MASON HAYES & CURRAN

Mid-Year Product & Consumer Protection Review

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Introduction

Welcome to Mason Hayes & Curran LLP's Product & Consumer Protection Mid-Year Review 2021.

In the six months since the publication of our 2020 Annual Review, the EU product and consumer protection law landscape continues to evolve in what is now a highly regulated sector. Significantly, we have seen the coming into full effect of the Medical Device Regulation (MDR), the coming into full effect of the EU's new Market Surveillance Regulation (MSR) and an increased focus on the regulation of artificial intelligence (AI). We review key developments so far in 2021 and look ahead to future reform.

In this Review, we will consider key issues like:

- Landmark reform for Irish consumer law under the Consumer Rights Bill 2021
- The European Commission's proposal for a Regulation on General Product Safety
- Greenwashing
- Collective Redress
- The European Commission's proposals on energy labelling and ecodesign measures for mobile phones and tablets

It is important that those in the product and consumer sectors familiarise themselves with the upcoming and recent legislation to ensure compliance.

We understand the impact for businesses where there is a failure to comply with legislation, both from a legal and reputational perspective.

Our experienced team is dedicated to providing pragmatic and clear advice while robustly defending our clients' interests. We devise practical, commercially-focused solutions to help businesses adapt to the ever-changing consumer and product regulatory landscape.

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Michaela is a Regulatory Partner who leads the Products practice. She advises clients in the pharmaceutical, healthcare, medical device, digital health, cosmetic, video game, software and general consumer product sectors on various regulatory compliance matters. She frequently advises clients on the applicable regulatory framework, regulatory approval, labelling, packaging, traceability, safety and liability issues. Michaela also represents manufacturers in product liability claims and enforcement action by regulators.

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Contents

A New Products Landscape – the New EU General Products Safety Regulation

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After years of discussion, the EU has published its new draft Regulation on general product safety (GPSR). The GPSR seeks to address deficiencies identified in the current regulatory framework governing the safety of non-food consumer products, as part of the European Commission's evaluation of the General Product Safety Directive 2001/95/EC (GPSD). Issues were identified in relation to traceability, market surveillance and product recalls, as well as the increasing digitalisation of retail and connectivity of electrical and electronic consumer products.

In particular, the GPSR's new definition of a 'product' to include interconnectivity reflects the profound shift in the scope of products now available to consumers, compared to when the GPSD came into effect almost twenty years ago. The GPSR provides a new regulatory framework that is consistent with more recent EU legislative and policy goals, such as the EU Circular Economy Action Plan, the EU Digital Services Act, the EU Chemicals Strategy for Sustainability and its recent proposal for an Artificial Intelligence Act. Additionally, the GPSR will also repeal the current EU Directive on food-imitating products (Directive 87/357/EEC) and integrate its provisions so that they will be enforced in a more harmonised way by the Member States.

Application & scope

The GPSR is proposed to apply to all products defined in Article 3(1) as being *'...any item, interconnected or not to other items, supplied or made available, whether for consideration or not, in the course of a commercial activity including in the context of providing a service – which is intended for consumers or can, under reasonably foreseeable conditions, be used by consumers even if not intended for them'*. The GPSR is not proposed to apply to products that are regulated by separate EU legislation, such as medical devices, medicines and food. This definition of 'product' is inclusive of second-hand, refurbished, reused and recycled products. The recitals to the GPSR also make clear that specific cybersecurity risks presented by interconnected products should be dealt with in separate, sectoral legislation.

Distance sales

The GPSR proposes to introduce a new and broad legal definition of 'online marketplace' to reflect the digitalisation of the retail sector, which will mean *'...a provider of an intermediary service using software, including a website, part of a website or an application, operated by or on behalf of a trader, which allows consumers to conclude distance contracts with other traders or consumers for the sale of products covered by [GPSR]'*. Similarly, the GPSR explicitly addresses distance sales separately in Article 4. This is in contrast to the inclusion of online and electronic selling within the scope of recital 7 in the GPSD.

In order to determine whether the GPSR will apply to a particular online transaction, economic operators should take non-exhaustive criteria into account on:

- The use of an official language or currency of the Member States
- The use of a domain name registered in one of the Member States
- The geographical areas to which the products can be dispatched

Criteria for assessing product safety

On the issue of safety, where a product conforms to European standards, the GPSR offers a presumption of conformity with the general safety requirements or, in the absence of such standards, to health and safety requirements prescribed by Member State law. Article 6(3) of the GPSR, however, makes clear that such conformity will not prevent market surveillance authorities from taking action where a product is considered dangerous. Where the presumption of conformity does not apply, the determination of whether or not a product is safe involves the assessment of nine detailed criteria:

- The characteristics of the product, including its design, technical features, composition, packaging, instructions for assembly and installation and maintenance (where applicable)
- Its effect on other products, where reasonably foreseeable that it will be used with them
- The effect that other products might have on the product
- The presentation of the product, its labelling, any warnings and instructions for its safe use and disposal, and any other indication or information
- The categories of consumers at risk when using the product, particularly vulnerable consumers
- The appearance of the product and in particular, where a product, although not foodstuff, resembles foodstuff and is likely to be confused for food
- The fact that, although not designed or intended for use by children, the product resembles an object commonly recognised as appealing to or intended for use by children
- The cybersecurity features necessary to protect the product against external influences, which might impact its safety
- The evolving, learning and predictive functionalities of a product

The GPSR introduces new criteria for assessing product safety arising from advances in electrical and electronic products. It also proposes to apply stricter traceability requirements, to be adopted by a separate delegated act, for products that are likely to pose a serious risk to people's health and safety.

General obligations of economic operators

Economic operators are subject to general obligations under the GPSR to ensure the safety of products. Notably, the GPSR proposes the introduction of a new requirement on substantial modifications, whereby responsibility for the safety of a product will lie with the person making the modification. The GPSR also extends the concept of an EU-based 'responsible person', as seen in other EU legislation, to non-harmonised products. This aims to address direct imports from third countries.

Safety gate notification system

The GPSR lifts and adapts sections of the MSR to create a single surveillance regime for both harmonised and non-harmonised products. Another significant development in the proposed new legislation is the rebranding of the RAPEX product safety notification system to 'Safety Gate'. Although the structure of the notification system is unchanged, Member States will have two working days to notify corrective measures via Safety Gate, whereas the obligation to notify such measures via RAPEX fell due 'immediately'. Consumers will also be able to review warnings and recall information issued by economic operators on the Safety Gate system.

Voluntary arbitration mechanism

The GPSR also introduces a new voluntary arbitration mechanism between Member States. Under this mechanism, the European Commission can make a decision on the level of risk presented by a product where there are diverging risk assessments.

Conclusion

The GPSR represents a new era in product safety law. This is not only in terms of the broader scope of products subject to regulation, but also that retail is no longer confined to bricks and mortar, or even distance selling, but has expanded to include a global online consumer experience. Although many of its requirements are similar to those under the GPSD, the new legislation contains enhanced and detailed requirements. It is recommended that companies identify their obligations under the proposed legislation well in advance of its application.

