MASON HAYES & CURRAN

Product & Consumer Protection Annual Review 2023

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Welcome to Mason Hayes & Curran LLP's Product & Consumer Protection Annual Review 2023

In the six months since the publication of our Mid-Year Review, advancement in the EU product and consumer protection law landscape has continued apace. We review some of the key developments during the year and look ahead to future reform for 2024.

In this Review, we will consider key issues such as:

- The implications of the proposed revised Product Liability Directive for economic operators of consumer products. Its entry into force is much anticipated now that political agreement on a compromise text has been reached between the Parliament and Council
- The new product safety obligations that providers of online marketplaces will have to comply with under the EU's General Product Safety Regulation
- The headline measures under the new Batteries Regulation, as part of the EU's initiatives under the European Green Deal to achieve a carbon-neutral continent by 2050
- An update on recent developments regarding the legal position on third party litigation funding in Ireland
- An overview of the EU's proposed Right to Repair Directive and anticipated next steps now that the European Parliament and Council have finalised their negotiating mandates
- The implications for economic operators of consumer products following the EU's recent amendment to the REACH Regulation, which aims to restrict the intentional use of microplastics in consumer products

As we look to 2024, we discuss these issues and much more and hope you enjoy the fifth edition of our Annual Product & Consumer Protection Review.

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The transition to a digital and circular economy continues to transform various aspects of the healthcare sector. This undoubtedly has many positive economic and social impacts. However, the changing nature of healthcare products in the digital age has challenged some of the core rules and concepts underpinning the current product liability regime provided for under EU law. Notable recent changes include the interconnectedness and self-learning functions of products, and the emergence of new actors such as online platforms.

A revised Product Liability Directive

The current EU Product Liability Directive (PLD) has been in force for nearly 40 years. A 2018 evaluation of the PLD by the European Commission identified several shortcomings, largely driven by significant changes since the PLD was adopted in 1985. These include the modernisation of product safety and market surveillance rules.

In particular, technological advances and increased awareness around environmental sustainability and the circular economy have led to the creation of a new generation of products that have made it more difficult to:

- Consistently apply the definitions and legal tests contained in the PLD
- Effectively prove that a defect in a product caused the damage suffered
- Allocate responsibility and liability when a business substantially modifies a product that is already on the market, or when a product has been directly imported from outside the EU by a consumer

In light of these concerns, in September 2022, the European Commission published its proposal for a new Product Liability Directive (PLD Proposal). The changes contained in the PLD Proposal are designed to address these challenges and provide the EU with an extra-contractual product liability regime updated to deal with the 21st century product landscape.

Noteworthy features

Some noteworthy features of the PLD Proposal include:

- **Alignment of Terminology:** the PLD Proposal would bring EU product liability and product safety rules into closer alignment by adopting various terms and definitions that are already used in EU product safety legislation. For example, 'manufacturer', 'placing on the market' and 'making available on the market'.
- **Expanded definition of a 'product'**: the PLD Proposal expands the definition of a 'product' to include software and digital manufacturing files. The proposed new definition clarifies when a related service, ie a digital service that is integrated into, or inter-connected with, a product is to be treated as a component of that product.

- **Defectiveness:** the PLD Proposal adds additional factors to be considered when determining whether a product is defective. These factors include interconnectedness, self-learning functionality, and a product's cybersecurity vulnerabilities.
- **Burden of proof:** there is a proposed rebuttable presumption of defectiveness where:
  - The claimant establishes that the product does not comply with mandatory safety requirements
  - The claimant establishes that the damage was caused by an "obvious malfunction" during normal use or under ordinary circumstances
  - A defendant fails to comply with an order to disclose the evidence necessary for the claimant to understand how a product was produced and how it operates

The PLD Proposal also includes a rebuttable presumption that a defective product caused damage where it has been established that the product is defective, and the damage caused is of a kind typically consistent with the defect in question.

- **Defendants:** The PLD Proposal expands the pool of defendants that can potentially be held liable for damage caused by a defective product. As well as manufacturers, importers and in some cases distributors, the PLD Proposal would also permit no-fault liability claims to be brought against authorised representatives, fulfilment service providers, third parties making substantial modifications to products already placed on the market, and certain online platforms. This proposed change highlights the growing significance of products manufactured outside the EU and is designed to ensure that there is always an economic operator in the Union against whom a claim for compensation can be made. In the case of online platforms, the PLD Proposal makes it clear that it does not affect the conditional liability exemption available under the Digital Services Act. This is because the PLD Proposal is geared towards liability in cases where an online platform cannot benefit from that exemption; and a person is harmed by a defective product and seeks compensation
- **Scope of 'damage':** The PLD Proposal seeks to extend the concept of 'compensable damage' to include corruption of data and recognised forms of psychological injury. It is also proposed to remove the €500 minimum threshold for property damage
- **Scope of liability:** The PLD Proposal seeks to expand the scope of liability from the previous reference to when a product was put into circulation to possibly include the time after circulation, including once the product has been placed on the market, if a manufacturer retains control of the product, for example through software updates
- **Longstop provision:** The PLD Proposal suggests two modifications to the 10-year longstop provision. First, an extension to 15 years in certain cases involving latent personal injuries. Second, calculation of time running from the date that a product has been substantially modified, at a point after it has been placed on the market or put into service

When?

