

# International Product Liability Review

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Issue 50

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## About our Product Liability Practice

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 and children's products, sporting goods, blood products, aircraft and machinery. Hogan Lovells' product liability lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells' product liability practice, please visit our website at [www.hoganlovells.com](http://www.hoganlovells.com) or contact the Product Liability Group Leader, John Meltzer, at [john.meltzer@hoganlovells.com](mailto:john.meltzer@hoganlovells.com) or any of the lawyers listed on the back page of this publication.

### 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 liability and product safety 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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## In this issue...

### 1 Overview

#### FEATURE

### 2 Reform of EU product safety laws: important changes on the horizon for those involved in the product supply chain

Two significant developments are currently under way for EU product safety laws: the revision and alignment of the New Approach Directives and the revision of the General Product Safety Directive. Rod Freeman, Claire Taylor and Valerie Kenyon (London) look at how the changes will impact on those in the product supply chain.

#### EUROPE – EU

### 7 EU waste law and product recalls: what you need to know

The EU law that governs the shipment of waste between member states raises a number of regulatory and administrative challenges which can add significant cost and complexity to a product recall. Christopher Norton (London) considers how EU waste transportation measures may affect product recalls.

#### EUROPE – GERMANY

### 11 Court rejects application to medical devices of the right to disclosure under German Medicinal Products Act

The Higher Regional Court of Frankfurt has rejected an argument by a claimant that the right to disclosure of documents that is provided by the German Medicinal Products Act should apply by analogy to medical devices. As Sebastian Lach and Victoria Parr (Munich) comment, the decision is to be welcomed.

### 13 Reform of the Capital Markets Model Case Act: product liability claims left alone, but for how much longer?

Stefan Rekitt and Victoria Parr (Munich) look at the recent reform of the German securities class action procedure, and question how long it will be before its scope is extended to other types of claim, including product liability claims.

#### EUROPE – NETHERLANDS

### 17 Dutch Court of Appeal rules that leaking heart valve is not a defective product

Karen Jelsma (Amsterdam) reports on the recent case considered by the Court of Appeal of The Hague in relation to whether a leaking heart valve should be considered a defective product within the meaning of the Dutch legislation implementing the EU Product Liability Directive.

#### EUROPE – SPAIN

### 19 An introduction to the criminal law aspect of product liability in Spain

Ignacio Sánchez (Madrid) canvasses the Spanish Criminal Code provisions applicable to defective products – specifically food and pharmaceuticals – and comments on the interplay between the civil and criminal aspects of the product liability laws in Spain.

#### EUROPE – UK

### 23 Legal privilege in England and Wales confined to lawyers

David Graves (London) discusses the recent, and much anticipated, decision of the Supreme Court of England and Wales on the question whether legal advice privilege extends to legal advice given by professionals other than lawyers. As the majority has ruled, it does not.

### 25 English Commercial Court finds actual, rather than alleged, liability is necessary for insurance indemnity in product liability case

Nina Tulloch (London) describes the recent decision of the Commercial Court in relation to two preliminary issues between Astrazeneca Insurance Company Limited and two of its reinsurers. The issues that the Court was asked to consider would establish whether, under the particular insurance liability policy in issue, the coverage was only for actual – and not merely alleged – liabilities.

## In this issue...

### **27 A delicate balance: High Court finds in favour of claimant on retrial of catastrophic injury case**

Siobhan Thomson and Dennis Waller (London) report on the successful appeal by the claimant in *Uren v Corporate Leisure (UK) Ltd and Ministry of Defence*, and the judgment following retrial in the High Court, which highlights the importance of performing proper risk assessments and of taking proportionate and sensible steps where any real risk is identified.

### **NORTH AMERICA – US**

### **30 Jurisdiction of US courts over foreign product manufacturers after *J. McIntyre Machinery, Ltd. v Nicastro***

Alvin Lindsay (Miami) considers the continued application in most US courts of the “stream of commerce test” (which sets the bar low for taking jurisdiction over foreign suppliers) despite a recent Supreme Court decision suggesting that something more is required than merely placing a product into channels of trade in circumstances where it might find its way into the forum.

## Overview

The current General Product Safety Directive (GPSD) has been a central feature of the European consumer product regulatory regime for more than a decade. Over that time, the general landscape for product safety regulation, both in Europe and on an international level, has changed significantly. For that reason, and for some years now, the European Commission has recognised that the GPSD has been in need of an overhaul. Whilst it was never going to be a straightforward task to revisit the form and content of such a fundamental piece of legislation, the European Commission has, after a consultation period spanning some three years, finally produced its proposals for reforming the GPSD, which is the subject of our feature article in this issue (page 2). Most aspects of the proposals are unsurprising but, inevitably, some points are controversial and are generating debate. With the Commission announcing a relatively short time frame (by European standards) for adoption and implementation of the new measures, expect this to remain a hot topic over the coming year.

For product manufacturers around the world, the question of potential exposure to product liability litigation in the United States remains an important consideration. In this issue, with reference to some recent case law, we look at the US courts' approach to asserting jurisdiction over foreign manufacturers, and see that some fundamental issues remain unresolved (page 30).

Increasingly, the interplay between product liability and criminal liability is an important consideration in Europe. In this issue, we look at how criminal law has been used to deal with product safety concerns in Spain (page 19). Each country in Europe approaches this issue in a different way, but the risk of exposure to criminal liability is something that needs to be managed in the product liability context, whether in Spain or in any other European jurisdiction.

Finally, if you are a regular reader of *International Product Liability Review* you will notice that we have moved to a new, more modern style. We hope that the new look will enhance your experience of the publication. Our approach to content is, of course, unchanged - we remain committed to producing each quarter a unique resource to help international businesses keep up to date with important developments in product liability and product safety laws around the world.



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