Home Fitness Products – Making Sense of the Regulatory Risks Involved

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The home fitness market is booming with revenues estimated to exceed €10 billion in 2021. The global impact of the COVID-19 pandemic has resulted in a huge spike in people opting to exercise in their homes and has given many non-fitness enthusiasts the opportunity to prioritise their health and fitness. Innovative technologies and associated apps such as smart treadmills and spinning bikes that monitor heart rate and smart dumbbells that monitor arm movement have proven very popular fitness tools but come with new legal challenges. We discuss some of the regulatory issues surrounding home-fitness products and the technologies they utilise.

Safety requirements

Home fitness products cannot be placed on the market if they are not considered 'safe' according to EU and Irish product safety rules. Under the General Product Safety Directive (GPSD), for a product to be safe it must not, under normal or reasonably foreseeable conditions of use, present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons. Manufacturers should be aware of their potential obligations and liabilities under the product safety legislative framework.

Depending on the product type, this could also extend across product specific Directives such as, for example, Directive 2014/53/EU (Radio Equipment Directive), Directive 2014/35/EU (Low Voltage Directive) and Directive 2014/30/EU (Electromagnetic Compatibility (EMC) Directive).

In this context, it must be noted that the European Commission has put forward its proposal for a new General Product Safety Regulation (GPSR) which would substantially amend and replace the current GPSD. While software is not explicitly included within the definition of a 'product' under the new text, the proposed Regulation would expand the aspects for assessing whether a product is safe to include protection against cyber-security risks. In addition, the definition of 'product' under the proposed regulation expressly includes reference to items which are interconnected to other items.

Adequate warnings

Under the GPSD, when determining whether a product is safe, warnings and instructions for its use are considered. The fact that home fitness products are, by their nature, used in the home rather than a designated place of exercise or gym, comes with the risk of unintended users such as children accessing them and injuring themselves.

As such, it is vital that manufacturers include warnings on home fitness products to satisfy their legislative obligations, particularly around who the products are to be used by, where they ought to be used and how. If a manufacturer knows, or has reason to believe, that their home fitness products are being used for purposes other than their intended use, they will still have obligations and duties to users, including appropriate disclaimers and warnings.

Is the product a medical device under the Medical Device Regulation (MDR)?

Critical to any consideration of the regulatory risks posed by home fitness products is whether such products could be medical devices for the purposes of the MDR. Products, including software, which are intended to be used for a variety of *'specific medical purposes'* including diagnosing, preventing, monitoring, predicting, treating or alleviating a medical condition are captured by the definition of medical device under the MDR. Home fitness products classified as medical devices under the Regulation are subject to strict obligations. These obligations are determined by a risk-assessment of the device, including clinical investigations, conformity assessments by notified bodies, CE marking and post-market surveillance. Placing a product on the EU market that does not meet these requirements can result in regulatory enforcement action, including fines or enforced recall of the product from the market.

The way that a product is presented to potential users (ie. particular health claims made) can also qualify the product as a medical device under the MDR. As such, manufacturers and developers should carefully scrutinise marketing and promotional material to ensure that any claims made about the product do not create the impression that it is intended to be used for one of the specific medical purposes provided for in the definition of a medical device. Such claims could inadvertently bring the product within the scope of the MDR.

Data Privacy considerations

Home fitness technologies can collect significant amounts of data about their users. As such, GDPR compliance obligations are a vital consideration for manufacturers of these products. Issues to consider include:

- Being transparent with users and providing information about the data being collected and generated from their use of the technology, and how that data will be used. This information should be easily accessible to users and easy to understand. Providing sufficient information to users regarding their privacy can be challenging, particularly on small-screen devices. Use of easily accessible online privacy notices and appropriate linking and layering of full privacy policies should be considered by manufacturers of such devices when providing this information.
- Understanding whether they are collecting 'health data', as defined under the GDPR. As health (or genetic or biometric) data is particularly sensitive, the GDPR designates it as a 'special category of personal data' that must be given additional protections. This often means a manufacturer needs to obtain a user's explicit consent before using it. Answering this question will depend on the picture the data paints about the user's health. Simple step count data likely won't qualify as health data but data on step count, diet, heart rate and blood pressure combined might. Manufacturers need to take extra precautions when processing this category of data.
- Ensuring appropriate security measures are in place to protect the data and ensuring the technology has been developed in accordance with the GDPR's rules on privacy-by-design and default. These rules mean that privacy cannot be an 'add-on' consideration at the end of the product development process but something that needs to be considered from the outset.

Use of Artificial Intelligence

Many home fitness products also now incorporate AI into their design. The complex characteristics of these technologies is not explicitly dealt with under existing legislation, which presents challenges for product safety. This has prompted the European Commission to publish legislative proposals of which providers, users, importers and distributors of AI should take note. For instance, the European Commission's GPSR proposal will expand the aspects for assessing whether a product is safe under the GPSD to include the evolving, learning and predictive functionalities of the product.

In addition, a new AI specific regulation has been proposed by the European Commission. This regulation will introduce strict requirements for AI systems classified as 'high-risk' before they can be put on the EU market. This includes adequate risk assessment and mitigation systems, the use of high-quality data sets to minimise risks and discriminatory outcomes, and logging of activity to ensure traceability of results. AI systems classified as limited risk such as chatbots will have less onerous transparency obligations providing that users must be able to make an informed decision on whether they wish to interact with these types of systems. Lastly, AI systems classified as minimal risk, which pose only minimal or no risk for citizens' rights or safety (most AI systems according to the European Commission), will not be subject to any new obligations.

Conclusion

Home fitness products present many regulatory challenges and risks for their manufacturers, particularly when innovative new technologies are involved. Manufacturers must ensure that the home fitness products they place on the EU market are safe and accompanied by adequate warnings.

Careful consideration should be given as regards the intended use of these products as this could trigger onerous MDR obligations and sanctions for non-compliance could follow. Manufacturers of home fitness products which collect data from their users should be mindful of their GDPR obligations, while those that utilise AI should pay close attention to legislative developments in this space.

What's in Store for 'Greenwashing' Products?

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What is greenwashing?

'Greenwashing' is giving a false impression or providing misleading information about how a company's products are more environmentally sound than they truly are. Companies apply these greenwashing techniques to promote their products to appeal to the environmentally conscious consumer. This may involve the use of vague and general statements like 'eco-friendly', 'sustainable', or 'green' when marketing their product to consumers.

Ryanair came under fire last year when the UK's Advertising Standard Authority criticised it for using outdated information by claiming it was the UK's lowest emission airline while failing to include many rival airlines in its comparison. In 2019, H&M launched a line of clothing titled 'Conscious' which was allegedly made from 'organic' cotton and recycled polyester. H&M soon received media criticism for using this as a marketing ploy to make the clothes appear more environmentally friendly than they actually were.

