

Product Recalls vs Withdrawal From Sale: The Current UK Position

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On 14 June 2017, forty fire engines and more than 200 firefighters were required to tackle an inferno that destroyed 151 homes, and killed scores of people at Grenfell Tower, a 24-storey block of public housing flats in West London. The source of the Grenfell Tower fire has recently been [identified](#) as a fridge freezer. The Metropolitan Police has stated that it will consider manslaughter, as well as health and safety and fire safety charges in respect of the disaster.

While there has been significant public outrage and media attention in relation to the activities of Local Authorities and their role in ensuring fire safety and carrying out requisite building inspections, the spotlight on the actual cause of the fire (the fridge freezer), has paled in comparison. As at 14 July 2017, some 3 weeks after the incident, a product recall for this item has not been issued.

Interestingly, a [Government working group](#) on product recalls and safety (established in October 2016), was tasked with identifying the causes of fire in white goods and the actions needed to reduce them. This came about following a review of a number of published [product recalls in recent years](#), which highlighted that various white good products (which includes dishwashers, washing machines, tumble dryers, fridges and freezers) had been recalled due to fire risks. White goods on average account for over [300 fires in London each year](#). In 90 per cent of these cases, the cause of the fire was a fault in the appliance or its electrical supply, rather than human behaviour.

The working group delivered its initial recommendations to the Minister for Small Business, Consumers and Corporate Responsibility, Margot James, which included amongst other things, that it would develop a Code of Practice on managing effective Correction Action (including recalls). The working group was due to deliver its full recommendations in the Spring of 2017, however now into the Summer months of 2017, the recommendations have not yet been published.

Corrective Action – Room for Regulatory Improvement

Currently, the obligation under the General Product Safety Regulations 2005 (the “GPSR”), is that manufacturers and retailers who may be a ‘Producer’ (as defined by GPSR) are required to adopt measures commensurate with the characteristics of the products to enable them to:

- Be informed of the risks their products might pose; and

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- Take appropriate action in the event they learn that a product they have marketed poses unacceptable risks to consumers. Where necessary, and as a last resort this may include undertaking a product recall.

Contrary to what many companies might believe, the GPSR does not in fact prescribe that a recall is required where a product is unsafe. It does require that a Producer takes commensurate action when it knows that a product placed on the market does not meet the general safety requirement under the GPSR, and goes on to list several remedial measures available. These include adequately and effectively warning consumers, withdrawing the product from sale and issuing a recall (recall being described “as a last resort”). Withdrawing a product from sale will effectively stop any further product from being placed on the market, however it will not deal with any product that has already been sold and which may already be with the consumers.

Clearly, there will be circumstances when a product must be recalled where it does not meet the general safety requirement under GPSR, however, there is little guidance available as to what the level of risk to consumers must be, before such an action is taken. There may also be circumstances where a product may not be compliant with other legislation, such as meeting the relevant labelling requirements. This may or may not impact upon the risk posed to consumers, and whether the product is safe, however the extent of action to be taken in these circumstances is unclear. Companies are therefore often in the dark as to whether a full recall is necessary, and if it is not, what corrective action they should take and would be considered appropriate by an enforcement authority.

[Guidance issued](#) by Prosafe (and supported by the EU commission) provides the following examples of corrective action which could be considered based upon an assessment of the level of risk:

- Changing the design of products;
- Changing the production method;
- Media or web communication to alert consumers on the proper use of the product;
- Isolating and withdrawing products from distribution;
- Modifying products in the distribution chain;
- Improving the instructions supplied with a product;
- Disseminating additional information to consumers about the correct use of products;
- Modifying products at consumers' premises;
- Return of products by consumers for modification;
- Instruction to consumers to dispose of products; and
- Offering consumers a replacement or refund for recalled or discarded products (this is likely to make the action more successful).

Although the above is a helpful list of actions which might be available, this does not assist Producers to know which actions would be considered appropriate by an enforcement authority, or help them to determine the key issue – when will a withdrawal from sale suffice, as opposed to a recall? A new Code of Practice prescribing what actions should be taken, based upon the degree of risk, is therefore likely to be welcomed by all those who manufacture and retail products.

What action should Producers currently take?

We currently advise our clients to assess the risks posed by their products using the methodology consistent with that set out in a Commission Decision 2010/15/EU. This is the same methodology adopted within the RAPEX system and will produce a risk rating of low, medium or high.

The [European guidance](#) suggests that if the overall level of risk is judged to be “serious”, Producers should inform the relevant enforcement authority (Trading Standards in the UK), isolate supplies (at all levels of the supply chain) and contact consumers. Strangely, this would appear to suggest that even in “serious risk” scenarios, a withdrawal from sale might be sufficient, as opposed to a recall. However, it is common in the UK, that where a Producer knows there is a risk to consumers, it will voluntarily carry out a product recall, or a recall will be required by Trading Standards.

Nonetheless, the guidance confirms that if the overall level of risk is judged to be less than serious, then less extensive corrective action will be required:

If the overall level of risk is judged to be **high**, the actions mentioned for serious risk may still be appropriate to be performed. In any case, the final decision, on which actions have to be taken, falls under the responsibility of the Corrective Action team.

If the overall level of risk is judged to be **medium**, it may be appropriate to limit the Corrective Action to products in the distribution chain and/or to issue revised warnings or instructions to consumers and, if relevant, to give details to the authorities regarding what has been/is being done.

If the overall level of risk is judged to be **low**, it may be sufficient to limit Corrective Action to changes affecting products in design and production.

Consequences of Failing to Take Appropriate Action

It is understandable that companies will not want to carry out a product recall if it is not necessary, but the decision to recall is always difficult, especially when there is doubt as to the level of risk actually posed by the product. Even where a low risk is identified, given the potential consequences of leaving unsafe products with consumers, companies may lean towards adopting a “better safe than sorry” policy, and recall the product.

In failing to take appropriate action, a Producer may face the risk of criminal sanctions, and therein lies the danger and incentive for companies to go over and above what they are legally required to do.

- Placing an unsafe product on the market can lead to a fine of up to £20,000 or 12 month's imprisonment or both (per offence).
- Failure to take appropriate action to avoid risks associated with a product (e.g. failing to undertake a recall), can result in a fine of £5,000, 3 month's imprisonment or both (per offence).
- Failing to comply with a recall notice could lead to a fine of up to £20,000 for a company. In 2014, Beko Plc was fined £76, 659 for failing to notify the enforcement authority in writing, its concerns about the safety of its products.

Enforcement authorities in the UK have an express power to order a product recall where it considers that the action being taken by a Producer is unsatisfactory, and the authority has given at least 10 days' notice of its intention to issue a recall notice. However in our experience, recall notices are often avoided through discussion and collaboration with local Trading Standards Officers.

Conclusion

The GPSR clearly intends for there to be a sliding scale of corrective actions available to Producers, in the event that issues are identified with products. The challenge to Producers is in making an informed risk assessment quickly, and the lack of clear guidance that addresses what circumstances might require a withdrawal from sale, but not a recall, coupled with the threat of potential criminal sanctions, may lead Producers to go above and beyond what is legally required. Although a product recall is only prescribed under the GPSR to be used "as a last resort", that is not to say Producers should seek to avoid recalling products which pose a serious safety risk to consumers.

The corrective action required to be taken with regards to the fridge freezer in the Grenfell tower is unknown at this time, needless to say however, there is definite room for regulatory improvements in this area, and a Code of Practice would greatly reduce the scope for misinterpretation of the legal requirements, and unnecessarily making expensive and uncommercial decisions with regards to product recalls.

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