Guidance Note

European Law & Regulations

A Survival Guide For Technology Companies

MORRISON | FOERSTER

Index

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1. INTRODUCTION

Since 1980, Morrison & Foerster has been tracking the development of technology-related regulations across Europe – and advising companies on the effects of such laws on their business. We have seen first-hand how some businesses have used the development of laws and regulations to take advantage of new business opportunities. But more often, it has to be said, the growth in technology-related regulation has adversely affected business strategy. And, as much as the language barrier, the lack of harmonisation of laws across Europe has operated as a stumbling block to a unified exploitation of that market.

The EU market has come a long way from the Treaty of Rome in 1957, through the single European market in 1992 – to a point now where it comprises 27 Member States and almost 500 million citizens. The EU Member States account for the world's largest gross domestic product, and are an important trading partner to every other major country. In theory, then, the EU is one market. In practice, of course, it's not so simple. Each of those 27 countries has its own set of laws and regulations and, for the most part, in the technology sector the central EU lawmakers in Brussels have not directly super-imposed laws across the entire market.

It is with dismay that many companies doing business in the EU discover that it is still up to individual countries to put in place national laws implementing EU directives - and they do so in slightly different ways and at different times. So while, at one level, the development of the EU market has led to a considerable degree of harmonisation of technology-related laws, it is still not possible to say with certainty that there is only one way to do something, regardless of the country. Overall, it is still the case that although most technology-related laws may stem from a common basis, they are not truly harmonised.

This presents a problem for any technology-based business – especially non-EU-based companies who may be unfamiliar with EU legal regimes – seeking to exploit its products or services across the European market. Whether a company is involved in the supply of hardware, software, IT or telecoms services, or online services, its business will be affected by EU laws and regulations and variations between countries in the applicable legal or regulatory regimes.

So what guidance can businesses take to steer through the mass of laws and regulations that exist across the EU?

Based upon its experience over the past three decades, MoFo has put together a series of guides for its clients on areas where laws and regulations across Europe need to be taken into account by businesses seeking to exploit the products and services across the European market. Highlights of the areas considered are set out below.

2. PRIVACY, DATA PROTECTION AND DIRECT MARKETING

There is extensive legislation in Europe regulating how businesses can collect, process and use personal data. These laws affect how businesses maintain their databases and communicate with individuals (whether customers or suppliers).

Legal Framework and Sanctions

- **Breach of legislation**

  European legislation is highly developed with regards to the protection of personal data. Member States are expected to apply certain general principles which are set out in the legislation described below. In addition, many Member States have developed case-law and regulator-issued guidance on specific topics such as monitoring of employee communications, use of health data and the effect of new technologies such as RFID.

  Virtually every organisation processing personal data about employees, customers, or suppliers in the European Union (EU) may be affected by EU data privacy and security laws. Processing is very broadly defined and includes collection, recording, storage, transmission, or use of personal data including the sharing of such data with affiliated entities. Personal data covers any details relating to an identified or identifiable individual. As a result, customer records, payroll data, contact details for suppliers, etc. will regularly contain personal data, and thus be regulated by EU data privacy and security laws. Personal data may also consist of sound and image data such as voice mails, photographs, or video recordings.

- **General law protecting data (Data Protection Directive)**

  The general principles of EU data privacy and security laws are set out in 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 ("Data Protection Directive"). This is the main legal instrument of EU data protection law.

- **Control of email, SMS and spam (E-Privacy Directive)**

  The processing of personal data over the internet and via electronic communications is also subject to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("E-Privacy Directive").

- **Sanctions**

  The potential liability for organizations failing to abide by these laws can be substantial. For example, the Spanish data protection authority has imposed fines of €840,000 (approximately US$ 900,000) for sharing customer records with affiliated entities and imposed fines of €1.08 million (approximately US$1.17 million) for publishing contact details. Given the possible fines and potential injury to reputation and goodwill that may result from a serious privacy violation, it is important that businesses operating in the EU review data processing practices and adopt appropriate policies.

General Compliance Checklist for Business Users

- **Initial Due Diligence into Information Processing Practices**

  Any organisation within the scope of EU data privacy and security laws should determine what personal information it collects, how such information is used, to whom it is disclosed and to what countries it is transferred. Special attention should be paid to sensitive information (such as medical or criminal records or information relating to ethnicity or political beliefs) because it requires special handling. It should consider if all the information it actually collects serves a purpose and whether any of the information is unnecessary and merely increases costs in terms of technical infrastructure, staff, and regulatory compliance costs.

- **Ongoing Compliance**

  Procedures should be put in place to ensure the accuracy of information. Further, a business should evaluate its technical and organizational measures for ensuring that information is protected against unauthorized disclosure or access and should also ensure that appropriate training is in place for staff that have access to personal

information. Contracts with service suppliers and all recipients of information should be reviewed to ensure appropriate contractual protection.

- **Notice and Consent**

  Detailed notices will need to be provided to the individuals from or about whom personal information is collected. In many Member States, affirmative (opt-in) consent will need to be obtained from each individual about whom information is collected.

- **Cross Border Requirements**

  Any organisation transferring personal information from the EU to other countries should have in place a mechanism to guarantee an adequate level of protection for that data is in place.

- **Access Request**

  When receiving an access request, an organisation should, if necessary, verify the identity of the person requesting access to the data (to ensure that personal information is only disclosed to the person to whom the information relates), inform the person making the application whether a fee is payable, and having checked identity (if necessary) and received a fee (if required), promptly provide the person requesting access with copies of the relevant information in an intelligible permanent form.

- **Registration with local regulators**

  A business should ensure that it is complying with registration/notification requirements and approval requirements in those Member States that require such registration, notification and/or approval.

- **Contracts with Service Providers**

  Contracts with service providers may be required to establish: (a) what the service provider can and can not do with the data; (b) an explicit obligation on the service provider to implement appropriate technical and organizational measures to protect the security and confidentiality of the data; and (c) audit rights.

- **Labour Unions/Works Council**

  In some Member States, an organisation may have an obligation to consult with the labour union or works council before implementing a privacy policy or sending notices to workers.

- **Monitor Legislative Changes**

  Finally, given the evolving nature of data privacy requirements and the discussion on information processing, organizations should routinely monitor new developments and adjust their compliance measures accordingly.

Direct Marketing

Whether communicated by post, fax, telephone or electronically direct marketing can provide effective business benefits. However, certain practices, such as email spamming, can create a nuisance to individuals and even interfere with the lawful practices of other businesses. Regulation of direct marketing in Europe is effected by a combination of statutes and other measures, the main areas of which are considered below.

- **Data Protection Directive**

  European data protection legislation requires compliance with certain specified principles, one of which is particularly relevant to direct marketing: personal data must be processed "fairly". Member States have set out their own guidance for fairness. However, it is generally clear that a person processing personal data must:

  - provide clear information about the data-user's identity and the purposes for which personal data is required to be processed; and
  - fulfil certain legitimacy requirements. These may be satisfied by obtaining "unambiguous" consent which, in turn, may be achieved by a clear "opt-in" at the point of data collection. An alternative way of achieving legitimacy which might be relied upon for direct marketing purposes would be if the processing was in support of the individual's "legitimate interests".

A higher threshold is set where the direct marketing involves use of sensitive personal data.

Even where a direct marketer is processing data in compliance with relevant law, an individual nevertheless has a right to object to the ongoing process of their personal data.

- **E-Privacy Directive**

The E-Privacy Directive is significant in the context of direct marketing because it introduces new restrictions on "unsolicited communications" by email and SMS. The E-Privacy Directive acts together with the Data Protection Directive and prohibits unsolicited communications unless an express "opt-in" has been given.

