THE GENERAL PRODUCT SAFETY DIRECTIVE – AN OPPORTUNITY FOR INSURERS

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It is one year on since European Union Council Directive 92/59/EEC on general product safety (which came into force in January 2004) was implemented in the UK by Statutory Instrument 2005/1803 (“the Regulations”).

For manufacturers and suppliers, the Regulations provide exactly what they say on the tin, more regulation. They place a general duty on all suppliers of consumer goods to supply products that are safe in normal or reasonably foreseeable use. As to what is safe, the enforcement authorities take into account factors such as the product’s characteristics, instructions and warnings and the categories of consumers at serious risk when using the product, particularly children. Relevant British or European standards can be taken into account in assessing the safety of a product.

The Regulations apply to new and second-hand consumer products, except new products that are covered by other specific European safety legislation. The products covered include (but are not restricted to) clothing, medicines, primary agricultural and horticultural products, DIY tools and equipment, food and drink, household goods, nursery goods and motor vehicles.

The Regulations are somewhat onerous. In the UK, the maximum penalty for the Directors of companies found to be supplying non-compliant products is 12 months imprisonment and/or a £20,000 fine. The Regulations also give the enforcement authorities power to force manufacturers to recall or replace faulty products, which alone may be a financially more onerous penalty.
Under the Regulations, the enforcement authorities are given new powers to enter premises, test products and seize records and products. The authorities have various measures available to them, i.e.

- Suspension Notices to suspend supply of a product until results are collected
- Requirements to mark and warn, placing an obligation to add appropriate warnings etc.
- Withdrawal Notices to prevent further supply of a product
- Recall Notices to recall products (which could include the disposal of the products by consumers)
- Seizure and Destruction of products

This means that there is likely to be an ever increasing amount of product recalls – and so far, this is borne out by the number of recalls since the implementation of the Directive.

In the European Union the rate of notifications of dangerous products are up 25 per cent on last year’s average. In the UK, so far this year the authorities have published notices concerning 80 product recalls (which is over 2 per week). The most common product featured in recalls have concerned toys, amounting to 26 per cent of the total products recalled. The next highest was electrical goods with 23 per cent followed by motor vehicles with 8 per cent.

More product recalls will mean a greater demand for polices which cover recall risk. Undoubtedly, this will mean more claims under those policies.

More than ever, insurers who write such risks will want to see that they are not failing to take advantage of their subrogated rights should a third party supplier (or indeed any other entity) be responsible for the recall. Once a recall has begun and insurers have been notified by the insured, it will vastly improve any recovery prospects if the right kind of specialist legal expertise is in place. This will maximise opportunity for insurers and their insureds to recover their insured and uninsured interests respectively.

One year on, there are indications that more can be done to educate manufacturers and suppliers of their responsibilities under the Regulations. But this also represents an opportunity to insurers to sell greater protection to manufacturers and suppliers by writing more defective/contaminated product insurance which covers the risk of a product recall. It is very likely that more companies will look to insurers for such policies, and if they do, it is all the more important for their own profitability for insurers to do everything they can to maximise their subrogation position.