Having approved their negotiation positions on the PLD Proposal, the European Council and European Parliament entered trilogue negotiations in October 2023. As the table overleaf illustrates, while there was some consensus between the three institutions prior to entering the trilogue process, there were significant differences in their respective positions.

On 14 December 2023, political agreement was reached between the Parliament and Council. The agreement must be endorsed by the representatives of the Member States within the Council. Once formally agreed, the text will then be adopted. This is with a view to having the legislation passed in advance of the European Parliament elections in June 2024.

Once adopted, the revised Product Liability Directive will also need to be transposed into national law. The PLD Proposal provides that the current Directive would be repealed, and Member States would be required to transpose the new legislation into national law within 12 months of its entry into force.

Snapshot: Respective negotiating positions of the EU Institutions on the revised Product Liability Directive

	Product	Defectiveness	Damage	Causation	Limitation Periods
European Commission	Should include 'software' and 'digital manufacturing files'. Proposed treatment of a 'related service', a digital service that is integrated into, or inter-connected with a product, as a component of that product.	Should be assessed with reference to: • A product's ability to learn after its deployment • Its effect on other products that can reasonably be expected to be used together • Product safety requirements and cybersecurity vulnerability Introduction of a rebuttable presumption of defectiveness in certain cases.	The notion of compensable damage should include corruption of data and recognised forms of psychological injury. Removal of the €500 minimum threshold for property damage.	Introduction of a rebuttable presumption that a defective product caused the damage where: • Claimants face "excessive difficulties" in proving defectiveness owing to the product's technical or scientific complexity • It can be established that the product is defective, and the damage caused is of a kind "typically consistent" with the defect in question	Proposed extension of 10-year longstop to 15 years in certain cases involving latent personal injuries. The limitation period could also reset and restart from the date that a product had been substantially modified.
European Council	Definition should cover raw materials.	When assessing defectiveness: • Warnings or other product information cannot, by themselves, make an otherwise defective product safe • A product's 'reasonably foreseeable use' should include foreseeable instances of misuse	Compensation for pure economic loss, privacy infringements or discrimination should not by themselves trigger liability under the revised Directive. However, this should not affect the right to compensation for any damages, including non-material damages, under other liability regimes.	Presumption of a causal link between a product's defectiveness and the damage suffered where the claimant has established that a product is defective and similar cases have shown that the damage suffered is typically caused by the defect in question.	Proposed extension of longstop period to 20 years in certain cases involving latent personal injuries. A new limitation period after a product has been substantially modified and has subsequently been made available on the market or put into service.
European Parliament	Agrees with the inclusion of raw materials. Recognition of the increasing prevalence of inter-connected as well as integrated products.	A product's 'reasonably foreseeable use' should consider its expected lifespan. Defectiveness should consider a product's ability to acquire new features or knowledge after its deployment.	The definition of 'damage' should include material losses resulting from: • Medically recognised damage to psychological health • Damage to or destruction of property subject to certain specific exceptions, and • Destruction or irreversible corruption of data not used for professional purposes, provided the material loss exceeds €1000	The presumption of a causal link where a product belongs to the same production series as a product already proven to be defective. Empowerment of national consumer protection bodies to gather the evidence necessary to prove defectiveness, damage and the causal link between the two, on behalf of groups of consumers.	Proposed extension of longstop period to 30 years in certain cases involving latent personal injuries.

Product Safety for Providers of Online Marketplaces: The EU General Product Safety Regulation

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Ecommerce marketplaces in the EU will soon be subject to specific product safety laws. The new General Product Safety Regulation (GPSR) entered into force in June 2023 and will apply to products placed or made available across the EU market from 13 December 2024. As well as economic operators like product manufacturers, importers, distributors, authorised representatives and fulfilment service providers, it will require 'providers of online marketplaces' to comply with new product safety obligations. We cover what these new requirements are and who they will apply to.

What is a 'provider of an online marketplace' under the GPSR?

A "provider of an online marketplace" (POM) is defined under the GPSR as "a provider of an intermediary service using an online interface, which allows consumers to conclude distance contracts with traders for the sale of products". Practically speaking this means that most if not all platforms and websites that facilitate the selling of products that are placed or made available on the EU market will be regulated as a POM under the GPSR.

Depending on the nature of its business model, a POM may also be subject to other requirements under the GPSR applicable to other types of economic operator.