There is an exception to this general prohibition which will be relevant to direct marketing – it is permissible in some circumstances to send such communications to existing customers (or persons with whom there have been negotiations to conclude a sale) in relation to similar products and services.

As with the Data Protection Directive, the E-Privacy Directive imposes information provision requirements (as to identity and return address) upon businesses using personal data to communicate with individuals. Further, as with the Data Protection Directive, Member States have generally implemented the E-Privacy Directive no less strictly than required but sometimes with regard to pre-existing local laws and practices resulting in some areas of heightened protection.

The E-Privacy Directive also reiterates or reinforces rules relating to:

- the use of automated calling systems, telephone calls and fax;
- location data; and
- cookies.

- **Other applicable EU legislation**

In addition to the Data Protection Directive and the E-Privacy Directive, direct marketers of technology products or services will also need to consider the information provision requirements of the E-commerce Directive (see section 3 (Mandatory Consumer Protection Laws)), the Distance Selling Directive (section 3 (Mandatory Consumer Protection Laws)) and any national legislation applicable to the use of telecoms networks (for example the Communications Act 2003 in the UK which creates offences connected with misuse of an electronic communication system).

- **Member State regulation**

In addition to legislation implementing the relevant provisions of the Data Protection Directive and the E-Privacy Directive, many Member States have in place local codes of practice which govern direct marketing.

PRIVACY LIBRARY

Please take advantage of our extensive collection of links to privacy laws, regulations, reports, and government authorities around the world:

www.mofoprivacy.com

3. MANDATORY CONSUMER PROTECTION LAWS

Organizations supplying products and services to EU-based consumers need to be aware of mandatory consumer protection laws which apply irrespective of the choice of law.

Unfair Commercial Practices Directive

A new EU-wide consumer protection framework – called the Unfair Commercial Practices Directive ("UCPD") – came into force in 2007. The UCPD is a wide-ranging statute which prohibits unfair commercial practices and applies to both business advertising as well as other commercial communications. In particular the UCPD:

- defines misleading acts, misleading omissions and aggressive practices, all of which are deemed unfair;
- sets out a non-exhaustive list of illustrative unfair practices;
- identifies categories of vulnerable consumers for whom still higher standards apply.

Distance Selling

The Distance Selling Directive governs contracts made with the consumers via means of distance communications, that is where there is no face-to-face contact (*e.g.*, through the internet, mail order, phone or fax). In these circumstances:

- certain information has to be provided to the consumer before the contract is concluded;
- on conclusion of the contract, additional information needs to be provided in writing or in a "durable medium" (*e.g.*, by e-mail which can be printed off);

- in most cases, consumers have an unconditional right to cancel the contract within seven days of receiving the goods (although some local laws provide for a longer cancellation period); and
- the cancellation period is extended to three months if the supplier fails to provide the information referred to above.

E-Commerce Directive

The E-Commerce Directive addresses a wide range of issues associated with what are called "information society services". It applies to the entities providing such information society services (this would include ISPs as well as website providers, hosting information sites and discussion fora). The E-Commerce Directive:

- mandates that Member States must enforce contracts made electronically (provided that certain conditions are met);
- provides a framework of varying defences from liability for entities providing information society services; and
- mandates that certain information should be made available when trading online in the EU. When providing services to consumers, business must in particular acknowledge receipt of orders without undue delay and provide specified information to the consumer (see also section 6 (Disclosure Requirements for Websites and Emails)). This supplements the information to be provided under the Distance Selling Directive.

Sale of Consumer Goods and Associated Guarantees Directive

In addition to specific rules relating to electronic communications, the EU also mandates certain minimum consumer protections to all contracts for the sale of goods. So, if selling goods:

- the seller is liable for any defect that existed at the time of delivery and became apparent within two years of delivery;
- there is a (rebuttable) presumption that any defect which becomes apparent during the first six months already existed at the time of delivery;
- consumers must be able to terminate the sales contract or obtain a reduction in price if repair is impossible or disproportionate; and
- any commercial guarantees given by the supplier are on top (and not in lieu) of the statutory warranties.

Unfair Terms in Consumer Contracts Directive

Where the UCPD can be seen to regulate the commercial practices associated with marketing to and the entering into contracts with consumers, the Unfair Terms in Consumer Contracts Directive seeks to regulate the contents of the contracts themselves. Where a term is found to be unfair, it will not be binding on the consumer and the Member State may impose other sanctions upon the business. So, pre-formulated standard contract terms may not:

- interfere with the consumer's cancellation rights;
- deny the consumer's ability to reject non-conforming software;
- transfer guarantee or warranty rights where this may result in reduced guarantees or warranties for the consumer;
- inappropriately exclude or limit the liability for death or personal injury, consequential loss, delayed delivery or damage caused by faulty goods or services;
- allow the supplier to alter the pricing or the characteristics of the product or service at discretion;
- transfer the risk in transit to the consumer; or
- otherwise cause a significant imbalance of rights to the detriment of the consumer (test of fairness).

Furthermore, pre-formulated standard contracts must be drafted in plain intelligible language and any uncertainty is interpreted in favor of the consumer.

Sector Specific Regulations

In addition to the general laws described above there are also pan-European industry-specific laws which apply to commercial transactions in specific sectors such as financial services, pharmaceuticals, real estate, leisure and consumer credit.

Data Protection

Although not restricted to consumers as such, EU data protection legislation is also highly relevant to the manner in which business in Europe deal with consumers. See section 2 (Data Protection and Direct Marketing).

Advertising Regulation

In addition to the UCPD, Member States impose and enforce national codes of advertising practice. See section 5 (Misleading and Comparative Advertising).

Product Safety Regulation

Where technology products are being supplied in Europe, product safety regulation applies. This area of law is discussed in section 4 (Product Safety Regulation).

Member State Consumer Protection Laws

Although the UCPD seeks to harmonise consumer protection laws across the EU, Member States are free to impose higher standards of protection and, accordingly, local law review may be required depending upon the products or services being offered to consumers.

4. PRODUCT SAFETY REGULATION

There are numerous product safety regulations in the EU, the applicability of which suppliers of technology products need to consider. The specific regulatory regime which applies will partly depend upon into which general product category a particular product falls.

Product Specific Regulatory Requirements

Manufacturers, distributors and importers must first determine whether there is any applicable sector-specific legislation. This will be contained in an EU Directive, implemented by EU Member States by way of national legislation.

Products covered by sector-specific Directives include, amongst others: chemicals; pharmaceuticals; cosmetics; food; machinery; toys; medical devices and implants; equipment using low voltage; radio equipment and telecommunications terminal equipment; and equipment capable of causing electromagnetic disturbance (other than radio equipment or telecommunications terminal equipment).

The requirements that need to be satisfied by such products vary from product to product, but in respect of "hard" products (as opposed to "soft" products such as chemicals, pharmaceuticals, cosmetics and food, all of which are controlled by their own unique regulatory regimes), the underlying Directives typically impose the following two obligations:

- to design and manufacture the product in a particular fashion; and
- to provide appropriate safety information to the end user.

In respect of the design and manufacture obligation, the relevant Directives often refer to harmonised European standards, treating products that comply with certain technical standards as being compliant with the regulatory requirements contained in the Directives.

In respect of the information obligation, that national legislation implementing the Directives often imposes an obligation to provide the safety information in the language of the Member State in which the product is being marketed.

