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The International Comparative Legal Guide to:

Product Liability 2014

12th Edition

A practical cross-border insight into product liability work

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
May 2014

ISBN 978-1-908070-99-9
ISSN 1740-1887

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Recent Developments in European Product Liability

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Introduction

The Product Liability Directive, 85/374/EEC ("the Directive") lays down common rules governing liability for defective products in the European Union ("EU"). It imposes strict liability on the producer of a defective product for damage caused by the defect. A product is defective if it does not provide the safety that consumers generally are entitled to expect taking account of all of the circumstances, including the product's get-up and presentation and its expected use.

This chapter discusses recent developments in European product liability law, including the European Commission's Fourth Report on the Directive, the Consumer Rights Directive, the proposed Consumer Product Safety and Market Surveillance Regulations and proposals regarding collective consumer redress that could significantly change the legal environment for bringing product liability claims in the EU.

The European Commission's Fourth Report on the Application of the Directive

The Directive has now been in force for more than 25 years, but despite calls from both business and consumer groups that it should be revised, the European Commission does not presently favour amendment. In its Fourth Report on the practical application of the Directive published on 8 September 2011 ("the Report") it concludes that a review of the Directive is not presently merited, although it will continue to monitor developments.

The Commission notes that over the period since its last report (published in September 2006), there appears to have been an increase in the number of claims being brought under national laws transposing the Directive; several Member States, including Austria, France, Germany, Italy, Poland and Spain, have recorded an increase in the number of product liability cases being brought, while other countries have reported an increased number of out-of-court settlements. This increase is attributed to external factors, such as greater consumer awareness and better organisation of consumer groups pursuing these types of claims.

Contributors to the Report predictably expressed different views about the Directive, with consumer groups pressing for enhanced consumer protection, while producers and insurers argued for stronger defences. However, overall the Commission concludes that the Directive strikes an appropriate balance between consumer protection and the interests of producers. It comments that the Directive provides consumers seeking compensation for damage caused by a defective product with an effective potential remedy.

While the Report notes some minor differences in application of the Directive in different Member States, it takes the view that these differences do not create significant trade barriers or distort competition in the European Union. In particular, it considers that different national procedural rules do not prevent injured parties from establishing causation where claims are brought under national laws implementing the Directive.

The Report considers the application of the Directive in a number of areas:

- Burden of proof (Article 4) – the Report highlights some differences in terms of the evidence needed to prove a defect. In some courts, for example, in Belgium, France, Italy and Spain, it is sufficient for the claimant to prove that the product did not fulfil the function for which it was intended, whereas in other countries, such as Germany and the UK, the claimant must prove the precise nature of the product's defect in more detail. While some national authorities considered that consumers faced difficulties in proving general causation (that damage was caused by the product defect), the Report notes that such difficulties were mainly due to the cost of obtaining an expert opinion, rather than the application of the legal test.
- Defence of regulatory compliance (Article 7(d)) – the Report notes that there is very little case law on the application of this defence. Highly regulated industries, such as the pharmaceutical industry, argued in favour of the introduction of a broader regulatory compliance defence.
- Development risk defence ("DRD") (Article 7(e)) – the Report notes that national courts have adopted differing interpretations of this provision. For example, the German Supreme Court has ruled that the defence does not apply to manufacturing defects, whereas the courts in the Netherlands and the UK have applied the defence to all types of defects. It remains the position, as was the case when the Directive was first implemented, that Member States are divided as to whether DRD should continue to be available as an optional defence. Some national authorities, including those in Bulgaria and Malta, suggested in their feedback that the Directive should be reviewed in order to remove this defence to improve the functioning of the internal market. However, other authorities including those in Greece, Italy, Lithuania and the UK remain in favour of the defence and commented that it contributes to maintaining a balance between the encouragement of innovation and consumer protection.
- Minimum damages threshold for property claims (Article 9) – some Member States argued for reducing or removing this threshold in order to guarantee more effective consumer protection, whereas industry representatives argued for an increase in the threshold to take account of the effect of inflation.

The Commission concludes that the available information is not sufficiently fact based and that, because amendment to one or more provisions would have an effect on the overall balance of the

Directive, it would be premature to propose its review at this stage. However, it will continue to monitor developments in the area.

