

November 2006

A legal update from Dechert's EU & Competition Group

## EU Briefing

The following briefing sheet contains an overview of the activities of the various European Union institutions for November 2006. It also takes a prospective look at the events in the month of December 2006.

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### INSTITUTIONAL ACTIVITIES

#### European Commission Approves Gaz de France/Suez Merger, Subject to Conditions

The merger combines the two main gas and electricity operators in Belgium and two out of the three main operators in France. In June 2006, the European Commission (the Commission) opened a Phase II in-depth investigation into the proposed merger since it was concerned that serious competition issues could arise by the removal of the increasing competitive pressure that Gaz de France and Suez had been exerting and would have continued to exert in the gas and electricity markets in France and Belgium. The Commission alleges that given the conditions of the markets, including what it sees as the very high barriers to entry, their respective dominant positions could have been considerably strengthened by the proposed merger.

On 18 August, the Commission sent a statement of objections to the parties concluding that the merger as proposed would impede competition. On 21 September Gaz de

France and Suez submitted proposed remedies to the Commission. On 14 November, the Commission announced that following its assessment of the proposed remedies it had approved the merger, subject to conditions which include the following:

- Suez divesting its holding in the incumbent Belgian gas operator Distrigaz, one of its main subsidiaries, to an independent party to be approved by the Commission
- Gaz de France selling its 50 percent shareholding in the company through which it has joint control over SPE, the second largest operator in the Belgian gas and electricity markets, and divesting its subsidiary, Cofathec Coriance, to address the concerns in the district heating market in France
- Suez relinquishing its control over Fluxys, the Belgian gas network and gas storage regulated operator, along with other commitments concerning Fluxys International to be created
- The merged entity carrying out a number of investment projects in Belgium and France to develop infrastructure capacities which will promote entry of new competitors to the market and stimulate competition

The Commission stated that the far reaching remedies will ensure that there is effective competition in the newly-liberalised French and Belgian energy market.

#### Commission Informs Spain Proposed Measures in E.ON/Endesa May Violate EC Law

On 18 October, the Commission began formal infringement proceedings against Spain after Spain failed to lift conditions which its national

competition authority, Comision de Nacional de Energia, had imposed upon the German company E.ON's bid to acquire Endesa, the Spanish energy company. The acquisition had been notified and cleared by the European Commission in March 2006.

On 4 November the Spanish government decided to lift the most onerous of the conditions, keeping only the requirements that E.ON abide by Endesa's existing investment plans and that Spain retains a final veto right on any further sale of the company. However, new conditions imposed on the merger by the Spanish Minister of Industry, Tourism and Trade are have been looked at by the Commission. On 29 November, the Commission informed Spain of its preliminary conclusion that the conditions violate the EC Treaty's rules on free movement of capital (Article 56), freedom of establishment (Article 43), and free movement of goods (Articles 28 and 29).

Spain has until 13 December to comment on the preliminary assessment of the Commission. If it confirms its assessment, the Commission could adopt a decision holding that Spain has violated Article 21 of the Merger Regulation and require the relevant conditions to be withdrawn.

#### **Update on Microsoft's Compliance with March 2004 Decision**

On 24 March 2004, the Commission declared that Microsoft had used its dominant position on the market of operating systems to become dominant on the connected markets for work group server operating systems and for media players in violation of Article 82 of the EC Treaty.

One of remedies imposed on Microsoft was to disclose complete and accurate technical interface documentation necessary to allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers, within 4 months. On 12 July, after having considered that Microsoft had still not supplied complete and accurate information, the Commission imposed penalty payments totalling € 280.5 million. On 18 July Microsoft submitted revised technical documentation and has since then continued to improve it.

On 23 November, the Commission confirmed that Microsoft has now finally submitted a revised version of the set of technical documentation to allow potential licensees and the Monitoring Trustee, Professor Neil Barrett, to evaluate whether it contains the necessary information to allow the development of interoperable work group server operating system products. The Commission will take into account the comments from the potential licensees and the Trustee in deciding whether Microsoft has met the requirements of its March 2004 decision.

