

107. COMMERCIAL

107.1 Data Protection – Axel Viaene

107.2 Product Recall – Berry Jonk-van Wijk

107.3 E-Discovery - Wolter Kymmell

CONTENTS

- Introduction
- Data Protection
- Product Recall
- E-Discovery
- Closing and Questions

INTRODUCTION

- In-house counsel's role as business partner protecting the business' assets (people, property, IP and reputation)
- How to protect the reputation of your business:
 - Data (customer data, employee data)
 - Products (quality issues, product recall)
 - Communication (e-mails)
- International dimension
- ACC: by in-house counsel for in-house counsel
- Outside counsel integrated part of in-house counsel's success

DATA PROTECTION: CONTENTS

- **IMPORTANCE**
- **LAW**
- **SENSITIVE PERSONAL DATA**
- **COMPLIANCE: THEORY**
- **COMPLIANCE: PRACTICE**
- **SAMPLE CONSENT LANGUAGE**
- **ENFORCEMENT**
- **QUESTIONS**

DP: Importance

- Reality: tons of data flying from European subsidiaries to US mother ship
- On anyone's priority list?
- Reactive rather than proactive
- Key for reputation
- Data handling indicative of company processes in general?

DP: Law

- Heavily regulated in Europe
- Directive 95/46/EC of 24 October 1995
- National Laws
- Vocabulary:

Personal Data, Sensitive Data, Data Subject,
Data Exporter, Data Importer, Data
Controller, Data Processor...

DP: Sensitive Personal Data

- (a) racial or ethnic origin;
- (b) political opinions;
- (c) religious beliefs or other beliefs of a similar nature;
- (d) trade union membership;
- (e) physical or mental health or condition;
- (f) sexual life;
- (g) the commission or alleged commission of any offence; or
- (h) any proceedings for any offence committed or alleged to have been committed, the disposal of such proceedings or the sentence of any court in such proceedings.

DP: Compliance in theory

- EC model controller contract
- FTC Safe Harbor certification
- Registration with data agency
(UK, Netherlands)
- License from Ministry of Justice
(Netherlands)
- Role of Works Council
(Netherlands, Germany)
- To consent or not to consent

DP: Compliance in practice

- Registration and update
- Disclaimers on website, marketing and employment materials
- Employment contract: sufficient for consent?
- Data Protection policy
- Data stewards: where in organization

DP: Sample Consent Language

- **Consent to Policy [Acknowledgement of the Policy]**
- I have read the policy statement entitled “[**Insert name of local entity**] Partner Data Protection Policy” (“Policy”) dated [**insert date**]. I understand its contents and expressly and voluntarily consent to [**I understand its contents and acknowledge**] the application of its terms (including those regarding the collection, use, storage, and other processing of my Personal Data, including Sensitive Personal Data, by [**entity**], and the international transfer of my Personal Data to jurisdictions where data protection laws may not provide an equivalent level of protection to the laws of my home jurisdiction) during the course of my employment.
- I also confirm that I have duly provided my family members and dependents (if any) with all information regarding the processing of their Personal Data and their related rights, as described in the Policy, and that I have obtained the explicit consent of those individuals, where necessary, to the processing of their Personal Data.
- Please click the appropriate box/button to indicate your consent to [**acknowledgement of**] the Policy.

DP: Enforcement

- Netherlands
 - Civil liability: data controller liable for material and immaterial damages caused by data controller or its processor
 - Administrative liability: fine
 - Penal liability: fine, prison
- DP agencies have not been very aggressive in enforcing these
- UK Information Commissioner stepping up enforcement
- Better Safe than Sorry!

DP: Questions?

- Going once...
- Going twice...

PRODUCT RECALL: CONTENTS

- Legal basis
- Obligations under the General Product Safety Directive
- Notification procedure
- Practical tips

Legal Basis

- General Product Safety Directive 2001/95/EC (GPSD)
- Certain sector directives on product safety:
 - Directive on toys
 - Directive on cosmetics
 - Directive on personal protective equipment
 - etc.
- National (implementation) law

Relationship between General and Specific Legislation

- Article 1 (2) GPSD:
 - The GPSD applies to all the products
 - Where products are subject to specific safety requirements, the GPSD applies only to the aspects and risks or categories of risk not covered by those requirements

GPSD obligations on producers and distributors

- Main obligation:
 - Market safe products
- Additional obligations before risks arise:
 - Supply consumers with information enabling them to assess and prevent risks
 - Keep up to date on product risks
 - Carry out random checks on products on the market
 - Maintain traceability
 - Monitor/assess complaints
- Additional obligations when risks arise:
 - Inform consumers
 - Warn consumers
 - Withdraw the products
 - Recall products as a last resort

Notification obligation

- Where producers and distributors know or ought to know, on the basis of the information in their possession and as professionals, that a product that they have placed on the market poses *risks to the consumer that are incompatible with the general safety requirement*, they shall immediately *inform* the competent authorities of the Member States (Art. 5(3) GPSD)

When to notify?

