

The OECD's new global online consumer product recall portal presents both benefits and risks for businesses selling products abroad



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THE ORGANISATION FOR ECONOMIC Co-operation and Development (OECD) has launched a global online consumer product recall portal that gives consumers, businesses and governments easy access to the latest information on products recalled from the markets in Australia, Canada, Europe and the United States. The portal may be accessed at: www.globalrecalls.oecd.org.

An online product safety database is not a novel concept, and information sharing on product recalls among national and international agencies has existed for some time. Still, the OECD's efforts mark an ambitious evolution in the availability of such data on product safety risks on a global scale by making the information public and easily searchable. According to Marc Shelley, partner at Shook, Hardy & Bacon, it remains to be seen whether this portal will aid the management of product safety risks and propel discussions of greater harmonisation of safety standards, or instead create new headaches for in-house counsel and compliance teams by confusing consumers and widening manufacturers' litigation risks.

THE ONLINE PORTAL

The OECD's current work on product safety began in response to the 2007 'summer of recalls'. Toys in particular were recalled by the millions over fears of excessive lead content. Consumer product safety experts from OECD member and non-member countries began to review their product safety regimes and examine how to improve the exchange of information on safety risks within and across jurisdictions. This work evolved into the formation of a working party on consumer product safety in 2010. The working party generated a report on enhancing information sharing on consumer product safety in 2010 and a ten-point action plan of the working party¹.

The first item on the ten-point action plan is the GlobalRecalls portal, an effort to consolidate information on recalls and emergency alerts. The OECD website boasts that it is 'the first online tool that contains regularly updated information on consumer product recalls issued by jurisdictions around the world'².

The portal launched in October 2012 during International Product Safety Week

in Brussels. Speaking at the launch, OECD deputy secretary general Rintaro Tamaki said:

'The past decade has seen a sharp increase in the number of product recalls. With ever more sophisticated and globalised supply chains in international trade, it's more vital than ever for governments to co-operate and respond quickly to issues as they arise. The portal will play a key role in facilitating co-operation and information sharing'³.

Chairwoman Inez Tenenbaum of the US Consumer Product Safety Commission (CPSC), which is listed as a project partner, echoed this sentiment by stating on the global portal's endorsement page: 'In our global marketplace and interconnected world, information sharing is key'.

The OECD's portal is populated with information from a variety of sources. For example, public authorities in the European Union, the United States and Canada already have online product recall databases, and this will be one type of source from which the OECD portal aggregates information. For countries that do not yet have a similar electronic system on recalls, the OECD system can be 'easily adapted, customised and used in their jurisdictions'⁴.

Other data to be funnelled into the OECD database includes information on product testing results, reports on incidents of injuries, market surveillance, reports on emerging product hazards, product bans and consumer product standards. This information may not necessarily originate from public authorities, but could also come from consumer organisations (eg Que Choisir in France) and individual consumers (eg, in the United States, via www.saferproducts.gov). The level of information provided from a particular jurisdiction will depend on that jurisdiction's laws.

One remarkable feature of the portal is that, although the database is currently only in English and French, the public will eventually be able to search in multiple languages with the aid of an automatic translation into more than 100 languages. The searches will also account for linguistic

variations within the same language but in different regions. For example, a search by an American user for 'stroller' would include hits for 'pushchair', 'pram' and 'buggy', terms more commonly used in Australia and Europe.⁵

EMPOWERMENT FOR CONSUMERS?

According to Ms Tenenbaum, aggregating product safety information from around the world and making it searchable in a public database in multiple languages 'will empower [consumers] and advance the cause of safety'. Consumers will have the ability to check whether a product they plan to buy in a store or online has been taken off the shelf in another country.

Ms Tenenbaum's statement of consumer empowerment implies that existing domestic measures might not be fully protecting or empowering consumers. It suggests that consumers might want to know whether the same product sold in another country is considered harmful, notwithstanding the lack of recalls or reported incidents in their own country. It therefore heads toward a global product safety standard, which is certainly part of the OECD's goal.⁶

As discussed below, the convergence of product safety standards might not be a bad thing, but in the interim it means manufacturers might be judged by consumers against the most stringent product safety standards of the countries participating in the OECD portal. The working party's ten-point action plan identifies the need to develop mechanisms to co-ordinate international product safety initiatives and promote the harmonisation of standards, but these objectives are points two and three, after the development of the online portal to share incidents of recalled products. One might wonder whether the sequence of these priorities should have been reversed.

