LexisNexis

Australian
Product Liability
Reporter

2016 . Vol 27 No 2

Contents

Information contained in this newsletter is current as at April 2016

LexisNexis Butterworths

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Product Liability
Reporter

Crackdown on claims culture?

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Introduction

On 25 November 2015, the United Kingdom (UK) government's Autumn Statement revealed plans to limit sums claimed for minor road accidents. Still at an early stage, these proposals are geared to bringing down the cost of motor insurance. It's not clear at this point whether reforms will also apply to low value personal injury claims in general.

The government is critical of the fraud and claims culture in motor insurance and is seeking to reduce what it views as "excessive costs arising from unnecessary whiplash claims". According to figures from the Association of British Insurers, whiplash claims run to approximately £2 billion per year in the UK. Proposed measures, which the government will consult on in 2016, include:

- removing the right to general damages for minor soft tissue injuries; and
- removing legal costs by transferring personal injury claims of up to £5000 to the small claims court.

The government believes these measures will remove over £1 billion from the cost of providing motor insurance, resulting in average savings of £40 to £50 per motor insurance policy being passed onto consumers.

General damages

Claimants who suffer minor soft tissue injuries can currently claim for general damages, which compensate them for pain, suffering and loss of amenity, as well as special damages for loss of earnings, medical care and other economic losses.

Claimant law firms have criticised the government's plans to remove the right to claim general damages. The Association of Personal Injury Lawyers (APIL) has said the proposals "show a callous indifference to the suffering of people who were needlessly injured by the negligence of others".

Threshold for small claims

Because they're unable to recover legal costs from the defendant if they win, claimants in the small claims court are more likely to represent themselves than instruct legal representatives. The government's proposal to increase the limits for personal injury claims in the small claims court are a blow to claimant law firms, as the effect of the reform will be to dramatically reduce legal costs in low value cases.

The Law Society, however, has expressed concerns that this will create an imbalance between claimants bringing claims without legal advice and defendants who are likely to be able to afford professional legal representation.

The proposals will come as a surprise to some. This is because the government has previously declined to increase the limit following a consultation in 2013. However, given that many small value whiplash claims are relatively straightforward, the small claims track might be a more suitable venue in which to determine them.

Comment

Full details on the government's proposals are yet to be released. And it's unlikely that any reforms will be implemented earlier than 2017.

The current proposals raise many questions. These include whether or not the proposed increase in value of personal injury claims that can be allocated to the small claims track will be limited to motor injury claims. Clarification is also needed on how minor tissue damage will be defined.

To address the concerns of claimant firms over the removal of cash compensation for general damages, the government might consider redressing the balance by offering alternatives such as physiotherapy by insurers.

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Australian
Product Liability
Reporter

European Commission launches online dispute resolution platform

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On 15 February 2016 the European Commission (the Commission) launched a new Online Dispute Resolution (ODR) platform to help consumers and traders resolve disputes about purchases made online. The ODR platform is a user-friendly system allowing consumers and traders based in the EU to settle disputes about goods and services purchased online through Alternative Dispute Resolution (ADR) bodies. It can be used for disputes arising from both domestic and cross-border online purchases. All companies who sell their products online in the EU are now required to inform customers about the availability of the ODR platform.

ADR is often a quicker and cheaper way of resolving disputes. The aim of the ODR platform is to reduce the difficulties faced by consumers when complaining about goods or services purchased online by providing a simpler means of redress without having to resort to court proceedings.

The ODR platform is now available for consumers and traders to submit complaints using a simple online form. Once the parties have agreed on an ADR provider to handle the dispute, the ODR platform then transmits the complaint to the provider for resolution. The entire dispute resolution process is conducted online using the platform.

Companies selling products online now ***must*** provide an easily accessible electronic link to the ODR platform on their website and their email address. Guidance suggests that a logical place on the website for the link would be alongside information about the company's complaints procedure. If a company is obliged to use ADR (eg, as part of a trade association) they must also provide certain information relating to the use of ADR in resolving disputes.

The ODR platform has been launched as part of the EU's wider Digital Single Market (DSM) strategy — a set of initiatives designed to lay the groundwork of Europe's digital future. It remains to be seen how consumers and traders will make use of the ODR platform. However, the Commission is hopeful that it will have economic benefits by giving consumers more confidence in buying products online, particularly from companies based in other member states, as it will be easier to resolve a dispute should something go wrong. Additionally, traders will benefit from a new simple way to resolve disputes which can help to maintain their reputation across the EU.