#### **Commission Approves Nokia/Siemens Merger**

On 13 November 2006, the Commission announced that it has approved the proposed merger between Finnish company Nokia and the network equipment business of the German company Siemens AG under the EU Merger Regulation. Nokia is mainly active in the mobile telecommunications sector and Siemens has activities in the telecommunications sector and in other areas. The merger will see both Nokia and Siemens contributing their mobile and fixed line telecommunications network equipment business to a newly created company, Nokia Siemens Networks.

The Commission stated that the mobile network equipment sector would be the area most likely to be affected by the merger, but that the market would remain competitive because enough credible competitors would remain and customers would still have alternative suppliers.

#### **European Court of Justice Condemns Spain for Failing to Transpose Gas Directive**

All Member States were required to transpose the provisions of Directive 2003/55, the Gas Liberalisation Directive, into national law by 1 July 2004. By this date the Commission had not received any indication from Spain as to what steps it had taken towards transposition, and so the Commission initiated infringement proceedings against Spain, sending it a reasoned opinion in March 2005. The Commission found Spain's response to the reasoned opinion to be inadequate and thus lodged an action with the European Court of Justice (ECJ).

The ECJ held that because legal measures had not been taken to implement the Gas Directive within a specified time period, Spain was in breach of its obligations under the Directive. The Commission had stated in its November 2005 report on the internal market for energy and gas that delay in the transposition of the gas and electricity directives is one of the main causes for the shortcomings in the European internal energy market. Spain now faces the possibility of condemnation for non-transposition of the equivalent electricity directive.

#### **Commission Imposes Second Highest Fine Ever on Synthetic Rubber Cartel Participants**

On 29 November, the Commission announced that it has imposed a total fine of € 519 million upon five companies (Eni, Shell, Dow, Unipetrol and Trade-Stomil) that participated in a cartel to fix prices and share customers for some types of synthetic rubber.

The Commission stated that the companies noted above had “operated the cartel from at least 1996 to 2002” and that the practices of the cartel constituted a serious infringement of the Article 81 of the EC Treaty, since during the cartel meetings over a number of years the participants had:

- agreed prices
- exchanged information on key customers
- exchanged information on the amounts of rubber supplied to customers

In deciding upon the fines to be imposed on the companies, the Commission took into account the size of the EEA market for the product, the duration of the cartel and the size of the companies involved. The fines imposed were as follows:

- Bayer – would have been fined more than € 204.187 million but received full immunity from fines under the Leniency Notice because it was the first company to inform the Commission about the cartel
- Dow – € 64.575 million (its fine was reduced by 40 percent under the Commission’s 2002 Leniency Notice for having provided important evidence about the cartel to the Commission
- Eni – € 272.25 million
- Shell – € 160.875 million
- Unipetrol – € 17.55 million
- Trade-Stomil – € 3.8 million

Shell had also provided evidence to the Commission about the cartel but because its information did not add sufficient value to the investigation it did not receive any reduction of its fine under the Leniency Notice. In fact, Shell, Eni and Bayer had their fines increased by 50 percent because of repeated cartel offending due to their involvement in previous polypropylene, PVC (II) and citric acid cartels. The 50 percent increase did not however apply to Bayer because it had benefited from full immunity under the Leniency Notice.

The overall fine imposed by the Commission is the second highest that it has imposed in a cartel case. The total amount of fines imposed on 2006 now stands at € 1.843 billion, which is a new annual record for the Commission.

## FINANCIAL SERVICES

### ECJ Gives Preliminary Ruling on Information Exchange Between Credit Institutions

In November 1999, the Spanish competition authority exempted a system for the exchange of information about customer solvency and payment records between members of the banking trade association ASNEF-EQUIFAX from the Spanish prohibition on restrictive practices. The exemption was to last for five years as long as the system was accessible to all relevant financial institutions on a non-discriminatory basis and that information about specific creditors remained confidential. However, another banking trade association appealed against the exemption, claiming that it was restrictive of competition. The competition authority’s decision was overturned and ASNEF-EQUIFAX appealed to the Spanish Supreme Court.