So, product safety compliance in the EU often means compliance of the products with a specified set of technical standards and provision of safety information translated into the applicable local language.

General Product Safety Directive

In addition to any applicable sector specific regulation, all manufacturers, and in some cases distributors, of consumer products need to comply with the requirements imposed by the General Product Safety Directive (the "GPS Directive").

The GPS Directive applies to any product which could be used by consumers, subject to limited exceptions (e.g. certain repaired or reconditioned goods). However where a product is subject to specific safety requirements imposed by another relevant Directive (see "Product Specific Regulatory Requirements above"), the GPS Directive will apply only to those aspects not covered by that specific Directive.

Under the GPS Directive, manufacturers are obliged to ensure that their products do not present any risk or present "*only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons*".

A product is deemed to satisfy this general safety requirement if it satisfies the relevant harmonised European standard published under the GPS Directive. However, no applicable harmonised European standards exist for many types of products, and the safety of such products need to be assessed by taking into account a number of factors such as:

- the characteristics of the product, including packaging and instructions for assembly, installation, and maintenance;
- the effect on other products (where it is reasonably foreseeable that the product will be used with other products);

- the presentation of the product including any associated, labelling, warnings and instructions for use and disposal;
- the categories of consumers at risk when using the products, in particular children and the elderly;
- codes of good practice in the relevant industry sector, the state of the art and technology, and reasonable consumer expectations concerning safety.

Aside from the general obligation to ensure that their products are 'safe', manufacturers, and potentially distributors, are also obliged to:

- provide consumers with safety information to enable them to assess the risk inherent in their products; and
- adopt measures that will enable themselves to be informed of the risks their products might pose and take appropriate action (including measures such as recall or withdrawal) if necessary to avoid such risks. Specifically a manufacturer is expected to:
- place its identity on the product or its packaging the identity, and some means of identifying the products (e.g. batch number or product serial number);
- monitor its own product in the market, for example by carrying out sample testing, investigating complaints, etc. (This obligation also applies to a distributor of products);
- immediately inform the competent authorities in the relevant Member States if it knows, or ought to know that their product poses unacceptable risks to the consumer. (This obligation also applies to a distributor of products); and
- cooperate with the competent authorities on action taken to avoid the risks of its products. (This obligation also applies to a distributor of products).

Each Member State has implemented the GPS Directive in a slightly different fashion and so sanctions for non-compliance are likely to vary from one Member State to another. However, in all Member States, the competent authority can potentially ban or force the withdrawal of unsafe product from the market. Generally, a failure to inform the competent authorities when a marketed product was known, or ought to have been known, to pose unacceptable risks to consumers will attract criminal sanctions.

CE Marking

"CE" is the abbreviation of French phrase "Conformité Européenne" (literally, "European Conformity"), and a CE mark is placed on products sold within the EU to declare that the product complies with all the applicable provisions of the relevant Directives, and that it has been subject to the appropriate conformity assessment procedures.

A CE mark acts as a passport within the EU and Member States are not allowed to restrict the marketing and use of CE marked products, unless there is evidence of non-compliance justifying such restriction.

In many cases, the Directives that impose product-type specific requirements also impose an obligation to:

- CE mark the products;
- maintain a written declaration that the equipment to which the CE marking has been affixed complies with the requirements of the relevant Directives; and
- maintain a set of technical documentation which describes the equipment in question, contains information about the design, manufacture and operation of the equipment, and details the procedures followed in reaching the conclusion that the product is compliant.

This obligation to CE mark applies to most types of 'hard' products but does not apply to 'soft' products such as chemicals, pharmaceuticals, cosmetics, and food.

A product not covered by a Directive providing for CE Marking must not be CE marked, and where a product is covered by several Directives that all provide for CE marking, the marking indicates that the products are presumed to conform to the provisions of all these Directives.

According to the European Commission's guidelines, the obligation for CE marking extends to all products covered by the relevant Directives, and must be placed on:

- all new products, whether manufactured in the Member States or in third countries;
- used and second-hand products imported from third countries; and
- substantially modified products that are subject to Directives as new products.

5. MISLEADING AND COMPARATIVE ADVERTISING

Following the implementation of the consumer protection focused Unfair Commercial Practices Directive (see section 3 (Mandatory Consumer Protection Laws)), the scope of the existing Directives on Misleading and Comparative Advertising will be limited to the regulation of business-to-business advertising as well as comparative advertising which may harm a competitor by denigration.

Misleading Advertising

Under the Misleading and Comparative Advertising Directives ("MCA Directives") misleading advertising is defined as any advertising which, in any way, either in its wording or presentation:

- deceives or is likely to deceive the persons to whom it is addressed or whom it reaches;
- by reason of its deceptive nature, is likely to affect their economic behaviour;
- or for those reasons, injures or is likely to injure a competitor.

It remains an offence for any person to engage in misleading advertising.

Comparative Advertising

Under the MCA Directives comparative advertising is defined as "*any advertising that explicitly or by implication identifies a competitor or goods or services offered by a competitor.*" However the MCA Directives also permit comparative advertising, provided that the advert meets various conditions, including that it:

- It is not misleading;
- It compares goods or services for the same needs or purpose;
- It does not create confusion in the marketplace;
- It objectively compares one or more of the properties of the goods or services; and
- It does not take advantage of the reputation, discredit or denigrate the trade name, trademark or similar of a competitor.

Despite these safe harbours, comparative advertising remains an involved and complex legal area and advertisers should be aware that Member States may have in place additional regulations including advertising codes of conduct which may be enforced within member States and may apply to comparative campaigns.

6. DISCLOSURE REQUIREMENTS FOR WEBSITES AND E-MAILS

Any entity communicating with EU users via e-mail and any provider of website content for EU residents needs to consider the disclosure requirements imposed by European e-commerce and general business legislation.

Disclosure Requirements for Websites

The E-Commerce Directive (see also section 3 (Mandatory Consumer Protection Laws)) stipulates that providers of information society services must make available specified information "in a form and manner that is easily, directly and permanently accessible." The provision applies not only to providers of websites that allow on-line purchasing of goods or services, but also any website offering information or commercial communication.

Generally, the following information is to be provided:

- the name and geographic address at which the organisation is established;
- contact details for the organization, including e-mail address;
- where the organisation undertakes an activity that is subject to VAT, the VAT number;
- where the organisation is registered in a trade or similar register available to the public, details of the register and the registration number;
- where the provision of the information society service is subject to an authorization scheme, the particulars of the relevant supervisory authority;
- where the organisation conducts a regulated business, the details of any professional body or similar institution with which the organisation is registered, details of any professional title, as well as a reference to the professional rules applicable to the organization; and

- where the organisation refers to prices, these must be clearly and unambiguously indicated and, in particular, must indicate whether they are inclusive of tax and delivery costs.

The E-Commerce Directive does not prescribe how the requirement to make information "easily, directly and permanently accessible" should be met, but it is generally understood that these criteria would be met if the information is included in the website, *e.g.*, shown on a webpage that is accessible on every page of the website. Also, organizations should allow visitors to print and/or download the information.

Disclosure Requirements for E-mails

As a general rule, most Member States have laws clarifying that requirements for paper-based business communications also apply to e-mail and other electronic communications, at least with respect to companies incorporated in these jurisdictions. As a result, as a minimum, European businesses would be expected to include the following in commercial e-mails (*e.g.*, in standardized e-mail footer):

- the full legal name;
- details of the registered office;
- registered company number or equivalent; and
- place of registration or court where the trade register is maintained,

and each Member State may impose additional requirements upon entities incorporated in their jurisdiction.