The Consumer Rights Directive

The Consumer Rights Directive, 2011/83/EU, should have been implemented by Member States in national legislation at the end of last year, with the new laws due to take effect by 13 June 2014. It seeks to harmonise existing laws which are contained in two Directives governing distance contracts and contracts negotiated away from business premises (Directive 97/7/EC and Directive 85/577/EEC), and makes changes to some of the general laws governing consumer sales, strengthening and updating these in line with advances in modern technology and the increasing use of the Internet.

Key changes include the extension to all consumer sales contracts of the requirement that traders provide consumers with key pre-contractual information about the basic terms of the contract, and new requirements relating to the supply of digital content. The Directive prohibits surcharges for the use of credit cards, premium rate consumer telephone services and the addition of hidden costs and charges, for example, by the use of 'pre-ticked' default options where products are purchased over the Internet. In respect of distance and doorstep contracts, the Directive introduces a standard 14-day cooling off period during which consumers may cancel and imposes stricter rules on the payment of refunds.

The Directive sets maximum standards from which Member States cannot derogate, although there are a number of exceptions to this general principle, for example, in general sales contracts Member States can impose additional requirements regarding the provision of pre-contractual information to consumers.

Proposed Regulations on Consumer Product Safety and Market Surveillance

The European Commission has published two proposals for Regulations on Consumer Product Safety and Market Surveillance of Products which are likely to be enacted in 2014. The Regulation on Consumer Product Safety ("CPS") will replace the current General Product Safety Directive, 87/357/EEC; the new product safety regime will therefore be directly effective in Member States. Regulations remove the need for national implementation and, therefore, are viewed as reducing the potential for inconsistent transposition into national law. The draft CPS Regulation follows the same basic framework as the Directive, but seeks to harmonise this with the approach adopted in sector specific legislation such as the Toy Safety Directive, where responsibilities are imposed on each party in the supply chain: manufacturers; importers; and distributors. It requires manufacturers to hold a technical file, including a safety assessment, for the products they market, and imposes new obligations on distributors and regarding the labelling and traceability of products. The proposed Market Surveillance Regulation seeks to bring together in a single unified system powers governing the market surveillance of both consumer and business products.

From a liability perspective, any failure to comply with the new regime under the CPS Regulation once it comes into force will potentially increase companies' exposure to claims. In particular, any failure by manufacturers to comply with the new requirement to maintain a product technical file will likely be relied upon by claimants as evidence of fault or defect in relation to the manufacture and supply of faulty or unsafe consumer products. Manufacturers will only be required to maintain such a technical file where it is proportionate to do so, taking account of the product's risks; but they will need good reasons for deciding not to do so. The likely inference if a product is found to be unsafe is that a technical file should have been maintained.

Other European Developments - Collective Redress

Possible changes to the procedural rules affecting many product liability claims may have a greater impact on the overall legal environment for such claims than changes to the Directive itself. As the Commission acknowledged in its Fourth Report, many of the disparities in the application of the Directive reflect the varying legal traditions and procedural rules in different Member States.

Discussions regarding the effectiveness and efficiency of existing EU collective redress mechanisms have been ongoing for many years. A series of reports have been produced looking at the problems faced by consumers in obtaining collective redress for infringements of consumer protection legislation, but proposals to introduce legislation in this area have proved controversial and faced political deadlock.

These reports found that many Member States have no collective redress mechanism, and in those countries where there was a mechanism in place there was considerable divergence in the way those schemes operated and were regulated. Existing collective redress mechanisms had been applied in relatively few cases and the level of compensation provided to consumers was low.

The reports concluded that the efficiency and effectiveness of existing mechanisms could be improved, that they may not provide adequate redress where a group of consumers pursue very low value claims, and the absence of any collective redress mechanism in some countries may leave consumers with no adequate means of obtaining compensation. Indeed, in its Green Paper on Consumer Collective Redress published in November 2008, the Commission concluded that because of these differences "a significant proportion of consumers who have suffered damage do not obtain redress".