Current Irish legal landscape

The Consumer Protection Act 2007

Where greenwashing claims amount to a *'misleading commercial practice'* under the Consumer Protection Act 2007, they are prohibited in Ireland. A misleading commercial practice or advertising includes false, misleading or deceptive information that is likely to cause the average consumer to purchase goods or services that they would not otherwise. A marketing communication can also be considered misleading if important information about the product is omitted, and that omission misleads a consumer regarding the essential characteristics of the product.

The Advertising Standards Authority for Ireland (ASAI)

The ASAI is an independent self-regulatory body whose primary objective is to ensure that all commercial advertisements and promotions are legal, decent, honest, and truthful. Although the ASAI Code is a non-binding industry code, advertisers are still required to abide by it.

The ASAI Code requires that any marketing communications relating to sustainability or eco-friendly materials should be supported by robust evidence. They must not mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission, or otherwise. Therefore, any environmental claims should not be used without qualification unless advertisers can provide evidence that their products will not cause any environmental damage.

Approach elsewhere

The Competition and Markets Authority (CMA)

The UK's CMA has published draft guidance to help businesses understand and comply with their existing consumer law obligations when making environmental claims. The draft guidance sets out six principles to help businesses comply with existing consumer protection law when making sustainability claims:

- Be truthful and accurate
- Be clear and unambiguous
- Fully disclose all relevant information
- Ensure that any comparisons made are fair and meaningful
- Consider the full product life cycle
- Be sure that claims can be substantiated

The final guidance is set to be published by the end of September 2021. It is relevant for all UK businesses that make environmental claims aimed at consumers. It is also a useful reference point for Irish traders, in the absence of any more detailed CCPC rules.

The Consumer and Markets Authority (ACM)

The ACM in the Netherlands is also trailblazing with sustainability initiatives. In January 2021, it published guidelines on Sustainability Claims from a consumer protection perspective. The guidelines set out five *'rules of thumb'* for businesses to abide by when making sustainability claims:

- Set clear descriptions of the sustainability benefits
- Updating any sustainability claims
- Sustainability claims must be accurate and true
- Comparisons should also be accurate and true
- Quality claims must not be misleading

EU red card for greenwashing

The European Commission is making sustainability a top priority in its European Green Deal. The deal introduces a framework of regulations and measures targeting the environmental impact of products sold within the bloc. A new draft regulation or directive is expected to be published this year to empower consumers for *'the green transition'*. This is intended to strengthen consumer protection against practices like greenwashing. The draft will give consumers better and clearer information about the eco-credentials of products they are purchasing and will require green claims to be substantiated.

In its Circular Economy Action Plan, the European Commission recommends that companies should substantiate any green or environmental claims against a standard methodology to assess their impact on the environment.

It is also worth noting that the Unfair Commercial Practices Directive (Directive 2005/29/EC) is one of the four EU consumer protection laws that will be amended by the Enforcement and Modernisation Directive. From May 2022, consumer protection authorities will be able to impose higher-level penalties and GDPR style fines of up to 4% of annual turnover, or at least €2 million for widespread breaches of certain consumer protection laws, including misleading commercial practices, thereby increasing the importance of traders making accurate 'green' claims.

Conclusion – Key takeaways

Inaccurate, misleading, or unsubstantiated environmental claims may be in breach of current Irish and EU laws. Penalties for these practices will increase in 2022. It is time for traders to:

- Verify any green claims they are making or proposing to make for their products, services or processes
- Be aware of the requirements of the Consumer Protection Act and ASAI Code
- For more detailed guidance, look to the UK (CMA) and Netherlands (ACM) authorities' publication
- Keep an eye out for proposed EU law on greenwashing

Copyright Update: Liability for Online Platforms considered by CJEU

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In a judgment recently handed down by the Grand Chamber of the Court of Justice of the EU (CJEU), the European Court has indicated that online video sharing and social media platform YouTube should not be liable for the uploading of copyright infringing content by users.

The Court had to decide in the context of the legal position as it was at the time the alleged infringements occurred. As a result, this decision has not taken into account the position under the new copyright regime, in particular, Article 17 of Directive 2019/790 (Copyright Directive). Article 17 of the Copyright Directive considers *'online content sharing service providers'* (OCSSPs) to be, in principle, liable for uploads made illegally by users where there is a failure on behalf of the OCSSP to obtain authorisation from the rightsholder. For example, by signing up to a licencing agreement. Nevertheless, the guidance of the CJEU is still of relevance when assessing claims against online platforms who are accused of copyright infringements which have occurred prior to the implementation of the Copyright Directive. The decision is also relevant when considering the liability of online platforms that do not meet the criteria to be considered by OCSSPs under Article 17 of the Copyright Directive.

Background

This ruling relates to two cases which date back as early as 2008. The cases concerned online platform operators YouTube and Cyando. Both operators had been sued in the German Courts by copyright holders who sought an injunction for the illegal upload of their copyrighted works by users of these platforms. In the first case, a music producer sought relief against YouTube in circumstances where sound recordings and concert clips had been posted unlawfully by users of the YouTube platform. Similarly, the second case saw a publisher claiming that medical books had been uploaded unlawfully to a file hosting and sharing platform operated by Cyando.

The German Federal Court of Justice chose to refer a number of questions to the European Court in order to clarify the extent of liability which may or may not be attributed to online platforms where copyright protected works are posted online without consent by users of those platforms.

Deliberate Participation

As an initial point, the CJEU indicated that it is primarily the users, as opposed to the operator of the platform, who are responsible for carrying out *'acts of communication to the public'* for the purposes

of assessing liability for copyright infringement where content is uploaded illegally online.

Nevertheless, where the nature of any participation by the platform operator in such infringements is deliberate, this will be persuasive to a court that some liability may be attributed to the platform operator. In its consideration of this issue, the CJEU indicated that a number of factors may be examined in this regard:

- Did the platform operator fail to put in place appropriate technological measures which may be expected from a reasonably diligent operator in its situation to prevent copyright infringements on its platform?
- Does the platform provide tools to its users which are specifically intended for the sharing of illegal content on its platform?
- Does the platform operator promote the sharing of illegal content by way of adopting a financial model which encourages such activity?
- Does the platform operator participate in selecting content which is then illegally communicated to the public?
- Is the principal purpose of the platform to make copyrighted content available to the public illegally?

If the answer to any of the above questions is yes, the court is more likely to find that the platform has deliberately participated in the copyright infringement.

Factors not sufficient to amount to deliberate participation

If the platform operator is aware, in a very general manner, that content is made available illegally on its platform, or if the operator has an aim of making a profit through the operation of its platform generally, this will not be enough to conclude that the platform operator had played a deliberate role in the communication of content to the public illegally. Additionally, in accordance with the safe harbour regime under the e-Commerce Directive 2000/31/EC, online platforms have no obligation to monitor its platform generally. A platform operator will only gain 'actual knowledge' of illegal content when it is notified of that specific infringement.

Liability of YouTube and Cyando

While the decision on liability will ultimately be a matter for the consideration of the German Courts, the CJEU indicated its views on the liability of both YouTube and Cyando for the infringements in question.

