SIGNATURE



Product Recall, What's New?

The European Union's new general product safety Regulation enumerates new requirements and guidelines for economic operators concerned with product recall in the European Union.

However, an economic operator may offer only one of the three remedies if the other two are either impossible or impose a disproportionate cost. In the case in which the responsible economic operator is unable to complete a repair or provide a replacement in a timely manner, the consumer remains entitled to a refund.

In addition to repair of the recalled product carried out by the economic operator, repair-by-consumer can also serve as an effective remedy. However, repair-by-consumer can only be considered as such when it can be carried out easily and safely. In addition, the responsible economic operator shall provide the consumer with the necessary instructions, parts, updates, or any other elements needed for easy, safe, cost-free, and successful repair. Consumer disposal of a good can only be considered an effective remedy if it can be carried out easily and safely all while imposing no cost to the consumer, leaving unaffected their right to refund and replacement, and abiding by the Union's environmental and sustainability goals. In case of return, the consumer shall bear no shipping cost, including in cases where the recalled product is not portable, in which case the responsible economic operator shall arrange for its collection.

In large, one principle remains constant across the new Regulation regarding remedy – no means of effective remedy shall entail significant inconvenience to the consumer.

The regulation sets a list of three remedies – **a minimum of two of which must be offered to the consumer "in an effective, cost-free, and timely manner," in the event of product recall**, regardless of other measures of remedy taken by the responsible economic operator.

The remedies include:

1. Repair of recalled product
2. Replacement of recalled product with a safe one of the same type of same value and quality
3. Adequate refund of value of the recalled product

Recall Notices:

In the case of a product safety recall, the written form of recall information provided to consumers shall take the form of a recall notice. The notice shall be easily understood by consumers and available in the relevant language(s) of the member state(s) concerned by the product recall. The EU Commission, through implementing acts, shall determine and make public a recall notice template for easy access by economic operators (including disability accessible formats).

The recall notice will be required to have several elements:

a. A clear product safety recall headline, including a description of the recalled product, any identifying characteristics, serial numbers, ID, photo identification of where to find product identification
b. A description of the hazard – **AVOIDING** language that may decrease the consumer's perception of risk posed by the recalled product
c. A description of the remedies available to the consumer
d. Information of a free online or phone-based contact service where consumers can find more information in a relevant language
e. An encouragement to share recall information with others





LONDON PARIS GIBRALTAR

The new Regulation outlines the responsibilities of various actors in the case of identification of a dangerous product and subsequent product recall.

I. Providers of Online Marketplaces (POMs)

Under the new Regulation, providers of online marketplaces are required to notify consumers in a direct and timely manner in the event of recall. POMs must additionally carry out this notification through the platforms on which the recalled product were originally sold and publish recall information on their online interfaces.

The Regulation also emphasizes the duty of POMs to collaborate with relevant authorities and other economic operators to assure recall efficiency and non-obstruction. Providers of online marketplaces are to maintain up-to-date safety information in the safety gate portal and are encouraged to check products proposed for sale on their platform in the safety gate platform before approving their sale on the platform.

II. Member States

Member States will grant consumers and other parties the ability to submit complaints regarding product safety, surveillance and control practices. In the case of unsatisfactory remedy in the case of product recall, consumers can also level complaints through the relevant member state.

Additionally, safety information held by relevant market surveillance authorities shall be made available to the public by the member state in adherence with certain transparency requirements.

III. Economic Operators

No matter the role or domain, in the case of recall, all economic operators must make sure that affected consumers are contacted directly and without due delay. If the economic operator collects consumer data this data shall be used to communicate recalls and safety warnings. Information about the recall is to be disseminated through all means possible and must be accessible to persons with disabilities.

Use of the Safety Gate Portal

The Regulation describes in detail the role of the Safety Gate Rapid Alert System in product safety information for both consumers and economic operators. Member States and economic operators are encouraged by the new regulation to update the Safety Gate Portal with any information on corrective measures for dangerous products (including all recall information).

Use of the rapid alert system also enables Member States to coordinate responses to dangerous products being sold across the Union with consumers, economic operators, and one another.