Commission Recommendation 2013/396/EU on Common Principles for Collective Redress Mechanisms

Apparently in an attempt to break the political impasse, the Commission has introduced a Recommendation on Collective Redress, 2013/396/EU, which sets out a number of common principles to be applied by Member States in their national collective redress systems. The principles are intended to apply horizontally in all areas where collective claims are made, but in its accompanying Communication the Commission singles out, in particular, the areas of consumer protection, competition, environment protection, protection of personal data, financial services and investor protection.

Member States are asked to implement the principles set out in the Recommendation by 26 July 2015. However, the Recommendation is not binding and it therefore remains to be seen whether any changes to existing national laws will be made. Within two years following implementation, by 26 July 2017, the Commission will assess the practical impact of the Recommendation and will determine whether further measures should be proposed to consolidate and strengthen EU laws on collective redress. This timetable is extremely challenging, given that for those Member States who act upon the Recommendation it may require changes to Members States' legal systems and procedural frameworks, and this

has led some commentators to suggest that the Commission's initiative is bound to fail.

One area that will remain under review is whether there is a need for specific rules on jurisdiction and choice of law in collective redress actions: the Commission rejected this proposal in its Communication, but said that it will review experience of these issues in cross-border cases. As matters currently stand, there is considerable uncertainty as to whether any strengthened measures will be introduced in future. According to the Commission's Communication, Member States that responded to the consultation expressed divergent views on whether binding rules on collective redress should be introduced, ranging from support to "strong scepticism". Some Member States supported the idea of binding rules only in certain legal areas such as competition law (Sweden and the UK) or for cross-border claims only (Denmark).

The overall aim of the Recommendation is to facilitate access to justice by ensuring that collective redress mechanisms are available to assist in the resolution of large numbers of similar claims, while at the same time ensuring that appropriate procedural safeguards are put in place to avoid abusive litigation. Put simply, the Commission's aim is to make redress more widely available to consumers who suffer damage, if necessary by facilitating litigation. The Commission Communication rejects 'US style' class actions which it describes as vulnerable to abusive litigation and highlights the fact that such class action procedures, and in particular the availability of punitive damages, funding of cases by means of contingency fees, extensive discovery of documents and 'opt-out' class action procedures, have encouraged defendants to settle claims that may not be well founded. The Recommendation seeks to balance these different considerations, proposing that all Member States should have collective redress mechanisms in place, while at the same time introducing 'safeguards' in terms of the format of that procedure. The few Member States which do not presently have any collective redress mechanisms are therefore encouraged to introduce these. To balance this, the Commission proposes a range of safeguards including recommending that Member States' collective redress procedures are 'opt-in', no punitive damages should be available, there should be restrictions on the availability of funding by means of contingency fees and through third party funders, and the 'loser pays' rule should apply to the payment of costs.

The Common Principles

The Recommendation contains a set of principles which would apply to all collective redress mechanisms, whether their purpose is to provide injunctive relief to stop illegal practices, or to provide compensation to injured parties in mass harm situations. These are:

1. *Standing to bring a Representative Action* – Member States should designate representative entities to bring representative actions on the basis of defined conditions of eligibility. In particular, the Commission suggests that the representative entity should be non-profit making, have a direct relationship with, or interest in, the subject matter of the collective proceedings and act in the best interests of the group represented. Alternatively, Member States should be permitted to empower public authorities to bring representative actions on behalf of claimants seeking compensation.
2. *Admissibility* – the Recommendation appears to support a process of approval or certification of all collective actions by the courts to ensure that manifestly unfounded cases are not pursued.
3. *Provision of Information* – the representative body must be able to publicise the proposed proceedings.
4. *Costs* – the Commission proposes that the "loser pays" principle should apply and that the party that loses a collective redress action should reimburse the legal costs of the winning party.
5. *Funding* – Claimants should be required to provide details of their source of funding for the litigation at the outset of the case. Although the Recommendation accepts the funding of collective proceedings by third party funders, this would only be permitted in restricted circumstances.
6. *Cross-Border Cases* – Member States should ensure that claims can be brought in their jurisdiction by foreign groups of claimants or representative entities from other countries. In particular, any representative entity that has been officially designated by another Member State as having standing to bring proceedings in that country should be permitted to bring a claim in another Member State which has jurisdiction to hear the collective proceedings.