The CJEU was not of the view that YouTube should be found liable in the circumstances. This is because YouTube does not participate in the posting or selection of content to be posted, which is an automated process. In addition, YouTube has technical measures in place to prevent the infringement of copyright and its Terms of Use do not permit copyright infringement.

In contrast, while copyright infringements are also prohibited on the Cyando platform and Cyando does not participate in selecting content for upload, the CJEU indicated that a significant proportion of illegal content or the encouragement of users to share such content would amount to intentional conduct and ultimately communication to the public by the operators themselves.

This decision by the CJEU is helpful in that it sheds some light on how claims against online platforms are to be assessed where these platforms are accused of copyright infringements which have occurred prior to the implementation of the Copyright Directive. In addition, the decision is informative when assessing the liability of platforms who do not meet the criteria to be considered by OCSSPs under Article 17 of the Copyright Directive.

A key takeaway in this regard is that online platforms will be held responsible when they play an active role in deliberately providing access to the copyright protected work. These platforms should not encourage illegal uploads through any financial model and the services provided through the platform should not be predominantly based on the making available of illegal uploads. Online platforms should also have reasonable measures in place, for example screening technology or bots, to prevent copyright infringement.

Revisions to EU REACH and CLP to Implement the European Green Deal

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The European Green Deal sets out the EU's ambition to be climate neutral by 2050, and to achieve zero-pollution for a toxic-free environment. To help meet its ambitions, the EU's Chemicals Strategy for Sustainability was published in October 2020. The Strategy sets out actions to better protect consumers, professional users and the environment from hazardous chemicals, and to encourage the development of safer alternatives. Such actions include a prohibition on the use of the most harmful chemicals in consumer products, unless proven essential for society, and ensuring that all chemicals are used more safely and sustainably.

Reform as part of Better Regulation Programme

To this end and as part of its Better Regulation Programme, the European Commission has undertaken to evaluate and reform the EU's main legislative framework on chemicals. In particular, the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation 1907/2006 (REACH) and Regulation 1272/2008 on the Classification, Labelling and Packaging of chemical substances and mixtures (CLP). The options for revision of REACH and CLP are currently under review following recent impact assessments by the European Commission.

Proposed revision of REACH

On 4 May 2021, the European Commission published and sought feedback on its roadmap for a proposed amendment to REACH to help achieve a toxic-free environment. While the European Commission acknowledges in its impact assessment document that REACH is widely recognised as being the most advanced knowledge base for chemicals globally, it notes that there are still gaps in knowledge of many substances which need to be addressed, particularly in relation to critical hazard classes. The roadmap proposes a number of options for the targeted revision of the REACH framework. These include the revision of the registration process, simplifying communication in supply chains, revising the procedural rules on dossier and substance evaluation and reforming the authorisation and restriction processes.

A key measure proposed under the roadmap is an upgrade of REACH's provisions on control and enforcement, which can vary considerably across the different EU Member States. Options considered include establishing minimum requirements for national controls and enforcement, such as stricter border controls and the possible establishment of a European Audit Capacity to audit enforcement by Member States.

Another key measure considered under the roadmap is the adoption of a Mixtures Assessment Factor (MAF) to take unintentional exposures from combined substances into account in risk calculations for individual chemicals. This issue is not currently addressed in REACH, which means that the legislation currently offers no protection from the combined effects of substances in products or in the environment.

Proposed revision of CLP

The European Commission has, in its second roadmap, also called for submissions on its proposal to amend the CLP. Some of the key measures proposed under this roadmap include:

- The introduction of new hazard classes such as endocrine disruptors
- New labelling requirements for substances not currently within the scope of the CLP
- New rules for online sales
- The clarification of obligations relating to mixtures and complex substances
- New multilingual fold-out labels or tailored labelling where needed

The roadmap also proposes the introduction of a mandate for the European Commission to request the European Chemicals Agency (ECHA), an EU agency tasked with the implementation of the EU's chemicals legislation, to develop new harmonisation classifications.

Following the conclusion of the public consultation process, the European Commission's adoption of the revision to CLP and REACH is scheduled for Q2 and Q4 of 2022 respectively.

Conclusion

The EU Chemicals Strategy for Sustainability charts a new long-term vision for EU chemicals policy and is likely to bring about significant and wide-reaching change, starting with the reform of the REACH and CLP Regulations. Its proposed reforms may also introduce changes on a more practical level.

These proposed changes include the creation of a group approach to hazardous substances to ensure that hazardous chemicals, including all CMR, endocrine disrupting and PBT/vPvB substances, are phased out of consumer products and the introduction of more flexibility in relation to labelling, with the option of multi-lingual fold-out CLP labels. However, it currently remains to be seen how the reforms proposed in both roadmaps will be implemented in the proposed amendments to the Regulations.

Top 5 EU & Irish Guidance Documents

1

Advertising Standards Authority of Ireland, Guidance Note on the Recognisability of Influencer Marketing Communications (February 2021)

2

European Commission, Guidance Document on Decorative Products, Products for Collectors and the Toy Safety Directive 2009/48/EC (April 2021)

3

European Commission, Is Your Software a Medical Device for the Purposes of the Medical Device Regulation? (March 2021)

4

European Commission resolutions on the regulation of artificial intelligence (April 2021):

- Communication on Fostering a European Approach to Artificial Intelligence
- Coordinated Plan with Member States: 2021 update
- Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)

5

European Chemicals Agency, Guidance on How to Update Information in the SCIP (Substances of Concern In Products) Database (May 2021)

Collective Redress: EU Directive on Representative Actions

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A recent industry study reported that the number of class actions filed across Europe rose by over 120% between 2018 and 2020. Consumer and data protection class actions featured heavily in the increased number of claims. As a common law jurisdiction, and now the only one left in the EU/EEA, Ireland has always been in a good place to have your dispute. One area where Ireland has lagged behind other EU jurisdictions is in the area of class actions, and in particular collective consumer redress. That historic position is about to change.

EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (Directive on Representative Actions) was published on 4 December 2020. Ireland and the other Member States are required to adopt implementing measures by 25 December 2022 and the measures will apply from 25 June 2023.

Once it comes into effect, it will harmonise the regime for collective actions to be brought on behalf of EU consumers. It also aims to balance the availability of the mechanism across Member States while providing safeguards to prevent frivolous claims against traders. To distinguish the EU regime from the more litigious US class action procedure, the criteria required in the Directive to bring a redress action are relatively strict.

Qualified entities

The Directive requires each Member State to designate at least one 'qualified entity' to bring actions on behalf of consumers. A list of qualified entities will be maintained by the European Commission. Qualified entities, such as consumer organisations, will be empowered to bring collective action cases on behalf of consumers for breaches of a wide range of EU Directives and Regulations. Member States will have a high level of discretion in selecting the criteria that qualified entities must meet for the purpose of bringing domestic representative actions.

