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EUROPEAN INSIGHT

Highlighting the latest European regulatory & policy developments affecting international businesses in Europe

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TELECOMS: EUROPEAN COMMISSION PUBLISHES RECOMMENDATION ON RELEVANT MARKETS

Fiammetta Amendola

The European Commission has published its long awaited Recommendation on Relevant Product and Service Markets. The Recommendation (published on 12 February 2003) was the last piece to the new regulatory framework for electronic communications in the European Union. According to the Recommendation, National Regulatory Authorities (NRAs) will have to investigate 18 markets in this sector in order to decide whether they continue to justify sector-specific regulation.

The Recommendation identifies separate markets at a retail and wholesale level. For example, it defines a number of retail and wholesale markets in relation to the provision of public telephone services at fixed locations as well as to mobile voice services (e.g., wholesale international roaming). It also includes a wholesale broadband access market which is currently limited to bit stream (i.e., high speed access offered by the former incumbents) but may be extended to services offered over alternative infrastructures in the future. Ex-ante obligations will only be imposed on operators designated by NRAs as having *Significant Market Power* (SMP). This is deemed to occur where no effective competition exists in a specific market and where national and Community competition law remedies are insufficient to address the lack of competition. Where competition is effective and no operator is deemed to have SMP, NRAs will be obliged to remove any obligations imposed under the previous regime. The European Commission will retain certain regulatory powers, including the power to require NRAs to amend their draft measures to (i) designate an operator as having SMP and (ii) seek to regulate markets other than those identified in the Recommendation. Intervention in markets not identified in the Recommendation will be possible provided the Commission agrees with the NRA that: there are high barriers to entry into the relevant market; there is an absence of dynamic competition; and that competition rules are not sufficient to address the perceived market failures.

View the Recommendation at:
http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf

SECURITIES LAW: EUROPEAN WIDE PROPOSALS

Gordon Mackenzie

The European Commission has just published its proposal for a law that would create a system of pan-European investor protection and transparency. In comparison to the U.S. Sarbanes-Oxley Act and related legislation, the EU legislation should result in fewer regulatory burdens for companies, particularly insofar as reporting requirements are concerned. For example, the U.S. requires a full financial statement for three quarters of the financial year whilst the Commission proposes a financial statement in condensed form only in the half-yearly report and only basic data (net turnover, profit and loss before or after tax) in the quarterly financial information. Furthermore, the Commission is proposing only a half-yearly update of the last annual management report (instead of the more detailed information, provided in the U.S. quarterly report) and, unlike the U.S., the Commission proposes that auditing would only be optional for all interim financial information - that is to say, audit would be compulsory only for the annual report. Finally, since the Sarbanes-Oxley Act in 2002, the U.S. requires certification of all financial information by Chief Executive Officers and Chief Financial Officers. In contrast, the Commission is proposing a statement by the issuer or its supervisory or administrative body in the half-yearly financial report, accompanied by a liability for false information in all interim financial information.

View the EU proposal and other related documents at: http://www.europa.eu.int/comm/internal_market/en/finances/mobil/transparency/index.htm

PRIVACY: EU/U.S. AGREEMENT ON PASSENGER DATA

Gaela Bailey

The European Commission and U.S. Customs and Border Protection (CBP) have issued a joint statement confirming a transitional agreement regarding the sharing of passenger information on transatlantic flights. Since March 2003 airlines and reservation systems has been supplying the CBP with Passenger Name Records (PNR) data for all persons whose travel itinerary includes flights into, out of, or through the U.S.. Data disclosed includes passengers names, itineraries, contact phone numbers and other details. In exchange for the agreement to release data, the CBP has given the EU assurances about appropriate handling of the records. Talks between the European Commission and the CBP confirmed that sensitive PNR may only be used or transferred to other law enforcement agencies for the purposes of preventing and combating terrorism, not merely for profiling purposes.

The U.S. requirement for passenger data stems from the provisions of the Aviation and Transportation Security Act 2001, which made airport security a direct federal responsibility in the U.S. The current agreement on the sharing of passenger information is a transitional system and both sides agreed to work together towards a bilateral arrangement under which the European Commission, in response to undertakings by the CBP about the handling and security of the data, will adopt a decision in accordance with the provisions of EU data protection legislation. A final solution is expected to be agreed at the EU-U.S. Summit on 25 June 2003.