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Australian
Product Liability
Reporter

A safe harbor for now — product liability risk exposure stemming from human rights abuses in supply chains

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Introduction

Globalisation has created significant benefits for consumers by making products cheaper to purchase. It has allowed consumers to access food that is out of season from halfway across the globe, or regularly update the model of their phone. However, the long and complex supply chains that facilitate these outcomes are unpredictable and difficult to control.[1] Participants in the supply chain may be engaging in conduct that would be illegal in the destination market, if not also in the local market, perhaps violating labour practices or animal welfare standards. At the time of writing, 353 goods were believed by the US Bureau of International Labor Affairs[2] to have been produced by forced or child labour in violation of international standards.[3]

Many consumers say that they consider a company's ethical credentials to be important when deciding where and how to spend their money. In 2014, Nielsen released the results of a survey showing that:[4]

> … fifty-five percent of global online consumers across 60 countries say they are willing to pay more for products and services provided by companies that are committed to positive social and environmental impact.

Only late last year, consumers took to social media to call for a boycott of prawns sold at major supermarkets that had been sourced from a Thai company who allegedly used child and forced labour.[5]

Although Australian companies whose supply chains are tainted by labour practice infractions can be exposed to independent investigations by human rights groups and journalists (as occurred in the recent prawn controversy), they are currently required to do very little to ensure that any ethical issues in their supply chain are disclosed to potential consumers. However, recent United States experience shows that failure to disclose such issues may give rise to product liability issues in the form of consumer law claims. Even if unsuccessful (one such claim has recently been dismissed), class actions are costly to deal with and impact upon the company's reputation.

This article examines how these issues might play out in the Australian context, with a focus on human rights. First, it considers the potential for businesses to become liable under existing regulation, for example, s 18 of the Australian Consumer Law (ACL). It then considers the potential for the introduction of new regulation, such as mandatory labelling.

Supply chain slavery class actions in the United States

For some time, US litigants have been bringing legal action against corporations that have misled consumers about supply chain issues.

This began with the prominent example of the *Kasky v Nike* action, concerning promotional statements made by Nike about the labour standards of its overseas suppliers. In response to adverse publicity in the 1990s, Nike had said that their workers were protected from abuse, they were properly paid, they received free meals and health care, and their working conditions were in compliance with applicable occupational health and safety requirements. In 1998, consumer activists challenged these statements, on the basis of a California statute preventing false advertising. Nike claimed that the lawsuit was barred by the constitutional guarantee of free speech. However, in 2002, the California Supreme Court held that Nike's statements were ***commercial*** speech, which is given less constitutional protection than non-commercial speech. In 2003, the US Supreme Court agreed and would have allowed the case to proceed to trial on its merits.[6] However, the parties settled out of court before any finding on liability could be made.

More recently, in August 2015, Nestlé was served with a class action law suit alleging that they broke various laws by failing to disclose the likelihood that slave labour had been used in the supply chain of Fancy Feast pet foods.[7] A *New York Times* investigation revealed systematic abuse of workers from Cambodia and Myanmar held in bondage on Thai fishing boats. Fancy Feast was identified as one of the eventual end products of the seafood.[8] The managing partner of plaintiff law firm Hagens Berman said:[9]

> It's a fact that the thousands of purchasers of its top-selling pet food products would not have bought this brand had

> they known the truth — that hundreds of individuals are enslaved, beaten or even murdered in the production of its pet food.

In the same month, a similar lawsuit was filed against Costco, in relation to one of its brands of shrimp.[10]

Plaintiffs in the above lawsuits accuse the companies of violating California's Unfair Competition Law (UCL), Consumers Legal Remedies Act and False Advertising Law. To satisfy these causes of action, the plaintiffs in *Barber v Nestlé* (*Nestlé*) pleaded, among other things, that:[11]

- Nestlé had a duty to disclose the likelihood of forced labour in their supply chain, arising from:
  - — their superior knowledge of Nestlé's supply chain and the practices of its suppliers as compared to consumers; and
  - — their representations to the contrary, for example, corporate statements intended to show that Nestlé does not tolerate use of forced labour by its suppliers.
- These omissions would be material to a reasonable consumer, and reasonable consumers are likely to be deceived by the omissions.
- The plaintiffs in fact suffered injury, including the loss of money, because they would not have purchased nor paid as much for Fancy Feast had they known the truth.

