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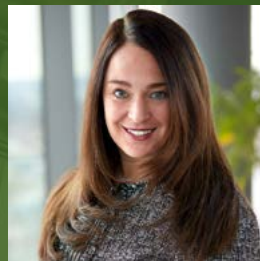
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France launches “SignalConso”: an innovative national consumer reporting platform

On 18 February 2020, the French Ministry of Economy and Finance announced the launch of a new online platform called SignalConso, an easy-to-use public service enabling individuals to report any consumer law issue they may face directly to the French Consumer Regulator, the Directorate General for Competition, Consumer Affairs and Fraud Control (“DGCCRF”).

This innovative project was launched in 2018 and developed by a state-owned start-up company in close collaboration with consumers, in order to make it as intuitive and practical as possible.

How is it different from a formal complaint to the authorities?

Each year, the DGCCRF receives about 70,000 formal complaints from consumers. Only half of them are made electronically, the other half are made by telephone or by letter.

SignalConso was designed to drastically simplify exchanges between consumers and the authorities by allowing consumers to make reports online, on a dedicated platform, in a few clicks only. The main innovation is in the fact that SignalConso acts as an intermediary, putting reporting consumers into contact with professionals, under the aegis of the DGCCRF.

What can or cannot be reported through SignalConso?

SignalConso can be used by consumers to report general consumer law issues they encounter. A wide variety of issues can therefore be reported, such as issues relating to the price of products, promotions offered, unfair commercial practices (such as misleading advertising), unauthorized health claims on food products, issues with the implementation of the right of withdrawal of warranties (statutory conformity warranty, warranty against hidden defects or commercial warranty), lack of mandatory information on the packaging of products, incomplete labels, issues with the instructions for use (e.g., lack of French translation), planned obsolescence of a product, missing data in relation to energy class, sale of expired products, lack of hygiene of a shop or a restaurant, recalled products which are still available for sale or, more generally, any type of scam or fraud they may face.

Reports made through SignalConso can only concern private companies established in France. Companies established abroad are therefore excluded.

It is not yet possible to report issues relating to eCommerce sales or mobile applications, but,

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during the course of 2020, the platform should be developed to allow it.

Besides, some issues are too specific or too serious to be reported through SignalConso. For instance, it is not possible to report defective or dangerous products causing safety risks. SignalConso informs consumers that such issues must be reported directly to the competent authorities.

How does it work in practice?

SignalConso aims at facilitating reports for consumers. Therefore, SignalConso will guide users to ascertain, in a few clicks, whether or not they can report their problem.

Consumers first have to select the predefined category which is most related to their issue (e.g., banking/insurance sector, health sector, purchases in a store, restaurants, travel/leisure, etc.) Then they have to answer a series of multi-choice questions in order to identify their issue more accurately (e.g., does your issue relate to food or an object? Is your problem about the warranty? The packaging and in-box materials? Perhaps the quantity or the safety? Etc.) Consumers are then able to describe the context in which the problem was encountered and may add any other relevant document to their report (such as invoices, warranty, photo of the product, etc.)

The professionals at stake receive a letter informing them that they have been reported on SignalConso and invite them to activate their professional space on the platform. By doing so, they have access to the list of all the reports filed on them on SignalConso. Failure to activate the professional space will result in the alert being closed without an answer being provided to the consumer.

SignalConso gives professionals the opportunity to explain why the report is ill-founded or to take action to remedy the situation and provide the DGCCRF with elements to prove it, if appropriate. If consumers have agreed to share their contact details with the professionals, they can also be contacted directly for professionals to provide assistance, explanations or, if appropriate, any form of compensation. A report is deemed closed as soon as an answer has been given. Ideally, issues are resolved directly between the parties without the DGCCRF having to intervene in any way.

How can it impact you and why you should get prepared

As at September 2020, SignalConso already received more than 28,000 reports from consumers. Therefore, French consumers have started to use this new tool extensively. This is why companies based in France should familiarise themselves with this new tool.

- The DGCCRF explained that it plans to use SignalConso as a tool to help them identify problematic behaviours and to prioritise their inspections:
 - should a given professional consistently fail to address reports made by consumers, the DGCCRF will more likely decide to investigate it; and
 - if many consumers report the same issues, the DGCCRF may decide to tackle it by launching a sectorial investigation and therefore investigate the majority of players in this industry sector.
- SignalConso's database is not publicly accessible and can therefore only be consulted by the DGCCRF. However, we



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cannot exclude that the DGCCRF would regularly publish reports, naming and shaming professionals who consistently fail to address consumer reports.

Therefore, we strongly recommend professionals to activate their professional space on SignalConso upon receipt of a letter inviting them

to do so and proactively address reports made by consumers. In addition to building trust with clients, in most cases, it would put an end to the matter, without the DGCCRF having to step in and get involved. Finally, should an investigation be launched, it would facilitate subsequent exchanges with the authorities and help mitigate risks of sanctions being imposed.



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Recommendation

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Data class actions in the Netherlands?

Since 1 January 2020, the Netherlands has a “U.S.-style” class action. It seems, however, questionable whether this collective redress mechanism can also be used for claims on the basis of the GDPR.

Netherlands: Opt-out

In the Netherlands, there are three main collective redress mechanisms: collective settlement, collective action, and the assignment model.

1. First of all, the collective settlement of mass damages claims on the basis of the Class Action Financial Settlement Act or WCAM.

