



Memo

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Cc	Mr. Pete Bradley Mr. Massimo Brunamonti	Office	Innere Kanalstr. 15 D-50823 Köln
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Meeting with EGEA on December 9, 2013 regarding registration of a EGEA collective mark/quality label for mobile air conditioning devices

Dear Ms Gotzen,

Please find below our legal summary and follow-up assessment of the issues discussed in our meeting on December 9, 2013.

1 EGEA specifications for MAC service stations

EGEA presented to us a draft proposal for so called “EGEA specifications on Service Unit for MAC Systems for use with Motor Vehicle using refrigerant R-1234yf” (in the following “EGEA specification”). These specifications are issued by EGEA and shall be the basis for usage of the planned EGEA quality label. EGEA clarified that the specification is created by a panel of ten manufacturers of testing devices for MAC-Systems (mobile air conditioning systems). This EGEA panel i.a. took into account the “best practice” recommendations for technical features of MAC testing (service unit in the EGEA specification). Moreover, the EGEA panel defines technical specifications of the device used for MAC service. We understand that apart from MAC service, EGEA intends to expand this procedure onto other working groups, e.g. by creating a similar specifications for Brakes/Suspension Testers.

We understand that in doing this, EGEA is acting as a body setting a standard for service units for MAC systems. The EGEA label will then be used to show that EGEA has verified that the



requirements issued by EGEA are met and that the tools are performing according to the EGEA specification. The label will distinguish the “EGEA approved” service units from others on the market, e.g. from cheap machines manufactured in the Far East and not meeting the quality standards set out in the EGEA specification.

When acting as publisher of technical information there is a general risk of liability for faults of this specification. In addition, since the quality label is creating public trust, EGEA must provide a proper and objective mechanism of quality control to avoid liability for any misleading usage of the quality label as already mentioned in our memo of October 18, 2013. In our meeting, the discussion therefore mainly focussed on the question if and how the EGEA board could avoid liability in case of any faults either in the specification or in the process of monitoring that the quality criteria set out in the EGEA specification are actually met by the licensees. In the following we will line out the kinds of liability which have to be faced (below 2 and 3) and the means to reduce liability (4). As for the detailed steps of a quality control process and the full content of the statutes of the quality label, we propose to go more into detail once EGEA decided to further pursue this project.

2 Risk for Liability

The risk for liability seems to be rather low in general since the manufacturer of the MAC service equipment (tool manufacturer) and the repairer working with the equipment would be mainly liable in case of any fault of the product and/or damages caused at the repaired cars. Moreover the risk for liability seems to be rather low since the EGEA specification will be a collection of the best practice recommendations. However, the risk for liability in particular either vis-à-vis the end consumer (car owner) or vis-à-vis the repairer cannot be fully excluded.

In case of a claim, liability presupposes that the claimant (i.e. the car owner or the repairer) has suffered some form of product-related damage. If this condition is met, there are two legal bases for imposing liability on the issuer of a quality label in addition to vendor and/or manufacturer liability: (1) the purchased product (MAC tester) bears the quality label even though it does not meet the specifications, and (2) the specifications themselves do not guarantee what they purport to do – in other words, the specifications as such, meant to guarantee a certain quality level, are faulty.

Product liability could arise in three areas of the law: contractual liability, quasi-contractual liability, and delict/tort.

2.1 Applicable law

Liability is essentially a matter of national law. This is important to keep in mind because the standards of care required in different European jurisdictions might vary. For instance, in the recent breast implant scandal, German courts have indicated *obiter* that under German law, the

certifying body *TÜV Rheinland* did not breach a duty of care vis-à-vis the purchasers of the product by certifying the products without random product samples because this did not form an integral part of the certification process.¹ French courts, on the other hand, affirmed liability under French law.²

Aside from the specification of the duty of care, another important difference between jurisdictions is the recoverability of pure economic loss in delict or tort. This is a substantial difference for the following reason. The repairer who purchases a service unit with a quality label will very likely not suffer any damages to a so-called absolute right such as property or bodily integrity. Rather, his damage will consist in being held liable himself by the end-consumer, the owner of the serviced car. This is what is called a pure economic loss. If the applicable law does not recognize a pure economic loss as a recoverable damage in tort or delict, a claim by the repairer against EGEA would require the existence of a contractual or quasi-contractual link between EGEA and the repairer. The question whether there exists a quasi-contractual link between the certifier of a product and the purchaser of the product is an unsettled question of law (see below). Thus, liability might hinge on the recognition of a delictual liability for pure economic loss. While this is very rarely recognised in Germany or England, other jurisdictions such as France are more liberal in this regard.