In December 2015, the Central District Court of California granted Nestlé's motion to dismiss the case, concluding that plaintiffs' claims were barred by the "safe harbor doctrine".

Nestlé relied upon the fact that California's Transparency in Supply Chains Act of 2012 (Supply Chains Act) requires companies to make specific disclosures on their website about efforts it makes to eradicate slavery and human trafficking from its direct supply chain, for example, whether or not it "conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains". Judge Carney agreed with Nestlé's argument that, in passing the Supply Chains Act, the Californian legislature had already decided what level of disclosure would be sufficient to adequately inform consumers. The Supply Chains Act's clear intention (which was also informed by its legislative history) was to only give consumers reasonable access to basic information, while leaving it up to the companies whether or not they want to actively fight human trafficking and slavery. This was impossible to reconcile with the plaintiffs' contention that the consumer protection law required companies to make disclosures beyond what the Supply Chains Act required.

Further, in relation to the misrepresentation claim (which was not protected by the safe harbor doctrine), Carney J held that, on the facts, the corporate statements were not misleading. The plaintiffs had pointed to a number of statements made online by Nestlé which, in their view, would persuade a reasonable consumer that forced labour was not present in its supply chains. For example, Nestlé said that it "expects the Supplier to adhere to all applicable laws and regulations … and strive to comply with international and industry standards and best practices".[12] However, it was clear from other statements that Nestlé anticipated a certain level of non-compliance, for example, the statement that Nestlé "*ask*[s] [its] suppliers and their sub-tier suppliers" to comply with its requirements and that the "standards of the Code set forth *expectations*". Accordingly, no reasonable consumer could conclude that Nestlé's suppliers complied with Nestlé's requirements in all circumstances.

The plaintiffs are appealing this decision to the 9th Circuit Court of Appeals, and the *Monica Sud v Costco Wholesale Corporation* (*Costco* case) is ongoing. The Costco complaint, which was recently amended on 19 February 2016, similarly relies upon public statements by Costco about its supplier code of conduct which prohibits human rights abuses in its supply chain. Arguably, the Costco statements demonstrate a more zero-tolerance approach than the Nestlé statements, for example, stating:[13]

> Our suppliers contractually agree to follow the Code and to ensure that their sub-suppliers also comply. … If we discover a violation of our Code of Conduct, we respond in a manner commensurate with the nature and extent of the violation. "Critical violations" are considered serious enough to require immediate and decisive remedial action and may result in the termination of the business relationship. For less serious violations, we allow the supplier reasonable time to develop and implement a plan for remediation. In those instances we conduct follow-up audits to monitor progress.

It will be interesting to see whether, on this basis, these plaintiffs succeed in establishing that the representations were misleading and deceptive.

Potential consumer action in Australia?

The California UCL, relied upon in the *Nestlé* and *Costco* suits, has very similar requirements to the ACL. Plaintiffs are required to show that the defendant engaged in unfair, deceptive, untrue or misleading advertising, that the plaintiff suffered injury in fact and lost money or property. To determine whether advertising is misleading, California courts evaluate the advertisement's entire impression, including words, images, format and product packaging, and have held that advertising is misleading if "members of the public are likely to be deceived".[14]

There is no reason why Australian consumers and regulators attempting to emulate these suits could not

attempt to rely on s 18 of the ACL, which prohibits misleading or deceptive conduct in trade or commerce.

The Australian Competition and Consumer Commission (ACCC) has already expressed its particular concern with unverifiable claims about:

- health benefits;
- animal welfare;
- environmentally friendly and organic designations; and
- country of origin claims.[15]

And has taken enforcement action against a number of companies for misleading statements on product labelling relating to the "sustainable", "fresh", "organic" and/or "free range" nature of the product.[16] For example, in September 2015, the Federal Court of Australia declared that Darling Downs Fresh Eggs had engaged in misleading conduct in regards to its free range egg lines that had, in fact, kept its hens in barns without access to the outdoors,[17] and ordered a fine of A$250,000 along with other remedies.

However, unlike in credence claims cases, failure to disclose human rights abuses in supply chains often involve only ***omissions*** (except for rare examples like *Kasky v Nike* where there were positive representations). Although the legislation provides that to "engage in conduct" includes refusing to do an act, and "refusing to do an act" includes a reference to refraining from acting, the omission must not be inadvertent.[18] Further, a failure to disclose information will only be misleading and deceptive when all the relevant circumstances give rise to a ***reasonable expectation of disclosure*** of the relevant facts.[19]

The most likely source of a positive obligation to disclose facts will be other positive conduct, such as an express statement which creates a false impression unless otherwise corrected.[20] In the *Nestlé* and *Costco* cases, this was argued to be the corporate statements on websites which created a false impression that there was no forced labour in the companies' supply chains. To reduce the risk of attracting litigation, corporations who make statements on their websites about their efforts to ensure that their supply chains are ethical would be well-advised to review the *Nestlé* decision and ensure that the overall impression created by their statements are also clearly aspirational in nature.