For example:

- A POM that sells its own-branded products may assume the responsibilities of a manufacturer
- A POM that buys and resells on its own account products made by other manufacturers, as opposed to simply providing an intermediary service, may qualify as an importer or distributor
- Providing warehousing, packaging and/or addressing and dispatching services in connection with products sold via its platform may trigger requirements as a fulfilment service provider

What will POMs need to do?

1. Contact points

The Safety Gate System is an EU-wide information sharing system that connects Market Surveillance Authorities (MSAs), the European Commission, economic operators and consumers. It allows information about unsafe products to be shared so that appropriate action can be taken everywhere in the EU. The Safety Gate Portal is a part of this system and allows consumers to access information on unsafe products and submit complaints. POMs must designate a single direct email address for MSAs to contact them and register that address on the Safety Gate Portal.

POMs must also designate a single point of contact for consumers, such as an email address, allowing them to communicate directly and rapidly with POMs on product safety issues.

2. Removal of content – dangerous products

In line with powers conferred on MSAs, and subject to minimum conditions set out in the Digital Services Act (DSA), MSAs will be able to issue orders to POMs requiring them to remove, disable access to or provide explicit warnings about specific content referring to offers of dangerous products on their platforms. These orders will have to be acted upon by POMs without undue delay and in any event within two working days from receipt of the order.

POMs will also be required to suspend services to traders that frequently offer non-compliant products, in line with similar requirements provided for under Article 23 of the DSA.

3. Monitoring - MSA notifications

POMs must also monitor the Safety Gate Portal for dangerous product notifications submitted by MSAs using the Safety Gate Rapid Alert System. POMs must then take appropriate actions to detect, identify, remove or disable access to any content which refers to those products on their platforms.

4. Processing notices – illegal content

POMs will need to process any notices relating to product safety that they receive in accordance with Article 16 of the DSA. Article 16 requires certain online platforms to put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Under the GPSR, POMs are required to process these notices without undue delay and in any event within three working days from receipt of the notice.

5. Providing information – products

POMs must design and organise their platforms in a way that allows traders to make the following information about each product available to consumers and easily accessible on the product listing:

- The name of the product manufacturer and its address (electronic and postal) and the same for the responsible person as required under Article 16 of the GPSR or Article 4 of the Market Surveillance Regulation, if that manufacturer is based outside the EU
- Product identifying information – including picture, type or other identifier
- Product warnings required under the GPSR or other EU harmonised product safety legislation

Note that it is the trader or the seller who must provide the product information to consumers. At the same time, it is the POM's obligation to design its interface in a way that enables the seller to provide the information.

6. Providing information – traders

POMs must also put in place internal processes enabling traders to provide:

- The trader's "self-certification" that they have committed to offer only GPSR compliant products and information
- Additional information required by Article 30(1) of the DSA regarding traceability of traders

7. Cooperation on corrective actions

POMs must cooperate with MSAs, traders and other relevant economic operators to facilitate the elimination or mitigation of risks by a product that is or was offered online using their platform. The GPSR sets outs various specific obligations of POMs under this heading such as:

- Publishing information about product safety recalls on their platforms
- Notifying consumers who bought a product via their platform about any recalls or safety notices issued for it
- Notifying MSAs and traders using the Safety Business Gateway (another part of the Safety Gate System) of information on dangerous products
- Informing relevant economic operators about decisions to remove access to content referring to offers of dangerous products
- Cooperating with MSAs on product recalls, including by abstaining from obstructing recalls
- Allowing MSAs to access and use online product safety tools on their platforms, e.g., webcrawlers
- Cooperating in tracing the supply chain of dangerous products by responding, as far as possible, to data requests from MSAs
- Keeping national and EU-level law enforcement agencies updated on content that has been removed from their platforms in accordance with GPSR requirements
- Allowing scraping of data on their platforms for product safety purposes, on receiving reasoned requests from MSAs

Next steps

Organisations have until December 2024 to achieve compliance with these new requirements. They should first consider whether the "provider of an online marketplace" definition applies to them. If it does, they should begin taking steps to ensure that they incorporate the necessary systems and processes to satisfy these new requirements. This may require a significant and sustained commitment of resources in some cases, depending on the volume and variety of products being offered and the number and location of their sellers. Considerable resources may also be required given that compliance with these new obligations will require proactive monitoring and engagement with various stakeholders on an ongoing basis. For that reason, impacted organisations should make use of the time remaining to identify any compliance gaps and put in place plans and processes to make their platforms GPSR compliant.

Sustainability of Toys in the Current EU Legislative Environment

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The demand for eco-friendly products within the EU has increased significantly as consumers continue to become more environmentally conscious with a focus on sustainability. This has led to an increased demand for products created with minimal impact on the environment, that are more durable and that can be easily reused, repaired or recycled.

This behavioural change poses challenges for product manufacturers and other actors throughout the supply chain to ensure they are creating and selling products that deliver on performance, safety, and quality while ensuring compliance with sustainability legal frameworks. We explore the evolving product safety and sustainability frameworks in the EU as they apply to toys, as an example of where the objectives and frameworks governing chemical safety, product sustainability and product safety can overlap. In addition, we examine the material challenges and opportunities that this can create.

