

**International 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.

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.

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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## Overview

This issue of *International Product Liability Review* focuses on developments in Europe, ranging from broad policy objectives of the European Commission, through specific legislative initiatives at a European level, and some interesting product liability cases in the national courts around Europe.

At the broadest policy level, the European Commission's EC Consumer Programme for 2014 to 2020 confirms that strengthening consumer protection measures will be an ongoing priority for the Commission (page 2). In the field of product safety regulation, Europe already leads the world in most respects, at least insofar as the breadth and depth of the regulation is concerned. It has long been recognised by the policy-makers in Europe that the main shortcomings of the European regime arise from lack of enforcement, or at least inconsistent enforcement. It is no surprise, therefore, that enhancement of enforcement measures, and the better co-ordination of enforcement activities throughout Europe, sit as key features of the Commission's programme for 2014 - 2020. For product manufacturers, this is both bad news, and good news. On the downside, it means that the trends of the past years towards more complex regulation, and more aggressive enforcement in Europe, leading to greater business risk, will continue. On the other hand, provided the new measures are properly targeted, they ought to mean that the "rogues" - business operators who cut corners on compliance measures to allow them to undercut responsible manufacturers who invest properly in compliance systems - will be forced out of the markets. If it had this effect, it would be good news for responsible manufacturers, and for consumers alike. Regrettably, history has shown that enhanced regulation and enforcement policies are not always targeted at the rogue companies who present the greatest risks to consumers, as enforcement authorities sometimes consider it more important to make public examples of major brand names that are caught breaching the law. Inevitably, these issues will present increasing challenges for businesses in Europe as consumer policy continues to develop at an EU level.

At a national level, we see some interesting examples of product liability cases that carry important lessons for product manufacturers.

In Germany, we have yet another example of litigation arising from "exploding" drink bottles, with the Court of Appeals Munich confirming that the manufacturer will be liable under laws implementing the Product Liability Directive, even if it was not possible to detect the defect in the bottle prior to the accident (page 11). In this case, the manufacturer raised arguments to suggest that the defect which caused the explosion could have arisen by factors that came into play after the bottle had been marketed. However, these arguments failed for lack of evidence, and the manufacturer was not able to avoid the implications of the "no fault" liability regime. In addition to demonstrating the need for a

manufacturer to ensure that its defences are supported by convincing evidence, this case also demonstrates that robust quality control systems are important for minimising the risk of liability, but those systems cannot necessarily be relied upon to provide a defence in the event of an unavoidable defect.

Further south in Italy, the Supreme Court has considered the scope of damages that can be recovered by a bereaved claimant in the event of the death of a relative (page 13). This case, amongst other things, highlights the fact that, whilst principles of law are harmonised at many levels in Europe, principles surrounding the determination of recoverable damages are very much subject to traditional national principles, which can vary significantly from country to country.

The issues before the Amsterdam Appeal Court in the Netherlands included the question of whether limitation provisions in a party's standard terms and conditions would be applied so as to significantly reduce the damages recoverable by the "successful" claimant (page 14). This case is an important lesson for all businesses, as it highlights the fact that limitation clauses, even in standard form terms and conditions, can be very effective in limiting liability - good news for the party receiving the benefit of the clause, but potentially disastrous for the other party to the contract if it cannot effectively recover significant damages to which it might otherwise have been entitled. This case serves as yet another reminder that businesses should consider carefully the way in which they transact with their suppliers and customers, as the implications of a careless approach to those practices can be very significant in the event of an unforeseen problem.

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# Feature – EC Consumer Programme for 2014 - 2020: anything new?

## INTRODUCTION

On 9 November 2011 the European Commission unveiled its proposal for the new Consumer Programme for 2014 - 2020 ("the New Programme").<sup>1</sup>

The general objective of the New Programme is to "support the policy objective of placing the empowered consumer at the centre of the internal market",<sup>2</sup> in line with the goals of Europe 2020, a ten year strategy proposed by the European Commission in March 2010 for reviving the economy of the European Union. As said by the Commissioner for Health and Consumer Policy John Dalli, "confident, empowered consumers create thriving markets".<sup>3</sup>

The New Programme, if approved by the European Parliament and the Council of Ministers, will replace the current Consumer Programme for the period 2007-2013<sup>4</sup> and become effective from 1 January 2014.

## CONTENT

The current programme sets two objectives: to ensure a high level of consumer protection (through improved evidence, better consultation and better representation of consumers' interests), and to ensure the effective application of consumer protection rules (in particular, through enforcement cooperation, information, education and redress). The New Programme proposes four objectives: safety, information and education, rights and redress, and enforcement actions ("SIRE"). From a first glance at these objectives, the similarity in scope of the New Programme to the current programme is apparent.

### Safety

Product safety will be enhanced through effective market surveillance throughout the EU. This corresponds to the first objective of the previous programme which was to "ensure a high level of consumer protection".<sup>5</sup> Building on the current programme, this objective will be measured in particular through the EU-wide RAPEX system. The New Programme targets an increase of 10% of RAPEX notifications entailing at least one reaction by other member states during the seven year period.<sup>6</sup> Specific actions envisaged include

- support for the tasks of the independent scientific committees established by Commission Decision 2004/210/EC setting up Scientific Committees in the field of consumer safety, public health and the environment
- the development and maintenance of IT tools (eg databases, information and communication systems)
- the organisation of seminars, conferences, workshops and meetings of stakeholders and experts on risks and enforcement in the area of product safety
- exchanges of enforcement officials and training
- specific joint cooperation actions in the area of safety of non-food consumer products and services, under the General Product Safety Directive
- monitoring and assessment of the safety of non-food products and services, including the knowledge base for further standards or the establishment of other safety benchmarks
- administrative and enforcement cooperation with third countries that are not participating in the New Programme and
- support to bodies recognised by EU legislation for the coordination of enforcement actions between member states.

The New Programme also targets a specific category of non-food products: cosmetics. The Commission plans to maintain and develop databases dedicated to cosmetics to support the implementation of the new regulation on cosmetic products.<sup>7</sup>

### Information and education

The New Programme aims to improve consumers' awareness of their rights (an existing goal under the current Consumer Programme). The Commission wants to remedy the lack of "transparent, comparable, reliable and user-friendly information for consumers".

<sup>1</sup> The Consumer Programme is the financial framework for European consumer policy.

<sup>2</sup> Article 2 of the Proposal for a Regulation of the European Parliament and of the Council on a Consumer Programme 2014-2020.

<sup>3</sup> Press release of the European Commission dated 9 November 2011.

<sup>4</sup> Decision No 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013).

<sup>5</sup> Annex 1 of Decision No 1926/2006/EC.

<sup>6</sup> A notification can trigger several reactions from authorities from other member states.

<sup>7</sup> Regulation (EC) 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products. For more information, see Sylvie Gallage-Alwis and Perrine Bertrand, "Regulation No. 1223/2009 on cosmetic products: How to get ready for 2013", reported in *Cosmetics Liability and Safety Regulation: Retrospective and Prospective Perspectives* (March 2011) p30.