

*Title Short:*

### **Distributor's obligations for products in stock and used products**

*Fiche Nb:*

**18**

*Subject:*

Clarification of the scope of Decision 768/2008/EC that the obligations of the distributor do not apply to products already in stock and used products.

*Last Update:*

03-05-2011

*Category:*

Obligations for distributors

*Legal basis:*

*Decision 768/2008/EC, Annex I, Article R 5 paragraph 2 and paragraph 4*

#### Legislative references:

- **Regulation (EC) No 765/2008** of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93
- **Decision No 768/2008/EC** of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC
  - Decision 768/2008 R.5.2

Before making a product available on the market, distributors shall verify that the product bears the **required conformity marking or markings**, that it is accompanied by the required documents and by instructions and safety information in a language which can be easily understood by consumers and other end-users in the Member State in which the product is to be made available on the market, and that the manufacturer and the importer have complied with the requirements set out in Article [R2(5) and (6)] and Article [R4(3)].

**Where a distributor considers or has reason to believe that a product is not in conformity with ... [reference to the relevant part of the legislation], he shall not make the product available on the market until it has been brought into conformity.** Furthermore, where the product presents a risk, the distributor shall inform the manufacturer or the importer to that effect as well as the market surveillance authorities.
  - Decision 768/2008 R.5.4

Distributors who consider or have reason to believe that a **product which they have made available on the market is not in conformity with the Community harmonisation legislation applicable shall make sure that the corrective measures necessary to bring that product into conformity, to withdraw it or recall it, if appropriate, are taken.** Furthermore, where the product presents a risk, distributors shall immediately inform the competent national authorities of the Member States in which they made the product available to that effect, giving details, in particular, of the non-compliance and of any corrective measures taken.

#### ISSUE TO BE ADDRESSED

Article R5.2 of the Decision 768/2008 describes the obligations for distributors “*before making a product available on the market*”. This creates a significant degree of uncertainty in the case of products that were placed on the market under legislation in force at the time a product was supplied to the distributor. The uncertainty derives from the lack of a relevant interpretation in the current *Guide to the implementation of Directives based on the New Approach and the Global Approach* (“Blue Guide”), which only explains the notion of placing on the market (i.e. making available for the first time)<sup>1</sup>.

EU legislation generally follows the principle of non-retroactivity of law: a product, lawfully placed on the market under the provisions of the legislation applicable at the time, can continue to be circulated within the internal market even if the legislation changes. If this principle is not adhered to, distributors risk having products in stock that they cannot make available to the final customer whenever the provisions of applicable legislation change.

<sup>1</sup> Guide to the implementation of Directives based on the New Approach and the Global Approach, section 2.3.1 “placing on the market” p. 18 [http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic\\_en.pdf](http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf)

The problem will be particularly apparent when all 10 directives scheduled for an alignment with the New Legislative Framework (NLF) come into force. Article R5.2 of the Decision sets specific marking and certification requirements, which are not included in all of the 10 currently applicable directives. For instance, there is no requirement for the affixing of the manufacturer's address in the Low Voltage Directive 2006/95/EC<sup>2</sup>. If Article 5.2 is not interpreted according to the principle of non-retroactivity of the law, many products in stock within the distribution chain would no longer be in conformity, although they had been lawfully placed on the market.

Paragraphs R5.2.2 and R5.4 require distributors who consider that a product, which they are about to make or already have made available on the market, is not in conformity with the applicable Community legislation to take the necessary corrective measures. If the conformity of the product were to be judged according to the legislation in place at any given point in time, then distributors would be left with many products that were lawfully placed on the market according to the former legislation.

Principe de non-rétroactivité de la loi

### Used and new products:

A further implication derives from the lack of distinction in the text of the Decision between used products and new products. The Blue Guide makes it clear that the circulation of used products shall not be impeded by the application of New Approach Directives<sup>3</sup>. This principle was reaffirmed in the Guide to the application of the Machinery Directive 2006/42 published in 2010<sup>4</sup>. Therefore, the implementation of the NLF should not extend the scope of the distributor's obligations to bring a used product into conformity with revised legislation.

### SOLUTION ENVISAGED

The European Commission should clarify that paragraphs R5.2 and R5.4 will be interpreted according to the general principle of non-retroactivity of law and invite enforcement authorities to check a product according to the legislation in force when it was placed on the Community market for the first time. The best solution would be to include into the New Approach Directives the following clause:

"Member States shall not impede the making available of products which have been placed on the Community market before [date of cessation of the preceding Directive] and that comply with the requirements laid down in Directive [Number of preceding Directive]".

An alternative solution would be to include in a revision of the Blue Guide an interpretation of which legislation is applicable. It should explain that the obligations of distributors in Article R5 refer to the legislation and the state of the art applicable when the product was first placed on the market.

With regards to used products, the current status-quo should remain valid by mentioning in the revision of the Blue Guide that the formal and technical requirements set out in the applicable harmonisation legislation refer to new products only.

<sup>2</sup> Low Voltage Directive 2006/95 art. 10 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:374:0010:0019:en:PDF>

<sup>3</sup> "Used products, which are on the Community market, are subject to free movement according to the principles laid down by Articles 28 and 30 of the EC Treaty" Guide to the implementation of Directives based on the New Approach and the Global Approach, section 2.3.1 "placing on the market" p. 18

<sup>4</sup> "In general, the Machinery Directive does not apply to the placing on the market of used or second-hand machinery." Guide to the application of the Machinery Directive 2006/42, June 2010, §72, p. 56  
[http://ec.europa.eu/enterprise/sectors/mechanical/files/machinery/guide-appl-2006-42-ec-2nd-201006\\_en.pdf](http://ec.europa.eu/enterprise/sectors/mechanical/files/machinery/guide-appl-2006-42-ec-2nd-201006_en.pdf)