Increased regulation: mandatory disclosure

In recent years, corporations operating in the United States have been subject to specific requirements to disclose human rights abuses in their supply chain, for example, California's Supply Chains Act (discussed above). Further, in 2012 the Securities and Exchange Commission (SEC) approved a rule requiring certain companies to conduct due diligence on their use of "conflict minerals" originating in Congo or adjoining countries (the Conflicts Mineral Rule) and disclose any use of conflict minerals to the SEC.[21] In the United Kingdom context, the Modern Slavery Act 2015 (UK) similarly requires commercial organisations to report annually on the steps that they have taken during each financial year to ensure that slavery and human trafficking are not taking place in their own business or in their supply chains.

In Australia, there have not yet been any developments of this nature, although the issue of transparency in supply chains is getting increased attention. Some more limited options have been proposed. For example, a consultation paper was recently released by the Federal Government in relation to a national standard for egg labelling, outlining potential options such as the mandatory disclosure of specific information to consumers (this might include, for example, stocking density information), and a basic definition of free range for egg labelling purposes.[22]

At a broader level, in June 2013, the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade (FADT Committee) tabled a report stemming from its inquiry into slavery, slavery-like conditions and people trafficking.[23] This report contained a chapter on exploitation in supply chains, and recommended that the Australian Federal Government should undertake a review with a view to:

- introducing legislation to improve transparency in supply chains;
- the development of a labelling and certification strategy for products and services that have been produced ethically; and
- increasing the prominence of fair trade in Australia.

However, the mandatory disclosure model has been criticised on a number of grounds:[24]

- The minimalist requirements and prioritisation of self-regulation does not tackle the problem directly, as opposed to providing incentives to businesses alongside functioning enforcement mechanisms and sanctions.
- The assumption that consumer pressure will motivate companies to comply and embrace the agenda is flawed, as many consumers simply do not read the disclosures and do not make decisions based on them, and those who do care lack the means to monitor the ethical credentials of firms and products consistently.
- The extra costs of such schemes might be inequitably borne by lower income earners.

Other risks

Even where there are no legal requirements around disclosing human rights abuses in supply chains, there is nevertheless a strong business case for adopting and aligning activities with international human rights standards (including soft law instruments). Although the litigation itself may fail, simply being sued entails significant reputational risks as well as the costs of defending (or settling) the suits. Further, in an era of increased shareholder activism, proactive alignment with human rights is fast becoming the expected norm. Some institutional investors are now making investment decisions explicitly based on human rights, environmental or social impact, and seek to influence corporate operations through shareholder resolutions.[25]

Conclusion

In Australia, there has been little regulatory activity in connection with the mandatory disclosure of ethical issues in supply chains. However, as the US experience shows, it may be possible for consumers to bring actions alleging that businesses have misled them by failing to disclose human rights abuses, at least where the company has made statements about its ethical expectations of its suppliers, and crucially, where these statements do not appear to be merely aspirational.

In any case, there is clearly continuing pressure for increased regulation, and manufacturers with large supply chains would be well advised to take steps to ensure they understand their supply chain risks and take steps to eliminate any potential human rights abuses in their supply chain.

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Footnotes

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Australian
Product Liability
Reporter

Ecodesign and energy efficieny labeling — legal risks of non-compliance

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Consumers and industry players on the European market know them quite well, the colorful stickers indicating an "A" or "A++". This is the visible tip of the iceberg "hiding" a complex system of legislation: European ecodesign law and energy labeling law are combined in order to increase energy efficiency. Difficult legal and technical questions arise in regard to the applicability of these provisions and the specific requirements. Non-compliance might not only cause sanctions and fines ordered by European market surveillance authorities but also injunctions under competition law. Taking into account some intensification of German competition law and an upcoming revision of energy efficiency regulations on the European level, this article gives an overview on the legal risks and recent developments.