The Regulation also lays down a number of specific principles relating to injunctive collective redress. These are very generally worded and suggest that Member States must provide expedient procedures so that any injunctive orders can be made promptly to prevent any continuing harm, and should provide for sanctions, such as daily fixed-fee penalty payments, to ensure that any injunctive orders are complied with.

With regard to compensatory collective redress, the Commission makes detailed recommendations governing the basis of the proceedings. These include:

1. *"Opt-in" Collective Redress Mechanism* – the Commission considers that claims should generally be pursued on an "opt-in" basis because this respects the right of individuals to decide whether they want to litigate. However, exceptions to this principle may be permitted if they are justified by reason of "sound administration of justice". Member States such as the Netherlands, Portugal, Bulgaria and Denmark which already have "opt-out" collective redress mechanisms may therefore be able to justify their continued operation on the grounds of appropriate national administration of justice.
2. *ADR and Settlement* – parties to any collective proceeding should be encouraged to settle the dispute both pre-trial and during the proceedings. Where a collective settlement is agreed, the Commission also proposes that this should be approved or verified by the courts.
3. *Contingency Fees* – in general Member States should not permit contingency fees as these risk creating an incentive to conduct litigation which might result in spurious claims being brought. However, Member States can exceptionally allow for contingency fees provided these are appropriately regulated, taking into account the right to full compensation of the individual Claimants.
4. *Punitive Damages* – these should not be permitted. In its Communication the Commission makes clear that the aim of collective redress procedures should be to facilitate compensation.
5. *Collective Follow-on Actions* – the Commission generally favours, so-called "follow-on" actions, and considers that proceedings should generally only be brought after any regulatory action has been concluded, so as to avoid the risk of conflicting decisions.

Conclusion

Although the Product Liability Directive has now been in force for over 25 years, there have been relatively few cases on the interpretation of its provisions and there remain a number of areas of uncertainty. For example:

- the scope of the development risks defence; and

- what information may be taken into account in assessing whether a product is defective – for example, whether this includes information and warnings supplied to intermediaries such as health professionals in the medicines and medical devices field, as well as information supplied directly to consumers.

It is hoped that the European Court will, in future, be invited to provide guidance in these areas. Nevertheless, the European Commission's Fourth Report has concluded that the Directive is operating in a satisfactory way, balancing the interests of consumers and producers.

A number of new legislative initiatives are being pursued in parallel by the European Commission, particularly in relation to mechanisms for collective redress that may in future enhance consumer rights in respect of defective products and make it easier to pursue claims for compensation. It remains to be seen whether the Commission's Recommendation on Collective Redress will be implemented in Member States: the timetable to do so is very short. However, if no steps are taken this may provide a platform for the Commission to propose legislation in future. What seems clear is that further developments are likely over the coming years in relation to EU mechanisms for collective redress.

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Mr. Dodds-Smith is a Fellow of the Royal Society of Medicine and is a member of the Defence Research Institute and the Federation of Insurance and Corporate Counsel. He has written widely on product liability issues including as co-author of the chapter on product liability for medicinal products in the Butterworths textbook on Medical Negligence.

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Alison Brown is a partner in the London office of Arnold & Porter, specialising in product liability litigation and advice. She has extensive experience in this area, handling both unitary claims and group actions, and co-ordinating litigation brought throughout the UK and EU. Her cases include the fetal anticonvulsant litigation and the successful defence of group litigation involving more than 100 claims relating to the "third generation" oral contraceptive pill on behalf of two of the defendant manufacturers. She has also acted in proceedings involving a range of products including pharmaceuticals, medical devices and food.
Ms. Brown also provides advice on product safety and health and safety laws. She advises on all aspects of regulatory compliance, including the notification of product recalls to UK and EU authorities and enforcement actions/investigations by regulatory agencies. She also acts in litigation relating to the recovery of recall costs.

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The European product liability group is a recognised leader in the UK and Europe, with comprehensive experience in handling the defence of claims. Its lawyers have been at the forefront of "group action" litigation, with experience derived from the successful defence of many major multi-claimant cases that have been brought in the UK and elsewhere in the EU over the last 30 years. In the US, the firm has acted both as national counsel for companies and as trial counsel in cases involving personal injury and property damage claims.

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