A FINAL SOLUTION IS EXPECTED TO BE AGREED AT THE EU-U.S. SUMMIT ON 25 JUNE 2003

Further information including a copy of the joint statement issued by the European Commission and U.S. Administration is available at: http://europa.eu.int/comm/external_relations/us/intro/pnr.htm

TOBACCO CONTROL: WORLD HEALTH ORGANISATION COMPLETES FRAMEWORK CONVENTION

Tara Gurr

On 1 March 2003, the World Health Organisation (WHO) finalised a ground-breaking treaty to control tobacco supply and consumption. The treaty touches on a wide variety of areas from taxation to advertising. In particular, the treaty requires all parties to work toward a comprehensive ban on advertising within five years provided such a ban is permitted by that country's constitution. In addition, parties are encouraged to actively pursue legislative action to hold the tobacco industry liable for costs related to tobacco use. The final text of the WHO treaty will be presented for adoption at the World Health Assembly in May. It will then be opened for signature and will enter into force shortly after it has been ratified by 40 countries.

THE UK HAS ALREADY TAKEN STEPS TO BAN TOBACCO ADVERTISING WITH PASSAGE OF THE TOBACCO ADVERTISING AND PROMOTION ACT 2002

The UK has already taken steps to ban tobacco advertising with passage of the Tobacco Advertising and Promotion Act 2002. The first stage of the ban entered into effect on 14 February 2003 with the removal of most forms of conventional advertising – billboards, magazines, newspapers etc. Additional areas of advertising, including international sponsorships will come into effect over the next two years.

View the Draft Framework Convention at: http://www.who.int/gb/fctc/PDF/inb6/einb65.pdf

View the UK Tobacco Advertising and Promotion Act 2002 at: http://www.hmso.gov.uk/acts/acts2002/20020036.htm

PATENTS: EU COUNCIL REACHES AGREEMENT ON COMMUNITY PATENT

Evi Switters

EU Member States have agreed a common political approach on the main characteristics of the Community Patent (CP). The agreement is based on a compromise proposed by the Greek Government (which holds the rotating EU Presidency). The most important features of the agreed approach are: (i) confirmation of the principle of a centralised jurisdiction (a Community Patent Court, attached to the European Court of First Instance); (ii) a seven-year transition period (i.e., until 2010) during which national courts will continue to rule on patent disputes and thereafter the Court of Justice will have exclusive jurisdiction regarding patent disputes; (iii) the confirmation of the central role of the European Patent Office (EPO) in examining applications and granting CPs; and (iv) a linguistic regime that provides for the use of three working languages by the EPO (English, French and German – patent descriptions will need to be translated into these three languages) and the translation of patent claims (the most important and shortest part of the patent) into all official Community languages.

The CP will be valid throughout the European Union, representing an even greater benefit for applicants once

the EU expands from 15 to 25 countries in May 2004. It is expected to cost approximately 25,000 euro (about half the current typical cost of a patent valid in eight EU countries, although still higher than the cost of a patent in the U.S. or Japan).

The text is expected to finalised in the next few months.

For further information, see:
http://www.europa.eu.int/comm/internal_market/en/indprop/patent/imc/index.htm

IP LAW: COMMISSION PROPOSES LAWS AGAINST PIRACY AND COUNTERFEITING

Evi Switters

The European Commission recently proposed new legislative measures to strengthen action against counterfeiting and piracy. The proposed Regulation would replace the existing Regulation (EC) No 3295/94, which sets out the conditions under which the customs authorities may intervene in cases where goods are suspected of infringing intellectual property rights and identifies the steps which the authorities can take when goods are found to be illegal. The new Regulation would: (i) make the law clearer; (ii) extend its scope to new IP rights (plant variety rights, geographical indications and designations of origin); (iii) make the rules more accessible for right holders (including cost-free access for small and medium-sized enterprises); and (iv) provide a more effective legal instrument against this type of fraud. After consultation with the European Parliament, the proposal will have to be approved by the EU Council.

As there are significant differences in Member States' legislation concerning the enforcement of intellectual property rights (which pirates and counterfeiters use to their benefit), the Commission also proposed an additional Directive intended to complement the Regulation discussed above. The aim of the Directive is to harmonise national laws on the means of enforcing intellectual property rights, and to establish a general framework for the exchange of information between the responsible national authorities. The Directive would require all Member States to provide injunctions to halt the sale of counterfeit or pirated goods as well as provisional measures (such as precautionary seizures of suspected offenders' bank accounts), evidence-gathering powers for judicial authorities and powers to force offenders to pay damages to right holders. It would also require Member States to ensure that all serious infringements of intellectual property rights, as well as attempts at, participation in, and instigation of such infringements are treated as criminal offences. The proposed Directive requires the approval of both the European Parliament and the EU Council.

