



# International Product Liability Review

Issue 65

December 2016

# About our Product Litigation and Compliance Practice

Hogan Lovells has the leading international product litigation and compliance practice covering all aspects of product liability, compliance and mass torts. We focus on acting for clients around the world covering all product sectors including food and beverages, pharmaceuticals and medical devices, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, chemicals and hazardous substances, toys and children's products, sporting goods, aircraft and machinery. Hogan Lovells product litigation and product safety lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells product litigation and compliance practice, please visit our website at [www.hoganlovells.com](http://www.hoganlovells.com) or contact the Product Litigation and Compliance Group Leader, Rod Freeman, at [rod.freeman@hoganlovells.com](mailto:rod.freeman@hoganlovells.com) or any of the lawyers listed on the back page of this publication.

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## About International Product Liability Review

In December 2000, Lovells (as it then was) launched its quarterly *European Product Liability Review*, the only regular publication dedicated to reporting on product liability and product safety developments in Europe for international product suppliers, and others interested in international product issues. Over the next ten years, this unique publication featured hundreds of articles, from authors across our network, covering issues in Europe and, increasingly, further afield. Reflecting the growing globalisation of product risks, and following the creation of Hogan Lovells through the combination of Lovells with Hogan & Hartson in May 2010, the publication was renamed *International Product Liability Review* in March 2011.

Hogan Lovells *International Product Liability Review* continues to be the only regular publication dedicated to reporting on global developments in product litigation and product regulation. It is distributed worldwide free of charge to our clients and others interested in international product issues. If you would like additional copies of this publication, please return the form enclosed with this edition, or contact a member of the editorial team by e-mail:

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# Meet the team

We are pleased to introduce two of the authors who have contributed to this edition of *International Product Liability Review*: Cléa Dessault (Paris) and Lucía Perlado (Madrid).



**Cléa Dessault**

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As an associate in the Hogan Lovells Paris office, Cléa Dessault focuses her practice on commercial and civil litigation. She brings her experience in civil and commercial proceedings, notably in product liability, commercial disputes and life sciences regulations to pharmaceutical companies, biotech companies and medical devices manufacturers.

Cléa studied business law and common law at the Panthéon Assas University in Paris and to further her understanding of the ins and outs and dynamics of a company, she studied at and graduated from the ESCP Europe business school before passing the Paris bar in 2014.

See page 14 for Cléa's article "*Market-share liability and causation: the lessons of recent "DES" decisions*"



**Lucía Perlado**

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Lucía Perlado is a Junior Associate in the Hogan Lovells Madrid litigation team. As a litigator, she specialises in the resolution of civil and commercial disputes, which vary from corporate and real estate to consumers and antitrust competition. She has also assisted in providing legal advice to automotive, health care and financial companies.

As a member of the Madrid product litigation team, Lucía has assisted in advising clients on national and international product liability and product safety issues and she has also been involved in handling claims involving medical devices.

As part of her litigation work, Lucía has represented several national and international companies in court in different consumer claims related to alleged violations of the Spanish Consumers Act.

See page 21 for Lucía's article "*Collecting evidence: chain of custody under increased scrutiny by Spanish courts*"

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### FEATURE

## 2 Talking product safety: 2016 International Safety Week in brief

Rod Freeman, Anthea Davies, Sarah-Jane Dobson and Ellie Pszonka (London) report back from International Product Safety Week, which took place in Brussels in November, hosted by the European Commission. During a full week of discussions involving participants from around the world, one of the key areas of focus was the need for consumer protection from unsafe products and ever greater cooperation, not just across borders, but also between government and business.

### EUROPE – EU

## 6 Animal testing of cosmetic products: scope of marketing ban clarified by CJEU

Sarah-Jane Dobson (London) summarises the impact of a recent preliminary ruling of the Court of Justice of the European Union, which provides much-needed clarity about the scope of the marketing ban on animal testing in the EU. As well as highlighting ambiguities in the Cosmetics Regulation, the CJEU's ruling may also indicate a reluctance, in certain circumstances, to place great weight on actions taken by EU manufacturers in third countries, even where such actions are outlawed in the EU.

## 9 Product Liability Directive: under evaluation

Since its adoption in 1985, the Product Liability Directive has not been subject to any formal evaluation. Now, as Cécile Burgess and Gavin Abel (London) explain, that's set to change. The Commission has recently announced its intention to carry out a thorough evaluation of the Directive, focused on its effectiveness, efficiency, coherence, relevance, and EU added-value. The relevance of this evaluation for all organisations that produce,

market and distribute products within the EU is significant.

## 11 Clarity at last: CJEU rules on sales of pre-installed software by technology manufacturers and retailers

With more and more connected products being sold with pre-installed software, Ellie Pszonka (London) reports on a recent decision by the CJEU that provides some welcome clarity for the technology manufacturers and retailers that sell these products. It's now clear that, where products are sold with pre-installed software and no option for separate purchase of that software, consumers will be able to reach an informed transactional decision without being given a detailed breakdown of its cost.

