

European Product Liability Review
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Hogan Lovells has the leading product liability practice covering all aspects of product safety as well as civil and criminal liability. We have experience of acting for clients in respect of a wide range of products including food, pharmaceuticals, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, toys, sporting goods, blood products, aircraft and trains. Hogan Lovells' product liability lawyers are supported by a dedicated Science Unit and Project Management Unit.

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1 Overview

FEATURE

2 Globalisation of product safety regulation

This edition's feature article combines two reports looking at recent initiatives by some of the world's major players in product safety regulation. Claire Taylor and Lucy Owens (London) report on the second Consumer Product Safety Trilateral Summit held in October. Sylvie Gallage-Alwis (Paris) then discusses The 7th International Meeting & Training Symposium held by the ICPHSO at the end of November. The reports are evidence of the significant efforts being made on national, European, and international fronts in the product safety arena.

LEGISLATION - EU

5 Reform process begins for key EU Product Directives

Rod Freeman (London) considers the process of potential reforms, recently initiated, for two of the European Union's key product directives - the General Product Safety Directive and the Product Liability Directive.

LAW AND PROCEDURE - EU

7 EU collective actions - review of progress over the year

Collective action is under consideration again by the European Commission, which appears determined to introduce some form of collective redress mechanism. John Meltzer (London) considers the actions taken by the previous Commission, and how this contrasts with the approach adopted by the current Commission.

LAW AND PROCEDURE - FRANCE

9 French case law under construction: compensation for anxiety

Cécile Derycke and Charles-Henri Caron (Paris) consider the progress of French law on compensation for anxiety, in particular in cases where actual damage is uncertain and leads to anguish.

12 Nanotechnologies and cosmetic products: new obligations and legal uncertainties to be expected

Sylvie Gallage-Alwis and Pauline Blondet (Paris) consider the new obligations for those in the cosmetics industry - with a particular focus on the likely implications in France - concerning the use of nanotechnology. The authors report on the new requirements for notification and labelling of nanomaterials and discuss the difficulties that cosmetics companies may well encounter given the "flexible list" of authorised nanomaterials.

LAW AND PROCEDURE - GERMANY

15 Lead case procedure for mass securities actions to be permitted for product liability cases?

Currently, there is no provision under German law allowing for class actions in the formal sense of the term. Stefan Rekkitt (Munich) considers whether a relatively new lead case procedure permitted in the context of securities litigation could be applied to product liability cases.

LAW AND PROCEDURE - ITALY

17 The four basic players of the toy supply chain under the new Toy Safety Directive 2009/48/EC

Adriana Tilve (Milan) takes a look at the new and clarified obligations introduced by the new Toy Safety Directive for those involved in the toy supply chain, and considers the implications for the toy industry in Italy

LAW AND PROCEDURE - UK

20 Reshaping the English legal landscape for personal injury and consumer group actions

John Meltzer, Dan Armstrong, and Matthew Felwick (London) discuss the recent changes proposed by the Ministry of Justice for the English legal system, and how they might impact on product liability and other personal injury claims in England and Wales.

RECENT CASES - FINLAND

22 Smokers withdraw their leave applications for last gasp appeals to Supreme Court

Siobhan Thomson (London) provides an update on the status of the remaining "light" cigarette claims in Finland, and outlines the further victory for the tobacco industry.

RECENT CASES - ITALY

23 **The Italian Supreme Court rules on a supplier's strict liability for defective products**

The Italian Supreme Court has recently ruled on a supplier's strict liability for defective products in a case brought by the parents of a child injured by a defective bicycle. Christian Di Mauro and Filomena Pacifico (Milan) discuss the key findings of the Supreme Court.

RECENT CASES - NETHERLANDS

25 **Absent a contractual relationship or proof of negligence, a manufacturer cannot be liable for damages outside the scope of the Product Liability Directive**

Machteld Hiemstra (Amsterdam) discusses the recent Dutch "radish seeds" case, in which the claimant claimed damages from the manufacturer on the basis of a "general unlawful act". The case is a reminder that if the damage sustained is not within the remit of the Product Liability Directive and there is otherwise no contractual link with the manufacturer, then without proof of negligence there can be no liability.

RECENT CASES - UK

27 **Trigger litigation update: the uncertainty continues**

Asbestos liability is a hugely important issue for companies who carry historical asbestos liabilities, for insurers, and for claimants who have (or may develop in future) serious asbestos-related diseases. Heather Gagen (London) considers the recent Court of Appeal judgment in the mesothelioma insurance "trigger" litigation.

INTERNATIONAL REPORT

30 **Recent Canadian decision raises spectre of liability for standards development bodies**

In *More v Bauer Nike Hockey Inc* the trial court in British Columbia held that a standards development organisation owed a duty of care to the end user of a product that was required to meet its standards. Siobhan Thomson and Rachel Shepherd (London) outline the key issues.

