



The current challenges of product liability and product recalls

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Introduction

Product-related risks are one of the greatest perils that businesses face today. Defective products not only pose a serious safety risk to the public, but can also cause significant financial and reputational damage to the companies concerned.

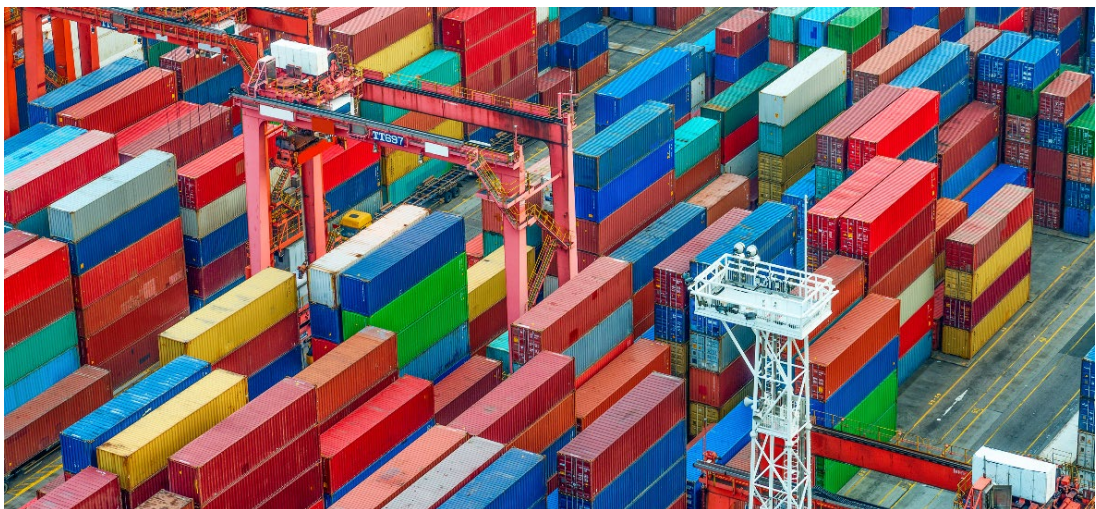
Product recalls are increasing in size and number, predominantly driven by the increasing complexity of global supply chains and the concentration of certain components or ingredients in the hands of a smaller number of suppliers, as well as tougher regulation.

While the discovery of defects in products is quite common, their consequences can be very significant. There are two substantive threats when it comes to potentially unsafe goods: product liability claims and product recalls.

The term “product recall” generally refers to the situation where manufacturers attempt to recall products that are already on the market or have been sold to the end customer. The reason for the recall is either a lack of authorization (e.g., certifications or licenses when using patents) or defects in the product.

Product liability, on the other hand, is a legal instrument by which manufacturers are made responsible for damage caused by defective products. In this context, product liability is a collective term for all circumstances in which a defective product causes personal injury or property damage, for which the manufacturer responsible for the product is liable under legal regulations – even where there is no other legal relationship between the manufacturer and the product user.

Globalization and the consolidation of industries mean that claims in general are getting bigger, and often span multiple jurisdictions. In times of crisis, if not handled well, product recalls and product liability can result in enormous costs and reputational damage for the manufacturer.



Challenges and statutory framework of product liability

Due to the strong influence of European Union (EU) legislation, product liability and product recall laws are very similar across Europe. However, one persistent difficulty with product liability is that it is not uniformly regulated throughout the EU, let alone the world.

1. GERMANY

In Germany alone, product liability law relates to the four areas of: contract law, tort law, the Product Liability Act (Produkthaftungsgesetz) and the Product Safety Act (Produktsicherheitsgesetz), with the first three areas falling under private law and the last area under public law. As soon as products are sold abroad, local product liability laws also apply, some of which differ significantly from the German rules. This illustrates just how complex the matter of product liability is for manufacturers and how demanding the resulting legal requirements are.

The Product Liability Act liability applies to manufacturers and their suppliers, “quasi-manufacturers” and importers into the EU. A quasi-manufacturer is a business that attaches its name, trademark or other denotation to a product, its packaging or its instructions. Quasi-manufacturers are treated as manufacturers for the purposes of the Product Liability Act. Similarly, the importer of a product into the EU for the commercial purpose of sale, hire, lease or any form of distribution in the course of business is deemed to be a manufacturer. The term “manufacturer” is used in a similar manner in the German Civil Code.



2. AUSTRIA

Austrian product liability law is similar to that of Germany. For product liability, the most important legal basis is the Austrian Product Liability Act (Produkthaftungsgesetz). For product recalls, the Austrian Product Safety Act (Produktsicherheitsgesetz) is of special importance.

The Product Liability Act defines “products” simply (and broadly conceived) as movable tangible property (including energy) and “defective products” as products failing to provide the safety which, taking all circumstances into account, may be reasonably expected. The Product Liability Act, therefore, has a wide scope of application and stipulates liability without requiring that the defect was culpably caused. Liability can result from both personal injury and property damage caused by a defective product.