When an association or foundation representing the interests of a group of injured parties and the party allegedly causing the damages have concluded a collective settlement, the parties can submit a joint application to the Amsterdam Court of Appeal, requesting the court to declare the collective settlement binding on all injured parties falling within the scope of the settlement agreement (whether known or unknown and whether residing in the Netherlands or abroad).

Those injured parties who do not want to be bound by the settlement agreement have the option to opt-out, but they must do so within a limited period of time.

2. Apart from collective settlement, collective action is also possible in the Netherlands on the basis of the Act on the Resolution of

Mass Claims in Collective Action or WAMCA.

Until the end of 2019, a claim vehicle (foundation or association) could only claim a declaratory judgment regarding liability. If the court had indeed ruled that the defendant was liable, each injured party had to initiate individual proceedings to claim its own damages, or settle individually or collectively. Since the first of 1 January 2020, the claim vehicle can also claim damages (resulting from events on or after 15 November 2016) on behalf of the injured parties.

This new Dutch collective redress mechanism is an opt-out model, as a result of which injured parties (falling within the scope) are bound, unless they have indicated that they do not wish to participate in the collective claim. In an opt-in model on the other hand, parties have to actively “step into” the collective proceedings in order to be bound. Under the new WAMCA, this opt-in mechanism is applicable for injured parties not residing in the Netherlands.

3. Because, up until 1 January 2020, the collective action did not provide for a claim for monetary damages, various claim vehicles have sought other ways to bundle multiple damages claims into one type of litigation.

They ask the (sometimes hundreds of) injured parties to assign their claim to

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the claim vehicle. Subsequently, the claim vehicle starts proceedings in the Netherlands against defendants thereby acting in its own name. This model is often called the Dutch assignment model.

GDPR: Opt-In?

Consideration 142 to the GDPR specifically states, with regard to claiming damages: “That body, organisation or association may not be allowed to claim compensation on a data subject’s behalf independently of the data subject’s mandate”.

This raises the question whether the Dutch opt-out models as described above can be used for claims based on the GDPR. It is certainly an argument worth considering for the defendant.

Of course, several arguments, depending on the situation, could be brought forward to argue

that claimants do mandate the claim vehicle. As recent claims in the Netherlands show, claimants often sign up with a claim vehicle to participate in collective redress. Furthermore, claimants residing outside the Netherlands opt-in under the new WAMCA proceedings. However, this does not change the Dutch legal opt-out mechanism for claimants residing in the Netherlands. It will therefore be interesting to see how this is dealt with by the courts.

Of course a claim could still be based on an unlawful act (for example, for a breach of the right to privacy embodied in the Dutch Constitution) instead of on the basis of the GDPR. Another option would be to use the Assignment Model for the collective recovery of damages in the Netherlands for GDPR claims.



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Comment

Of course a claim could still be based on an unlawful act (for example, for a breach of the right to privacy embodied in the Dutch Constitution) instead of on the basis of the GDPR. Another option would be to use the Assignment Model for the collective recovery of damages in the Netherlands for GDPR claims.

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First courts consider application of PREP Act immunity in the context of removal

Earlier this year, we published various articles breaking down the 10 March 2020 Public Readiness and Emergency Preparedness Act (PREP Act) Declaration (the Declaration) related to COVID-19. We've also published [several pieces](#) since then highlighting subsequent developments for the application of the PREP Act, and you can read our prior publications providing key background on the [Declaration here](#).

At the time of our last communications, we were not yet able to provide insights on how courts would interpret and apply the Declaration. August finally brought with it the first court decisions construing the Declaration, and they arise in the context of the removal of nursing home negligence actions to federal court. The cases are out of New Jersey and Kansas. While the decisions are far from clear precedent in all contexts, they shed some light on how courts are reading various provisions of the Declaration, and how broadly (or not) they are interpreting the scope of its immunity.

Quick COVID-19 PREP Act Refresher

Enacted in 2005, the PREP Act authorizes the Secretary of Health and Human Services (the Secretary) to provide certain individuals and entities (referred to as “covered persons”) with immunity from liability arising out of or related to the manufacture, distribution, administration, or use of certain covered medical countermeasures (referred to as “covered countermeasures”), except for

claims of willful misconduct. The Act defines “covered countermeasures” as “pandemic or epidemic product[s]” or “drug[s] or device[s]” (as defined by the FDA) that are authorized for emergency use.

In March 2020, the Secretary published several declarations providing immunity for certain countermeasure activities related to the COVID-19 pandemic. One of these declarations expanded the definition of “covered countermeasures” to include drugs, diagnostics, devices, or vaccines used to treat, diagnose, or mitigate COVID-19 or its transmission, or any device used in the “administration” of one of those products.¹ The PREP Act also contains an explicit preemption provision prohibiting any state from “establish[ing], enforc[ing], or continu[ing] in effect with respect to a covered countermeasure any provision of law or legal requirement” that is different from, or in conflict with, any requirement under the PREP Act and that relates to any activity involving the development, manufacture, or administration of the covered countermeasures.

In these contexts, the Secretary recently clarified that the term “administration” means: (1) the actual provision of countermeasures to recipients; (2) the activities and decisions directly relating to the distribution and dispensing of countermeasures to recipients; (3) the management and operation of countermeasure programs; or (4) the management and operation of locations for

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the purpose of distributing and dispensing countermeasures.