In addition to general corporate disclosure laws, there are specific requirements imposed by the E-Commerce Directive upon commercial communications (including, in particular, e-mail). Such commercial communications must be:

- clearly identifiable as such;
- clearly identify the person on whose behalf the commercial communication is made;
- clearly identify as such any promotional offer (including any discount, premium or gift) and ensure that any conditions that must be met to qualify for it are easily accessible, and presented clearly and unambiguously; and
- clearly identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

Finally, where commercial communications are sent unsolicited by the recipient, the sender will need to ensure that such unsolicited communications are "clearly and unambiguously identifiable" as such as soon as it is received. This is expressly so that recipients can delete such communications (or use filtering software to block or delete them) without having to read them. In some Member States it is sufficient to include a note in the body of the text, whereas in others, including Austria, Finland, France, Hungary, Ireland, Luxembourg, the Netherlands, and Portugal, a mention of the nature of the e-mail in the subject line is advisable. Other countries, such as Belgium, Czech Republic, France, Romania, or Spain require the use of particular wording. Unsolicited email communications are also addressed in the E-Privacy Directive (see section 2 (Data Protection and Direct Marketing)).

7. ENFORCEABILITY OF CLICKWRAP AND SHRINKWRAP LICENCES

Shrinkwrap licences and clickwrap agreements are commonly used in Europe for the marketing of software or digital content such as video and audio files and computer games. However, there is no specific pan-EU legislation that governs such agreements. Rather, these contracts are regulated by Member State contract law and where consumers are involved, consumer protection laws apply (see section 3 (Mandatory Consumer Protection Laws)).

Contract Formation

Although rules regarding formation of contract vary from one EU Member State to another, generally speaking a shrinkwrap or clickwrap licence agreement will not validly incorporate relevant terms unless it is certain that prior to contract formation the end user had the opportunity to read those terms and conditions and that they agreed to be bound by them.

Shrinkwrap Agreement

Shrinkwrap contracts, also called "tear-open agreements", are based on accepting contractual terms by opening or tearing open a package that contains both the purchased goods and the terms of the contract. Shrinkwrap agreements are drafted in advance by the provider and individual end-users rarely have an opportunity to negotiate. It is for this reason that in many EU Member States it is considered difficult in legal theory to enforce a shrinkwrap licence agreement,

especially where the terms and conditions are contained inside the physical packaging and not set out on the outside of the packaging. In this respect, most EU Member States do not follow the more lenient US approach to enforcement of shrinkwrap licence agreement as seen in *ProCD Inc. v Zidenberg* 86 F.3d 1447 (7th Cir. 1996). Shrinkwraps may also fail to be enforced where the contract law of a Member State provides for a strict rule on contract formation.

EU consumer protection legislation (see section 3 (Mandatory Consumer Protection Laws)) also affects enforceability of shrinkwrap terms and conditions. So, for example the Unfair Terms in Consumer Contracts Directive provides that terms that irrevocably bind the end-user to terms with which they had no real opportunity of becoming acquainted before the conclusion of the contract, could be considered unfair and therefore unenforceable.

Clickwrap Agreements

"Clickwrap" or electronic contracts are concluded by exchanging electronic messages relating to offer, acceptance, and terms of the contract, whether by e-mail, other forms of electronic message, or by conduct such as clicking on a button or downloading content from the Internet. In the case of clickwrap agreements, the problem of an end-user's clear assent to the terms and conditions is less likely to be an issue, as long as the end-user is actually confronted with the terms and conditions before making the choice to accept them (*e.g.*, by being forced to scroll through the terms and conditions before clicking on 'Agree' button or typing in 'I Agree').

Additionally, the problem associated with strict rules on contract formation in some EU Member States is alleviated by the E-Signatures Directive which grants electronic signatures legal effectiveness and admissibility as evidence and the E-Commerce Directive which provides for contracts to be electronically concluded (see also section 3 (Mandatory Consumer Protection Laws)), which together facilitate the enforcement of clickwrap agreements.

8. INTELLECTUAL PROPERTY RIGHTS IN EUROPE

Intellectual property is the cornerstone of many technology industries, providing legal protection for the hard won creative work and goodwill that underlies technology products and businesses.

Principal European Intellectual Property Rights

Intellectual property in technology products comes mainly in the form of patents, designs, copyright and related rights, confidential information and trademarks, although other rights may be crucial in certain sectors, such as drug data exclusivity and plant variety rights.

- **Patents**

  Patents provide absolute monopolies in protectable inventions. However, as generally with IP rights, patents are only negative rights to stop other people using a particular invention. In Europe there are two main competing systems of patenting; the national patent systems of each country, and the centralised prosecution system under the European Patent Convention 1973 (EPC). The EPC leads to the grant of a patent in each of the designated European states as a 'bundle of national rights'.

  The substance of European patent law is well harmonised under the EPC and patents are granted to inventions, whether products or processes, subject to the three criteria of: (i) novelty (is the invention new?); (ii) inventiveness (is the invention a sufficiently significant step forward over what was done before?); and (iii) industrial applicability (which is a low threshold to clear). In Europe patentable inventions must not be comprised of excluded subject matter, such as games, mathematical methods, business methods and programs for computers. Computer software is on its own unpatentable but may be patented if there is a demonstrable technical effect of the invention.

  The period of a patent under the EPC is the common world standard of 20 years from the date of the filing of the application for the patent.

- **Designs**

  The Design Directive 1998 (Directive 98/71/EC) and the Community Design Regulation 2002 (EC No 6/2002) deal with designs in the EU. A registerable design must be new and covers the product's appearance, including lines, contours, colours, shape, texture, materials and ornamentation. Protection is given for national and Community registered designs and also unregistered designs. The period of protection of Community and UK registered designs is 25 years from date of filing while an unregistered Community design is protected for 3 years from the date it was first made available to the public in the EU.

- **Copyright and Related Rights**

  Copyright and certain related rights protect different works; literary, artistic and musical works as well as computer programs and databases. Although the national laws of each of the EU Member States are the underlying foundation of copyright and related rights (such as publication, performance and moral rights), it is useful to highlight some of the main pan-European laws in this area:

  – The Software Directive 1991 provides for copyright in computer programs. The period of copyright protection of computer programs is the standard term of the author's life plus 70 years, except where the program is of unknown authorship or is itself computer generated.

  – The Database Directive 1996 provides protection for databases both under existing copyright law (retained to protect databases reflecting an authors own intellectual creation) and also under a new database right (protecting the investment in a database's creation). The database right lasts for 15 years after the year of a database's completion. To qualify for the database right the maker must be a national of European Economic Area (EEA), resident or a company or partnership established under the laws of an EEA state with their registered office or principal place of business in the EEA and having ongoing economic links or operations connected with an EEA state.

  – The Copyright Directive 2001 deals with copyright in content in "the information society". It provides two new rights: a right in public electronic communication and a right in performances through on-demand services. It also provides for legal protection of technology measures against unauthorised copying such as digital watermarks and copy protection.

- **Trademarks**

  The Trademark Directive 1989 harmonised the trademark laws of the EU. The Community Trade Mark (CTM) administered by the Office for the Harmonization of the Internal Market (OHIM) is now of increasing importance alongside national trade mark laws. The CTM and OHIM were introduced by the CTM Regulation 1993. A CTM's proprietor has the right to prevent third parties from using "in the course of trade" identical or similar signs to those covered by the trademark without consent throughout the EU. A CTM may be renewed every 10 years from the date of filing and thus are potential perpetual. National rights of unfair competition and "passing off" may also protect against misuse of unregistered trade marks.