In order to bring a cross-border representative action, the qualified entity will have to meet certain criteria:

- Be a non-profit organisation in the area of consumer protection
- Be independent
- Have a legitimate interest in ensuring that there is compliance with the provisions of the Directive
- The CCPC is likely to be a qualified entity in Ireland

The Irish position

Ireland does not have a compensatory collective redress procedure. There are currently no comprehensive provisions in Irish court rules for tackling class claims in a consistent manner. Instead, a range of somewhat unwieldy procedural options are available to allow claims involving multiple parties to be litigated as private actions.

Once implemented, the Directive on Representative Actions will require Ireland to introduce at least one representative action procedure for injunction and redress actions which can be brought by qualified entities.

Impact on the product and consumer sector

The infringement by traders must be related to claims arising under any of the 66 European directives and regulations specified in Annex I to the Directive, along with their national implementing measures. In order to capture a number of sectors, these directives include:

- The General Product Safety Directive
- The Digital Content Directive
- The Sale of Goods Directive
- The GDPR
- The Directive on Liability for Defective Products
- Medical Devices Regulations
- EU Regulations on Medicinal Products for Human Use

Current opportunities for consumers to bring proceedings against digital service providers are limited, expensive and time-consuming with limited potential benefit in terms of compensation by the end of the process. However, once Member States have applied the measures of the Directive on Representative Actions, this is likely to greatly increase the enforcement of consumer rights across the EU.

For example, if a wearable product has safety issues under the GPSD and a large number of consumers complain to a qualified entity, it will be able to bring a collective action against the manufacturer for alleged infringements of the GPSD. In some instances, qualified entities will be able to bring a joint representative action along with consumer protection groups and NGOs from other Member States if there is an EU-wide issue.

Injunctions and consumer redress

Qualified entities will also be able to apply for injunctive relief and other redress, with injunctions potentially being granted on a preventative or prohibitive basis. In addition, qualified entities may seek redress on behalf of consumers in the form of compensation, repair, replacement, price reduction, contract termination or reimbursement. The redress awarded could vary among consumers in the group or could be the same for all consumers involved in the action. Member States will be given some flexibility as to how this will operate, and will be able to decide to either opt-in, ie. consumers actively opt-in to being represented, or to opt-out, ie. a consumer must express their desire not to be represented by a qualified entity. For cross-border actions, only the opt-in basis will be available.

Safeguards

One of the important features of the Directive on representative actions are the safeguards which were introduced in order to ensure the system does not encourage frivolous lawsuits. These include:

- **Loser pays principle:** The costs of the proceedings should be borne by the unsuccessful party.
- **Dismissal of manifestly unfounded cases:** Courts will also be willing to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings.

- **Settlement:** There is also the possibility that a claim can be settled. However, such a settlement requires the approval of the court.
- **Third party funding:** A qualified entity will be required to publicly disclose information about its sources of funding for the representative actions it brings. It is important to note that at present, third party funding in Ireland is prohibited.
- **Multiple claims by individual consumers:** Member States will be required to lay down rules preventing consumers from bringing an individual action or being involved in another collective action against the same trader for the same infringement. Furthermore, Member States must ensure that consumers do not receive compensation more than once for the same cause of action against the same trader.

What's next?

Member States are required to adopt implementing measures by 25 December 2022 and the measures will apply from 25 June 2023.

On 15 March 2021, the Department of Enterprise Trade and Employment launched a public consultation seeking submissions as to how certain aspects of the Directive should be transposed into Irish law. It is notable that in launching the initiative, the Minister for Trade Promotion, Digital and Company Regulation stated that, *'This will be a first in Irish law, as such procedures are not currently in place here. My Department and relevant stakeholders have a significant job of work to do to design the procedural mechanism for collective representative actions required by this Directive.'*

While it remains to be seen how it will be implemented in practice, businesses subject to EU regulation should begin to prepare for an inevitable increase in both domestic and cross border consumer litigation.

Selling Products Online – The New EU Market Surveillance Regulation

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The EU's Market Surveillance Regulation (MSR) came into full force on 16 July 2021. The MSR applies to products that are subject to a wide list of EU product legislation specified in Annex I, except where that legislation contains more specific, equivalent provisions regulating market surveillance and enforcement. One of the most notable aspects of the MSR is its focus on strengthening enforcement measures and ensuring consumer safety for sales of products conducted online.

Annex I includes (but is not limited to) medical devices, in-vitro diagnostic medical devices (IVDs), construction products, toys, machinery, cosmetics and electronic and electrical equipment. As noted in its recitals, the MSR is intended to 'complement and strengthen' the existing EU product legislation with an express intention to extend to online selling.

Gaps in the current system

Many stakeholders have been vocal about gaps in the current market surveillance system. These concerns include, in particular, the rapidly increasing complexity of supply chains, which can lead to difficulties identifying those responsible for EU compliance, as well as difficulties arising from online sales direct to EU consumers from outside of the EU, which can evade product conformity and import inspections.

To close this gap, the MSR attributes a compliance role to all 'economic operators' in the supply chain, including obligations to cooperate with market surveillance authorities (MSAs). It also obliges Member States to enhance the powers of their respective MSAs to ensure an effective level of market surveillance for products sold offline and online.

Obligations on economic operators

General obligations

The MSR defines an 'economic operator' broadly to mean *'the manufacturer, the authorised representative, the importer, the distributor, the fulfilment service provider or any other natural or legal person who is subject to obligations in relation to the manufacture of products, making them available on the market or putting them into service in accordance with the relevant Union harmonisation legislation'.* This definition should, therefore, be wide enough to capture all entities in the supply chain for products subject to the MSR.

All economic operators are expressly obliged under the MSR to cooperate with MSAs regarding actions that could eliminate or mitigate risks presented by products they made available on the market. In the latter regard, it is important to note that the MSR clarifies that products sold online or via distance sales are deemed to be made available on the EU market if the offer is targeted at end users in the EU. This will be the case if the relevant economic operator directs, by any means, its activities to a Member State.

In seeking to cooperate with MSAs, economic operators also need to bear in mind that the MSR requires enhanced enforcement powers for MSAs. For more information on these increased powers, see our article on these issues here.

Requirement for EU-established economic operators

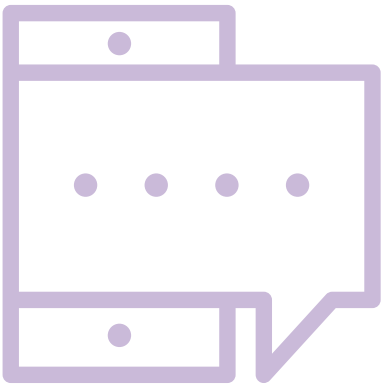
In addition to the above general obligations on all economic operators, Article 4 of the MSR prohibits 18 specific categories of products from being placed on the market unless an economic operator established in the EU is identified. These categories include, but are not limited to, construction products, PPE, toys, measuring instruments, pressure equipment and certain electrical equipment.