IT WOULD ALSO REQUIRE MEMBER STATES TO ENSURE THAT ALL SERIOUS INFRINGEMENTS OF INTELLECTUAL PROPERTY RIGHTS, ... ARE TREATED AS CRIMNAL OFFENCES

For further information, see:
http://www.europa.eu.int/comm/internal_market/en/intprop/docs/index.htm#proposals

TRADEMARKS: POSSIBILITY OF REGISTERING SMELLS IN DOUBT

Evi Switters

The European Court of Justice has recently cast a serious doubt over the possibility of registering a smell as a trademark. The ruling arises out of an attempt to register a particular smell as a German trademark (known as an "olfactory mark"). The application had described the smell as "balsamically fruity with a slight hint of cinnamon", referred to the chemical structure of the scent, the actual chemical formula and provided an odour sample in a container – all standard means used to describe olfactory marks. The German Federal Patents Court had doubts whether such an olfactory mark could satisfy the EU Trademark Directive's requirement for graphic representation and, consequently, referred the question to the Court.

The Court ruled that the Directive allows a non-visual trademark to be registered provided that (i) it can be represented graphically, particularly by means of images, lines or characters, and (ii) the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective. However, it stated that as regards an olfactory sign, the requirements of graphic representation are not satisfied by a chemical formula, by a description in written words, by the deposit of an odour sample or by a combination of those elements.

This decision calls into question the validity of a number of olfactory marks already accepted for registration by the Office for Harmonization in the Internal Market. Current applications will probably be refused as it is difficult to imagine alternative methods of representing an olfactory sign.

C-273/00, Sieckmann v Deutsches Patent-und Markenam, 12 December 2002

AVIATION: TOWARDS A NEW EU EXTERNAL AVIATION POLICY?

Paloma Navarro

Following the European Court Justice judgements in the "Open Skies" cases, the European Commission has now adopted two new measures in the field of aviation sector aimed at moving towards the creation of a new EU policy for international air transport.

The first proposal would extend the application of EU antitrust procedural rules to commercial cooperation agreements between the EU and third countries. The Regulation would give the Commission greater enforcement powers (e.g., imposition of fines) to investigate airline alliances or other commercial co-operation agreements involving these routes and would no longer have to rely on national authorities to impose remedies.

The Commission also adopted a package of measures which should provide greater legal certainty on the division of competences between the EU and the Member States regarding the negotiation and conclusion of aviation agreements with third countries. The proposed measures include: (i) a general mandate from the Council to the Commission to negotiate, on behalf of Member States, with third countries (aside from the U.S. which is subject to a particular mandate) certain aspects of their current aviation bilateral agreements (i.e., the "nationality clauses" and matters that fall within the EU competence); and (ii) a draft Regulation which will require Member States to consult the EU on matters falling outside the proposed mandate. These proposals will complement the Commission's requested mandate to negotiate an EU-U.S. wide transatlantic aviation agreement.

View the proposals at:
http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0094en01.pdf

http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0091en01.pdf

TRADE: EU POSITION ON SERVICES IN THE WTO

Peter Sellar

Around 145 member countries of the WTO are currently negotiating the extent to which they wish to open up their various service sectors to foreign competition. The liberalisation of service sectors is considered important not just for developed but also for some developing countries because, for some developed countries, services generate over 50% of their GDP. Thus, access on a non-discriminatory basis for those countries to other countries' service sectors is key to their economic development. The EU stands to benefit as well as services account for approximately two-thirds of the EU's GDP and more than 67 million Europeans are employed in commercial services. Some sectors have already been opened up and "commitments" entered into by the EU and other WTO members. In the context of the "Doha Development Round" of negotiations (which began in November 2001), initial requests for specific commitments to open up service sectors have been made by some WTO members, including the EU, and final offers regarding opening up service sectors must have been made by 31 March 2003.

The EU proposal contained commitments in the sectors of professional, business, construction, environmental, tourism, news agencies, financial, computer, telecommunications, transport, distribution, postal and courier services. However, no offer was made by the EU to open up 'public services' (i.e., education, health and social services), and similarly no offer was made in the audio-visual sector.

The EU is also formulating proposals with regard to the other aspects of the Doha Round, including market access for agricultural and non-agriculture goods and amendments to anti-dumping and dispute settlement rules.

Further information is on the EU offer is available at : http://europa.eu.int/comm/trade/services/nspw.htm for more details.

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