The Spanish Supreme Court referred the question of whether agreements between financial institutions to exchange information about customer solvency and payment records could be seen as restrictive of competition and affect trade between member states. The ECJ found that because the reference for a preliminary ruling applied to questions within the scope of EC law, and because it had sufficient information to give a useful reply, it was admissible.

The ECJ considered that Article 81(1) could apply to the information exchange system because by its nature cooperation between competitors was necessary. In respect of whether the register was capable of affecting trade between Member States, the ECJ held that the national court must consider whether it is sufficiently probable that implementation of the register may influence the supply of credit in Spain by operators from other Member States. It considered that it appears that access to the register may have significance when undertakings from inside and outside Spain are deciding whether or not to do business in Spain.

In respect of restricting competition, the ECJ held that the key question for the national court to look at was whether the system would reduce or remove the degree of uncertainty as to the operation of the market with the result that competition between undertakings is restricted. Where the market is not concentrated, it is not possible to identify the creditor and the access and use of the information is available on a non-discriminatory basis, an agreement for the exchange of information about customer solvency and payment records will not in principle have a restrictive effect on competition.

## STATE AID

### State Aid Reform – Speech by Lowri Evans, Deputy Director General, DG Competition

On 7 November 2006, Lowri Evans' gave a speech in relation to "State Aid Reform: Where do we stand? Status of the State Aid Action Plan." The Action Plan Ms. Evans referred to was adopted by the Commission in June 2005 to address problems with state aid policy, with the aim of making it a useful policy tool for growth and jobs. Ms. Evans explained that the four key principles of the Action Plan are:

- less and better targeted state aid
- a refined economic approach where a "balancing test" is used to weigh up the negative effects of aid on competition against the positive effects on the common interest
- more effective procedures
- shared responsibility between the Commission and member states

Ms. Evans stated that the Commission believes these guiding principles are necessary so as to promote greater understanding of state aid policy and to enhance its

legitimacy. Ms. Evans highlighted the work that had already been completed under the Action Plan:

- decisions and guidelines on services of general economic interest
- new regional aid guidelines
- new rules on short term credit insurance
- new risk capital guidelines
- a new framework on research, development and innovation
- new *de minimis* rules which should be adopted by the end of 2006

She also listed the following important procedural issues that are still under consideration:

- best practice guidelines – proposals have been finalised and the guidelines might be ready for publication in the summer of 2007
- draft new General Block Exemption – this may be adopted as early as December 2006 and will simplify and increase the possibilities for block exemptions to include innovation, environment, risk capital and regional aid

## CONCENTRATIONS UNDER MERGER REGULATION FOR NOVEMBER 2006

Name of Parties	Business Sector	JV or Merger	Stage of Procedure	Reference
Abertis/Autostrade	Motorway services	Merger	Non-opposition to a notified concentration	OJ [2006] C 268/07
Aggregate Industries/Foster Yeoman	Production and supply of aggregates and asphalt, road surfacing	Merger	Non-opposition to a notified concentration	OJ [2006] C 268/08
Alcatel/Nortel Networks	Supply of UMTS RAN equipment	Merger	Prior notification of a concentration	OJ [2006] C 278/04
Apollo Group/GE Advanced Materials	Manufacture and sale of silicones and related materials	Merger	Prior notification of a concentration	OJ [2006] C 267/04
Apollo Group/TNT Logistics	Provision of contract logistics services	Merger	Non-opposition to a notified concentration	OJ [2006] C 278/05
Arcadis/Dura Vermeer/Imtech/Asset Rail/JV	Maintenance of railway infrastructure in the Netherlands	JV	Prior notification of a concentration	OJ [2006] C 289/06
Arrow Electronics/In Technology	Distribution of computer products	Merger	Prior notification of a concentration	OJ [2006] C 288/12
Avnet/Access	Distribution of IT products, solutions and services	Merger	Prior notification of a concentration	OJ [2006] C 288/13