First COVID-19 PREP Act Jurisprudence

The first decision was issued in the case *Estate of Maglioli v. Andover Subacute Rehabilitation Center I*, 2020 WL 4671091 (D.N.J. Aug. 12, 2020), where the U.S. District Court for the District of New Jersey ruled that the PREP Act could not be used to remove to federal court state law claims against a nursing home for its alleged negligent failure to follow appropriate safety precautions relating to COVID-19.²

The defendants, a nursing home operator and certain of its employees, argued, inter alia, that the sweeping immunity conferred by the March 2020 PREP Act Declaration created federal jurisdiction by completely preempting the plaintiffs' state-law negligence claims:³

Defendants removed the actions on the basis that the PREP Act “provides liability protections for pandemic and epidemic products and security countermeasures,” including “respiratory protective devices.” Defendants state that they are “covered persons” under the PREP Act and that such “a ‘covered person’ shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure” during a health emergency.⁴

The plaintiffs countered that the defendants' alleged conduct did not fall within the scope of the PREP Act because their claims were “not directed against Defendants' role in the manufacturing, distribution, administration, or use of a covered countermeasure.”

Ultimately, the Court sided with the plaintiffs and ruled that the PREP Act did not provide a basis for federal jurisdiction.⁵ In reaching this decision, the Court imposed two important

limitations on the scope of the PREP Act's immunity and its preemption provision.

First, despite recognizing the PREP Act's “explicit provision regarding preemption” in Section 247d-6d(b)(8), the court somewhat confusingly applied implied—rather than express—preemption principles in concluding that the PREP Act's preemption clause does not “mandate a federal forum.” It then incorrectly concluded that the express preemption provision in the Act, “at most, restricts a state from passing a law that would conflict with the federal government's requirements for . . . covered countermeasures.”⁶

Second, the Court held that preempted conduct under the Act is limited to the “physical provision of the countermeasures to recipients,” or “relating to public and private delivery, distribution and dispensing of the countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for purpose of distributing and dispensing countermeasures.”⁷ In other words, “the Act, as extended by the declarations, covers the administration and distribution of products meant to curb the spread of COVID-19 but does not, by its plain terms, cover more generally the care received by patients in healthcare facilities.”⁸ The Court, therefore, agreed with the plaintiffs that their claims that countermeasures that were not used⁹ did not fall within the scope of the PREP Act and “would not be preempted by the PREP Act, which is designed to protect those who employ countermeasures, not those who decline to employ them.”¹⁰

Following the Maglioli Court's decision, additional COVID-19 PREP Act removal rulings were issued in a different set of 12 cases in the United States District Court of Kansas involving similar allegations of negligence against a nursing home facility for

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COVID-19-related injuries.¹¹ The rulings in these cases are legally identical to one another and the Court reached similar conclusions as the Maglioli Court, remanding the cases upon finding the PREP Act inapplicable because it applies to action, not inaction, as alleged in the plaintiffs' complaints.

Comment

These initial decisions certainly cast doubt on the ability of nursing homes, and perhaps healthcare providers/facilities more broadly, to obtain PREP Act immunity for state-law claims for alleged COVID-19-related failures to act or, at the very least, to remove these claims to federal court. The courts' refusals to apply the PREP Act to negligent omissions are, however, not particularly surprising given the language of the Declaration and the separate

state-enacted executive orders (as recognized by the Maglioli Court) conferring broader civil liability immunity upon healthcare workers for COVID-19-related claims, as discussed earlier¹². Though the law in this area is still far from developed, these removal decisions may set the stage for other courts to adopt a similar line of reasoning going forward in this context. As separate state-enacted immunity provisions vary widely from one state to the next (if they exist at all), healthcare facilities and practitioners should take care to review any such separately-applicable protections and should not count on the PREP Act as a mechanism for removal or likely source of immunity, especially when it comes to conduct not directly related to the use or administration of covered countermeasures.

¹ The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) then further expanded this definition by including OSHA-approved respiratory protective devices (i.e., face masks) as a "covered countermeasure."

² Specifically, the plaintiffs claimed the nursing home failed to monitor outside visitors, food preparation, employees and other residents and also failed to implement proper protocols and procedures, such as providing personal protective equipment, including face masks, to certain staff members.

³ Maglioli, 2020 WL 4671091, at *2. The other basis was federal officer jurisdiction under 28 U.S.C. §1442(a)(1), though it is the first ground that is the focus of this piece. Id.

⁴ Id. (citing 42 U.S.C. § 247d-6d(a)(1)).

⁵ Id. at *7.

⁶ As noted elsewhere, this overly-narrow interpretation that the preemption clause "at most" restrict a state from passing a conflicting law is incorrect, as it is already well-established that an express preemption provision preempting state "requirements" includes preemption of conflicting state tort

law/common law duties, not just legislation. Riegel v. Medtronic, Inc., 552 U.S. 312, 324 (2008) (citations omitted); see also <https://www.druganddeviceblog.com/2020/08/first-prep-act-immunity-decision-that-weve-seen.html>.

⁷ Id. at *6 (quoting HHS "supplemental information").

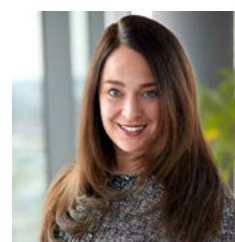
⁸ The Court also noted that "acts such as social distancing, quarantining, lockdowns, and [the like] . . . are not covered 'countermeasures' under the PREP Act at all." Id. at *10 (citation and quotation marks omitted).