Toy sustainability and safety

Toys are a challenging but interesting lens on product sustainability in the EU given the variety of toys available on the market and the vulnerable consumer group to whom they are marketed, ie children. This gives rise to an added safety obligation for manufacturers. A recurring theme is that the materials toys are made from must adhere to strict compositional requirements.

These requirements pose a sustainability challenge where a significant proportion of toys sold in the EU are made from plastic. This is reflected in the current Toy Safety Directive 2009/48/EC (Toy Directive). The Toy Directive lays down the safety requirements that toys must meet to be placed on the EU market, irrespective of whether they are manufactured in the EU or in third countries.

Following an evaluation of the Toy Directive, the European Commission identified a number of weaknesses in its practical application. These include those related to the level of protection from possible risks posed by harmful chemicals in toys, and the need for greater enforcement of the Toy Directive, particularly in the context of online sales. In addition to this evaluation, the European Commission's Chemicals Strategy for Sustainability called for strengthened protection of consumers and vulnerable groups, such as children, from exposure to some particularly harmful classes of chemicals.

Proposed Toy Regulation

Against this background, the European Commission has published a proposal for a new Toy Safety Regulation (proposed Toy Regulation). This proposed legislation revises the current rules to further improve the protection of children from potential risks in toys, specifically from harmful chemicals.

In particular, the proposed Toy Regulation will:

- **Enhance protections from exposure to harmful chemicals:** The proposed Toy Regulation builds on existing prohibitions under the current Toy Directive on substances that are carcinogenic, mutagenic or toxic for reproduction. The proposed Toy Regulation will extend the prohibition to the use of other harmful chemicals in toys. For example, endocrine disruptors, chemicals that affect the respiratory system, and chemicals that are toxic to a specific organ, including neurotoxic substances that may impact brain development in children.
- **Strengthen enforcement:** The proposed Toy Regulation introduces a requirement that all toys sold in the EU must have a Digital Product Passport. This Passport will record a toy's compliance with the proposed Toy Regulation, including safety and compliance information. The proposed Toy Regulation envisages a new IT system so that all Digital Product Passports will be screened at customs before entering the Union market. This additional screening procedure will be over and above the normal checks carried out by national inspectors. The proposed Toy Regulation also empowers the Commission to require the withdrawal of toys from the market where they present risks not clearly foreseen by the proposed Toy Regulation.

Proposed Ecodesign Regulation

The proposed Toy Regulation demonstrates the convergence and overlap of chemical safety with product safety and sustainability requirements and objectives. Reflecting this, the proposal for an Ecodesign for Sustainable Products Regulation (proposed Ecodesign Regulation) states in its recitals that *"chemical safety is a recognised element of product sustainability"*. However, the proposed Ecodesign Regulation also recognises that chemical safety is already the subject of a separate set of sophisticated EU legal frameworks.

As a result, it is not envisaged that the proposed Ecodesign Regulation would make provision for additional chemical safety requirements in the context of ecodesign. Taking toys as an example, future ecodesign requirements are expected to focus instead on encouraging increased durability of materials, recyclability and new models of toy ownership aimed at prolonging the lifetime of the toy in question. Meanwhile, the proposed Toy Regulation would introduce separate enhanced chemical safety requirements, which also achieve an environmental objective.

The Digital Product Passport is also provided for under the proposed Ecodesign Regulation. The rationale for this is that this requirement would overlap with the Digital Product Passport requirement in the proposed Toy Safety Regulation, resulting in a toy Digital Product Passport carrying a product's sustainability and product safety information.

REACH and Batteries Regulation

Under the existing Toy Directive and the proposed Toy Regulation, toys must also comply with various pieces of horizontal European environmental legislation. These laws include:

- The Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), and
- The new Batteries Regulation (EU) 2023/1542.

The new Batteries Regulation has replaced the Batteries Directive 2006/66/EC and applies to all manufacturers, importers and distributors of all battery types on the EU market.

The proposed Toy Regulation states in its recitals that as batteries are regulated under their own regulatory framework, the requirements regarding chemical substances in toys should not apply to the batteries included in toys. However, it further provides that toys that include batteries should be designed in such a way that the batteries are difficult for children to access. This once again shows the complex interaction between the various product legislative requirements applicable to toys.

Conclusion

The interaction between the EU's stated objectives of chemical safety, product sustainability and product safety are clearly seen under the proposed Toy Regulation. It is in many ways a microcosm of the EU products landscape and is representative of the complex patterns and relationships that are starting to emerge in EU product safety legislation.