Moreover, as the working party stated in its 2010 report on enhancing information sharing on consumer product safety, 'there are a number of issues that complicate the comparison of product safety information among countries'.⁷ A flood of data on product safety incidents released into a global recall database could do more harm than good if the information is separated

'A flood of data on product safety incidents released into a global recall database could do more harm than good if the information is separated from its legal and cultural context.'

from its legal and cultural context. Comparisons between markets on that element alone may leave consumers with the wrong impression and inadvertently heighten consumer alarm and harm a manufacturer's reputation and goodwill. This is because, although a product may be identical in two separate markets, a recall in one country may not mean the same applies in another country due to differences in the underlying product safety regime.

Consider, for example, that Canada limits the content of lead in children's toys to go parts per million (ppm) while the US limit is 100 ppm.⁸ Thus, a US consumer seeing that a product falling within this gap has been recalled in neighbouring Canada might decide not to purchase that toy, even though under US regulations the product is considered safe.

WHAT DOES THIS MEAN FOR BUSINESSES?

The OECD contends that the portal will also help businesses improve the tracking of emerging hazards from around the world by enabling them to identify problems faster, communicate with consumers and remove products from the market. The portal could conceivably help manufacturers make their case to legislators and regulators for greater harmonisation between domestic and foreign product safety standards to ease the burden on trade. The more product safety standards converge, and thereby reduce non-tariff impediments to trade, the easier international sales will become.⁹

The working party's 2010 report observes (at 18) that, because of the variations among the product safety standards of participating countries, 'not all data that can be exchanged is directly relevant for enforcement actions'. As a result, domestic authorities must consider whether a product identified as dangerous according

to another country's regulation is also dangerous under the country's own laws. But the working party addresses this only in the context of enforcement by the authorities and does not address the potential impact on reputation as the information is made publicly available under the OECD's mantle and potentially informs consumers' purchasing decisions.

The working party's 2010 report additionally notes (at 18) that perhaps the main obstacle is the importance of protecting professional secrecy and personal data. The information may be sensitive due to pending investigations and court actions. But again, the report does not tie this consideration to the risks to a manufacturer's reputation and goodwill. The OECD intends to populate the database with not only current product recall information, but also historical information that would presumably include product recalls and incident reports that have already been resolved. It notes that the length of time will be determined by national law and regulation, which in some cases could mean the information about product safety risks will remain indefinitely.

LITIGATION RISKS

The information in multiple languages and the ease with which consumers, consumer associations and regulators can access the information will heighten the risk that a recall in one jurisdiction will quickly trigger a cascade of recalls and lawsuits globally.

Evolving in tandem with this risk are demands for increased access to justice in a number of jurisdictions. This trend is driven in part by the belief that if a product is the same in all countries, then recourse for a Brazilian or Korean consumer ought to be as good as the recourse of an American or European consumer. The result is an increase in the tools available for private

recourse against product manufacturers, foremost in the form of class actions.¹⁰ The global recalls database may collide with this access to justice trend by pairing access to data on product safety with new civil justice tools to facilitate private action against the product manufacturers.

EXPERIENCE WITH THE US CPSC DATABASE

The US has experienced considerable controversy surrounding its domestic online portal, which launched in 2011 as part of the Consumer Product Safety Improvement Act of 2008.¹¹ Arguably the biggest criticism of the portal,

www.saferproducts.gov, is the public's ability to submit incident reports directly to the database and the lack of quality control by the CPSC. Once notified of an incident report, the manufacturer has ten days to challenge the report's accuracy before it is published on the database. The CPSC conducts its own review and makes the ultimate decision on whether to publish it and how it will be worded.

In August 2011, the US Congress approved a bill that included minor changes to www.saferproducts.gov, including requiring the agency to postpone posting an

incident report for an additional five days if it 'receives notice that the information in such report or comment is materially inaccurate.'¹² The amendment also requires the CPSC to seek model or serial numbers, or if neither of those is available, a photograph of the product, from anyone submitting incident reports about specific consumer products.