### EUROPE – FRANCE

## 14 Market-share liability and causation: the lessons of recent "DES" decisions

Several judgments recently handed down by the Versailles Court of Appeal continue to fuel the debate on product liability law in France. Cécile Derycke and Cléa Dessault (Paris) take a look at these cases and, in particular, assess their impact (and likely impact) in two key areas: market-share liability and the standard of proof required from a plaintiff to establish liability.

### EUROPE – IRELAND

## 17 Product liability litigation: adequacy of particulars

Isabel Foley, Joanelle O'Cleirigh and Orla Clayton (Arthur Cox, Dublin) look at an Irish High Court decision which considered the adequacy of particulars in product liability litigation. The case is of real significance to product manufacturers.

## **EUROPE – NETHERLANDS**

### **19 Food law: NVWA acts unlawfully by not compensating (recall) damages?**

Karen Jelsma and Laura-Jean van de Ven (Amsterdam) examine the implications of a recent case in the Hague District Court. This focused on the role of the regulator (the Dutch Food and Consumer Product Safety Authority, "NVWA") in food product recalls. The key lesson from the judgment is that the risks of taking decisions on whether or not to recall products fall to the food business operator. The state regulator has a subsidiary role.

## **EUROPE – SPAIN**

### **21 Collecting evidence: chain of custody under increased scrutiny by Spanish courts**

Following a recent ruling by the Madrid Court of Appeal, the level of diligence required in the collection, storage and transportation of evidence appears to be higher than ever before. As Lucía Perlado (Madrid) comments, this is highly significant for product liability cases, where failure to observe every formal requirement for preserving the evidence chain of custody could have a decisive impact on the final outcome of cases.

## **EUROPE – UK**

### **23 Defective products: when will a manufacturer not be liable?**

A recent English Court of Appeal judgment focused on the responsibility of end-users who voluntarily continue to use a product which they know is defective. Cécile Burgess (London) summarises the facts behind this case and the reasoning applied by the Court in reaching its decision. As she explains, a negligent product manufacturer may, in certain cases, escape liability if an end-user continues to use a product, despite having become aware of a defect in it before any damage occurs.

### **26 Consumer Protection Act 1987: new guidance on determining "defect"**

Caroline Moore (London) summarises a recent judgment in the English High Court that provides long awaited guidance on the proper approach to determining "defect" under the Consumer Protection Act 1987. Those advising manufacturers and users of medicinal products and medical devices will welcome its clarity.

### **29 Whiplash reforms: full throttle?**

Matthew Felwick (London) provides an update on the proposals aimed at driving down the cost of motor insurance, following a recent consultation by the Ministry of Justice on the planned reforms to the whiplash claims process. The proposed reforms appear to have been put on hold following backlash both from claimant law firms and the Law Society. With these now firmly back on the agenda, it remains to be seen if, when and in what form they will be introduced.



## Overview

Complex cases can lead to the development of novel principles of law, a tendency we see often in product liability cases around the world. In this issue of *International Product Liability Review*, we provide an update on important developments regarding "market share liability" in the context of the French litigation involving a certain class of drug prescribed (DES) prescribed to pregnant women from 1948 to 1977 in France (page 14). As is often the case, the courts, when deciding on "interests of justice", will try to stress that new principles on "interests of justice" should be limited to the narrow facts of the case at hand. However, experience invariably confirms that principles established in this way tend to be extended over time to broader scenarios. For this reason, the establishment of principles of "market share liability" in the DES litigation is likely to have significant implications for manufacturers marketing products in France if the recent decisions discussed in this issue are confirmed by the Supreme Court.

In England, the Court of Appeal has delivered an interesting judgment in which it confirmed that the manufacturer was not liable in negligence for a defect in its product in circumstances where the claimant was aware of the defect, and chose to continue to use the product (page 23). It might be expected that the principles underpinning this decision would also apply in situations where a manufacturer has publicised a product recall, which is ignored by a consumer, who is subsequently injured by the defect.

On the question of policy considerations in the context of product recalls, we report on a decision of the Hague District Court, which was called upon to adjudicate on whether the Dutch Food and Consumer Product Safety Authority would be liable where its regulatory actions led to a product recall which, it later emerged, was not justified (page 19). The Court decided that the Authority was not liable for the losses suffered by the manufacturer in the

circumstances of the case, focusing on the central role of the manufacturer to take responsibility for decisions about the safety of products they have placed on the market.

This issue of *International Product Liability Review* also includes a summary of the highlights of the European Commission's biennial International Product Safety Week, held in Brussels in November 2016 (page 2). The events of that week, which saw record attendances, highlighted the increasing internationalisation of product safety. It was a unique opportunity for stakeholders to meet in an international forum, which included leading regulators from around the world, to discuss the key issues in product safety policy. The Hogan Lovells international product safety team was there in force for the entire week, leading a number of the presentations, and participating in discussions about new technologies, enforcement policies, and practical issues in dealing with product safety compliance in an increasingly globalised world.



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