Product liability applies to the manufacturer as well as the party responsible for importing the goods to the EU. The manufacturer is the party responsible for manufacturing the finished product, a raw material or component part. Similarly, liability extends to so-called quasi-manufacturers (i.e., a party which designates itself as producer by affixing to the product its name, trademark or other distinguishing feature). In general, the retailer (or wholesaler) is not liable under the Austrian Product Liability Act, provided that it supplies the injured party, within a reasonable period of time, with the name of the manufacturer or – in the case of imported products – of the importer or the party that supplied the product. Liability only arises vis-à-vis consumers and for damages exceeding €500 not suffered by an entrepreneur who has used the product. Product liability cannot be waived or otherwise limited or excluded.

3. PORTUGAL

In Portugal, the legal regime applicable to product liability mainly results from the transposition of the Council Directive 85/374/EEC dated 25 July 1985.

Who is legally considered liable for a product?

- Under the Portuguese legal regime, the manufacturer is liable, regardless of fault, for the damages caused by defective products that it places on the market (principle of the objective liability of the manufacturer).

Who qualifies as a “manufacturer” under the law?

- For product liability, a manufacturer is any manufacturer of a finished product, a component part or raw material, as well as any person who presents themselves as the manufacturer by putting their name, trademark or other distinguishing feature on the product.
- Furthermore, the following are deemed to be manufacturers for product liability purposes: (i) any person who, within the EU and in the course of its commercial activity, imports from outside the EU products for sale, rent, lease, or any other form of distribution; and (ii) any provider of a product whose EU manufacturer or importer is not identified, unless upon receiving a written notification, it informs the injured person, in writing, within three months, of the identity of said EU manufacturer or importer, or of a former provider.

When is a product considered defective?

- A product is considered defective when it is not safe as was expected, considering all the circumstances: its presentation, the relevant reasonable use, and the time at which it was placed on the market. A product is not considered defective in the event that an improved product is subsequently placed on the market.

Notwithstanding the above, the manufacturer is not liable if it proves that:

- i. It did not place the product on the market;
- ii. Taking into account the circumstances, it may reasonably be considered that the product was not defective when it was placed on the market;
- iii. It did not manufacture the product for sale or for any other form of distribution for commercial purposes, nor was the product manufactured or distributed by it in the course of its business;
- iv. The defect is due to the conformity of the product with mandatory rules settled by the public authorities;
- v. The status of scientific and technical knowledge at the time it placed the product on the market did not enable it to notice the existence of the defect;
- vi. In the case of a component part, the defect is due to the design of the product into which the component part was incorporated, or the defect is due to the instructions provided by the relevant manufacturer.

- In case several people are identified as responsible for the damage, they are held be jointly and severally liable.
- Where a fault on the part of the injured person has contributed to the damage, the court may – considering all the circumstances – reduce or exclude the indemnification due to the injured person.

What kind of damage may be subject to compensation/indemnification?

- Damage arising from death or personal injury and damage caused to property other than the defective product, provided that the such property is typically intended for private use or consumption and the injured person has mainly employed it for such use. Notwithstanding, the damage caused to the abovementioned property will be compensated solely if the amount of the damage is higher than an amount set by law (currently €500.00).
- Indemnification is aimed at compensating the actual loss suffered (courts do not impose punitive or exemplary damages), to ensure the injured party's return to the situation in which it was before the wrongful conduct (including both the actual loss and injury and, if applicable, loss of profits). Both material and non-material damages can be claimed by the injured party. Liability in relation to the injured person may not be limited or excluded. Any provision to the contrary is deemed null and void.
- The injured person's right to compensation expires three years from the date the injured person is aware or should have been aware of the damage, of the defect and of the manufacturer's identity. Ten years after the date on which the manufacturer placed the defective product on the market, the right to compensation expires, unless the injured person has already taken legal action.



The injured party must produce evidence of the defect, the damage and a causal link between the two. Nevertheless, the injured party is not required to provide evidence that the defect was caused by the manufacturer and that there was a specific defect in the product at the time it was placed on the market. This is assumed by law and it is up to the manufacturer to disprove it.

Most product liability actions in court are not decided by a settlement. There are no rules or procedures governing settlements. In general, the parties are free to settle their disputes. In case of multiple parties, each party can settle its claim, but this does not affect the claims of the other parties.

Regarding the sale of consumer goods and related guarantees (applicable to sale and purchase contracts executed between a professional seller and a consumer), the seller is liable for the non-conformity with the contract (i) of a movable good for a period of two years and (ii) of real estate for a period of five years. However, the period of two years for movable goods may be reduced to one year in case of a used movable good, provided that the reduction is accepted by the consumer.

In case of non-conformity of the product with the contract, the consumer is entitled to have the product repaired or replaced free of charge, to have the price duly reduced or to have the contract cancelled. The consumer must notify the seller of the non-conformity of the product within two months in case of a movable good or within one year in case of real estate from the date the non-conformity is noticed. Currently, the law provides for a maximum period of thirty days for the seller to repair or replace the product in case of non-conformity and establishes a new warranty period when the product is replaced.