Notably, an 'economic operator' for the purposes of Article 4 is slightly narrower than the general definition detailed above, and only includes:

- The manufacturer
- The importer, in instances where the manufacturer is not established in the EU
- An authorised representative who has a written mandate from the manufacturer
- A fulfilment service provider, where none of the above are established in the EU. This is a person or company offering at least two of the following services commercially: warehousing, packaging, addressing and dispatching, without having ownership of the products involved. However, postal and parcel delivery companies are specifically excluded.

The relevant economic operator must ensure the availability of their technical and conformity documentation. They are also responsible for cooperating with MSAs in cases of non-compliance and informing authorities when they believe a product presents a risk. Importantly, their name and contact details must be indicated on the product or its packaging, parcel or accompanying document.

Parties, in particular those involved in selling products online, should take note of the obligations under the MSR that apply to them from 16 July 2021, and of the enhanced market surveillance powers being introduced.



Consumer Rights Bill 2021 – Landmark reform for Irish Consumer Law

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The Consumer Rights Bill

Irish laws on the sale of goods date from 1893, and rules on supply of services and consumer protection are spread across several different laws and regulations, making them complex and difficult to follow for both traders and consumers.

In May 2021, the Department of Enterprise, Trade and Employment published a draft law – a proposed Consumer Rights Bill – that will be the most substantial reform of Irish consumer contract law in over four decades. The proposed Bill will implement important new EU laws on digital content, unfair trading practices and consumer remedies. It will also update and consolidate into a single law, provisions which are currently spread over numerous acts and regulations.

The Bill, once finalised, will make consumer protection legislation easier to navigate and more aligned with rules across the EU. It will also strengthen the remedies available to consumers. It will create clearer rules for businesses but will introduce new obligations on traders selling to consumers. In addition, it will increase penalties for breaches of the laws up to 4% of turnover, or up to €2 million.

The consultation on the proposed Bill closed at the end June 2021, with the Government aiming to finalise and adopt the new legislation in Q4 2021.

What's in store?

The new Consumer Rights Bill, when it comes into effect, will implement the following EU laws:

- Digital Content Directive
- The new Sale of Goods Directive
- Enforcement and Modernisation (Omnibus) Directive, which itself amends:
  - Unfair Contract Terms Regulations
  - Unfair Commercial Practices Directive
  - Consumer Information Rights Directive
  - Price Indication Directive

In addition, the Consumer Rights Act will repeal several existing Irish pieces of Irish legislation, including:

- Parts of the Sale of Goods & Supply of Services Acts 1893 & 1980
- Parts of the Package Holidays Act 1995
- All of the Unfair Terms in Consumer Contracts Regulations

- All of the Consumer Goods and Associated Guarantees Regulations 2003
- All of the Consumer Information Rights Regulations 2013
- All of the Trading Stamps Act

and will amend:

- The Consumer Protection Act 2007
- The Sale of Goods & Supply of Services Acts 1893 & 1980

It will introduce several enhanced statutory protections for consumers, including:

- New rights for digital content contracts, for example audio, video files and computer games
- New rights for contracts for the supply of services, for example streaming services, cloud computing and social media
- Rights where the consumer does not pay a monetary price but gives personal data that the trader can commercialise
- An increased 'black list' of contract terms that are always unfair
- New enforcement powers for the Competition and Consumer Protection Commission (the CCPC) to ensure consumer rights are upheld

Additionally, it will strengthen consumer rights relating to quality, fitness for purpose and other aspects of services. Consumers will have statutory remedies where services supplied by traders do not comply with the legal requirements.

More detail on the changes required by the Digital Content Directive, Sale of Goods Directive and the Enforcement and Modernisation Directive can be found here.

The CCPC will also gain new enforcement powers in relation to traders who infringe the law, with radically increased penalties available for prosecutions of EU wide infringements. As required by the EU Enforcement and Modernisation Directive, GDPR style fines will apply to EU wide infringements of several parts of the proposed Consumer Rights Bill. These fines will be up to 4% of the trader's annual turnover in Ireland and relevant Member States, or up to €2 million.

Conclusion – Looking forward

The proposed text for the Consumer Rights Bill 2021 is still at its draft stage. However, once finalised Irish consumer law will be radically overhauled, obligations on traders will expand, and the penalties for infringements will radically increase.

Traders are advised to prepare for the introduction of this new law by considering the draft Bill, the changes that may be needed in their sales practices, and be ready to comply with the Bill as soon as adopted.

The Proposed EU AI Regulation: A 10,000 ft View

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The EU is leading the global charge to regulate AI and has now taken a significant step in realising that vision with the recent publication of its first AI Regulation. Critics claim this is a retrograde step that will see the EU fall further behind in the global race to dominate the AI sector. The EU is backing itself that consumers will affirm its strategy by ultimately demanding and only using AI products that are trustworthy and held to the standards set out in the Regulation.

The European Commission promises that this AI Regulation will make sure that Europeans can trust what AI has to offer. Proportionate and flexible rules will address the specific risks posed by AI systems and set the highest standard worldwide. The new rules will be applied directly in the same way across all Member States based on what is claimed to be a future-proof definition of AI. They follow a risk-based approach.

What will be regulated?

The new rules will be applied directly in the same way across all Member States based on what the European Commission believes to be a future-proof definition of AI based on software.

An artificial intelligence system (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.

Who is targeted?

Providers, users, importers and distributors will all be subject to the new rules. The place of establishment will not matter, however. What will matter is either the placing on the market or the putting into service or use of an AI system in the EU. A US or UK product manufacturer whose product deploys AI and who sells into the EU without an EU establishment will be subject to these rules.

Providers are defined as the product owners/ developers and they will bear the bulk of the burden under this Regulation. Importers, distributors and users will need to pay close attention to the Regulation as their obligations will be significant and will also require investment in resources and administration.

Intended use

The EU is keen that we understand that AI technology itself is not the focus of these new laws. The intended purpose of the AI is the target. This means the use for which an AI system is intended by the provider. These include the specific context and conditions of use, as specified in the information supplied by the provider in the instructions for use, promotional or sales materials and statements, as well as in the technical documentation. This design feature of the draft legislation will be both a benefit and a burden to AI providers. It will allow AI products to access the EU market provided at least one compliant intended purpose can be found. However, it will also necessarily exclude other uses, which will no doubt restrict the value of the product on the EU market by comparison to an unregulated market like the US.

Prohibited uses

AI systems considered a clear threat to the safety, livelihoods and rights of people will be banned. This includes AI systems or applications that manipulate human behaviour to circumvent users' free will (eg. toys using voice assistance encouraging dangerous behaviour of minors) and systems that allow 'social scoring' by governments.

The proposed ban on 'real-time' remote biometric identification or facial recognition systems in publicly accessible spaces for the purpose of law enforcement is garnering a lot of press, but perhaps disproportionately so. The challenges with deploying these systems in a generalised manner are already well understood under GDPR.