European Ecodesign Directive 2009/125/EC

The European Ecodesign Directive 2009/125/EC (the Ecodesign Directive) builds a legal framework for requirements on energy consumption with the aim to increase energy efficiency. At the same time, the Ecodesign Directive has the objective to prevent barriers to trade and unfair competition in the European Union caused by different national laws which may have an impact on the functioning of the internal market. Additionally, the Ecodesign Directive is supposed to increase the security of energy supply.

The Ecodesign Directive states that energy-related products may only be placed onto the European market if they meet the product-specific requirements laid down in so called implementing measures of the European Commission.

Scope: energy-related products

The term "energy-related product" which describes the scope of the Ecodesign Directive, is defined in Art 2(1) of the Ecodesign Directive as "any good that has an impact on energy consumption during use which is placed on the market and/or put into service". The definition also includes parts intended to be incorporated into energy-related products covered by the Ecodesign Directive which are placed on the market and/or put into service as individual parts for end-users and of which the environmental performance can be assessed independently.

The scope of products covered is, therefore very wide — even though there are some explicit exemptions in Art 2 as well. Practically, the Ecodesign Directive can only be applied to products which are covered by an Implementing Regulation (also described as implementing measure) of the European Commission as those regulations set up the specific product requirements.

Addressees of the Ecodesign Directive

The Ecodesign Directive itself obliges only the EU Member States to implement the relevant provisions into national law. This means that the legal obligations of economic operators are laid down in the different laws of the EU Member States. The Ecodesign Directive, however, points out the addressees and content of such obligations which should, therefore, correspond between the different national laws.

Addressees of the obligations stated in the Ecodesign Directive are manufacturer, authorized representative and importer.

Obligations of economic operators

The Ecodesign Directive states in its Art 3 that only products may be placed onto the market which fulfill the requirements of the specific implementing measure and bear the CE marking (*Conformité Européene*) accordingly.

As known from European product safety law, the manufacturer must carry out a conformity assessment following the very technical rules in the applicable implementing measure. After having carried out such conformity assessment, the responsible economic operator must affix the CE marking and issue a EC declaration of conformity whereby he ensures and declares that the product complies with all relevant provisions of the applicable implementing measure.

According to Art 9(2) of the Ecodesign Directive, the application of harmonized standards triggers a presumption of conformity — as is also known from other European product regulations under the new approach.

The implementing measures of the European Commission

The Ecodesign Directive states in its Art 15 together with its Art 19 that the European Commission shall adopt implementing measures for products falling into the scope of the Ecodesign Directive.

There is already a list of such implementing measures, as examples might be referred to:

- Regulation (EU) No 1194/2012 with regard to ecodesign requirements for directional lamps, for light emitting diode lamps and related equipment;
- Regulation (EC) No 244/2009 with regard to ecodesign requirements for non-directional household lamps;
- Regulation (EC) No 642/2009 with regard to ecodesign requirements for televisions; and
- Regulation (EU) No 617/2013 with regard to ecodesign requirements for computers and computer servers.

As stated before, these implementing measures set up product specific technical requirements regarding energy consumption of the relevant products. Having an exemplary, more detailed look into Regulation (EC) No 244/2009, Art 1 describes the scope of the Regulation, *inter alia* referring to technical parameters. Annex II of Regulation (EC) No 244/2009 points out the values of maximum rated power for specific rated luminous flux referring to the different stages of application defined in Art 3 of Regulation (EC) No 244/2009.

Voluntary agreements under the Ecodesign legislation

As an alternative to implementing measures, the European Commission formally recognizes voluntary agreements of industry sectors and monitors their implementation.[1] These voluntary agreements must fulfill specific criteria of the Ecodesign Directive. Such voluntary agreement exists for example for game consoles.

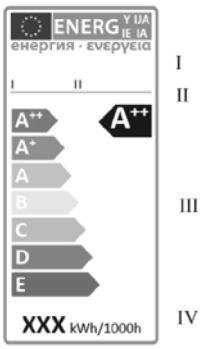
Market surveillance and consequences of non-compliance

The EU Member States are obliged to ensure that only products in compliance with the requirements of the Ecodesign Directive and the implementing measures are placed onto the European market. The rules for market surveillance and possible consequences of non-compliance are, therefore, to be found in national law of the relevant countries of distribution. According to Art 20 Ecodesign Directive, the penalties provided for non-compliance shall be effective, proportionate and dissuasive, taking into account the extent of non-compliance and the number of units of noncomplying products placed on the community market. It must also be expected that market surveillance authorities might order a ban of distribution in case of non-compliance. Of course, the principle of proportionality must be taken into account.