In terms of next steps, the European Commission will digest and summarise the feedback it received from its public consultation on the draft legislation. This feedback will be presented to the European Council and European Parliament as it makes its way through the usual legislative process where both institutions must consider and submit their position on the proposed draft text. Once this step has been completed, the three institutions will likely enter trilogue negotiations to finalise the text of the proposed Toy Regulation. This can be a lengthy process and next year's European Parliamentary elections may serve to delay it further. If enacted, most of the provisions of the proposed Toy Regulation will have a lengthy transition period to enable economic operators to adjust to their new legislative requirements.

EU Adopts New Batteries Regulation

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The new Batteries Regulation is part of a suite of EU-led initiatives designed to achieve the targets set out under the European Green Deal. The targets aim to make Europe the world's first carbon-neutral continent by 2050. The new Regulation lays down requirements on sustainability, safety, labelling, due diligence, and green public procurement of all types of batteries placed, made available or put into service on the EU market. It also lays down minimum requirements for extended producer responsibility, the collection and treatment of waste batteries and for reporting.

The Regulation came into force in August 2023 and applies to all manufacturers, importers and distributors of all battery types on the EU market.

Some of the headline measures are:

Restrictions on hazardous substances and labelling requirements

The Batteries Regulation restricts the use of mercury, cadmium, and lead in batteries.

Manufacturers must provide a 'carbon footprint declaration' for all electric vehicle batteries, rechargeable industrial batteries with capacity greater than 2kWh, and 'light means of transport' batteries, detailing their carbon footprint performance and other information.

The Regulation also provides for the introduction of an electronic 'battery passport' and QR codes for all batteries. The battery passport must provide information on the performance, durability and chemical composition of the battery for which it is created.

Due diligence requirements

The Regulation mandates that all economic operators, excluding SMEs, who place or bring batteries into service on the EU market must carry out due diligence to ensure materials used in their production are sourced and processed responsibly. Large economic operators will have to verify the source of raw materials used in the manufacture of batteries and provide this information to the relevant national authority. The national authority will periodically perform audits on due diligence records and policies.

The Regulation provides that economic operators must incorporate this due diligence into contracts with suppliers. The Regulation also requires them to implement mitigating measures to address any adverse effects on the environment which emanate from their supply chain. Economic operators will also have to maintain a record of certain information regarding their suppliers.

Waste management requirements

The Regulation covers the entire lifecycle of batteries. It establishes end of life requirements. These requirements include collection obligations aimed at maximising the recovery of materials along with extended producer responsibilities. As part of the electronic battery passport, every battery will have to specify the recycled content within the battery with certain prescribed minimum standards.

The Regulation requires that all waste batteries are collected free of charge from the end user by economic operators placing them on the market. The targeted collection rates for portable batteries are:

- 45% by 2023
- 63% by the end of 2027
- 73% by the end of 2030, and
- 61% of 'light means of transport' batteries by 2031

Conclusion

The new Regulation exemplifies the circular economy objectives underpinning the European Green Deal and reflects the EU's commitment to ensuring a safer and more sustainable supply chain for battery production and use. Batteries are a key component of the EU's decarbonisation strategy and will replace the use of fossil fuels.

For manufacturers, importers, producers, and suppliers of batteries, it is important to be familiar with the requirements of the Regulation. There is a broad range of matters that must be complied with, and these will be introduced incrementally in the coming years.

Industrial Products Elevated to Geographical Indication Protection

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The Council of the European Union has recently approved a new regulation which provides geographical indication protection for crafts and industrial products, also known as non-agricultural Geographical Indications (GIs). This was the final step in the decision-making process and the 'Regulation on Geographical Indication Protection for Craft and Industrial Products' has since been published in the Official Journal of the EU. The Regulation introduces an EU-wide system of GI protection for industrial products such as cutlery or ceramics which are linked to the geographical area of production. As such, these products will now benefit from similar protection to regionally produced foods, beverages, and agricultural products such as Parma ham and Champagne.

Background

EU-wide GI protection is currently available for agricultural products and foodstuffs, including wines and spirits. Currently, the origin of non-agricultural products can only be protected on an EU-wide basis by filing a collective trade mark application. However, the use of a collective trade mark does not enable manufacturing associations to certify the link between quality and geographical origin according to pre-determined EU-level standards. In some EU Member States, these products can also be protected on the basis of national legislation.

Eligibility requirements

Under the new rules, in order to qualify for GI protection, the crafts or industrial products must comply with the following requirements, linked to the product's quality or reputation:

- It must originate in a specific place, region or country
- It must have a quality, reputation or other characteristic that is essentially attributable to its geographic origin, and
- It must have at least one production step taking place in the defined geographic area

Two-step registration

In accordance with Article 7 of the Regulation, the registration procedure will consist of two phases:

1. A national body will process the application, including a national examination and a national opposition procedure
2. If the application passes the national procedure at point 1, then the national body will submit an EU application to the European Union Intellectual Property Office (EUIPO)

EU Member States may choose to deviate from step 1 and instead submit the application directly to the EU at step 2 above.