⁹ Id. at *9.

¹⁰ Id. The Court reasoned that this interpretation of the Act's limited scope is further supported by the fact that several states, including New Jersey, have "filled the gap" by issuing separate executive orders providing for immunity from civil liability for damages alleged to have been sustained as a result of an act or omission undertaken in good faith in the treatment of COVID-19.

¹¹ Id. See, e.g., Lutz v. Big Blue Healthcare, Inc., 2020 WL 481500, at *8 (D. Kan. Aug. 19, 2020).

¹² See supra n.10.



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Further reading

Navigating complexities in the life sciences and health care industries is no easy task. Do visit our Life Sciences and healthcare [website page](#) for more information



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Climate change: litigation and other developments

In 2014 the Member States of the European Union agreed that the EU should emit at least 40% less CO₂ by 2030. The Dutch legislator included a target of even 49% CO₂ reduction by 2030 in the Dutch Climate Act, which entered into force on 1 January 2020. Lately there have been some quite interesting developments in the Netherlands, in the area of climate change litigation, policy and legislation. We would like to highlight a few.

Urgenda State

The Urgenda Foundation (“Urgenda”) had requested the Court of The Hague, on behalf of the residents of the Netherlands who are being threatened with dangerous climate change, to order the Dutch State to reduce the greenhouse gas emissions in the Netherlands by at least 25% by 2020. Both the District Court and the Court of Appeal of The Hague ruled in favour of Urgenda and ordered that the state has to reduce emission of greenhouse gases by at least 25% by the end of 2020 compared to the level of 1990.

In its judgment dated 20 December 2019 the Supreme Court has confirmed this order issued by the Court of Appeal of The Hague. The Supreme Court ruled that on the basis of Articles 2 and 8 European Convention on Human Rights (ECHR) the Court of Appeal can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have a

severe impact on the life and well-being of the residents of the Netherlands.

Milieudefensie vs. Shell

Inspired by the Urgenda ruling of the Court of Appeal, the association Milieudefensie (“Milieudefensie”), together with six other NGOs and 17,379 individuals, has filed a writ of summons against Shell on 5 April 2019, claiming that Shell has a duty of care based on article 6:162 Dutch Civil Code (in conjunction with Articles 2 and 8 ECHR) to – briefly put – reduce its CO₂ emissions with 45% by 2030, by 72% by 2040 and by 100% by 2050 (all compared to 2010). Shell responded to the writ of summons in November 2019. There will be four hearing days in December this year and the judgement is already expected in 2021.

ACM Guidelines

On 9 June 2020 the Dutch Authority for Consumers and Markets (the “ACM”) has published its Draft Guidelines on Sustainability Agreements – Opportunities within competition law (the “Guidelines”). The ACM is the first competition authority in the EU to share its formal position in this regard.

In the Guidelines the ACM expands the possibilities for cooperation between competing companies in the field of sustainability. If an agreement restricts competition but fulfils certain conditions, amongst others that the benefits (lower carbon



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emissions) outweigh the disadvantages (e.g. a price rise for users), it will be permitted.

Currently the Guidelines are open for public consultation.

Emissions Tax

From 24 April 2020 until 29 May 2020 the public consultation on the draft Dutch Industry Carbon Tax Act took place. The proposal introduces a CO₂ tax for companies with industrial installations, including greenhouse gas installations and waste incineration plants. A few industrial installations are exempted. The aim is to achieve the target set for industry as

agreed in the Climate Act, but to affect the level playing field with neighbouring countries as little as possible. How high the tax will be has not yet been decided.

Greenpeace vs State?

More climate change litigation in the Netherlands seems to be on the horizon. In September 2020 Greenpeace Nederland sent a letter to the Dutch Finance Minister demanding that additional environmental conditions are added to the KLM bailout terms. Greenpeace threatens to initiate legal proceedings if it has not received a response confirming the additional conditions by 1 October 2020.



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Outlook

Climate change litigation, regulation and policy are likely to increase in the near future, especially given that a significantly higher European greenhouse gas emissions reduction target seems imminent. Of course all this creates additional risks and regulatory pressure for companies.

However, climate change also creates business opportunities and accelerates innovation, as is shown for example by the large increase of eco-friendly products and services, renewable energy related businesses as well as companies creating competitive advantages by improving their energy efficiency.

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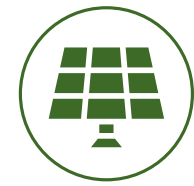
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The growth of climate change litigation

Across the world, investors, campaigners and representative groups of individuals, adversely affected by climate change, are resorting to litigation with greater frequency and success. New laws to regulate the causes of climate change combined with existing national and international legal regimes are emboldening complainants to sue governments and corporations for their contributions to greenhouse gas emissions and their failures to prevent or remedy the damage done. According to the latest report by the Grantham Research Institute on Climate Change and the Environment, 1,587 cases of climate litigation have been recorded up to May 2020, with the majority being brought in the United States, Australia, the United Kingdom and the European Union.

A striking development over the last year is the landmark decision of the Dutch Supreme Court in the case of Urgenda Foundation v The State of the Netherlands in December 2019. The Supreme Court upheld the lower courts' decision, ruling that the Dutch government had contravened Articles 2 and 8 of the ECHR (the rights to life and to private and family life) by failing to provide a more ambitious greenhouse gas reduction target for the end of 2020.