Risk-based approach

The next category of AI in the sliding scale of risk is those identified as high-risk, including AI technology used in:

- Critical infrastructures, eg. transport, that could put the life and health of citizens at risk
- Educational or vocational training, that may determine the access to education and professional course of someone's life, eg. scoring of exams
- Safety components of products including AI application in robot-assisted surgery
- Employment, workers management and access to self-employment, eg. CV-sorting software for recruitment procedures
- Essential private and public services including credit scoring denying citizens the opportunity to obtain a loan
- Law enforcement that may interfere with people's fundamental rights, eg. the evaluation of the reliability of evidence
- Migration, asylum and border control management, eg. verification of authenticity of travel documents
- Administration of justice and democratic processes including the application of the law to a concrete set of facts

These high-risk AI systems will be subject to strict obligations before they can be put on the market:

- Adequate risk assessment and mitigation systems
- High quality of the datasets feeding the system to minimise risks and discriminatory outcomes
- Logging of activity to ensure traceability of results
- Detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance
- Clear and adequate information to the user
- Appropriate human oversight measures to minimise risk
- High level of robustness, security and accuracy

In particular, all permitted remote biometric identification systems are considered high-risk and as such are subject to strict requirements. Their live use in publicly accessible spaces for law enforcement purposes is prohibited in principle. Narrow exceptions are strictly defined and regulated, such as where strictly necessary to search for a missing child, to prevent a specific and imminent terrorist threat or to detect, locate, identify or prosecute a perpetrator or suspect of a serious criminal offence.

These uses are subject to authorisation by a judicial or other independent body and to appropriate limits in time, geographic reach and the databases searched.

The third category of AI systems on the sliding scale of risk are those seen as limited risk, eg. chatbots. These AI systems will be subject to specific transparency obligations: When using AI systems such as chatbots, users should be aware that they are interacting with a machine so they can take an informed decision to continue or step back.

The fourth and final category are those uses of AI systems classed as minimal risk. The legal proposal allows the free use of applications such as AI-enabled video games or spam filters. The view of the EU is that the vast majority of current AI systems fall into this category. The draft Regulation does not intervene here, as these AI systems represent only minimal or no risk for citizens' rights or safety.

Compliance and governance

In terms of governance, the Commission proposes that national competent market surveillance authorities supervise the new rules. The creation of a European Artificial Intelligence Board will facilitate their implementation, as well as drive the development of standards for AI. Additionally, voluntary codes of conduct are proposed for non-high-risk AI, as well as regulatory sandboxes to facilitate responsible innovation.

It is worth noting that existing notified bodies and data privacy supervisory authorities are expected to perform conformity assessments for AI systems that are safety components of products or whose intended use is very much in their domain eg. remote biometric testing and data privacy supervisory authorities.

Measures for SMEs

Member States are mandated to provide supports for SMEs to provide guidance and respond to queries about the implementation of this Regulation.

They will also be treated differently and favourably from a costs perspective when applying for conformity assessments of high-risk AI systems.

Penalties

There is potential for infringements to give rise to maximum fines of up to €30M or, if the offender is a company, up to 6% of its total worldwide annual turnover for the preceding financial year, whichever is higher, for non-compliance with the prohibition of the artificial intelligence practices; or non-compliance of the AI system with data and data governance requirements. A sliding scale of equivalent fines (ie. €20M/4% of its total worldwide annual turnover and €10M/2% of its total worldwide annual turnover) can be levied for other lesser infringements. The European Commission stresses that its standard graduated response of dealing with infringements will apply and these significant fines will be a last resort.

Grandfathering

The Regulation will apply to high-risk AI systems that have been placed on the market or put into service before the date of application of the Regulation only if, from that date, those systems are subject to significant changes in their design or intended purpose

Next steps

The AI Regulation needs to be ratified by both the Council and the Parliament which will take time and will be subject to heavy lobbying. There is a sense in the European Commission that the big ticket items like high-risk AI and its regulation will be accepted based on a significant and positive commentary and feedback period last summer. Once ratified it is expected to have legal effect in each Member State within two years. In the meantime, those producing high risk AI systems have a lot of work to do!

Product Liability – Disclosure of Internal Reports

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Ireland, like many other countries, has specific litigation rules governing the conduct of personal injuries claims. In High Court personal injury actions, where generally the damages claimed must amount to more than €60,000, pre-trial disclosure obligations are set out in rules 45 to 51 (Part VI) of Order 39 of the Rules of the Superior Courts. This Order requires an exchange between the parties of all reports from expert witnesses intended to be called to give evidence at trial. The obligation is sweeping, and it could encompass reports or statements made by employee witnesses, removing the usual protection for such documents provided by litigation privilege. This can particularly impact manufacturers in defending personal injury claims, where an injury is attributed to an alleged defective product.

What is a report?

The disclosure rule concerns *'reports'* from expert witnesses. A report in this context is essentially any document that contains the substance of the evidence to be given by the expert witness. The Order provides that maps, drawings, photographs, graphs, charts, calculations *'or other like matter'* referred to in a report or statement must be disclosed.

Draft reports prepared by experts, updated reports and written comments on the plaintiff's expert reports have all been held to come within the definition of *'reports'* that should be disclosed.

Can you withhold disclosure on the basis of litigation privilege?

A party to proceedings can, generally speaking, refuse to disclose a relevant document which was created for the dominant purpose of actual or contemplated litigation by claiming *'litigation privilege'*. A report investigating alleged defects in a defendant's product prepared by the defendant would be a typical example of such a document. However, where the author of the report is then called as a witness in the proceedings, Order 39 requires the disclosure of that particular report and litigation privilege does not apply.

The Supreme Court confirmed that a defendant's employee could be treated as an expert for the purposes of Order 39 Part VI in the case of *Galvin v Murray*[1].

1. *[2001] 1 IR 331*

The defendant in that case argued that the engineers who were to give evidence *'were permanent employees .....and that each of them had furnished reports not as experts but as employees of the Defendant'*. The report prepared by the engineers contained comments that were unhelpful from a defence perspective and which the defendant did not wish to disclose. The Supreme Court, in a unanimous decision, held that the engineers' reports had to be disclosed.

When does the obligation to disclose reports apply?

Order 39 Part VI applies to High Court personal injury proceedings. Within one month of serving the Notice of Trial, the plaintiff must deliver a schedule listing the witnesses they propose calling and each report prepared by such expert witness. The defendant will then have seven days from receipt of the plaintiff's schedule to deliver its own schedule. Both parties then exchange expert reports.

The obligation to disclose reports continues up to the trial date, with any new or revised reports to be disclosed up to that date as and when they are prepared. If an expert witness is withdrawn, and their evidence not presented to the court, then their expert report can be removed from the schedule. Any privilege it may have had will, in effect, reattach to the report and it may not be relied upon or referred to by the other parties during the trial.

What is an expert and expert evidence?

Order 39 provides a non-exhaustive list of professionals, including actuaries, doctors, psychiatrists and scientists, who may be viewed as experts. However, it does not provide a specific definition of *'expert'* or *'expert evidence'*. The most concise interpretation as to what may be considered expert evidence was provided by the High Court in the case of *Power v Tesco Ireland Ltd*[2].

In this case, the Court held that expert evidence is *'evidence of fact or opinion given by a person who would not be competent to give such evidence unless he or she had a special skill or expertise'*.