Similarly, applications for EU GI protection from applicants in third countries will also be submitted directly to the EUIPO, which will examine the application directly. In contrast to the procedure relating to the agricultural GIs where the EU Commission has oversight, the EUIPO will serve as the competent authority for non-agricultural GIs.

Sectors impacted

The new rules will create possibilities for more stringent IP protection for a wide range of property owners in the crafts and industrial products industries. Potential products which could benefit if they can satisfy the conditions include Toledo Steel, Donegal Tweed, Waterford Glass, and Antwerp Diamonds to name a few.

The Regulation brings eagerly awaited procedural guarantees, with the aim of harmonising national schemes for protecting crafts and industrial products at an EU level. It may also ultimately make protection more accessible for smaller businesses with more limited resources. Applications will be examined by the soon-to-be-formed GI Division at the EUIPO. Similar to the procedure with other IP rights, its decisions can be appealed to the EUIPO's Boards of Appeal, and then subsequently to the General Court of the EU and the Court of Justice of the EU. The new procedures once up and running, will promote awareness and boost competitiveness for the crafts and industrial products industries.

Immediate next steps

The Regulation has been signed by the Presidents of both the European Parliament and the European Council and it was published in the Official Journal of the EU on 27 October 2023. In accordance with Article 73 of the Regulation, it came into force on the twentieth day following its publication ie, 16 November 2023. Save for certain sections which apply from 16 November 2023, the new system will finally be applicable from 1 December 2025. Change is clearly coming very soon!

Third Party Litigation Funding: Recent Developments

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The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 provides for third party funding of representative actions "insofar as permitted in accordance with law". The 2023 Act transposed into Irish law the Collective Redress Directive (EU) 2020/1828, which seeks to harmonise the regime for collective actions to be brought on behalf of EU consumers. However, the 2023 Act does not change the long-standing position under Irish law prohibiting the funding of litigation by third parties who have no interest in the dispute.

The Minister for Justice asked the Irish Law Reform Commission (LRC) to conduct a review of the law governing third party funding of civil litigation in Ireland. The LRC published a Consultation Paper on this topic in July 2023. The Consultation Paper is the result of an extensive project undertaken by the LRC involving research and analysis of the issues involved in third party litigation funding. It also examines the developments that have taken place concerning third party litigation funding in other jurisdictions. As a next step to the Consultation Paper, the LRC sought submissions from interested parties before 15 December 2023. The responses generated by this consultation process will enable the LRC to move to a final report setting out its recommendations.

Litigation funding in Ireland

The Commission defines "third party funding" as *"an agreement by an entity that is not:*

- *A party or a prospective party to a legal dispute,*
- *An affiliate of or otherwise connected to that party or prospective party, or*
- *Law firm or legal practitioner representing that party or prospective party in that dispute,*

to provide a party or a prospective party with funds or other material supports to finance part or all of the costs of the dispute either individually or as part of a specific range of cases in exchange for remuneration that is wholly or partially dependent on the outcome of the dispute."

In essence, third party litigation funding is investing in dispute resolution.

As we have reported previously, Irish law currently prohibits litigation funding by outside third parties who do not have a legitimate and independent interest in the dispute. This is subject to certain exceptions. The prohibition is founded on the ancient offences of maintenance and champerty. Maintenance is the funding of litigation in which the funder has no interest. Champerty is the funding of litigation in exchange for a share of the proceeds of that litigation.

In *Persona Digital Telephony Ltd v Minister for Public Enterprise*,[1] the Irish Supreme Court confirmed that these offences remain part of Irish law. Similarly, in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*,[2] the Supreme Court also determined that maintenance and champerty prohibit the assignment of a "bare" cause of action, that is, the transfer of the right to litigate a claim to a party who has no direct interest in that claim.

The arguments

In the Consultation Paper, the LRC sets out the following arguments against legalising third-party funding:

- It might encourage the bringing of vexatious and meritless disputes
- It causes funded parties to be under-compensated, as the funder may take their return on investment, with the result that the funded party is not fully compensated for the harm they have suffered
- Legal costs might increase as well as the price of insurance premiums
- It might not be appropriate in all types of disputes

Conversely, the LRC identifies four arguments in favour of legalising third-party funding. These include that:

1. Legalisation will help to expand access to justice in Ireland
2. It will improve equality of arms between opposing parties
3. It can help to increase the pool of assets available to creditors in insolvency proceedings
4. It will address an inconsistency in the law, whereby corporate entities can effectively engage in third-party funding under another name by issuing shares or transferring ownership of the company to fund its participation in dispute resolution

How it might work

In the event that third party litigation funding is to be legalised in Ireland, the LRC discusses three different models of legalisation:

1. The "preservation" approach, whereby maintenance and champerty would be abolished, but the public policy rules behind the offences would be preserved
2. The "abolition" approach, whereby maintenance and champerty would be abolished outright
3. The "statutory exception" approach, involving the retention of the offences of maintenance and champerty, but creating statutory provisions allowing third-party funding in some cases as exceptions