European Directive on Energy Efficiency Labeling 2010/30/EU

The European Directive on Energy Efficiency Labeling (the Labeling Directive) — to some extend — works together with the Ecodesign Directive. It has the objective to establish a framework for the harmonisation of national measures on end-user information, particularly by means of labeling and standard product information on the consumption of energy and where relevant of other essential resources during use. It also establishes a system in which the product specific requirements are laid down in implementing measures adopted by EC.

In a different way from the implementing measures within the framework of the Ecodesign Directive, there are no specific thresholds which must be met for compliance. Moreover, the implementing measures — which are called "delegated acts" in the Labeling Directive — contain specific technical testing methods and values which lead to a specific classification of products (mostly ranging from "A++" to "E"). Such classification has to be indicated on an energy label. Such energy label has to be made available by suppliers. Dealers must display the label in a way precisely described in the relevant implementing measure. Additionally, a product fiche with specific technical information on the product in question has to be provided.



Example of an energy label according to Regulation (EU) No 874/2012

As examples for delegated acts and the Labeling Directive may be mentioned in the following:

- Regulation (EU) No 874/2012 with regard to energy labeling of electrical lamps and luminaires;
- Regulation (EU) No 1062/2010 with regard to energy labeling of televisions; and

- Regulation (EU) No 665/2013 with regard to energy labeling of vacuum cleaners.

Relationship between the Ecodesign Directive and the Labeling Directive

Even though the Ecodesign Directive and the Labeling Directive are supposed to increase energy efficiency together, there are some discrepancies in their scope. The European Commission explicitly states in its publicly available frequently asked questions (FAQ) that the scope of the products covered under the energy labeling and ecodesign regulations are different. For example, colored LED lamps might not need to fulfill ecodesign requirements, but need to have an energy label according to Regulation (EU) No 874/2012. Similarly, there is an exemption for special purpose lamps in regard to ecodesign requirements in Regulation (EU) No 1194/2012,[2] but no exemption from labeling requirements under Regulation (EU) No 874/2012.

Accordingly, the applicability of both regulatory systems has to be assessed separately for every single product.

Requirements for energy labeling on the internet

It has to be taken into account that Regulation (EU) No 518/2014 amends all existing delegated acts under Directive 2010/30/EU with regard to online-distribution of energy related products. It points out specific requirements for the display of the energy label and the product fiche on the internet for every single product category covered by a delegated act. Accordingly, Regulation (EU) No 518/2014 — roughly spoken — obliges the supplier to provide such documents electronically to the dealer.

Proposal for a regulation repealing the Labeling Directive

There is a European Commission proposal for a new regulation setting a framework for energy efficiency labeling and repealing Directive 2010/30/EU.[3] If this proposal would pass the legislative process and enter into force, it would directly be applicable in all EU Member States — different from the Labeling Directive which always needs to be implemented into national law. The draft regulation in its current version would implement a European database of energy-related products accessible by market surveillance authorities and — in parts — also by the public. Economic operators would be obliged to place specific pieces of information about their products in this database. This aspect of the draft is discussed controversially and assessed as being overdone by many stakeholders. The draft is currently subject to trilogue negotiations in the European Parliament. It is expected that the legislation process will be finished in the beginning of 2017. The proposal also aims to review the energy label in order to make it easier to understand. Additionally, the proposal aims to align the structure and terminology of the European energy labeling provision with the New Legislative Framework.

Discretion of the European Commission with regard to delegated acts

As stated above, the European Commission adopts delegated acts under the Labeling Directive which contain rules for the classification of specific products as well as the testing methods to be used in order to find such classification. In regard to vacuum cleaners, there has been a recent judgment by the General Court[4] which made some important statements on the margin of discretion of the European Commission in this context: Dyson, a manufacturer of bagless vacuum cleaners claimed — in summary — that the testing method laid down for energy labeling of vacuum cleaners in Regulation (EU) No 665/2013 which requires tests conducted with an empty dust bag, would not comply with higher-ranking European Union law (ie, Directive 2010/30/EU). The claimant submitted that the testing method would — *inter alia* — lead to reporting of inaccurate information and labeling because it would not refer to the performance of the vacuum cleaner "during use" as required under Art 10 of the Labeling Directive.