Other than these two differences, the following statements about liability in German law should be roughly similar in all jurisdictions. This being said, the following can be said about responsibility in German law.

2.2 Contractual liability

2.2.1 Contractual liability by EGEA vis-à-vis the tool manufacturers

In the first place, it is questionable whether EGEA is liable vis-à-vis the tool manufacturers as these are the users of the label. We understood that the tool manufacturers will also have to pay for the usage. The EGEA membership as such does not automatically imply the usage right for the label (if not provided in the general EGEA statutes).³ The statutes of the collective mark thus have a similar effect as a licence grant. Therefore the rules for liability under license agreements should be applied. The licensor of a trademark is principally liable for the existence of the trademark. He is however not principally liable for damages resulting from the use of the trademark vis-à-vis the licensee. This risk is fully in the sphere of the licensee. The licensee can thus

¹ LG Frankenthal, Urt. v. 14.3.2013 - 6 O 304/12, MPR 2013, 134-138

² RFI, 'Le tribunal a condamné TÜV à indemniser les victimes des prothèses mammaires PIP' available online: <http://www.rfi.fr/zoom/20131115-laurent-gaudon-tribunal-condamne-tuv-indemniser-victimes-protheses-mammaires-pip-mas-anism> <last accessed: 11 December 2013.

³ The members of the association are not licensees in the meaning of Art. 22 Regulation (EC) No 40/94 (Eisenführ/Schennen, community trademark regulation, 3 edn. 2010, Art. 66 para 7).



as well not reclaim the “licensee fees” paid if his product does not meet the quality expectations of the public or has technical defects as these are not related to the trademark.

In the particular case it has however to be considered that EGEA provides additional technical recommendation which also is the basis for the use of the label. We therefore cannot exclude that a court might construe a contractual liability (at least re contractual ancillary duties) under the license agreement when the EGEA specification is faulty and it could be showed that EGEA is responsible for the error because it has acted negligently. However, as lined out below (cf. 2.3.3.), the tool manufacturer is self-responsible for the quality of its products. Thus the risk for additional liability of EGEA vis-à-vis the manufacturer is low.

2.2.2 Contractual liability by EGEA vis-à-vis garages and end customers

Contractual liability by EGEA requires that there is a contractual relationship between EGEA and the purchaser of the product with a quality label (i.e. the garage) or the end-customer which relies on the label when instructing the garage to service his air-condition system (with a labelled MAC device). While there is no straight-forward direct contract between EGEA and either of those two parties, in German law a contract between two parties may create contractual rights of third parties as well. This so-called “contract to the benefit of third parties” requires that the inclusion of third parties within the scope of the contract is foreseeable to the other parties of the contract.⁴ In the parallel case of rating agency liability for securities rating, doctrine holds that the foreseeability criterion is not met because the rating agency itself has no influence on the prospective customer pool. The same is likely to apply here as both the garages as well as the customers of the garages are not known individually.

2.2.3 Quasi-contractual liability towards garages and end customers

While it is thus unlikely that a contractual liability can be raised, courts might find that there is a quasi-contractual liability between EGEA and the repair shop or the car owner. Just like contractual liability, quasi-contractual liability includes pure economic losses and thus at least in German law, repair shops would most likely base their claim against EGEA on quasi-contractual liability. A quasi-contractual liability between the certifier of a product and the purchaser of the product is currently being discussed in doctrine with regards to rating agencies who rate securities. There, it is suggested that they fall within the scope of quasi-contractual liability based on sec 311(3) of the German Civil Code.⁵

⁴ See Gottwald, ‘§ 328’, in Säcker/Rixecker, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 2, (6th ed, Munich, 2012: CH Beck), at para 176 sqq

⁵ See Berger & Stemper, ‘Haftung von Ratingagenturen gegenüber Anlegern’, (2011) 64 WM 2289-2295 at 2292

sec 311(3) Civil Code

An obligation with duties under section 241(2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract.

It is said that rating agencies influence the purchaser of a security because the fact that the rating agency has awarded a certain rating to an investment product creates trust in that product. Securities without a rating are basically untradeable on the international securities markets.⁶

If the EGEA quality label turns out to be very successful, it might take a similar place, leading to a situation where automotive supply products without the mark are untradeable. In this case, the same reasoning that applies vis-à-vis rating agencies would apply as well vis-à-vis EGEA. In other words: EGEA could be liable if the quality label does not meet the public expectations.