Litigation has different drivers in and across jurisdictions and sectors. Much of the climate-related litigation to date has been “strategic litigation” aimed at accelerating changes in behaviour consistent with achieving the

Paris goals of limiting global warming to well below 2°C and pursuing efforts to limit it to 1.5°C. New types of litigation are being driven by changes in legal regimes and the appetite of courts to countenance claims for damages for loss caused by climate change. Another important driver is the ongoing advances in “climate attribution science”, the scientific and technological means to attribute climate change related damage to the actions or inactions of identifiable entities. The methodology to assess the individual contribution of companies to greenhouse gases in the atmosphere is currently being assessed in cases such as Saúl versus RWE, and, if successful, will be used to claim mitigation and adaptation costs from these companies.

Beyond claims against commercial organisations under established environmental laws, an increasingly diverse range of actions is being brought against corporations for their contributions to climate change and their sustainability practices. Energy and infrastructure companies are already vulnerable to claims alleging non-compliance with planning controls or sustainable development obligations, but it is increasingly likely that developments generating significant carbon and greenhouse gas emissions will be challenged as inconsistent with the goals of the Paris Agreement and any national provisions which implement it.[1] Corporations also face claims for misleading statements or “greenwashing” in relation to their advertising

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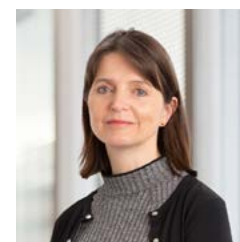
campaigns and public communications, including those with shareholders. A company is vulnerable if it gives a false impression of the scale of its sustainability measures or otherwise misrepresents the business's climate change-based risks.

Whilst litigation against governments on the basis of constitutional and human rights law is an increasingly common form of climate litigation, corporations and their sustainability and climate-related practices are also under growing scrutiny. Beyond the specific liability associated with particular proceedings, including nuisance and fraud cases, climate change actions also pose a significant reputational risk to corporations whose practices and promotional materials will come under the microscope of both the court and the public eye. In addition, at COP25, the Commission on Human Rights of the Philippines announced the possibility that corporations could be found legally and morally liable for human rights harms resulting from climate change.

The volume of litigation is expected to continue to rise in and across many jurisdictions. The creation of an international crime of ecocide – the loss, damage or destruction of ecosystems

of a given territory, such that peaceful enjoyment by the inhabitants has been or will be severely diminished – also looks increasingly likely and the French President has given his support to a referendum to introduce a crime of ecocide into French law.

The global changes in working practice as a consequence of COVID-19 lockdown may become a significant factor in reviewing litigation risks. Many businesses have been able to function well in the complete absence of business travel and with their employees working remotely. There are unanswered questions about the unseen sources of energy use and associated emissions from these working practices, such as those associated with greater use of internet and mobile digital resources, but research so far shows highly significant drops in emissions during lockdown and it will be difficult for companies to justify returning to carbon intensive ways of working in the future. The COVID-19 pandemic has caused enormous disruption which may delay the filing or progress of some claims, but may also provide motivation for new grounds, such as those linking aspects of the health emergency to climate change and legal challenges to financial support packages for carbon intensive industry sectors.



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Germany adopts laws transposing the Consumer Protection Cooperation Regulation

Regulation (EC) 2006/2004 established a network of public enforcement authorities for cross-border cooperation to pursue consumer law infringements by traders in the EU and EEA. The competent authority acts on behalf of partner authorities from other EU and EEA countries, or conversely, requests legal protection from these authorities for consumers of its nationality. Each member state designated one or more competent authorities to pursue cross-border infringements of these laws. Furthermore, the Regulation created a so-called single liaison office in each participating state to enhance coordination among the member states. In Germany, the Federal Ministry of Justice and Consumer Protection (“*Bundesministerium der Justiz und für Verbraucherschutz*,” or “*BMJV*”) holds this position since 2013.

Due to a relatively high number of newly introduced EU consumer laws and perceived shortcomings of Regulation (EC) 2006/2004, the European Parliament and Council enacted Regulation (EU) 2017/2394 (so-called CPC-Regulation) to improve the cooperation and enforcement of consumer laws in an area where consumers as individuals tend to face difficulties in enforcement. The CPC-Regulation upholds the general system established by the preceding legislation, but

expands powers of the competent authorities and extends the scope of application to comprise a larger number of Union laws.

For transposing the CPC-Regulation, the German legislator adopted the EU Consumer Protection Implementation Act (“*EU-Verbraucherschutzdurchführungsgesetz*” or “*EU-VSchDG*”) which came into force on 30 June 2020, thereby amending the previously applicable law. The legislation aims at strengthening the EU internal market and increasing consumer confidence in the functioning of the competent authorities. It also focuses on preventing distortion of competition at the expense of law-abiding traders. The *EU-VSchDG* entails detailed rules to clarify which authority may investigate and pursue the violation of which consumer laws. On the other side, Germany has decided not to enact further powers beyond the minimum competences as established by the CPC-Regulation. Rather, it adopted some limitations on the minimum powers to align it with rules and principles of the German Criminal Procedure Code (“*Strafprozessordnung*” or “*StPO*”), the Law on Administrative Offences (“*Gesetz über Ordnungswidrigkeiten*” or “*OWiG*”) and with German administrative law. This article provides a high-level overview of the *EU-VSchDG*.

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Minimum powers stipulated by the regulation

The *EU-VSchDG* did not adopt investigation or enforcement powers beyond those established by the CPC-Regulation.