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<b>Name of Parties</b>	<b>Business Sector</b>	<b>JV or Merger</b>	<b>Stage of Procedure</b>	<b>Reference</b>
Basell/Munchsmunster Cracker and associated assets	Manufacture of olefins	Merger	Prior notification of a concentration	OJ [2006] C 289/08
BC Partners/Techem	Sub-metering of utilities consumption and energy contracting	Merger	Prior notification of a concentration	OJ [2006] C 290/09
Bertelsmann/Vodafone/Moconta	Design and marketing services for mobile telecommunications	JV	Prior notification of a concentration	OJ [2006] C 267/05
Blackstone/PAI/United Biscuits	Production and sale of sweet and savoury biscuits, cakes and snacks	JV	Prior notification of a concentration	OJ [2006] C 277/05
Candover Partners/Hilding Anders	Development, manufacture and marketing of beds, mattresses and related products	Merger	Prior notification of a concentration	OJ [2006] C 285/05
Candover/Ferretti	Design, production and sales of luxury motor boats	Merger	Prior notification of a concentration	OJ [2006] C 288/15
Carphone Warehouse/AOL UK	Provision of telecommunication services; provision of internet services	Merger	Prior notification of a concentration	OJ [2006] C 279/06
Cinven/Gondola	Provision of investment management advice and services; holding company for pizza restaurants	Merger	Prior notification of a concentration	OJ [2006] C 276/05
Credit Agricole/Fiat Auto/FAFS	Manufacturing of cars; car purchase financing, long term vehicle renting, fleet management services	JV	Prior notification of a concentration	OJ [2006] C 271/06
CVC/Ferd/SIG	Supply of carton and plastic packaging solutions	Merger	Prior notification of a concentration	OJ [2006] C 280/08
Deutsche Borse/Euronext	Clearing services	Merger	Withdrawal of notification of a concentration	OJ [2006] C 283/06
Deutsche Bank/AIG/Pokrovsky Hills	Residential property	JV	Non-opposition to a notified concentration	OJ [2006] C 277/08
Deutsche Bank/Berliner Bank	Banking services	Merger	Prior notification of a concentration	OJ [2006] C 280/10
Doosan/Mitsui Babcock	Aftermarket services to the power industry, equipment and technology to the power sector	Merger	Prior notification of a concentration	OJ [2006] C 280/09
Dought Hanson/Caudwell Group Mobile Distribution Business	Distribution and repair of mobile handsets and accessories and ancillary services	Merger	Non-opposition to a notified concentration	OJ [2006] C 278/08
Dresdner Bank/Gazprombank/JV	Investment in primary projects generating Kyoto CO2 emission credits	JV	Prior notification of a concentration	OJ [2006] C 290/07
DSGI/FR-Invest/F-Group JV	Retail sale of consumer electronics	JV	Prior notification of a concentration	OJ [2006] C 270/03
Edison/Eneco Energia	Electricity supply	Merger	Non-opposition to a notified concentration	OJ [2006] C 277/07