From our understanding the label is however not used in such a way that it comes to attention of the car owner. In other words: The owner does not realize that his car is serviced with a EGEA labelled device. The marketing effect of the label is not used for the car owners but for the garages. Therefore, quasi-contractual liability only applies in respect to the garages which are the buyers of the MAC service tools.

2.3 Delict

2.3.1 Product Liability Act

Based on *Directive 2001/95/EC on general product safety*, the German legislator has enacted the *Product Liability Act*. The act renders manufacturers and importers of products liable for any damage incurred due to a faulty product. Under the act, EGEA would not be liable for any fault in the tool itself because in relation to this product, it is neither manufacturer nor importer. The public would as well not believe that EGEA is a quasi-manufacturer⁷ since EGEA has no own products on the market and the MAC service units are labelled with the trademarks of the respective manufacturers. As regards an improper permission to use the quality label or a fault in the specifications, liability is not implied either, because neither the specifications nor the quality

⁶ *Ibid*

⁷ Cf. criteria laid down in Fezer, casebook trademark practice, edn. 2012, p. 1552, margin 106.



label themselves constitute 'products' within the meaning of the *Product Liability Act*. Liability is thus not implied.⁸

2.3.2 General delictual responsibility for the mark

In principal the issuer of a quality label can be liable under general German tort law (sec. 823 (1) Civil Code).⁹ However, this liability would require a negligent or intentional breach of a duty of care. The issuer of a quality label owes a duty of care that the product meets the guarantee requirements.¹⁰ EGEA therefore has to provide for proper mechanisms to check that the users of the quality label actually fulfil the quality specification set out in the EGEA specification.

2.3.3 General delictual responsibility for the specifications

As a minimum, the publisher of a technical recommendation has a certain duty of care. It must enact a certain procedure which makes certain that the specification is correct. Only if there are any errors in the specification that were unavoidable even when applying this specification of care will the publisher not be held liable. At any rate, the publisher is liable if he has received notice of the insufficiency of the technical recommendation and does not change it.

EGEA could be liable for faults in the specification provided that this fault was caused by a negligent conduct. In the case a tool manufacturer has relied on the EGEA specification and as a consequence construed a defect MAC service tool, it is not fully excluded that EGEA is liable for the consequential damages caused by the usage of this tool. On the other hand the manufacturer is generally obliged to make its own assessment when manufacturing any product. He may therefore not refer to the EGEA specification but has to do his own research and development for the product. The risk for liability vis-à-vis the tool manufacturer thus appears to be low. The manufacturer knows well that the quality label is in the first a "marketing tool" which is directed outside to create trust for the customers of the tools (i.e. a marketing instrument for distributing the MAC service units to the repairers). Further, we understand that most of the manufacturers are participating in the creation of the specification as they are members of the EGEA panel. This makes liability claims even less likely.

⁸ See Martin, 'Technische Regelwerke und Haftung des Herausgebers: Haftet der Herausgeber für die inhaltlichen Aussagen eines technischen Regelwerks?', [2008] DS 176

⁹ BGH, NJW 1974, 1503 in this case liability was only denied because the claimant could not show there was an infringement of an absolute right (such as ownership) protected under German delictual law.

¹⁰ See Deutsch, 'Fallgruppen der Produkthaftung: gelöste und ungelöste Probleme', [1992] VersR 521;



3 Unfair competition liability

In German unfair competition law, EGEA as the issuer of the quality label can be held liable for any act of unfair competition *resulting from the use of the mark* alongside the manufacturer using the quality label.¹¹

Unfair competition liability might be implied if the mark is misleading. When evaluating if a quality mark is misleading in German unfair competition law, guidance can be given by German trademark law. If a collective mark uses the term 'quality mark', the public expect the respective good or service to have been tested with regard to the fulfilment of a minimum standard according to a set of objective criteria. If this is not the case, the licensing and use of the mark is misleading.

4 How to avoid or reduce EGEA's liability

4.1 Indemnification clauses

EGEA could potentially include an indemnification clause in its collective mark statutes. We did not find case law that would exclude such clause. EGEA is generally free to specify the conditions for usage of the EGEA label. If not bound by the antitrust regulations EGEA is also free to open the label only for the members of EGEA.¹²

As status quo, the EGEA specification is no "essential facility" for the distribution of MAC service tools. Therefore, no antitrust issues are implied. Even if the EGEA specification and label should be considered under antitrust regulations in the future, it can still be argued that such clause is objectively justifiable and non-discriminatory since all users of the label are treated identically.¹³

4.2 Indemnification given by the panel which is setting the specification

As an alternative, we discussed that the panel which creating the EGEA specification could provide for an indemnification towards the EGEA board. The advantage would be that this in-

¹¹ KG, Urt. v. 28.11.2011 - 24 U 145/10, WRP 2012, 480; in principle also BGH GRUR 1995, 62, 63 - Betonhaltung.