The minimum enforcement powers cover inter alia:

- the power to adopt interim measures to avoid the risk of serious harm to the collective interests of consumers.
- the power to seek, to obtain or to accept commitments from the trader responsible for the infringement covered by CPC-Regulation to cease that infringement. The *EU-VSchDG* concretizes this power to cover the possibility to oblige the trader to fulfil such a commitment.
- the power to inform consumers suffering from an infringement covered by CPC-Regulation about how to seek compensation under national law.
- the power to order in writing and bring about the cessation of infringements covered by CPC-Regulation by the trader.
- where no other effective means are available to bring about the cessation or the prohibition of the infringement covered by CPC-Regulation and in order to avoid the risk of serious harm to the collective interests of consumers:
 - the power to remove content or to restrict access to an online interface or to order the explicit display of a warning to consumers when they access an online interface;

- the power to order a hosting service provider to remove, disable or restrict access to an online interface; or
- where appropriate, the power to order domain registries or registrars to delete a fully qualified domain name and to allow the competent authority concerned to register it.

- the power to impose penalties, such as fines or periodic penalty payments.
- the power to initiate sweeps, that are concerted investigations of consumer markets mainly coordinated by the EU Commission through simultaneous coordinated control actions to check compliance with EU consumer laws.

Furthermore, where there is a reasonable suspicion of a widespread infringement of a law covered by CPC-Regulation, the competent authority shall take part in a coordinated action based on an agreement between all authorities involved.

The measures taken shall be proportionate and comply with national and EU law, including applicable procedural safeguards and with the principles of the Charter of Fundamental Rights of the European Union.

For an effective use of enforcement powers, the availability of enough information about infringements inducing enforcement measures is crucial. Therefore, the CPC-Regulation furthermore provides for a comprehensive information gathering and data exchange framework. Also, the Regulation fosters the exchange of information and cooperation between the competent authorities.

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Lastly, it enumerated minimum investigation powers covering inter alia:

- the power of access to or to require any public authority, body or agency within their Member State or any natural person or legal person to provide any relevant documents, data or information related to an infringement covered by the CPC-Regulation.
- the power to carry out necessary on-site inspections, including the power to enter any premises, and examine or seize information, data or documents found thereby.
- the power to purchase goods or services as test purchases in order to detect infringements covered by the CPC-Regulation.

Implementation of these measures in Germany

the *EU-VSchDG* fosters the gathering of information regarding potential violations of consumer law by stipulating reporting duties regarding CPC cases and by conferring power upon the Federal Ministry of Justice and Consumer Protection to designate different associations that may issue alerts regarding alleged infringements of EU consumer laws. Therefore, it becomes more likely that violations of laws covered by the CPC-Regulation are detected and brought to the attention of the responsible national authority.

Furthermore, the *EU-VSchDG* limits the enforcement powers parallel to similar enforcement measures in other fields of law. Thus, the general principles of administrative procedure and administrative offences that limit measures infringing individual rights apply. Moreover, the *EU-VSchDG* stipulates

further rights of a person under investigation and restrictions to the designated powers that parallel those in the German Criminal Procedure Code and the Law on Administrative Offences. This includes a trader's or person's right not to be compelled to incriminate oneself in case disclosure could lead to a criminal prosecution or the initiating of proceedings according to the Law on Administrative Offences. Besides, traders may refuse searches of business premises and persons and seizures of information, documents or data storage devices unless ordered by courts, except in cases of imminent danger. The same applies for searches of residential property, albeit no exception in cases of imminent danger exists. Additionally, if a trader is suspected of criminal conduct, it does not have to accept any measures that do not comply with the requirements of the Criminal Procedure Code.

Furthermore, the *EU-VSchDG* allocates competence to pursue infringements of the CPC-Regulation or the act to the Federal Office of Justice ("*Bundesamt für Justiz*" or "*BfJ*"), unless the law provides otherwise. To meet these extensive statutory tasks, a new department will be established at the BfJ.

Exceptions for the competent authority exist if existing public law obligations are enforced by other authorities. For example, if a trader violates consumer law under Art. 20 of the Directive 2006/123/EC on services in the internal market, the German Federal Network Agency is responsible for investigation and enforcement measures, as the implementation of the provision falls within the responsibility of the Federal Ministry of Economics and Energy.

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While this exception ensures that similar legal questions are dealt with by the same expert authority, it can also lead to a shared competence if several infringements are complained of. To ensure a smooth collaboration and to enhance clarity for traders as to the responsible authority, the single liaison office decides which authority is competent to enforce consumer law in the case at hand. The other agency has only a supporting role in this case.

Due to the complex rules especially regarding responsibility, it is possible that authorities misinterpret their powers and thus issue measures that are unlawful on procedural or substantive grounds. Therefore, seeking legal advice may have good prospects to avoid enforcement measures against a trader.

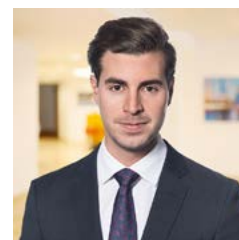
Outlook

The CPC-Regulation and the *EU-VSchDG* provide for an array of investigation and enforcement measures that could play a role in future cross-border cases.