Where an employee has special qualifications, skills or expertise which will be relied upon to give evidence, they may be considered an expert for the purpose of Order 39. For example, if an employee is to give evidence on a manufacturing system or quality control system, they may be considered an expert. Similarly, if an employee is to give evidence opining on the 'state of the art' relevant to an allegedly defective product or opining on why a product may have malfunctioned, this may also be considered expert evidence.

A report of an employee of a defendant in a personal injuries action will fall under the provisions of Order 39, Part VI where their evidence includes, even in part, expert evidence. There is an extensive obligation in personal injury actions to disclose reports, draft reports and any other written documents that contains the evidence the expert witness will give at trial. This will be of relevance in complex product liability claims, for example relating to medical devices or pharmaceuticals.

Conclusion – Moving forward

Defendants should be aware of the disclosure obligations arising from Order 39, Part VI from the earliest stages in litigation. When carrying out investigations at the commencement of litigation, the scope of any report should be focused on the plaintiff's allegations. Consideration should also be given at an early stage of litigation as to who may be required to give evidence, if the matter is to progress to trial.

2. *[2016] IESC 5*

‘Right to Repair’ and Energy Labels Proposed for Mobile Phones and Tablets

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The European Commission has launched public consultations on proposed ecodesign and energy efficiency measures for mobile phones and tablets. These consultations will inform upcoming regulations to ensure that these products become more durable and recyclable for the benefit of consumers and the environment.

Proposed reform under the Circular Electronics Initiative

The proposed regulations are part of the Circular Electronics Initiative announced in the EU’s 2020 Circular Economy Action Plan. They will require that mobile phones and tablets are not only designed for energy efficiency and recyclability, but that consumers’ ‘right to repair’ is also implemented by making device repairs more systematic and cost-efficient. The proposed legislation will build on the existing EU Energy Labelling Framework Regulation 2017/1369/EC (Energy Labelling Regulation) and Ecodesign Directive 2009/125/EC (Ecodesign Directive), which give the EU the legislative mandate to *‘regulate the environmental performance of energy-related products’*.

The aim of the public consultations is to gather feedback from stakeholders in relation to the proposed requirements. It will also get information on users’ preferences, choices and habits in relation to the purchase, use and disposal of their devices.

Ecodesign preparatory study

The European Commission has already published the final report on its preparatory study on mobile phones, smart phones and tablets. In that report, the Commission examined relevant factors including:

- Testing standards
- Eco-labels
- Existing legislation
- End-of-life systems
- Environmental impact assessment
- Life cycle cost
- Policy and design options to provide the scientific foundation for the new energy labelling
- Ecodesign requirements

The preparatory study also proposes legislative requirements applicable to mobile phones, smartphones, cordless phones and tablets from 2023. These include obligations on manufacturers, importers or authorised representatives to:

- Make prescribed spare parts available to professional repairers
- Make a list of spare parts available and explain how to order them
- Provide access to repair and maintenance, product specifications, pricing and delivery information
- Provide access to design, marking and disassembly requirements

Aims of ecodesign and energy labelling requirements

The aim is to reduce product obsolescence and ensure that durable, reparable and recyclable devices are circulating in the EU market. Another aim is to provide consumers with energy efficiency information, helping them to make more sustainable product choices.

The impact assessment documents published as part of the public consultations explain that the widespread use of phones and tablets has resulted in several problematic issues. There are increased power demands as devices become more complex. There are also resource concerns as critical raw materials used in devices, like tungsten and tantalum, are not only finite resources but are also of global concern due to their status as conflict minerals. Additionally, at their end-of-life, devices are usually left unused resulting in wasted resources when they could be reused, recycled or recovered. Consumers are replacing their smartphones every 2 to 3 years. This is done not only so that consumers can purchase the latest model, but also due to the lack of spare parts, reduced battery endurance and the limited availability of software upgrades. Similar issues apply to generic mobile phones and tablet devices.

Both the impact assessment documents and the European Commission's final report on its preparatory study outline the different policy options available to achieve the EU's objectives on energy efficient and resource efficient mobile phones and tablets. The policy options are:

- No regulatory changes, ie. business as usual
- Self-regulation, if proposed by stakeholders
- Mandatory generic and/or specific ecodesign requirements according to the Ecodesign Directive
- Energy labelling according to the Energy Labelling Regulation
- A combination of both ecodesign and energy labelling requirements

Conclusion – Next steps

Stakeholders should be aware that new regulations based on the outcome of the consultations are expected to be adopted in Q2 next year. The regulations would be directly applicable in all member states, without the need for transposition into national legislation. This will result in the uniform implementation of measures on ecodesign and energy labelling.

The EU's Circular Economy Action Plan proposes new regulatory measures for electronics to ensure that new devices are designed for energy efficiency, durability, reparability, upgradability, maintenance, reuse and recycling. The proposed regulatory measures are particularly focused on stakeholders in the ICT sector and prioritise measures for implementing consumers' right to repair.

With widespread use of mobile phones and tablets in the consumer market, the EU is seeking to keep the climate and environmental impacts of these products *'within planetary boundaries'*. This will be done by way of the proposed ecodesign and energy labelling requirements.

Given the likely significant impact of the proposed new measures on industry, it is recommended that stakeholders contribute to the discussion via the consultation pages on the Commission's website before the conclusion of the public consultation period on 23 August 2021.

Webinars & Recent Publications

Webinars

- Selling Radio Devices in Ireland – What you need to know (June 2021)
- The EU Market Surveillance Regulation – What you need to know (May 2021)
- Consumer Products in 2021 – Three Key Issues for the Year (March 2021)
- Software as a Medical Device (October 2020)
- Commercial Contracts – What's Market? (July 2020)
- The EU Regulation of Wearables – A Changing Landscape (July 2020)
- AI Regulation: The EU Approach (June 2020)
- Selling Online – Consumer Protection Overhaul (May 2020)
- Smart Contracts – Does Irish law have the IQ to recognise them? (May 2020)
- In-House Counsel Masterclass – Recent Developments in IP and AI (May 2020)

Publications

- MDR is Here: Now What? (June 2021)
- Getting the Deal Through: Digital Health 2021
- Is Your Mental Wellbeing App a Medical Device? (June 2021)
- Draft Proposal for the Regulation of Ethical AI (November 2020)
- AI Overview (October 2020)
- Product Regulatory Update: Post Market Surveillance Obligations Under the MDR (September 2020)
- Manufacturers of Class I Medical Devices: Making the Most of MDR's Transitional Provisions (September 2020)
- Article 120 of the Medical Devices Regulation – When is a Change Significant? (June 2020)
- The Role of Wearables in the Battle Against COVID-19 (May 2020)
- Getting the Deal Through: Product Recall in Ireland 2020
- Tough Cookie – New Guidance and Report from the DPC (May 2020)
- Complying with GDPR Timelines During COVID-19 (March 2020)
- Highlights of the Data Protection Commission's Annual Report for 2019 (February 2020)

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