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EGIS/Alpine/Hochtief/Austrian Highway A5	Motorway infrastructure	JV	Non-opposition to a notified concentration	OJ [2006] C 267/07
FLEETCOR/CCS	Services of fuel card payment services	Merger	Non-opposition to a notified concentration	OJ [2006] C 280/12
GE/Banque Artesia Nederland	Manufacturing, services and technology; corporate and retail banking	Merger	Prior notification of a concentration	OJ [2006] C 275/04
GE/CS/GIMP/JV	Asset management services	JV	Non-opposition to a notified concentration	OJ [2006] C 268/09
GE/DISKO/ASL	Equipment finance; fleet leasing and management services	Merger	Prior notification of a concentration	OJ [2006] C 279/07
Goldman Sachs/Cerberus/Harpen	Rental and development of property	JV	Prior notification of a concentration	OJ [2006] C 287/07
Goldman Sachs/Matlinpatterson/Securlog	Cash services and secure courier services	JV	Non-opposition to a notified concentration	OJ [2006] C 277/06
Hewlett Packard/Mercury Interactive	Provision of application testing software and IT governance software	Merger	Non-opposition to a notified concentration	OJ [2006] C 287/10
HSBC/Lamda/Olympia Village	Real estate investment and management; real estate development	JV	Non-opposition to a notified concentration	OJ [2006] C 277/09
HTA/CDPQ/KVW/BAA Budapest Airport	Airport management services	JV	Prior notification of a concentration	OJ [2006] C 288/11
ICA Baltic/RIMI Baltic	Retail sales of daily consumer goods	JV	Prior notification of a concentration	OJ [2006] C 275/06
JCI/FIAMM	Manufacture and sale of batteries	Merger	Prior notification of a concentration	OJ [2006] C 268/12
KKR/Goldman Sachs/Kion	Fork lift trucks and materials handling equipment	JV	Prior notification of a concentration	OJ [2006] C 289/05
KKR/SIF (Tarkett)	Producing and distributing flooring products	JV	Prior notification of a concentration	OJ [2006] C 275/03
Lactalis/Galbani	Dairy products including cheese	Merger	Non-opposition to a notified concentration	OJ [2006] C 286/05
LBO France/Vinci Airport Services	Airport services	Merger	Non-opposition to a notified concentration	OJ [2006] C 278/07
Macquarie/Thames Water	Provision of water and sewage services	Merger	Prior notification of a concentration	OJ [2006] C 268/13
MAN/Scania	Manufacture and sale of trucks, buses, industrial and marine engines	Merger	Prior notification of a concentration	OJ [2006] C 274/09
MEIF II/Techem	Sub-metering of utilities consumption	Merger	Prior notification of a concentration	OJ [2006] C 286/02
Merck/Serono	Global research based pharmaceuticals	Merger	Prior notification of a concentration	OJ [2006] C 283/03

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Merrill Lynch/Irish Life & Permanent/JV	Mortgage loans	JV	Prior notification of a concentration	OJ [2006] C 267/03
Metro/Geant Polska	Retail of daily consumer products	Merger	Non-opposition to a notified concentration	OJ [2006] C 267/08
MLCP/CIR/Oakwood	Sales/acquisition of mortgages, hire purchase contracts for motor vehicles, pension funds	JV	Prior notification of a concentration	OJ [2006] C 288/10
News Corporation/Jamba/Ojom	Mobile phone entertainment	JV	Prior notification of a concentration	OJ [2006] C 288/14
Motorola/Symbol	Mobile telecommunications	Merger	Prior notification of a concentration	OJ [2006] C 219/13
Nordic Capital Fund VI/ICA MENY	Wholesale of daily consumer goods	Merger	Non-opposition to a notified concentration	OJ [2006] C 291/16
Nycomed Group/Altana Pharma	Research, development, manufacturing and sale of pharmaceuticals	Merger	Prior notification of a concentration	OJ [2006] C 283/04
OJSC Novoliptesk Steel/Duferco/JV	Carbon steel semi-finished and finished flat and long products	JV	Non-opposition to a notified concentration	OJ [2006] C 291/15
Onex Corporation/Sitel Corporation	Provision of business process outsourcing services in the customer care industry	Merger	Prior notification of a concentration	OJ [2006] C 291/14
Osterreichische Post/trans-o-flex	Document and parcel delivery, freight forwarding, contract logistics	Merger	Prior notification of a concentration	OJ [2006] C 287/09
Permira Holdings/Borsodchem	Production of certain plastics and plastic ingredients	Merger	Non-opposition to a notified concentration	OJ [2006] C 283/05
Petroplus/European Petroleum Holdings	Refining crude oil, wholesale marketing of refined oil products	Merger	Non-opposition to a notified concentration	OJ [2006] C 275/14
Petroplus/ExxonMobil	Oil	JV	Prior notification of a concentration	OJ [2006] C 288/17
Providence/Caudwell Group	Sale of mobile phones and related services	Merger	Non-opposition to a notified concentration	OJ [2006] C 278/06
Remondis/Cronimet/ALFA Acciai/TSR Group	Trade in and processing of raw materials for steel industries	JV	Withdrawal of notification of a concentration	OJ [2006] C 268/06
Ricoh/Danka	Production and distribution of office automaton products and related services	Merger	Prior notification of a concentration	OJ [2006] C 275/08
RREEF/Peel Ports Holdings/Peel Ports	Land and property investment and development; operation and maintenance of port facilities	Merger	Prior notification of a concentration	OJ [2006] C 276/03
Ryanair/Aer Lingus	Airline operating	Merger	Prior notification of a concentration	OJ [2006] C 274/10