4. ITALY

In Italy, product liability is mainly regulated by the Italian Consumer Code (Codice del Consumo) and, on a complementary basis, by tort law and product safety law. For international sales, the Italian Consumer Code allows consumers to take legal action against the manufacturer in its home country and according to its laws.

In accordance with the rules of the Italian Consumer Code, liability applies not only to the manufacturer, but also to the suppliers of goods, and to importers into the EU. The latter can be held liable in the absence of any other representative of the original manufacturer. Furthermore, the manufacturer is not only the party that produces the finished product, but also the producer of parts of the final product, which implies that multiple manufacturers may therefore be held jointly and severally liable.

5. FRANCE

In France – as with Germany and Austria - product liability may be invoked on several grounds, in particular under product safety law (French Consumer Code), under the EU product liability act (Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products - transposed in the French Civil Code), and under contract law or tort law (French Civil Code).

- *Product safety*

The French Consumer Code lays down a general safety obligation applicable to the manufacturers of products and their distributors, entailing several consequent obligations (obligation to inform, to trace products, to report risks, etc.) (Articles L. 421-1 et seq. of the French Consumer Code).

The notion of “manufacturer” includes:

- i. The product manufacturer, if established in the EU, or any other person presenting themselves as the manufacturer by putting their name, trademark or any distinguishing feature on the product;
- ii. The representative of the manufacturer, if the latter is not established in the EU, or the importer of the product; or
- iii. Other professionals in the distribution channel, if their activity is likely to affect the safety features of the product.

This general regime applies to:

- i. All users of the product, either consumers or professionals; and
- ii. All products which are not subject to specific regimes or EU regulations.

Any product which does not fulfill this general safety obligation is either prohibited or regulated by specific national decrees.

- *Other regimes applicable to product liability*

Aside from this general obligation related to product safety, a product user may seek compensation for damage in the event of an accident caused by a product on other grounds, in particular:

- If the damage was caused by a **defective product**, the product user/victim must act on the ground of the defective product liability regulation (Articles 1245 et seq. of the French Civil Code);
- If the damage was caused following **the performance or non-performance of an agreement** entered into with a professional, the product user/victim must act on the ground of contractual liability (Articles 1217 et seq. of the French Civil Code), in particular on the basis of pre-contractual information (Article 1112-1 of the French Civil Code and/or specific provisions of the French Consumer Code if a consumer is involved);
- If the damage occurred **outside any agreement**, the product user may act on the basis of tort law (Articles 1240 et seq. of the French Civil Code).

French case law specifies that a victim cannot combine legal actions on the grounds of both contractual liability and tort liability (French Supreme Court, Civil Chamber, 9 March 1970; 9 May 1973).

The liability regime for contracts or torts may be triggered by any damage, whether material or physical, suffered by the user.



Challenges of product recall

Tougher regulation and harsher penalties, the rise of large multinational corporations and increasingly complex and consolidated supply chains, the current socio-economic landscape, increasing threats of litigation, technological advances in product testing, as well as heightened consumer awareness – and growing use of social media – are just some of the many factors contributing to the significant increase in exposure to the risk of product recall over the past decade.

Making an informed decision in a recall situation is crucial and is an area where planning can really pay off. Ultimately, a company will need to decide whether their product is at fault and if it needs to be recalled. This decision is not always black and white.

A product recall can take the form of a request to return, exchange, or replace a product after a manufacturer or consumer watch group discovers defects that could hinder performance, harm consumers, or generate legal issues for the producers. Where action is required and time is of the essence, an exact plan needs to be followed to mitigate any damage to the manufacturer or company and each step must be executed with due care and precision. To avoid and minimize potential litigation or governmental exposure, the best way to act is to issue prompt, clear, and concise notice to all persons affected by the recall, including direct notice to end users or consumers whenever possible.

Some of the recurring and important questions across all jurisdictions in connection with product recalls are therefore as follows:

- What steps to take in case of a defect?
- How is a recall organized?
- Who bears the costs?
- When is it necessary to notify the authorities?
- Which authority should be notified?
- What information must such notification contain?
- What post-sale duties exist?

When affected by a recall, it can be beneficial to work with a corporate communications or public relations specialist to ensure the appropriate messages reach the correct audiences. In addition, working with legal counsel can help the affected organization understand the full extent of its legal risk and take an appropriate course of action. Having a response plan will help to ensure the faulty products affect as few people or organizations as possible and will also help reduce the difficulty and expense associated with product recalls.

Additionally, it is important to keep in mind that certain markets, such as children's products or medical products, can require additional steps in the event of a recall.

Our services

Practices for handling product recalls differ across Europe and the rest of the world.

However, our experience enables us to combine market knowledge with legal expertise to help our clients manage product compliance and liability risks and to take corrective action in a broad range of industries and under every jurisdiction.

Our legal services range from preventive advice and the development of risk avoidance and recall strategies, to product safety law and product certification, the drafting and negotiation of quality assurance agreements, coordination with insurers and contentious litigation in product liability cases – tailored to the needs of our clients and regardless of the jurisdiction. We manage and coordinate national and international product recalls and guide your company safely through a crisis. We help you avoid mistakes when communicating with authorities at home and abroad and minimize the risks associated with criminal and regulatory offences.



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