The LRC states that if third party funding is to become a reality in Ireland, it is likely that the "statutory exception" approach is the best option. Regarding the regulation of the funding sector, if it were to be permitted in Ireland, the LRC suggests that regulation should aim to:

- Reduce the financial and other risks that this funding and funders might create for those who use third-party funding services, and indeed, for non-funded parties to funded disputes
- Protect and enhance the proper and efficient administration of justice in Ireland

Lastly, the LRC analyses the regulatory regimes employed in a number of other common law jurisdictions including the voluntary self-regulatory regime used in England and Wales, and the enforced self-regulatory regime used in Hong Kong. It ultimately concludes that any future regulatory system to be rolled out in Ireland would likely consist of a combination of different approaches.

1. *[2018] IESC 44, [2019] 1 IR 1*
2. *[2017] IESC 27*

Are we any closer to change?

There has been undoubted recent movement and general interest towards amending the law in Ireland on third party litigation funding. For example, the recent introduction of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 permits third party funding in international commercial arbitration and related proceedings. In addition, in its Consultation Paper, the LRC recognises the evolution of the legal and policy context for third party litigation funding. The LRC notes that this evolution has resulted in "the liberalisation of the statutory and regulatory framework in many countries." It will therefore be interesting to note the level of engagement and discussion which the Consultation Paper evokes.

Regarding likely changes to the legal position in Ireland, it is possible that any change will be on the "statutory exception" basis suggested. This is due to the fact that the LRC itself notes that third party funding should perhaps be prohibited in certain dispute types including personal injury proceedings. It similarly raises significant concerns with the idea of promoting the assignment of a "bare" cause of action, highlighting that such an assignment has been prohibited in many jurisdictions. We therefore consider it unlikely that a blanket legalisation of all third party litigation funding will be permitted.

Overall, if the consultation process does ultimately result in overturning the existing prohibitions on third party litigation funding in Ireland, this will represent a very welcome development for many, bearing in mind that the changes will likely lead to greater access to justice and to the Irish Courts.

Use of Microplastics to be Restricted by the EU

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The European Union recognises the environmental damage caused by the ubiquitous presence of synthetic or chemically modified natural polymers. These are insoluble in water, degrade very slowly and can be easily ingested by living organisms. Polymers, or 'microplastics', have been found in drinking water and food and accumulate to pollute the environment and be toxic.

Through a recent amendment to the Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH Regulation), the EU is taking action to restrict the intentional use of microplastics in consumer products. The amended law prohibits the placing on the EU market of microplastics, which are manufactured to be used on their own or as additives in products which release microplastics when used. These measures support the Zero Pollution Action Plan 2030 target to reduce microplastics released into the environment by 30%.

The amendment to the REACH Regulation entered into force on 17 October 2023. However, restrictions on certain products will take effect on a phased basis from between 2023 and 2035.

Scope

The EU has taken a broad interpretation of microplastics by including all synthetic polymer particles (SPMs) below five millimetres that are organic, insoluble and resist degradation.

Microplastics will be prohibited from being placed on the market except in limited circumstances. An exemption will apply to certain medicinal, agricultural and food products, and to products used at industrial sites or from which microplastics are not released during use. However, manufacturers will have to provide instructions on how to use and dispose of the product to prevent microplastic emissions.

Timeline for restrictions

The prohibition of microplastics in products will be introduced as follows:

- **17 October 2023** – SPMs that:
  - Are solid, and
  - Are contained in particles and constitute at least 1% by weight of those particles or build continuous surface coating on particles, and
  - At least 1% of the particles referred to have dimensions equal to or less than 5mm or the length of particles is equal to or less than 15mm and their length to diameter ratio is greater than 3
- **17 October 2027** – Cosmetic products intended to be removed after application on the skin, hair or mucous membranes (rinse-off products)

- **17 October 2028** – Detergents, waxes, polishes, air care products, plant and mushroom fertiliser, and all other agricultural and horticultural products except for plant protection products
- **17 October 2029** – Medical devices, fragrances and cosmetic products intended to stay in prolonged contact with the skin, hair or mucous membrane (leave-on products)
- **17 October 2031** – Plant protection products, ie substances designed for the protection of crops, plants, etc, and granular infill for use on synthetic sports surfaces
- **17 October 2035** – Cosmetic products intended to be applied to lips, nails, and other make-up products

In addition, from 17 October 2025, suppliers of certain products containing SPMs will have to display information on the labels of these products. The information will need to include:

- Instructions for correct use and disposal
- Details and concentrations of SPMs in the product, and
- The applicability of the REACH Regulation to the product

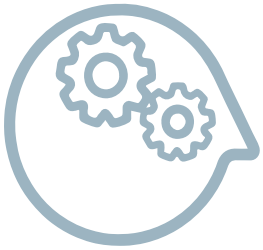
From 2026, manufacturers and industrial downstream users of SPM pellets, flakes, and powders as feedstock in plastic manufacturing will be obliged to submit annual reports to the Environmental Protection Agency by 31 May each year. The reports will have to include details of the SPMs used in the previous calendar year, including an estimate of the amount of SPMs released into the environment as a result of their processes. This information will be made publicly available.

