion from the register of trademarks based on its earlier registered “Intel” trademarks.

The Court of Justice of the European Communities in its judgement states that Article 4(4)(a) of Directive 89/104 must be

interpreted to the effect that the link between an earlier mark with a reputation and a later mark must be assessed globally together with all facts and circumstances relevant to the case. The fact that the earlier mark has a huge reputation for certain specific types of goods and services, while such goods and services are dissimilar to those for which the later mark is registered, and that the earlier mark is unique in respect of any goods and services does not necessarily imply a link between the conflicting marks. Whether the use of the later trademark takes or would take unfair advantage of, or is or would be harmful to the distinctive character of the earlier trademark shall be examined in the view whether economic behaviour of the average consumer of the goods or services for which the earlier trademark is registered has changed consequently to the use of the later trademark or a serious possibility of such change in the future exists.

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ENVIRONMENT - NEW DIRECTIVE ON WASTE

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

This new Directive on waste was adopted referring to the need for revision of the previously valid Directive 2006/12/EC of the European Parliament and of the Council on waste, establishing the legal framework for the handling of waste in the Community. In the interests of clarity and readability, Directive 2006/12/EC was repealed and replaced by this new Directive.

Directive 2008/98/EC on waste clarifies key concepts such as the definitions of waste, recovery and disposal, and strengthens the measures that must be taken in regard to waste prevention.

It introduces new approach that takes into account the whole life-cycle of products and materials and not only the waste phase, and is focused on reducing the environmental impacts of waste generation and waste management, thereby

strengthening the economic value of waste. Furthermore, the recovery of waste and the use of recovered materials are encouraged in order to conserve natural resources.

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, Council Directive 91/689/EEC of 12 December 1991 on hazardous waste and Directive 2006/12/EC are repealed by this Directive with effect from 12 December 2010.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 12 December 2010.

Official Journal of the European Union, L 312, 22 November 2008, p. 3 - 30

ENERGY - TRANSPARENCY OF GAS AND ELECTRICITY PRICES

Directive 2008/92/EC of the European Parliament and of the Council of 22 October 2008 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (recast)

The Directive recasts Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users in particular for the reason of clarity.

The Directive aims to achieve price transparency without endangering the necessary confidentiality of contracts. In this respect, Eurostat shall disclose the data supplied to it, however in an aggregated form which shall not enable individual commercial transactions to be identified. This information, which concerns gas and electricity consumed by industry for energy end-users, will also enable comparisons to be drawn with other energy sources (oil, coal, fossil and renewable energy sources) and other consumers.

Undertakings which supply gas and electricity as well as industrial gas and electricity consumers remain, independently of the application of this Directive, subject to the EC Treaty competition rules, under which the

Commission can require communication of prices and conditions of sale from them.

With the prospect of the achievement of the internal market in energy, the system of price transparency should be rendered operational as soon as possible.

This Directive entered into force on 27 November 2008.

Official Journal of the European Union, L298, 7 November 2008, p. 9 - 19.

PERSONAL DATA PROTECTION – EUROPEAN CITIZENSHIP

Judgment of the Court of Justice of the European Communities of 16 December 2008 in Case C-524/06, Heinz Huber v Bundesrepublik Deutschland

The Court of Justice of the European Communities in its judgement in Case C-524/06, Heinz Huber v Bundesrepublik Deutschland, rules that the storage and processing of personal data containing individualised personal information in a register such as the German Central Register of Foreign Nationals for statistical purposes cannot, on any basis, be considered necessary within the meaning of Article 7(e) of Directive 95/46/EC stipulating that personal data may be processed only if processing is necessary

for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.

Mr Huber, an Austrian national living in Germany from 1996, alleged in his action that he was discriminated against by reason of the processing of his personal data in the Central Register of Foreign Nationals, in particular because such database did not exist in respect of German nationals. Mr Huber requested the deletion of those data, which request was rejected by the administrative authority responsible for maintaining the register at that time.

The Court of Justice reasons in its ruling that Article 12(1) of the EC Treaty must be interpreted as meaning that it precludes putting in place by a Member State, for the purpose of fighting crime, a system for processing personal data specific to Union citizens who are not nationals of that Member State, while similar system for processing personal data does not exist with respect to nationals of that Member State.

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² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

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Advokátska kancelária Čechová & Partners
Združenie advokátov: JUDr. Katarína Čechová (evidenčné číslo v zozname advokátov vedenom Slovenskou advokátskou komorou/IČO: 0339/317 831 63) poverená vedením účtovníctva združenia pod IČ DPH SK1020333083, JUDr. Jana Ďurišová (4260/307 989 73), JUDr. Simona Haláková (5503/318 195 41), Mgr. Ing. Michaela Jurková (4286/307 989 57), Mgr. Tomáš Mareta (1601/318 172 11), Mgr. Tomáš Rybár (3988/307 967 76), Mgr. Tomáš Zárecký (4020/360 754 18)

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