- **Confidential information and Know-How**

  There is no pan-European law of confidence nor is there a property right in confidential information. Instead Member States will apply national laws to protect confidential information and trade secrets. However, it should be noted that in the technology transfer block exemption (see also section 12 – Competition Law) the European Commission has defined a narrow package of non-patented practical information (which must be "secret, substantial and identified") which may justifiably be the subject of a know-how licence.

Other Issues Affecting the Enjoyment of European Intellectual Property Rights

- **Competition law and intellectual property**

  There is an inherent tension between the exclusivity conferred by intellectual property rights and competition law. An overview of the ways in which European law addresses this tension is set out in section 11 (Competition Law).

- **Exhaustion of IP rights**

  The European Court of Justice developed the doctrine of exhaustion of IP rights. The rule of exhaustion implies

that where protected goods have been sold by or with the consent of the IP right-holder, whether the proprietor or its lawful licensee, then IP right is considered to be "exhausted" or spent and cannot be used again to prohibit the free movement of these goods within the EU.

- **Enforcement of IP Rights**

  The Directive on Enforcement of IP Rights 2004 deals with different measures to protect IP rights. The courts can order the seizure of the goods suspected of infringing an IP right or issue interim injunctions against the infringer to prevent imminent infringement. In addition, courts may order the seizure of assets of the alleged infringers including the freezing of their bank accounts.

9. DISTRIBUTION AND AGENCY LAWS

Organizations supplying products and services through intermediaries must first decide on the type of intermediary to be used. The choice will be dictated by commercial realities and legal considerations:

- Agents are intermediaries with the authority to negotiate the sale or purchase of goods or services on behalf of another person, the principal, or to negotiate and conclude such transactions on behalf of and in the name of that principal. It is the principal rather than the agent who bears the financial and commercial risk.

- Distributors, by contrast, do conclude transactions in their own name and on their own account. It is the distributor and not the principal who bears the commercial risk.

Distribution and Competition Law

When engaging a distributor an organization needs to consider EU competition (i.e. anti-trust) law.

The EU Vertical Restraints Block Exemption Regulation provides a safe harbor for distribution agreements which do not contain "hardcore" anti-competitive restrictions and provided the parties' combined market share on the relevant product market is below 30%. If the market share exceeds 30%, an individual assessment of the distribution agreement will be required, balancing the pro-competitive effects against any negative effects.

Hardcore restrictions are always illegal and, in addition to being unenforceable, may subject the parties to considerable fines. The relevant hardcore restrictions are:

- minimum resale price maintenance (recommended resale prices and maximum resale prices are acceptable, provided they are not subterfuge for fixed resale prices);

- restrictions of passive sales (active sales can be restricted into exclusive territories or to exclusive customer groups); and

- restricting active or passive sales within a selective distribution system.

Non-compete clauses are generally acceptable, provided their duration is limited to five years. Non-compete clauses that are automatically renewable are deemed to be entered into for an indefinite term and unlikely to be enforceable.

Agency and Competition Law

Agency agreements generally fall outside the scope of the EU competition rules. An agency agreement may exceptionally be subject to competition law provided the agent assumes the risk in case of non-performance of the contract and the level of investments that are required from the agent are particularly high.

Agency and Compensation Payments

The Agency Directive provides for mandatory compensation and termination rights which apply irrespective of the choice of non-EU law in the agency contract. As a practical matter, however, the risk of an award of compensation and severance payments might be reduced if the agency contract provides for the choice of US or another non-EU law and forum. This is because there is a possibility that the US courts would refuse to apply the termination provisions of the Directive. However, if a US court were to follow procedure, it would apply the law of the country of the agent to the issue of termination. Also, the risk of a claim being brought before a US court is reduced due to the costs involved for the agent.

The following is an overview of the main features of the Agency Directive:

- *Commission Payments* - During the term of the agreement, the agent is entitled to commission on all transactions concluded as a result of their intervention. If the agent is allocated either a specific geographic area or a particular group of customers, the agent is also entitled to commission for any transactions entered into with a customer from that group or geographic region.

- *Post Termination Commission Payments* - An agent is entitled to claim post-term commission if:

- the transaction is mainly attributable to the efforts of the agent during the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- the order reached the principal or the commercial agent before the agency contract terminated and the agent would otherwise be entitled to a commission if the contract had not ended.

It is advisable to define the "reasonable period between the termination and the conclusion of the contract", depending on the length of the sales cycle, as some Member State courts have found that an order that came in two years after termination of the agreement was still attributable to the agent.

- *Post Termination Indemnity or Damages* - An agent also has the right to:
- an indemnity for the expansion of the customer base or additional business from existing customers, provided the payment of the indemnity is equitable having regard to all the circumstances; or
- compensation for damages resulting from lost commission and investments that the agent has not been able to amortize.

Some Member States provide for either indemnity or damages, whilst others provide for both, including Denmark, Greece, the Netherlands, Spain and the United Kingdom. The amount of indemnity the agent can claim is capped at the equivalent of the agent's average annual remuneration over the preceding five years. If the contract goes back less than five years the indemnity is based on the average for the period in question. The amount of damages that may be claimed is not capped. It is therefore generally beneficial to stipulate that the agent may claim an indemnity, but not compensation (for those countries that do provide for both).

- *Post Term Non Compete* - Post-term non-compete clauses are only enforceable if limited to the products or services in question and only cover the specific geographic area or customer base. The maximum duration is two years after termination. Also, in some Member States, it is necessary to compensate the agent for adhering to the non-compete provision post-termination.
- *Notice Periods* - An agency agreement concluded for an indefinite term (as well as term contracts that continue to be performed after the term, and, in some Member States, contracts providing for automatic renewal) may only be terminated by observing mandatory minimum notice periods that depend on the amount of time the agreement was in force:
- termination during the first year of the contract is subject to a minimum period of 1 month;
- during the second year of the contract a minimum of 2 months; and
- during the third or subsequent years a minimum of 3 months.

Member States may and do opt for longer minimum notice periods. If the agency agreement does not provide for an appropriate notice period, the agent is entitled to the statutory notice period applicable at the place where he/she carries out his/her activities.

Termination for cause is exempt from the minimum notice requirement, but the Directive only recognizes two cases of termination for cause:

- failure of agent to carry out all or part of their obligations; and
- in exceptional circumstances.

10. ENVIRONMENTAL LEGISLATION ON ELECTRICAL EQUIPMENT

There are two pieces of EU legislation that particularly affect manufacturers of electrical equipment: The Directive on waste electronic and electrical equipment ("WEEE") and the Directive on the restriction of the use of certain hazardous substances Reduction ("RoHS"). Both Directives apply to Electronic and Electrical Equipment ("EEE"), which covers a very broad range of IT and telecoms equipment and most other electronic items.

The RoHS Directive

The RoHS Directive prohibits certain heavy metals and brominated flame retardants in new EEE put on the EU market. Manufacturers outside of the EU whose products are not RoHS compliant will not be able to place those products on the EU market.

There are a number of exemptions to the restrictions in the RoHS Directive, and these are constantly being revised and updated by the European Commission. In addition, some grey areas and borderline cases exist. It is advisable for producers to check the up-to-date status if there are any doubts about meeting the restrictions set out in the RoHS Directive.

Manufacturers that source components from third parties should seek warranties and assurances of RoHS compliance of such components, as each producer is responsible for the RoHS compliance of their own complete product.