For the limited period of 17 October 2031 to 16 October 2035 inclusive, suppliers of cosmetic products intended to be applied to lips, nails and other make-up products will be obliged to ensure that these products have displayed on them the following statement: "This product contains microplastics."

Conclusion

The EU's amendment to the REACH Regulation is a significant step towards the reduction of plastic pollution in line with the European Green Deal, Circular Economy Action Plan and Zero Pollution Action Plan. Owing to the current widespread use of microplastics, these restrictions are likely to have a profound impact on the manufacturing and consumer industry.

Although the restrictions are to be introduced over a 12-year period, manufacturers and suppliers of products containing microplastics should become familiar with the restrictions now so that they have ample time to adjust their processes and plan for the future as necessary.



Update: EU Right to Repair Directive

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The European Parliament and Council recently adopted their respective negotiating mandates on the Commission's proposed Directive on common rules promoting the repair of goods (Right to Repair Directive). Encouraging repair as a more sustainable consumption choice, the Right to Repair Directive will incentivise repair over replacement of defective products, both within and beyond the legal guarantee. The proposal contributes to the EU's climate and environmental objectives under the European Green Deal.

Often when a product breaks, it is easier and cheaper to replace it than repair it. This is particularly the case when the legal guarantee has expired. However, the European Commission reports that the often-premature discarding of products contributes to some 35 million tons of waste in the EU every year. It also results in an annual estimated loss to consumers of approximately €12 billion.

The Commission's proposal

The Right to Repair Directive proposes the introduction of a statutory "right to repair" for EU consumers:

- Within the legal guarantee, sellers would be required to offer repair except when it is more expensive than replacement
- On expiration of the legal guarantee, a series of rights and measures would help make repair an easy and accessible option for consumers, including:
  - A right for consumers to claim repair from producers for products that are technically repairable under EU law
  - An obligation on producers to inform consumers about the products that they are obliged to repair themselves
  - An online 'matchmaking' repair platform to connect consumers with repairers and to promote refurbished goods
  - An obligation on repairers to issue upon request a quote in a standardised form on the price and conditions for repair, known as a European Repair Information Form
  - Development of a voluntary European quality standard for repair services to help consumers identify repairers across the EU, who commit to minimum quality standards

The Council's negotiating mandate

The European Council has proposed the retention of the consumer's current right to choose between a repair or a replacement.

In the case of repair, the Council proposes extending a seller's liability period by six months from the moment when the product is brought into conformity. To cut red tape for small repairers, the Council proposes that the requirement to provide the European Repair Information Form should only apply to those who have a legal obligation to repair a product. For all other repairers, provision of the form should be voluntary. The Council also proposes a single European online repair platform instead of the operation of 27 separate national platforms.

The Parliament's negotiating mandate

In contrast to the Council, the European Parliament has, subject to some tightening of the concept, endorsed the European Commission's proposal that replacement should only be available to consumers when cheaper than a repair. Like the Council, it also proposes an extended warranty period for repaired goods. To prevent a situation where no economic operator is established in the Union to fulfil the repair obligation, the Parliament proposes that fulfilment service providers should also be covered by the Directive.

A further amendment proposed by Parliament would prevent producers from using any contractual, hardware or software techniques to impede third-party repair. They could also not impede the use of original or second-hand spare parts, compatible spare parts, and 3D-printed spare parts by independent repairers when those spare parts are in conformity with requirements under national or EU law. The Parliament has also proposed that producers could not refuse to service or repair a product that was bought or previously repaired outside of their authorised service or distribution networks.

Conclusion

Now that the European Council and Parliament have formalised their respective positions regarding the proposed Directive, trilogue negotiations are due to get underway in December 2023. Given the different positions adopted by the institutions, the negotiations could prove protracted and difficult. Each institution has proposed a different deadline for the transposition of the Directive and the application of transitional provisions into national law. If the Commission's originally proposed transition period of 24 months remains in place, the proposed Directive could be enforced from as early as the fourth quarter of 2026.

Recent Events, Webinars & Publications

Events & Webinars

- Seminar: The Future of Food
- Webinar: Commercial Contracts: What's Market 2023?

Publications

- Getting the Deal Through – Product Liability 2023
- Supporting the 2023 AI Awards
- IP Stars 2023 – Leading Practitioners in IP
- EU: Navigating AI Vendor Relationships
- IP Protection and Enforcement – Key Emerging Issues in 2024
- Arts, Crafts and Intellectual Property
- New Rules to Improve Fairness in the Agri-Food Supply Chain
- National AI Strategy: AI – Here for Good

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Our Products Team

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