- A product intended for or likely to be used by consumers (Art. 2 (a) GPSD)
- No specific similar obligation in community legislation (Art. 1 (2) GPSD)
- Producer or distributor (Art. 5 GPSD)
- Product on the market
- Dangerous product

What to notify?

- Details of the producer or distributor
- Details of the product involved
- Details of the hazard
- Details of corrective actions that have been taken or are planned to reduce or eliminate the risk to consumers
- Details of all companies in the supply chain that hold affected products and the approximate number of products in the hands of businesses and consumers
- If a serious risk: all the available information relevant for tracing the product

Follow-up to notification

- If appropriate, the authority that received information replies by asking for *more information* or asks the producer or distributor to take *further action or measures*;
- If *RAPEX notification* is required: Community Rapid Information System

RAPEX

- Rapid exchange of information between Member States and the Commission on measures and actions in relation to *consumer products marketed in several Member States* posing a *serious risk* to consumer health and safety
- **Warning!** RAPEX has far-reaching consequences
 - All authorities can impose further action and measures
 - Exporting dangerous products from the Community is prohibited, unless provided otherwise (Art. 13 (3) GPSD)

RAPEX

(source: European Commission, Health & Consumer Protection Directorate General, www.ec.europa.eu)



Who must be notified?

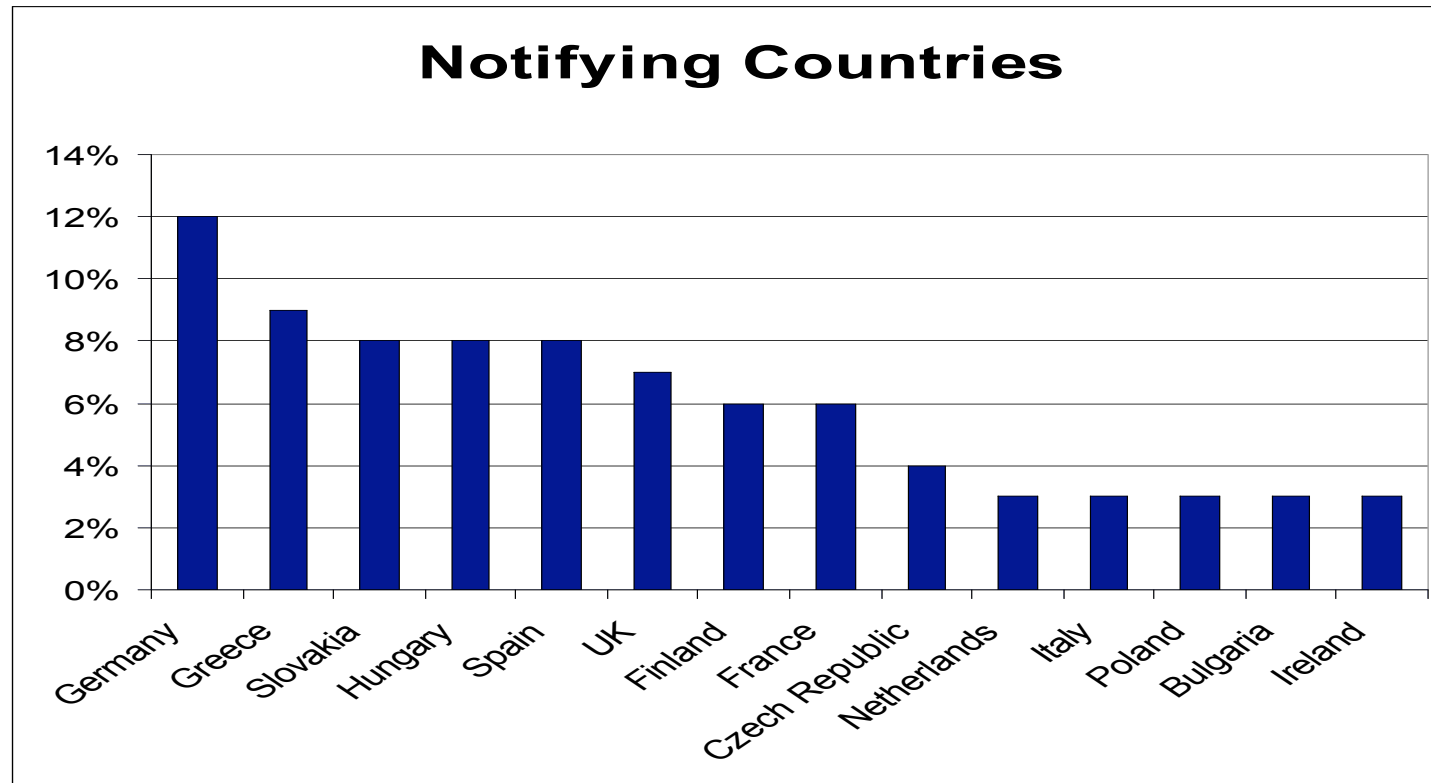
- Producers and distributors are required to send their notifications to:
 - The market surveillance authorities of all Member States where the product has been marketed or otherwise supplied; or
 - The market surveillance authority of the Member State in which they are established

