

Hogan
Lovells

International Product Liability Review

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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 or contact the Product Liability Group Leader, Thomas Rouhette, at thomas.rouhette@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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FEATURE

2 The evolving face of consumers' rights in France and the UK

Christine Gateau and Sylvie Gallage-Alwis (Paris) and Rod Freeman and Vera Wichers (London) assess the impact on consumer rights of two draft bills issued in the UK and France in the run-up to the implementation of the new Directive on Consumer Rights. As they explain, there are many provisions, unique to each country, which will have an important impact on businesses.

EUROPE – EU

6 Proposed reforms of product safety laws miss opportunity to enhance traceability

Rod Freeman and Claire Taylor (London) explain how the European Commission's proposals for reform of the General Product Safety Directive, and the opinion on these proposals issued by the European Data Protection Supervisor, have so far missed an opportunity to enhance product traceability.

8 The European Commission's RAPEX report for 2012: an assessment of trends and developments and their impact on companies' strategies

Dr Sebastian Polly and Moritz Bamberger (Munich) evaluate the data presented in the European Commission's recently published RAPEX report and suggest how companies should assess their potential RAPEX exposure risks and prepare for possible scenarios.

12 Actions for declaratory judgments of non-liability: forum shopping is now available for alleged tortfeasors

Cécile Di Meglio (Paris) assesses the impact of a recent decision by the Court of Justice of the European Union on declaratory judgment actions in tort matters. The decision is likely to have important consequences for courts in many member states, even in France where courts do not agree to rule on declaratory judgment actions.

EUROPE - GERMANY

16 "Other circumstances", within the meaning of Section 84 Paragraph 2 Sentence 3 of the German Drug Act, as a central issue in drug liability trials

A recent decision of the German Federal Supreme Court has provided comment for the first time on the relationship between Section 84 Paragraph 2 Sentences 1 and 3 of the German Drug Act. Ina Brock and Stefan Re kitt (Munich) discuss the impact that this is likely to have on the judicial evaluation of evidence and, more widely, on evidence gathering in drug liability proceedings.

19 Corporate criminal liability for product non-compliance in Germany

Although the German justice system has no concept of corporate criminal liability as such, companies can still be exposed to stringent economic sanctions in circumstances where their representatives have committed criminal or regulatory offences. Dr Sebastian Lach and Désirée Maier (Munich) explain that such cases are by no means limited to offences of bribery, but also extend into the area of product compliance.

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23 The "Phurnacite litigation": the meaning of "success" when assessing the costs of group actions

A recent High Court decision suggests that the English courts will adopt the same approach, and apply the same principles, when determining costs in both group litigation and unitary actions. Cécile Duchesne (London) summarises the judgment and examines its impact on assessments of costs in group litigation.

25 Dealing with problems caused by another party: recovering for wasted staff time

Valerie Kenyon and Ellie Pszonka (London) summarise a recent case that reinforces the principle that companies can claim for the cost of time spent dealing with a defendant's breach of contract or negligence. They also highlight ways in which companies can maximise the amount of damages that can be recovered in this way.

NORTH AMERICA - US

27 NHTSA backs down and allows defect disclaimers

Following vociferous objection from the motor industry, the National Highway Traffic Safety Administration (NHTSA) has decided to permit "disclaimers" in defect reports submitted to the agency. Jacqueline Glassman (Washington DC) assesses the impact of this recent capitulation for manufacturers and provides a summary of US law in this area.

Overview

Consumer protection law continues to evolve in the EU, with much work being undertaken at a policy level over recent years to further harmonise and strengthen consumer protection legislation. It is interesting that, in the context of the implementation of the new Directive on Consumer Rights, two of the major EU markets (France and the UK) are taking the opportunity to undertake a broader review of their respective national consumer protection laws (page 2). Whilst in each case the review reflects the national differences that exist in this field, there is clearly a trend to a more consistent approach to general consumer protection in the EU - an aspect which, in terms of harmonisation, has lagged behind more specific measures such as product safety. As with all such measures having their origins in EU law, the ultimate test will be whether the national approach to enforcement will create a level playing field for companies and consumers. Experience has shown that, in practice, the approach to and level of enforcement varies significantly across the EU, so it should not be assumed that these developments will soon result in greater consistency or predictability across the member states.

In previous issues of *International Product Liability Review*, we have reported on the increasing trend in many European countries to use the criminal law to deal with product liability issues. On that theme, in this issue we highlight some of the risks that arise in Germany, where criminal sanctions can be (and have been) levied against companies, including in product liability cases (page 19).

Also in relation to Germany, we report on a recent judicial consideration of principles of causation in pharmaceutical product liability cases (page 16). As product liability litigation continues to increase in many European countries, such developments are of considerable importance, and will guide companies in how best to defend cases that may well be brought against them in the future.

Product suppliers and their insurers will also be interested in recent litigation in the UK that considered whether a company could recover wasted management and administrative costs arising out of a business partner's breach (page 25). Whilst the dispute did not arise out of a product defect, the outcome indicates that such costs and expenses can be recoverable, and also helps illustrate what evidence

will need to be adduced to prove such loss. These principles will apply equally to, for example, a company that must deal with a product recall caused by the default of a supply-chain partner. This highlights the importance of managing a product recall situation in a way that will allow the costs to be recovered subsequently from the defaulting party.

This issue of *International Product Liability Review* also features a report on some significant developments in the way in which automotive product recalls are dealt with in the US (page 27). The principles that are being debated in this context, which relate to the use of "disclaimers" in connection with potential safety defect reports, could have important implications for other product sectors in the US, and also for the management of product recalls worldwide. This article is therefore of interest to all companies who may have to deal with product recall risks.



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