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SABIC/Huntsman Petrochemicals UK	Production and sale of basic chemicals and certain byproducts	Merger	Prior notification of a concentration	OJ [2006] C 288/08
SHV/Mammoet	Heavy lifting operations and road transport	Merger	Prior notification of a concentration	OJ [2006] C 289/07
Siemens/Bayer Diagnostics	Development, manufacture and sales of in-vitro diagnostic systems	Merger	Non-opposition to a notified concentration	OJ [2006] C 280/13
Smithfield/Oaktree/Sarah Lee Foods Europe	Production and supply of processed meat products	JV	Non-opposition to a notified concentration	OJ [2006] C 280/14
Sun Group/Autobar Packaging	Manufacture of disposable, flexible and rigid packaging products	Merger	Prior notification of a concentration	OJ [2006] C 268/14
Swiss Re/GE Life	Insurance services	Merger	Prior notification of a concentration	OJ [2006] C 275/05
Tata/Corus	Manufacture of finished and semi-finished carbon steel products	Merger	Prior notification of a concentration	OJ [2006] C 288/16
TPG/Telediffusion de France	Provision of over the air and wireless services; operation of terrestrial infrastructures	Merger	Prior notification of a concentration	OJ [2006] C 275/07
Universal/BMG Music Publishing	Music publishing	Merger	Prior notification of a concentration	OJ [2006] C 276/02
Veolia Cargo/RAIL LINK/JV	Goods transport	JV	Non-opposition to a notified concentration	OJ [2006] C 290/10
Voestalpine/K&N/Euroshipping	Provision of inland shipping services	JV	Non-opposition to a notified concentration	OJ [2006] C 267/06
William Hill/Codere/JV	Gambling	JV	Prior notification of a concentration	OJ [2006] C 288/09
WLR/BST	Manufacture of flat airbag fabric and other technical fabrics	Merger	Prior notification of a concentration	OJ [2006] C 276/04

**BRUSSELS AGENDA FOR DECEMBER 2006**

4 – 5 December	Economic and Financial Affairs Council (ECOFIN) – Brussels
11 – 12 December	General Affairs and External Relations Council (GAERC) + Defence – Brussels
11 – 12 December	Education, Youth, and Culture Council – Brussels
11 – 14 December	EP Plenary (Strasbourg)
14 – 15 December	Agriculture and Fisheries Council – Brussels
18 December	ECOFIN (Budget) – Brussels
19 – 21 December	Informal ministerial meeting: Regional Affairs – Brussels

## Practice group contacts

For more information, please contact one of the lawyers listed or the Dechert lawyer with whom you regularly work. Visit us at [www.dechert.com/financialservices](http://www.dechert.com/financialservices).

**Peter R. Crockford**  
London  
+44 20 7184 7506  
peter.crockford@dechert.com

**Pierre-M. Louis**  
Brussels  
+32 2 535 54 79  
pierre.louis@dechert.com

**Kathleen Dierckx**  
Brussels  
+32 2 535 5435  
kathleen.dierckx@dechert.com

**Isabelle M. Rahman**  
Brussels  
+32 2 535 5445  
isabelle.rahman@dechert.com

Dechert  
LLP  
www.dechert.com

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