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THE NEW EUROPEAN UNION PRODUCT LIABILITY REGIME

The General Product Safety Directive (“the Directive”) comes into effect in the United Kingdom on Oct. 1, 2005. The objective of the Directive is to improve the safety of consumer products and obliges member states of the European Union (“EU”) to impose new obligations on producers and distributors of such products. The purpose of this briefing is to highlight the main features of the Directive.

General:

The Directive is intended to cover all products that are supplied to consumers, which includes everything from chemicals and clothing to motor vehicles and toys. The Directive extends to all products made available to consumers, including those that one might reasonably foresee may be used by consumers even if not intended for consumers, ie. those which might migrate from the professional to the consumer market.

The Directive imposes obligations on “producers” and “distributors” to reduce the risk of placing dangerous products in the market place.

A “producer” includes a manufacturer, someone who places his or her name or trademark on the product or an EU representative of a manufacturer. If the manufacturer is not established in the EU or if there is no such representative, then the importer of the product.

A “distributor” is any professional in the supply chain whose activity does not affect the safety properties of a product.

Obligations of Producer:

- Place only safe products on the market;
- Provide consumers with relevant information to enable them to assess risks inherent in the product;
- Have systems to enable consumers to be informed of risks that a product might pose;
- Have systems which enable the producers to take appropriate action to avoid risks;
- Keep distributors informed of any sample testing or other monitoring;
- Where appropriate, carry out sample testing of marketed products;
- Keep registers of complaints and adequately investigate complaints;
- Notify competent authorities immediately if a product is known or should be known to pose unacceptable risks; and
- Recall dangerous products in the appropriate circumstances.

**Obligations of Distributors:**

- Keep and make available documentation necessary for the tracing of the origins of products;
- Pass on information on product risks;
- Cooperate with the action taken by producers and competent authorities; and
- Notify competent authorities immediately if a product is known or should be known to pose unacceptable risks.

**Notification:**

There is an obligation on both producers and distributors to notify a competent authority “immediately” if they know or ought to know that a product poses unacceptable risks. The penalties for failure to do so vary between the EU states. In the United Kingdom, failure to do so may lead to a penalty against the corporation and/or its officers and directors of up to £20,000 ($35,000) and/or 12 months’ imprisonment. “Immediately” is notification within 3-10 days, depending on the information to be supplied and the nature of the risk.

Notification provisions are based on US CPSC legislation but are more onerous because:

(i) Safety thresholds for reporting product risks are likely in most cases to be lower;

(ii) Enforcement mechanisms will be decentralized and subject to inconsistent application between various member states of the EU; and

(iii) There is less adequate protection of confidential information supplied by producers and distributors.

**Rights of Customers:**

There are three bases upon which customers can claim with respect to defective products, namely: breach of contract, negligence/fault or strict liability. Commonly, most claims are based upon
breach of contract or, where the defective product has caused damage, strict liability. Strict liability is applied in most of the EU states. Damages awarded to the consumer in the EU are generally much lower than those in North America. However, damages are beginning to approach the level of those seen in North America, particularly in the Republic of Ireland and the United Kingdom.

Sharing of Information:

The European Commission is empowered to share information received from national authorities. Therefore, if the product has been marketed in more than one member state, the producer or distributor is faced with having to give notification to the national authorities in up to 25 member states of the EU. What that will entail could mean that the producer or distributor would need to deal with each enforcement authority separately in order to adequately protect its reputation in the market where the product is sold and to maintain control over the conduct of any corrective action.

It is evident that the Directive imposes varied and onerous obligations on the producer and distributor. As a result, clients who fall within those definitions need to consider their positions on how to respond to those obligations, particularly in the risk management forum.

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