The Regulation also opens up the possibility of portal access to non-member states and applicant states (granted upon certain conditions enumerated in article 40) in order to promote international cooperation in the promotion of consumer safety.

The Impact of the Reference to the Precautionary Principle

Article 2.5. of the new Regulation provides under the heading "Scope" that this Regulation shall be implemented taking due account of the precautionary principle.

While at first the reference to the precautionary principle may not appear to carry substantial consequences, it could in practice be used against economic operators in order to claim that they breached this Regulation.

At the EU level, the precautionary principle is set out in Article 191 of the Treaty on the Functioning of the European Union, according to which the Union shall take into account at all times the available scientific and technical data, the environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, and the economic and social development of the Union as a whole and the balanced development of its regions.

Pursuant to the Communication of the European Commission on the precautionary principle, its scope is much wider that the protection of the environment and is applicable to the protection of consumers and to consumer policy, as stated in the above-described Regulation on the general product safety. A Communication of the European Commission notably indicates that where action is deemed necessary, measures based on the precautionary principle should be, *inter alia*:

- proportional to the chosen level of protection,
- non-discriminatory in their application,
- consistent with similar measures already taken,
- based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis),
- subject to review, in the light of new scientific data, and
- capable of assigning responsibility for producing

The principle of proportionality appears to be central in the assessment of one's compliance with the precautionary principle, specifically in the context of the corrective measures taken in application of the Regulation on the general product safety. Indeed, while the precautionary principle requires economic operators to take into account the above-mentioned factors at the manufacturing and selling stages of a product, as well as during the implementation of corrective measures following a potential safety issue with a product, the assessment of an economic operator's compliance with the precautionary principle should be made in light of the principle of proportionality.





LONDON PARIS GIBRALTAR

To put it differently, the reference to the precautionary principle in this new Regulation shall not impose disproportionate obligations on the economic operators which can only take the precautionary measures that are proportionate to the level of protection provided for in the Regulation.

Under French law, the precautionary principle holds that *uncertainty about the reality of a serious and irreversible damage to the environment – in particular where these activities are likely to be harmful to health - does not justify inaction (Conseil Constitutionnel)*. As outlined in the Environmental Charter of 2004, the scope of the precautionary principle primarily concerns public actions affecting the environment (including health impacts), giving it a more specific lens of application than its broader European equivalent. However, in the context of corrective measures taken by economic operators following the identification of a dangerous product, the precautionary principle is interpreted in line with the proportionality principle by regulatory authorities. Under French law, the proportionality principle holds that only necessary and sufficient means shall be used to effectuate a given objective.

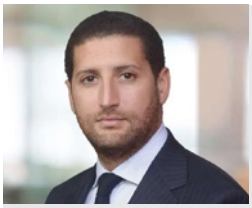
Thus, in the case of the identification of a dangerous product, economic operators should be prepared to offer corrective measures which are proportional to the risk posed by the given product. Therefore, the type of risk (chemical, injury, choking hazard etc.) and its degree of seriousness should be considered by economic operators when offering corrective measures. Overall, economic operators should be prepared to offer proportional corrective measures in the cases when precaution fails, and a once-considered safe product is identified to be dangerous to consumers.

What to Know Moving Forward

Relevant economic operators and providers of online marketplaces should be prepared to take steps to assure compliance with the new regulation through preparing the internal measures necessary for the prevention of placing dangerous product on the market and preparation for the provision of the new remedies necessitated by the Regulation in the case of recall. The Regulation also entails new responsibilities pertaining to product and consumer information which providers of online marketplaces and economic operators should be prepared to manage.



Sylvie Gallage-Alwis
Partner
sylvie.gallage-alwis@signaturelitigation.com



Elias Boukachabine
Associate
elias.boukachabine@signaturelitigation.com



Audrey Morganstern
Trainee Lawyer
audrey.morganstern@signaturelitigation.com

LONDON
Signature Litigation LLP
138 Fetter Lane
London EC4A 1BT
+44 (0)20 3818 3500

PARIS
Signature Litigation AARPI
49/51 avenue George V
75008 Paris
+33 (0)1 70 75 58 00

GIBRALTAR
Signature Litigation (Gibraltar) Ltd
7 Governor's Street
Gibraltar GX11 1AA
+350 200 10 900