The WEEE Directive

The WEEE Directive imposes a far-ranging regime of take-back and disposal obligations on "producers" of EEE. In essence, producers of EEE placed on the EU market after 13 August 2005 are responsible for the take-back and safe disposal of such products once they have fallen into disuse. In practice, this obligation is almost always met by joining a collective scheme. Users of EEE have a corresponding obligation to return products which have fallen into disuse to collection points; disposal in the general waste system is prohibited. In addition, there are registration, reporting and labelling requirements that must be met by producers of EEE.

The cost of take-back and disposal is borne by each producer in relation to its own products placed on the market after 13 August 2005. The cost contribution of each producer is determined by weight of the products placed on the market, based on the figures provided by the producer under the reporting obligations. For sales of EEE to business users, the parties may agree on a different regime, for example making the business user responsible for the cost of disposal.

The cost regulation for "historic" WEEE, i.e. those products placed on the market up to 13 August 2005, is more complex. For historic WEEE disposed by households, the cost is borne collectively by all current producers of EEE according to their market share, irrespective of who placed them on the market originally. Business users, on the other hand, will generally be responsible for the cost of disposing of historic WEEE, except in circumstances where a producer replaces historic WEEE "like-for-like". The combined effect of both household and business user regimes can be looked at as a "tax" on anyone placing EEE in the consumer market and those business users in possession of historic wee.

Effect on non-EU Producers

The WEEE "producer" obligations apply, broadly speaking, only to those that place EEE on the market in the EU. Therefore, non-EU manufacturers or traders of EEE are, generally speaking, not directly affected by the WEEE Directive, unless they make direct sales to end-customers in the EU.

For non-EU producers who distribute their products to the EU via local importers and distributors, the key concern will be that those local distributors will be deemed to be the "producer" for purposes of the WEEE Directive and therefore must comply with the producer obligations.

Non-EU producers should reinforce this point in their distribution agreements with EU distributors and should seek appropriate compliance warranties and indemnities. The cost of compliance will be a commercial issue for the negotiation of distribution agreements.

In addition, other complications, such as correct labelling, may arise, which will have to be looked at carefully on a case-by-case basis. It is important that the "producer" of record for WEEE purposes appears on the appropriate label. Non-EU manufacturers may unwittingly make themselves responsible WEEE producers by incorrect labelling. Particularly complex issues arise for non-EU based manufacturers of PC components, such as internal hard drives or pci cards, as these may be treated as finished products under the WEEE Directive.

11. COMPETITION LAW

European competition laws primarily relevant to commercial transactions entered into by technology suppliers are based upon the prohibitions set out in Articles 81 and 82 of the European Community Treaty. In addition the European Community Merger Regulation may be relevant depending upon the nature of the commercial arrangement.

Article 81 (Anti-competitive agreements)

Article 81(1) prohibits agreements which actually or potentially prevent, restrict or distort competition within the EU and which may affect trade between Member States. Article 81(3) offers an exemption from the basic prohibition for agreements which generate countervailing pro-competitive benefits. Certain categories of agreement are exempted en bloc under Article 81(3) where they fulfil the requirements set out in one of a number of "block exemptions". An agreement will

fall outside Article 81 altogether if its impact is considered to be "de minimis". The de minimis notice will not be applicable to "hardcore restrictions" such as price fixing, limitation of sales and allocation of markets and/or customers.

There are various consequences of an agreement being in breach of Article 81. First, restrictions on competition that fall within Article 81(1) and are not exempted are void and unenforceable. The remainder of the agreement may survive if the void restrictions can be severed from the remainder of the agreement but this is a question of contract law to be decided by national law. Second, the European Commission has powers to fine each party to an infringing agreement up to 10%. of its worldwide aggregate group turnover. Finally, it is possible for private actions for damages to be brought in national courts by a party who has suffered loss as a consequence of the competition law infringement. Such actions are very much in their infancy in the European Union.

Article 82 (Abuse of a dominant position)

Article 82 prohibits undertakings from abusing a dominant position in the whole or a substantial part of the European Union. There is no exception or exemption to this prohibition, although conduct will not be considered to be abusive if it can be shown that it is objectively justified.

European Community Merger Regulation

In addition to Articles 81 and 82, strategic agreements between companies in relation to technology products or services may fall to be regulated under the European Community Merger Regulation if the co-operation is considered to be tantamount to a merger. If the strategic co-operation falls short of bring considered a full function joint venture, then it may nevertheless be subject to Article 81.

Horizontal agreements and vertical agreements

Competition law broadly divides agreements into two broad categories. "Horizontal agreements" are those entered into between parties who are active at the same level of the supply chain. "Vertical agreements" are those entered into between parties who are active at different levels of the supply chain. Generally speaking, horizontal agreements tend to attract greater scrutiny since they are seen as capable of creating cartels that fix prices, share markets or divide up customers between the members. Broadly, vertical agreements are less likely to be objectionable although restrictions such as resale price maintenance – where the supplier dictates the onwards selling prices of its distributors – and export bans are considered to be hardcore restrictions and will attract heavy fines.

Article 81 Exemptions

Contrary to the previous notification procedure, the Commission will now only give informal guidance on whether an agreement merits exemption and then only if the parties are faced with novel or unresolved questions regarding the application of Article 81 or 82, and then only at its discretion.

However, the Commission still adopts a range of regulations granting exemption under Article 81(3) to certain categories of agreements. These block exemption regulations include exemptions for categories of:

- vertical agreements (replacing the previous block exemptions for exclusive distribution, exclusive purchasing and franchising as well as the notice on exclusive dealing contracts with commercial agents);
- technology transfer agreements (i.e. patent and know-how licences);
- research and development agreements;
- specialisation agreements.

The block exemption relating to vertical agreements, which came into force in June 2000, creates a presumption of legality for vertical agreements between parties whose market shares in the markets affected by the agreement fall below certain market share thresholds. However, the vertical block exemption also sets out a number of restrictions which the Commission regards as being very unlikely to be capable of exemption under Article 81(3). If the agreement contains any of the 'hardcore restrictions', then the block exemption will not apply regardless of the market shares of the parties. These hardcore restrictions include:

- resale price maintenance obligations;
- direct or indirect non-compete obligations exceeding 5 years in duration; and
- any post-termination non-compete obligations unless necessary to protect the supplier's know-how and limited to one year in duration.

The vertical block exemption is backed up by guidelines published by the European Commission which set out the principles for assessment of a wide range of vertical agreements, including distribution agreements. In relation to horizontal agreements, the Commission has also issued a notice setting out guidelines which cover areas such

as research and development, production, purchasing or commercialisation agreements and deal in particular with the position where such agreements are entered into between competitors. These guidelines will be particularly relevant where an arrangement is not covered by a specific block exemption (i.e. generally those relating to production, purchasing or commercialization).

12. JURISDICTION AND APPLICABLE LAW

In any cross-border transaction, it is advisable to include provisions on the choice of forum for hearing of disputes and the law applicable to the transaction, in order to avoid uncertainties.

Choice of Law and Forum

The parties generally have a free choice of law and forum if a contract is between businesses and is not on unilaterally imposed standard terms.

The appropriate and most advantageous choice of law and forum in cross-border contracts depends on a number of factors and may vary depending on the circumstances. For companies that have created an establishment in the EU, the best option may be to choose local law and forum, so that the local establishment can deal directly with any dispute.