However, both the CPC-Regulation and the *EU-VSchDG* leave legislative and regulatory gaps to be filled by court interpretation and by

guidelines of the Federal Ministry of Justice and Consumer Protection as the competent single liaison office. This is explicitly predicted by the German legislator, who refers to remaining ambiguities and difficulties of interpretation. This especially applies to the interpretation of indeterminate legal terms used to define the enforcement powers and their limits. Also, the Federal Government may issue further administrative provisions to enhance the application of the CPC-Regulation and the *EU-VSchDG*. This could become necessary to ensure a coordinated and uniform application of the law by all relevant public authorities.

The continuing developments, especially the practical implementation of the new German act, could present legal and business challenges for traders. We will continue to actively monitor the application of the law in practice as well as ongoing legislative proceedings and will be happy to co-ordinate closely with all stakeholders involved.



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Can bulky books be replaced by a simple QR code?

Almost every manufacturer is facing the issue of providing product manuals with their products on a regular basis. With the introduction of more and more innovative and digitalized products, the question of certain digital forms of product manuals becomes more prevalent.

There are multiple potential rules and guidelines under EU and national law, which on top of that may vary from country to country. Manufacturers frequently see themselves confronted with uncertainty and – consequently – potential legal implications when providing product manuals.

This article tries to shed some light into the legal provisions and guidelines and to provide potential practical solutions for manufacturers of (consumer) products. In doing so, this article analyses the respective provisions and their requirements regarding inter alia content, language and form of product manuals. It particularly addresses the question whether product manuals can be provided in a digital form. In doing so, the relevant legal provisions pertaining to product manuals and their content are outlined with particular EU law, guidelines and technical standards.

The law on product manuals is only partly harmonized under EU Law. Particularly with respect to products being sold to consumers (b2c), Directive 2001/95/EC of the European Parliament and of the Council of 3 December

2001 on general product safety ("GPSD") sets out certain requirements manufacturers must meet. Art. 5 Para. 1 of the GPSD stipulates the obligation of the manufacturer to "provide the consumer with relevant information to enable him to assess the risks arising from the product during normal or reasonably foreseeable periods of use which are not immediately apparent without appropriate warnings and to protect himself against them."

Additionally, certain product specific requirements, as for example stipulated in CE directives may also cover provisions for product manuals. For instance, the 'Low Voltage Directive' states that "manufacturers shall ensure that the electrical equipment is accompanied by instructions and safety information in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned. Such instructions and safety information, as well as any labelling, shall be clear, understandable and intelligible". As another example, the 'Machinery Directive' contains a whole chapter (1.7.4 of its Annex I) dealing with product manuals, beginning with: "All machinery must be accompanied by instructions [...]"

In addition, the Blue Guide on the implementation of EU product rules 2016 published by the EU Commission ("Blue Guide"), which generally serves as a



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reference point when interpreting relevant EU legislation, states that "whilst the safety information needs to be provided on paper, it is not required that all the set of instructions is also provided on paper but they can also be on electronic or other data storage format". Statements of the EU Commission such as this guideline are no formal law and therefore in general not legally binding. However, this guide is addressed to the EU Member States and local authorities. Courts might follow the guidelines in their decisions and refer to them in particular for interpretation of product related legal requirements.

Furthermore, DIN EN ISO 82079-1 is a (technical) standard setting out requirements for drafting user instructions and recommends taking into account the needs and accessibility of the target group when choosing media for user information. In addition, the instructions should be usable for the expected lifetime of the product.

German law

Particularly with respect to Germany, it is especially important to diligently consider the respective implementation of the GPSD into national law (Product Safety Act/ Produktsicherheitsgesetz – "ProdSG")

Art. 3 Para. 4 ProdSG states that "where specific rules have to be complied with regarding the use, addition or maintenance of a product in order to guarantee safety and health, German language instructions for its use shall be supplied with the product when making it available on the market [...]". We understand that the idea is to avoid potential safety and liability risks. Art. 3 Para. 4 ProdSG

generally applies to all products made available on the market (including non-consumer products).

Regarding consumer products, even stricter requirements may have to be met, namely Art. 6 Para. 1 Nr. 1 ProdSG. This provision requires manufacturers "to ensure that the user receives the information he needs in order to assess the risks and protect himself against the risks related to this consumer product during the usual or reasonably foreseeable period of use and where those risks are not directly recognisable without adequate information". Thus, manufacturers are basically required to generally ensure that a consumer receives the relevant information about potential hidden product hazards that may occur during the regularly expected lifespan of the product. Additionally, manufacturers are basically required to generally supply the consumer with information about these hazards. Overt hazards that may be obvious for an understandable consumer may not fall under this information obligation. Yet, informing the consumer or buyer about such hazards is regularly covered by Art. 3 Para. 4 ProdSG (see above).

What does this mean for businesses?

Traditionally, product manuals are supplied to customers on printout leaflets, brochures or even – especially in the automotive sector – books, sometimes up to 1,000 or more pages. In the wake of digitalization, replacing or at least supplementing traditional "old-school" paper product manuals, sometimes containing an excess of several hundreds of pages, with digital forms of all kinds has become of

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particular interest to manufacturers. Providing product manuals online and granting consumers/buyers access to product manual files does not only enable producers to easily provide product manuals in a variety of languages but also allows them to modify and update them on a regular basis. This raises the question of whether a digital solution complies with the relevant legislation and is therefore feasible.

The ProdSG generally requires manufacturers to inform the buyers of a product about potential safety risks. The details of which information may be considered safety relevant under the ProdSG may leave significant room for interpretation. The provisions basically do not define the specifics of safety relevant information. However, it appears clear that the extent of the relevant information to be supplied depends largely on the potential hazards and/or risks presented by a product. This makes sense as safety warnings for potentially dangerous products need to generally inform about certain risks in more detail and to a larger extent.