The database includes the disclaimer that the 'CPSC does not guarantee the accuracy, completeness, or adequacy of the contents' of the database. This disclaimer provides little consolation, however, when a complaint is wrongly linked to a product and the manufacturer must disprove its product's defectiveness. A challenge to the CPSC through litigation to secure the removal of incorrect complaints from the database is an expensive and risky proposition for a manufacturer.

Two of the CPSC's commissioners, Anne Northrup and Nancy Nord, have publicly criticised the consumer products database as being too rushed and exposing the agency to lawsuits. Commissioner Nord has gone as far as suggesting that many of the database's complaints from the public may have originated with law firms instead of individual citizens.¹³

The commissioners' comments are best illustrated by a case filed in 2011 by an unidentified company. The company sued the CPSC and chairwoman Tenenbaum under seal in the US District Court of Maryland for publishing an incident report that the company claimed was 'materially inaccurate'. In October 2012, the court ruled in *Company Doe v Inez Tenenbaum & ors* [2012] that the CPSC's decision to publish the incident report was 'arbitrary and capricious' and therefore violated the Administrative Procedure Act. The court concluded that the evidence considered by the CPSC did not adequately link the injury suffered to the product. This meant that the report was misleading and could have influenced the purchasing decisions of a reasonable consumer because:

'The report bears the government's stamp of approval through its publication on an official website that, by its terms, is a repository of

NOTES

- 1) Both reports are available at: www.oecd.org/sti/consumerpolicy/consumerproductsafetyworkattheoecd.htm.
- 2) www.oecd.org/sti/consumerpolicy/consumerproductsafetyworkattheoecd.htm.
- 3) www.oecd.org/newsroom/oecdlaunchesonlineportaltoboostproductsafety.htm.
- 4) www.globalrecalls.oecd.org/AboutThePortal.aspx?lang=En.
- 5) www.globalrecalls.oecd.org/HowToUseThePortal.aspx?lang=En.
- 6) See ten-point action plan of the working party, available at www.oecd.org/sti/consumerpolicy/45534271.pdf.
- 7) Report on enhancing information sharing on consumer product safety, at 12.
- 8) Martina S Barash, 'Cross-Border Product Safety Standards Needed for Global Markets', *Businesses Say*, *BNA Product Safety & Liability Reporter* (2011).
- 9) Gregory L Fowler & Simon J Castley, 'Product Manufacturers, Take Heed: International Markets Bring International Regulatory Oversight, Safety Standards and Liability Concerns', *Bloomberg European Business Law Journal* (Vol 1, Winter 2007), at 83.
- 10) For a discussion of emerging class action legislation and trends in product claims, see Harvey L Kaplan, William J Crampton and Marc E Shelley, Chapter 7: Class Action Developments Overseas, in *Product Liability Litigation: Current Law, Strategies and Best Practices* (PLI 2012).
- 11) See www.saferproducts.gov.
- 12) The law as amended may be found at www.cpsc.gov/businfo/cpsa.pdf.
- 13) Commissioner Northrup's testimony may be viewed at www.energycommerce.house.gov/hearing/oversight-consumer-product-safety-commission; for further discussion of the hearing, see Sean Wajert, CPSC Commissioners Testify at Hearing Regarding Database, *Mass Tort Defense* blog, available at www.masstortdefense.com/2012/08/articles/cpsc-commissioners-testify-at-hearing-regarding-database/.

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reports regarding “unsafe product[s]”.
(*Company Doe* at 47.)

The court’s ruling has essentially validated many of the concerns regarding the CPSC’s database voiced by industry, particularly that poorly-vetted information would find its way on to the public database and harm the goodwill of a company.

NEXT STEPS AND RECOMMENDATIONS

The official launch of the OECD’s portal marks the completion of only the first phase of the project. As discussed above, the next steps include the enhancement of the translation and searching capabilities and the addition of historical information. They also include efforts to automate regular updates and to gather data from additional jurisdictions. The

OECD is also working to develop a mobile application to facilitate the portal’s use.

Although consumers may benefit almost immediately from access to the portal, businesses may have to wait until greater harmonisation appears in global product safety standards. In the meantime, they are advised to pay even greater attention to ensuring that national and international recall actions, and any related product liability defence strategies, are well co-ordinated.

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*Company Doe v Inez Tenenbaum & ors
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