Practical tips

- Realize the differences!
 - Cultural differences
 - Different policies

RAPEX Statistics (1 January – 30 November 2007)

(source: European Commission, Health & Consumer Protection Directorate General, www.ec.europa.eu)



More practical tips

- Planning is everything:
 - Think of a strategy for measures and product recall in advance, including:
 - Developing and maintaining an international network of specialists
 - Developing a strategy/plan for all company departments that will be affected: marketing, legal, communications, financial etc.

Practical tips

- Be able to take measures at any time:
 - Know your product
 - Know the safety profile of your product
 - Know where your products are: traceability
 - Know your market

Practical tips

- If notification is given: have a good plan ready!

Practical tips

- Maintain a good relationship with the authorities
 - Again: realize the differences!

Practical tips

- Ensure consistency in data flow internally and externally

Practical tips

- Know how to deal with confidential information:
 - Be aware which information you are obliged to give
 - Develop a system for how to handle confidential information

Practical tips

- **Be in control!**

Product recall: Questions?

- Going once...
- Going twice...

E-DISCOVERY- content today

- What is Electronic Discovery (ED)
- Case
- US vs EU or ‘Why should I care?’
- Prevention
- Managing ED
- Some conclusions and suggestions

What is E-discovery?

- All electronic records:
 - e-mail, data files, back-up tapes, chat boxes, PDA's, bb's, etc.
 - original format and metadata
- US origin: find the truth!
- Its an industry
- Immensely expensive
- Strategic and tactical weapon in litigation
- A company's potential nightmare

CASE

- Price fixing
- Investigation US and EU
- And yes, of course....class actions
- Perception in Europe: get lost (please)!
- Consequences can be extremely severe
(Morgan Stanley, Enron, punitive damages, etc)

Why should I care?



- US : personal jurisdiction?
- If yes: get ready
- ‘control’ vs ‘location’ of records
- ‘Accessibility’ of records
- The Hague Evidence Convention

Local Blocking statutes

- eg. Data protection, secrecy
- balancing act: reasonable & proportionate
 - importance of documents
 - US versus foreign interests
 - specificity of request
 - alternative means to obtain information
- Conclusion: prudent to preserve

Prevention and preparation is key

- Adam and Eve: Creation of records
 - what and how (e-mail!)
- Records “retention”: not sexy but crucial
 - implementation + enforcement of policy=**key**
 - may need a culture shift
 - sponsorship and involvement IT and departments
 - training, education and appointment of champions
 - include ‘hold’ instructions
 - central guidance and monitoring, local implementation
 - organize records + automatic deletion: reasonableness

Anticipated Litigation

- 'hold' instructions
 - memo and letters to employees
 - attention: outside vendors
 - reissue regularly
 - identify, inform and instruct key players
 - separate relevant back-up tapes
 - document your steps taken
- Sedona Principles for ED production

ED=Project management!

- Get support top level executives
- Multidisciplinary
- Get early scope definition
- Produce data map
- Confer with other party: format, search, etc
- Privilege and business secrets
- Technology and vendors

Some conclusions and suggestions

- Make realistic risk assessment
- Get and be prepared
- Customized solutions
- Integrated approach
- Leadership demanded from in-house
- Continuous follow up