Regarding the language of product manuals, the ProdSG may require the safety related instructions and safety relevant warnings to be provided in German. Amongst German authorities, courts as well as legal commentators the opinion prevails that product manuals need to be provided – at least to consumers in German. Therefore, German authorities and courts may consider product manuals including safety related instructions and relevant safety warnings provided e.g. only in English in b2c transactions insufficient under German product compliance, product

safety and product liability law. In b2b transactions, however, there is significantly more room for maneuver, particularly if the intended users are definable, capable of or used to e.g. English only instructions and, potentially, agreements as to which language is used exist.

While being reasonably specific about the necessary content of product manuals, the relevant provisions in Art. 3 Para. 4 and Art. 6 Para. 1 Nr. 1 ProdSG remain largely unspecific regarding the form of the product manual. One could argue that it is possible to meet the requirements under the ProdSG by including a product manual on an electronic device that can be read by the customer/consumer. Indeed, German courts have held that such electronic product manuals might be sufficient. For instance, the LG Potsdam (Regional Court) has found an electronic product manual for a digital camera supplied on a CD-ROM sufficient under the ProdSG. The OLG Frankfurt a. M. (Higher Regional Court) has even considered a product manual supplied via email to the consumer to be sufficient.

In doing so, in the event of emails, it is generally important for sellers to ensure that a buyer actually receives the product manual via email. In addition, sellers should ensure that a buyer receives the product manual before or basically at the same time of receiving the product. Otherwise, there could be a hypothetical scenario in which the product is put into operation improperly because of a not-yet-received product manual.

This OLG Frankfurt a. M. judgement seems to open the door for replacing product manuals on paper with electronic manuals. However,



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the obligation to include the product manual in the delivery of the product still remains. And, even more noteworthy, this only seems to be feasible with respect to buyers who can easily access and deal with product manuals provided in a digital form. With regard to products that require a basic understanding of modern (consumer) electronics (such as smartphones, digital cameras, etc.), there are promising arguments that these buyers can be expected to be able to access and get along with digital product manuals. For products particularly aimed at special target audiences, e.g. elderly people, those arguments might of course be harder to make.

Generally, however, from a strictly legislative point of view, there is no reason for a consumer-friendly interpretation of the law. Consumer protection plays an important role in several fields of the law, in particular when it is harmonized under EU Law. However generally, (German) product safety law shall primarily establish uniform market entry requirements considering the interests of all market players (not just consumers). For example, consumer protection is merely one aspect of the ProdSG and generally only relevant with regard to specific provisions (e.g. Art. 6 ProdSG).

In general, it seems to be reasonable to differentiate between different types of products, e.g. (1) rather digital and modern products such as smartphones, tablets, etc. and (2) rather non-digital traditional products.

With respect to type (2), it is – at least for now – still rather advisable to sell products with a tradition paper manual.

Regarding type (1), there are already good arguments that certain digital manual options are compliant. Of course, depending on the specific product and its potential product safety risks, it can – at least for now – still be advisable to (also) provide certain safety-relevant information in traditional paper form.

Comment

Depending on the product, there are convincing arguments for a potential digital approach with respect to product manuals. This is supported by a certain tendency in case law – specifically in Germany – and one can probably expect more supportive case law to come in this area. Also, in recent years more and more digitalized/IOT products have been developed and brought to the market. This tendency opens new possibilities for manufacturers and therefore new/other forms of digital product manuals might arise. Generally speaking, there are still a few (legal) barriers left before a simple QR code will replace printed manuals, but the tendency is clear and in some cases, manufacturers may already wave their goodbyes to manuals in solely printed form.

Besides, one should keep in mind that digital product manuals might be in the interest of users as well. Digital solutions may offer contemporary, video-based, interactive, permanently retrievable, easily updateable and modifiable product manuals and therefore may result in a "win-win situation" for all parties involved.

Finally, based on our experience, a potential coordination with market surveillance authorities can also help reduce risks. As



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long as the law doesn't provide a specific answer, this might be a practical approach for manufacturers in order to obtain some degree of legal certainty. In doing so, we have

successfully helped manufacturers introducing innovative new forms of (digital) product manuals including obtaining prior approval from the authorities.



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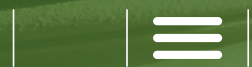
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About International Products Law Review

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 10 years, this unique publication featured hundreds of articles, from authors across our network, covering issues in Europe and, increasingly, further afield. Reflecting the growing globalization 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. Our International Products Law Review continues to be the only regular publication dedicated to reporting on global developments in product litigation and product regulation. It is distributed worldwide to our clients and others interested in international product issues.

Get in touch with our leading Global Products Law practice for more information. You can also keep up with news from our Global Products Law team by signing up for our quarterly publication, International Products Law Review. Please contact **Meredith Merville** to be included in our global mailing list.

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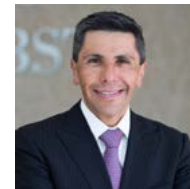


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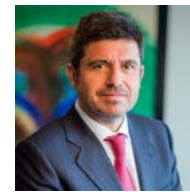
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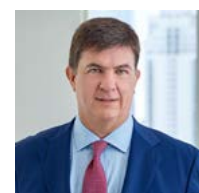
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