The General Court stated that the European Commission has broad discretion in the exercise of the powers conferred on it where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations. Still, the European Commission is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question, taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question. European Union judicature is in these cases basically limited to verifying whether there has been a manifest error of assessment or a misuse of powers. After thorough assessment of the technical arguments brought forward by the claimant, the General Court held that there would be no such manifest error of assessment in regard to the testing method laid down in Regulation (EU) No 665/2013. The General Court dealt with different testing methods suggested by the claimant which would be based on a (partly) dust-loaded receptacle in order to actually show the behavior of the appliance "during use". It came to the conclusion that the European Commission could not be criticised for having failed to require tests conducted with a dust-loaded receptacle because such tests were not yet reliable, accurate and reproducible. Additionally, the General Court stated that "during use" does not necessarily mean "with a dust-loaded receptacle" because

the term does not specify the timely stage of use and might also refer to the first use.

Competition law risks

Despite the fact that competent authorities in EU Member States increase their efforts to strengthen enforcement activities with respect to the Ecodesign Directive and the Labeling Directive, in practice the most relevant risk for companies placing affected products on the EU market are attacks from competitors.

In this context it should be noted that, for example, in Germany, the newly revised Act against Unfair Competition (the Act) entered into force around the turn of the year. The revision *inter alia* transposes the Unfair Commercial Practices Directive (2005/29/EC) (UCPD Directive).

Overview

The revised Act against Unfair Competition retains the Act's broad scope of application. The Act continues to apply both to B2C and B2B business while it now makes a clearer distinction between the standards giving protection exclusively to competitors and the standards serving to protect consumers and other market participants. This, however, does not involve substantive changes, since the legislator leaves the standards themselves untouched.

Retention of general clauses in s 3 of the Act

As in the past, s 3(1) of the German Act against Unfair Competition contains the general clause for the B2B sector and s 3(2) of the Act contains the general clause relating to consumers. However, the latter has been modified to more clearly meet the requirements of the UCPD Directive through the new definitions included in the list in s 2 of the Act regarding "material influence on the economic behaviour of consumers"[5] and the "transactional decision".[6] The previous "professional diligence" has been replaced by "entrepreneurial diligence",[7] meaning that it is also clearer from the wording that the traders are the addressees of the duty of care.

Infringements of applicable ecodesign or energy labeling requirements therefore continue to qualify as unfair practice as both regimes aiming at consumer protection by stipulating product compliance requirements to influence the consumer's purchase decision.

Restructuring of protection of competitors and breach of the law

Although the revised act provides a fundamentally new structure, the general approach to make the general clause in s 3(1) of the Act more concrete by providing examples of unfair commercial practices remains unchanged. In particular, the standard of breach of the law (s 4 no 11 of the old Act), which has significant relevance in practice in connection with product related regulation like ecodesign and energy efficiency labelling requirements, has been exported to a new s 3a of the Act.

Furthermore, the examples formerly provided for in s 4 of the old version of the Act[8] were already misleading practices before the revision and the contents of the provisions are now correctly found in ss 5 and 5a of the Act.

The legislator has taken up the provisions relating to omitting or concealing material information vis-á-vis the consumer. The Act, thereby orienting itself more closely to the wording of the UCPD Directive, now explicitly states that omitting or concealing material information qualifies as unfair practice provided that the average consumer needs the information, according to the context, to take an informed transactional decision and omission of information is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Infringements of provisions regarding ecodesign and energy efficiency labelling, thus, unquestionable constitute unfair practices in terms of the Act.

Against the background of:

- a continuous extension of implementing measures on the basis of the European Ecodesign Directive 2009/125/EC as well as the European Directive on Energy Efficiency Labeling 2010/30/EU;
- the clarifying wording of the revised German Act against Unfair Competition; and
- increased consumer awareness in relation to practices of enterprises in connection with environment-related product requirements, not the least due to the Volkswagen scandal, companies should be aware of related obligations at the interface between product compliance, labeling and information requirements on the one hand and potential liability risks according to EU and national legislation against unfair competition.

It goes without saying that this in particular holds true as proceedings according to legislation against unfair competition have been and will continue to be perceived in public and, thus, tend to have direct influence on companies' reputation.

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Footnotes

1. European Ecodesign Directive 2009/125/EC, Art 17.
2. Regulation (EU) No 1194/2012, Art 1 and Recital 5.
3. European Commission, COM(2015) 341 final.
4. *Dyson Ltd v European Commission* (Case T-544/13).
5. Act Against Unfair Competition 2015 (Germany), s 2(1).
6. Above n 5, s 2(1).
7. Above n 5, s 2 no 7.
8. No 3: concealing the nature of advertising; and no 4/5: lack of transparency in sales promotions or competitions.