If there is no establishment in the EU, the choice of law and forum may be trickier. The instinctive choice of non-EU based companies is often their "home" law and jurisdiction, but this is not necessarily the best option. Thought needs to be given to what the most likely dispute scenarios might be for the contract in question, and which rights might have to be enforced. For example, if a non-EU based technology company with contracts in the EU is mostly concerned about being able to enforce its intellectual property rights or to obtain payment from their counterparty, it may actually be more advantageous to bring such claims in the country where the counterparty is based. This is because any court award obtained, for example in the US, is not directly enforceable in the EU, but needs to be declared enforceable in separate proceedings, the outcome of which is not guaranteed. If, on the other hand, the counterparty also has assets in the US, litigation there may be more straightforward.

Another reason for non-EU companies to seek to apply their "home" law and jurisdiction is that they are worried about getting sued in a foreign country where they are economically active. But again, great care needs to be taken when drafting the appropriate choice of forum clauses. An EU counterparty suing a US based company in a US court, for example, would have access to all the usual mechanisms of discovery under US procedural law, and any US court award would be directly enforceable. If the same claim was brought in an EU court, it might at first seem like an inconvenience for the US based defendant, but EU civil procedure tends to be more defendant friendly, for example there is no comparable discovery process, and the plaintiff would have to bear the defendant's cost if the claim was not successful.

Especially for individually negotiated agreements, there is therefore no simple formula as which is the best forum to choose in the contracts for the settlement of disputes. As a general rule though, once a suitable choice of forum has been found, the choice of applicable law should normally follow that of the forum, because litigation in any court under a different substantive law can be very tedious and expensive.

Consumer Contracts and Standard Terms

When dealing directly with consumers in the EU, any non-EU based company should assume that, regardless of any express choice of forum or law made in the terms and conditions, the consumer will always have the right to bring proceedings in their country of residence and will always have the protection of mandatory consumer laws of their country of residence.

When dealing with businesses in the EU, the parties are generally a free to agree choice of law and forum clauses. However, the enforceability of such clauses may be in doubt if they are included in standard terms set by the other party, especially in situations where the terms may not be expressly agreed to, such as shrink wrap or click wrap licenses.

13. STOP PRESS! (WINTER 2007/2008)

European law and regulation continues to develop to encompass new technologies, new business ideas and developing policy requirements.

As at Winter 2007 the "legislative pipeline" covering areas discussed in this Survival Guide includes – or may be influenced by - the following:

PRIVACY AND DATA PROTECTION

Consultation on changes to the EC regulatory framework for electronic communications – data breach

The European Commission's recent consultation on changes to the regulatory framework for electronic communications includes a proposal that would require internet service providers and network operators to notify their customers and national regulators of any security breaches involving

personal data. On 13 November 2007 the European Commission adopted the proposals which are now being considered for approval by the European Parliament and EU Council of Ministers.

UK Government announces review of personal data-sharing in the public and private sector

In November 2007, the UK Ministry of Justice announced terms of reference for a review of the scope of the sharing of personal information and the protections that apply when personal information is shared in the public and private sectors. The review comes after a number of public authorities reported losses of electronically held personal data. This review will consider possible changes to the way the Data Protection Act 1998 operates in the UK and the options for implementing any such changes. A first report is expected to be published in the first half of 2008. On 12 December 2007, a related consultation was launched on the use and sharing of personal information in the public and private sectors. The consultation closes on 15 February 2008.

European Parliament legislative resolution on a draft Council Framework Decision on the protection of personal data in the third pillar

The Data Protection Directive does not apply to activities that fall outside of the scope of Community law (the "first pillar"). By contrast, in the "third pillar" (broadly, crime and security matters) Member States can themselves set appropriate data protection standards. On 7 June 2007, the European Parliament adopted a draft Framework Decision on the protection of personal data in the third pillar which, if adopted by the Council, would apply to the processing of personal data received by the law enforcement authorities of one Member State from another Member State within the framework of police and judicial cooperation in criminal matters.

Agreement between the EU and the US on the processing and transfer of passenger name record (PNR) data by air carriers to the Department of Homeland Security

On 23 July 2007, the European Council adopted a formal decision approving a new bilateral agreement between the EU and the US on the processing and transfer of PNR data to the US authorities. The Agreement allows the US to collect personal information about anyone who flies there from Europe. Previously such release of information would have been barred by European data protection laws. Some MEPs believe that the Agreement waters down protection for European citizens, is substantially flawed due to open and vague definitions with multiple possibilities for exceptions.

European Commission Proposal for a framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes

In November 2007, the European Commission adopted a proposal for a Council Framework Decision on the use of PNR for law enforcement purposes. The proposal is designed to harmonize EU Member States' provisions on obligations for all carriers which operate flights to or from the territory of at least one Member State, regarding the transmission of PNR data to the competent authorities, for the purpose of preventing and fighting terrorism and transnational organized crime. The proposal envisages that Member States must implement the measures before 31 December 2010.

Consultation on the use of radio frequency identification (RFID) tags in Europe

In March 2007, the European Commission published a Communication setting out its current strategy on the use of RFID tags and outlining the steps it will be taking in the next two years towards establishing a legal and policy framework. At the end of 2008, the European Commission has indicated that it will publish a further Communication analyzing the nature and the effects of its current strategy (to include an assessment as to whether further legislation is required).

UK Information Commissioner's Office launches consultation on new CCTV code of practice

The ICO has launched a consultation on a new draft CCTV data protection code of practice (to replace the existing 2000 code) which takes account of new legal developments, such as the entry into force of the Human Rights Act 1988 and the Freedom of Information Act 2000, as well as advances in CCTV technology. This new data protection strategy is expected to commence in early 2008 and the proposed code aims to be along the lines of those laid down by the Data Protection Act 1998.

CONSUMER PROTECTION

Consultation on consumer law

The ongoing consultation on consumer law is designed to modernize the EU consumer rules, and to simplify and improve the regulatory environment for both business and consumers. The European Commission's initial findings and possible options are set out in the Green Paper on the Review of the Consumer Acquis (COM (2006)) 744 Final, which was adopted on 8 February 2007. If further work confirms the preliminary findings, the European Commission will make proposals in 2008.

The European Commission will address problems that it has identified in particular directives. The eight directives under review include the Distance Selling Directive, the Unfair Contract Terms Directive, the Directive on Sale of Consumer Goods, the Directive on Price Indication, the Injunctions Directive, the Timeshare Directive, the Package Travel Directive and the Doorstep Selling Directive.

The European Commission's vision is to be able to demonstrate to all EU citizens by 2013 that they can shop confidently from anywhere in the EU and to be able to demonstrate to all retailers that they can sell anywhere on the basis of a single set of rules. The European Commissioner for Consumer Protection will, every year on European Consumer Day (15 March), deliver a speech outlining the progress that has been made. It will also keep the Council, Parliament and the Member States regularly informed. Before March 2011, the European Commission will produce a mid-term report, and before December 2015, an ex-post evaluation report.

COMMERCIAL

EU Services Directive: BERR Consultation on implementation

On 5 November 2007, the Department for Business Enterprise and Regulatory Reform (BERR) published a consultation document on implementing the EU Services Directive in the UK. The Services Directive introduces measures designed to facilitate the cross-border provision of services between EU Member States and to develop a single market in the services sector. It aims to achieve this through a) setting up points of single contact in each Member State through which service providers will be able to locate the necessary information required to do business in the relevant Member State; b) facilitating greater cooperation between regulatory and authorization bodies across the EU; c) abolishing restrictive legislation and practices that prevent service providers from setting up services within the EU and d) encouraging consumer confidence in cross-border service. The Services Directive applies to all service sectors and is required to be implemented in the UK by 28 December 2009.