¹² This is at least true under German law: Non-members of the association are not as such entitled to use a mark or to be included into an association, even if they meet the general requirements in the statutes of the collective mark (Fezer, trademark law 4 edn. 2009, Sec. 97 para 26). This is part of the German so called "autonomy of the association". This applies to quality labels as well – although there could be a claim under the unfair competition law. A further legal exception is regulated in Art. 66 (2) Regulation (EC) No 40/94/ Sec.102 (3) trademark act concerning labels which are using geographical names.

¹³ Cf. Criteria laid down in Fezer, casebook trademark practice, edn. 2012, II 1 K, p. 1753, margin 683.



demnification could be given without public attention, e.g. in a declaration independent from the EGEA statutes.

4.3 Provisions in the statutes of the collective mark

The statutes of the collective mark should provide for the following regulation for the users of the quality label to ensure that the quality is guaranteed and that insofar the risk of liability is reduced:

4.3.1 Detailed specification

We understand that the EGEA specification will contain a detailed specification of the features which need to be fulfilled by the MAC units.

4.3.2 Contractual penalty

Users should be obliged to respect all statutes of the collective mark. Compliance of the members with the quality criteria of the specification can be assured by stipulating for a contractual penalty in the statutes for the case that the quality label is being used for products which do not meet the requirements of the EGEA specification.

4.3.3 Protection against unauthorized use

The statutes should clarify that EGEA is entitled to take any measures required against unauthorized use of the EGEA label. Users of the quality label should be obliged to inform EGEA on any misuse.

4.3.4 Clarification of EGEA's obligation to warrant for respect of statutes

EGEA should clarify that it is obliged to warrant that the statutes are fully respected by the users of the quality label.

4.3.5 No warranty and exclusion of liability for usage of the label

It is advisable to include provisions that EGEA does not warrant for that the usage of the EGEA label does not infringe any third party rights. EGEA should clarify that it is not aware of any such third party rights (other trademarks in particular which could conflict with the EGEA label). This is a common provision in trademark license agreements. It should be clarified that EGEA does not undertake any liability for the usage of the label.

4.4 Insurance

Since liability cannot be fully excluded EGEA should seek for proper insurance coverage. It also has to be kept in mind that this memo only deals with liability under German law. Although we assume that the risk of potential damage claims from usage of the EGEA label is rather low we cannot fully exclude that EGEA is either liable for (i) faults in the EGEA specification or (ii) insufficient monitoring of the use of its quality label. Moreover it cannot be excluded that other jurisdictions are having stricter provisions and liability is given even under lower preconditions.

4.5 Quality control mechanisms

EGEA must establish a procedure to make sure that

1. the content of the specification is correct and
2. members who are using the quality label meet the requirements of the specification when using the label.

Furthermore EGEA has to monitor that these quality standards are also respected by the manufacturers on an on-going basis.

To verify that the user (tool manufacturer) provides for sufficient quality of its product, EGEA should request the user to provide evidence that he fulfils the criteria of the EGEA specification. This can be done by testing results from an independent laboratory which EGEA then compares with the EGEA specification.

Subsequently, the maintenance of the quality should be monitored in an on-going procedure. If EGEA detects misuse of the quality label it has to enforce the statutes of the quality label, if necessary by filing a complaint against the respective user to stop usage of the EGEA label.

Sylvia asked if there is a standard procedure for implementing these steps. Following our research after the meeting we found that there is a standard ISO/IEC 17065:2012 standard which is dealing with "Conformity assessment – Requirements for bodies certifying products, processes and services". The standard is directed onto specific bodies specialising in conformity assessments (such as e.g. the TÜV). It is not mandatory but could be helpful orientation when establishing the procedure for EGEA's quality control. We have bought a copy of this standard. Please find the copy attached to this memo. From our cursory review the passages 4.2.; 5, 7 and 8 provide (very detailed) guidance which could be used for establishing the management of MAC quality control and monitoring. We are happy to assist in the further development and/or review of such process.



Kind regards

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