Mass torts

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The following is a review of recent mass tort litigation in the United States (US). All of these cases have been part of our multidistrict litigation (MDL), congregating federal system cases with one judge. Most of them have also involved parallel litigation is state courts as well.

One potential usefulness of this listing is to make counsel aware of drugs and devices which are potentially harmful and could be sued on in the US or elsewhere. There are perhaps 25 other drug and device mass tort MDLs currently pending. A listing of these is in my book, *Litigating Mass Tort Cases*.[1]

1. **Transvaginal Mesh**. This is currently the largest mass tort pending in the US, and also the most complex to describe. Dozens of products, made by eight or more defendants, were sold over the years (with some still on the market). These are plastic slings and meshes installed via the vagina to deal with prolapse of internal organs or loss of bladder control. Over time these products have become eroded into surrounding tissue, leading to removal. More than 100,000 suits have been filed, most of them pending before the MDL judge in West Virginia. There have been many large verdicts, and now settlements are the predominant issue. More than 20,000 cases of the devices made by one company, American Medical Systems (AMS), are in a settlement plan, which the defendant has funded with some $830 million.
2. **Xarelto**. This is an oral anticoagulant, which unlike Coumadin, works by inhibiting factor Xa (generic name rivaroxaban). The defendants in the MDL are Bayer and Johnson & Johnson. Presently over 4000 cases are pending in the MDL, which is in Louisiana, with others in a few states, and more are being filed. The claims are for irreversible bleeding, in the brain (intracerebral hemorrhage) or the gastrointestinal tract (GI tract). The current status of the litigation is that bellwether cases are being selected.
3. **Actos**. This is a diabetes drug, made by Takeda Pharmaceutical and sold in the US jointly with Eli Lilly, which was found to cause bladder cancer (generic name pioglitsazone). Some 8000 cases were filed, in an MDL and in various state courts. The first trial resulted in a $9 billion verdict. In 2015 a comprehensive settlement plan was worked out, funded with $2.2 billion. The plan was based on factors such as length of use, year used, type of cancer, and the presence of alternative causes. This ended the litigation, but the money has yet to be paid to the plaintiffs.
4. **Zofran**. A new mass tort, assigned to an MDL judge in Boston, involves the morning sickness drug Zofran (ondansetron). So far several hundred suits have been congregated there, all alleging "birth defects", mostly heart vessel abnormalities and cleft palate and lip. There are many significant legal issues which have to be resolved, the chief one being that most women used a generic version of the drug, where the US Supreme Court has held that generic sellers are under no obligation to update their labeling. Right behind that issue come questions about preemption, causation and liability, that is, was there a failure to warn.
5. **Benicar**. Still in its early stages is an MDL in New Jersey — and state litigation involving the antihypertension drug (an angiotensin II receptor antagonist), Benicar, generic name on olmesartan. The supplier is Daiichi Sankyo. The injury is a very discrete one, enteropathy, manifest by uncontrollable diarrhea and weight loss. Fortunately, stopping Benicar leads to improvement, which is also an element on proof of causation. In 2013, there was a label change, adding a warning. More than a year before, however, there had been a major report of the side effect by Mayo Clinic. Discovery is underway, concentrating on causation; and bellwether cases have been selected.
6. **Mirena**. The Mirena is an IUD (intrauterine device) which contains a hormone, levonorgestrel. Bayer is the manufacturer. Several thousand suits have been started by women alleging embedment in the uterus or perforation. These in an MDL in New York and in various state courts. Recently the litigation reached the point of presentation of experts and the usual attack each side makes on the other's experts under the Supreme Court's

Daubert decision. In the MDL, the judge granted the defendant's motions to strike plaintiffs' experts on the ground that the medical theory they were using to explain the erosion of the uterus lacked adequate scientific grounding.

7. **IVC Filters.** Inferior vena cava filters are placed in order to catch thrombi that might flow from the leg or pelvis into the lungs. In recent years, they have been made retrievable — that is, after the risk of throwing a clot is passed, they can be pulled out. Some of the filters, however, have remained in the body and their arms have perforated the vein; or parts have broken off and gone to the lungs. MDLs have been established for two manufacturers, CF Bard and Cook Medical. Discovery is in the early stages.

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Footnotes

1. P Rheingold *Litigating Mass Tort Cases* AAJ Press, Thomson Reuters 2006 c 3.