IP

Amended proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (the Proposed Directive)

On 25 April 2007, the European Parliament approved the Proposed Directive, but with significant amendments. The European Council is currently considering the Proposed Directive. If the Council agrees to the Proposed Directive, it will enter into force immediately and Member States would then have 18 months to implement the Directive.

COPYRIGHT

Consultation on the development of Europe's online music industry

In March 2007, the European Parliament issued a report calling for a framework directive to deal with cross-border management of copyright and related rights for legitimate online music services. The director general of the EU's executive's internal market unit said that the public consultation showed a lack of support for a framework directive but agreed that the system for managing online music rights was unsatisfactory.

Consultation on the European Commission's communication on a Digital Library

The idea of a European digital library has been strongly endorsed by the Culture Ministers of all EU Member States and was backed by the European Parliament in its resolution of 27 September 2007. On 28 November 2007, there was a progress discussion towards launching the European digital library. Europe's cultural institutions plan to launch a prototype of the European digital library in November 2008 and it is envisaged that by 2010 the library will have grown to include far more than the original projected amount of 6 million digital objects.

Consultation on content online in the single market

On 3 January 2008, the European Commission adopted a Communication on "Creative Content Online in Europe's Single Market." This Communication addresses the European Community's desire to make Europe's online content market more competitive. A European Commission statement says

that "The Commission wants to facilitate copyright licences for online content covering the territory of several or all of the EU Member States." This document is the starting point for new EU actions to support development of innovative business models, cross-border services and consumer-friendly offers. According to the European Commissions' studies, the proposal could strengthen considerably the competitiveness of Europe's music, film and games industry and allow retail revenues of the sector to quadruple by 2010 if clear and consumer-friendly measures are taken. The Communication includes a further consultation with a view to preparing a draft recommendation in mid-2008 for adoption by the European Parliament and Council. Stakeholders have until 29 February 2008 to comment on this Communication.

UK IPO consultation on proposed changes to copyright

The UK Intellectual Property Office (UKIPO) launched a consultation paper on 8 January 2008, on proposed changes to copyright exceptions as part of the follow-up to the recommendations made in the Gowers Review of Intellectual Property (2006). The paper sets out proposed changes to copyright that will introduce a format-shifting exception for private individuals, students and libraries.

Responses to the consultation will close on 8 April 2008.

PATENTS

Revised European Patent Convention (EPC 2000) for patent practitioners

The EPC 2000 took effect on 13 December 2007. The EPC 2000 does not introduce any major changes in substantive patent law, except changes concerning novelty, industrial applicability and priority rights.

Draft European Patent Litigation Agreement (EPLA) and the EU Presidency Proposal of an integrated patent litigation system

In March 2007, the European Commission published a Communication on enhancing the European patent system which sets out various proposals aimed at providing a compromise between the draft EPLA and a proposed Community patent system, including the creation of a unified and specialized patent judiciary with competence for litigation on European patents and future Community patents. This Communication also stated that a separate and comprehensive Communication in Intellectual Property Rights is planned for 2008, which will complement the Patent Communication and address the main outstanding non-legislative issues in all fields of intellectual property. According to the UK IPO, any agreement on a common European patent litigation system will merely be a basis for further discussions on the Community patent, as a number of Member States regard the two as linked which means that a single European system of patent litigation is still a long way off.

In November 2007, the EU Presidency put forward proposals, in what it refers to as a "non-paper", for a unified system in the EU for litigation of European patents, with first instance courts in Member States and a centralized first instance court, which would have exclusive jurisdiction to hear claims for revocation and for declarations of non-infringement. All appeals would go to a specialized central second instance court. The divisions would be able to grant certain cross-border remedies and would use a uniform procedure. According to the UK IPO, the fact that it had been put forward as a "non-paper" indicates a recognition that any kind of proposal for uniformity in EU patent litigation has so far been very controversial.

UK IPO and USPTO announce "Fast-track" Patent Examination

The UK Intellectual Property Office (UK IPO) and US Patent Trademark Office from 5 September 2007, will be accepting patent applications for fast-track examination. This trial period will run for one year, until 4 September 2008. This pilot scheme will allow patent applicants who have already received an examination report by either the UK-IPO or the USPTO to obtain an accelerated examination of a corresponding patent filed in the other country.

TRADEMARKS

European Commission Communication on a proposal for regular review of Community trade mark (CTM) fees

In May 2007, the EU Competitiveness Council recommended an immediate reduction in the fees charged OHIM, particularly for Community trade mark applications, registrations and renewals. However, although the Council has called for a comprehensive impact assessment, it has not yet given its backing to the introduction of an automatic review of fees, as proposed by the European Commission. The Council has also recommended that a detailed study on the overall functioning of the CTM system be carried out (to include an evaluation of the existing cooperation between OHIM and national trade mark offices).

Proposal for a Directive to approximate the laws of the Member States relating to trade marks

The European Commission published a proposed Directive to consolidate the EC Trade Marks Directive (89/104/EEC) on 19 December 2006. Although the proposed Directive will supersede existing legislation, it will not make any substantive changes to the relevant instruments. The proposed Directive is currently in the middle of the legislative approval process and has been viewed favourably by an initial working party and the European Economic and Social Committee.

DESIGNS

European Council Decision approving the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs (2006/954/EC); and European Regulation amending Regulations 6/2002/ and 40/94/to give effect to the European Community accession (1891/2006/EC)

In July 2007, the European Commission adopted these two regulations which were necessary to give effect to the accession of the European Community to the Geneva Act. The European Community's accession to the Geneva Act of the Hague Agreement concerning the International Registration of Industrial Designs took effect on 1 January 2008. As from this date, applicants can obtain Community registered designs by means of an international application (which could also cover other non-EU countries which are signatories to the Geneva Act).

OHIM consults on draft guidelines for renewal of registered Community designs

The Office of Harmonisation in the Internal Market (OHIM) has launched a consultation on its draft guidelines for renewing registered Community Designs. The guidelines explain how OHIM will apply the Community Design Regulation (6/2002/EC), the Implementing Regulations (2245/2002/EC) and the Fees Regulation (2246/2002/EC). The first Community registered designs, which date from 2003, will be due for renewal in April 2008. The guidelines will be finalized and formally adopted in 2008.

European Parliament votes on Commission proposal to change designs on spare parts

The European Parliament has voted in favour of the European Commission's proposal for amending EC Directive 98/91 on the legal protection of designs in relation to spare parts, which entailed the addition of a "free-repair clause". The European Parliament has made some amendments, one of the key changes being a five-year transitional period for Member States to introduce any new legislation. This will provide some comfort to the majority of Member States (excluding the UK) whose design laws currently extend design protection to components for spare pairs or repairs.

ENVIRONMENTAL

European Commission consults on significant changes to the RoHS Directive

In December 2007, the European Commission launched a second consultation on amending the RoHS Directive. The consultation sets out wide ranging options for amendment which could have significant effects and cost implications for the industry. The options include adding further product groups and additional hazardous substances to the scope of the RoHS Directive. The European Commission proposes clarifying ambiguities in key definitions, and in relation to what equipment the RoHS Directive covers. The deadline for responses to the consultation is 13 February 2008.

EXPORT CONTROLS

European Commission's proposals to change Regulation 1334/2000, which governs controls on the export of dual-use items and technology (COM (2006) 829)

The European Commission published a Communication on 18 December 2006, accompanied by a press release, setting out its proposals for new measures on export of dual-use goods and technologies (products and technologies which are normally used for civilian purposes but which may have military applications). The Regulations have been subject to comment by exporters and are currently the subject of ongoing Council discussions.

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