33 **US preemption and medical devices: a discussion of *In re Sprint Fidelis Leads***

Eric Statman and Christina Taber-Kewene (New York) consider the recent case brought by more than 1,200 patients implanted with a defective wire leading to a cardiac defibrillator, who experienced unnecessary electric shocks. The decision is the first published opinion of a federal appellate court to analyse and apply the reasoning in *Riegel v Medtronic*.

35 **Personal jurisdiction in the United States: hope for clarity on the stream of commerce test**

Lauren Colton and Andrea Trento (Baltimore) consider "personal jurisdiction" in the US, and the "stream of commerce" theory that has developed in the context of certain cases, including those in the field of product liability.

38 **New Australian recall and reporting guidelines**

Heather Gagen (London) outlines the new recall and mandatory reporting guidelines published by the Australian Competition and Consumer Commission. The guidelines are not binding on suppliers, but aim to give practical advice on complying with the new requirements of the second part of the Australian Consumer Law.

Overview

With this issue of *European Product Liability Review*, we mark the ten year anniversary of our publication. For the last decade, we have tracked the remarkable development of product liability law and product safety regulation throughout the EU and around the world.

It is therefore fitting that our feature in this issue highlights the emerging trends in the globalisation of aspects of the regulation of product safety. There is a clear focus amongst the authorities in Europe, the United States and China to promote a better level of co-operation in managing product safety regulation, particularly for products that are marketed across national borders (page 2). This theme was also evident, on a broader scale, at the 2010 International Conference of the International Consumer Product Health & Safety Organisation held in London this year (page 3). Attended by senior representatives of the product safety authorities in the United States, Canada, the European Commission, Japan, Korea, China, Australia, and a number of EU member states, it was evident from this conference that international co-operation in the enforcement of product safety is a high priority. Whilst there are many challenges in achieving such co-operation in a meaningful sense, there is no doubt about the consensus that such co-operation is an important objective.

As we reflect on the past ten years, it is also significant that in looking forward we see the likelihood of major reform in the two most important pieces of EU legislation affecting product risks on a broad scale - the Product Liability Directive and the General Product Safety Directive ("GPSD") (page 5). In the case of the Product Liability Directive, the overwhelming view of product manufacturers, and their insurers, is that, despite the controversy when the Directive was adopted some 25 years ago, the practical experience so far has been that the Directive generally works well in striking the right balance between the interests of ensuring that consumers injured by defective products have a right to receive compensation, and the interests of business and their insurers in ensuring that they are not unfairly penalised for unavoidable risks that might be associated with the products they market. The concern accompanying the process of review that has recently been initiated by the European Commission is that there is a real risk that any proposals will open up the possibility of reforms and upset the balance that currently exists, and create a liability regime that does start to operate unfairly against product manufacturers.

The process of reform of the GPSD will certainly have an important impact on all manufacturers and suppliers of consumer goods in the EU. It is certain that reforms will be made to the GPSD to bring it into line with the "New Legislative Framework" already adopted by the European institutions, and the Commission is likely to go further in an effort to enhance the impact of the GPSD.

These are important developments, which all product manufacturers need to keep aware of, since they will have a significant impact in shaping product liability risks for them as we move into the next decade.

This issue of *European Product Liability Review* is also a landmark issue because it will be the very last issue of this publication - at least carrying this title. Reflecting the changing face of product liability risks for product manufacturers, and indeed reflecting the way in which our own publication has changed over recent years, the time has come for our publication to evolve into "*International Product Liability Review*". In many respects, readers will notice little change with our "rebranding", since increasingly we have devoted pages of our publication to important developments in jurisdictions beyond Europe. As the experience and scope of work of the Hogan Lovells Product Liability Practice continues to expand around the world, as we assist our clients with such issues wherever they might arise, it is natural that this should become an increasing feature of the scope of our own publication. *International Product Liability Review* will cover European developments in the same level of detail and just as comprehensively as our readers have come to expect, but with our new title we will increasingly include content on developments in other parts of the world. This expanded format, we hope, will ensure that our publication not only reflects the trend and growing challenges facing our clients, but also provides an even more valuable resource for our loyal and ever-expanding readership.

Finally, to celebrate ten years of this unique publication, we are hard at work preparing a special edition - a ten year retrospective of developments in product liability in Europe, as recorded in *European Product Liability Review*. That edition will be more than just a nostalgic look at how much has changed for product manufacturers in Europe in the past decade - it will be a valuable insight into the trends that have shaped product risks over that time, and which provide clear pointers to the way in which those changes will develop over the next ten years. Keep your eye out for this publication over the coming weeks.

So, it is with some reminiscing that we say goodbye to "*European Product Liability Review*". But the evolution is inevitable, as it makes way for an improved publication that will be equally unique, and will continue to grow and evolve so that it remains a distinctive publication reporting on the ever-changing challenges for international product manufacturers.

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