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DANGEROUS (UNSAFE) PRODUCTS AND CONSUMER PROTECTION: REMEDIES IN THE EVENT OF A PRODUCT SAFETY RECALL (ARTICLE 37 OF REGULATION 2023/988, ON GENERAL PRODUCT SAFETY)*

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Abstract: Regulation 2023/988, of 10 May 2023, on general product safety, allows economic operators to request the return of unsafe marketed products. When they ask consumers to return these products, consumers can exercise rights, such as the repair of the good, its replacement or the reimbursement of certain amounts, under the terms provided in article 37 of the Regulation. The present article examines this precept, and analyzes each of these measures, its legal regime, the agents with active and passive standing, and the relationship they have with the remedies for lack of conformity regulated in the Directive 2019/771, of 20 May 2019, on certain aspects concerning contracts for the sale of goods.

Keywords: General product safety; consumer protection; dangerous product; unsafe product; lack of conformity; repair of the product; replacement of the product; price reduction; termination of the contract.

Summary: 1. The duty to make available on the market safe products. 2. The recall of unsafe products by economic operators. 3. Consumer protection remedies in the event of a product safety recall: article 37 of the Regulation. 3.1. Remedies offered to the

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consumer: repair, replacement and refund of the value of the product. 3.2. What economic operator is obliged to offer these remedies? 3.3. The repair of the product by the consumer. 3.4. The disposal of the product by the consumer. 3.5. Measures in favor of the consumer or any owner of the product? 4. Compatibility with the remedies for lack of conformity provided for in Directives 2019/770 and 2019/771.

1. The duty to make available on the market safe products

One of the rights of consumers, proclaimed in international texts and in national law, is protection against risks that may affect their health and safety. Within the European Union, Directive 87/357/EEC of 25 June 1987, relating to the approximation of the laws of the Member States on products that appear to be deceptive that endanger the health or safety of consumers, and Directive 2001/95/CE, of 3 December, on general product safety. These Directives have been incorporated into Spanish law through Real Decreto 820/1990, of 22 June, which prohibits the manufacture and marketing of products with a deceptive appearance that endanger the health or safety of consumers, and Real Decreto 1801/2003, of 26 December, on general product safety. In addition, the right to health and safety of consumers is enshrined in Spanish law as a basic right [art. 8.1.a) General Law for the Defense of Consumers and Users, cited as LGDCU][1].

The two above-mentioned Directives have fulfilled the aims they pursued for years. However, it is necessary to review and update the regulation on this matter, considering the evolution of new technologies and the development of online sales.

On May 23, 2023, the Regulation (EU) 2023/988, of 10 May 2023, on general product safety (hereinafter, the Regulation), was published in the Official Journal of the European Union. The Regulation, which repeals the two Directives 87/357/EEC and 2001/95/EC with effect from December 13, 2024 (art. 50), establishes a uniform legal framework throughout the European Union on the safety of products. The Regulation has been the appropriate regulatory instrument, as it imposes clear and detailed rules that leave no room for divergent transpositions by Member States. This Regulation also contributes to achieving one of the objectives contemplated in art. 169 of the Treaty on the Functioning of the European Union. In particular, it seeks to ensure the health and safety of consumers and the functioning of the internal market as regards products intended for consumers.

As explained in art. 1 of the Regulation, the purpose of this Regulation is "to improve the functioning of the internal market while providing for a high level of consumer

[1] Available in https://www.boe.es/buscar/act.php?id=BOE-A-2007-20555.

protection". The Regulation applies to all products placed on the European Union market or marketed therein, to the extent that there are no specific provisions for the same purpose in Union Law that regulate the safety of products. products (art. 2.1 Regulation). This is a "general" Regulation on product safety, which does not affect specific safety regulations, where they exist.

This Regulation completes the provisions of Regulation (EU) 2019/1020, of 20 June 2019, regarding market surveillance and product conformity. The 2019 Regulation sets out rules to strengthen product market surveillance, to ensure that only products that are safe are placed on the market in the Union. With this objective, it lists the tasks of economic operators related to product safety (art. 4) and devotes special attention to regulating the organization, activities and obligations of national market surveillance authorities (arts. 10 to 19). Regulation 2023/988 completes this regulation, by establishing the rules on general product safety and focusing more on the obligations of economic operators than on the role of market surveillance authorities.

"Economic operators shall place or make available on the market only safe products". This is the essential legal norm, contained in art. 5 of the Regulation.

Each of the terms used in art. 5 Regulations have their own definition. "Product" means any object, whether or not interconnected with other objects, supplied or made available, for a fee or free of charge, including in the context of providing a service, intended for consumers or which, under reasonably reasonable conditions, foreseeable, it can be used by consumers, even if it is not intended for them. That product must be safe. It is defined as "any product which, under normal or reasonably foreseeable conditions of use, including the actual duration of use, does not present any risk or only the minimum risks compatible with the product's use, considered acceptable and consistent with a high level of protection of the health and safety of consumers" (art. 3.2 Regulation). A product that is not safe is classified as a "dangerous product" (art. 3.3). To assess the safety of a product, one must consider the elements listed in arts. 6 and 8 of the Regulation.

The economic operators are the ones obliged to introduce in the market safe products. The Regulation defines the economic operator as "the manufacturer, the authorized representative, the importer, the distributor, the fulfilment service provider or any other natural or legal person who is subject to obligations in relation to the manufacture of products or making them available on the market in accordance with this Regulation" (art. 3.13). Each of these subjects has its own definition in art. 2 Regulation. Thus, for example, a manufacturer is any natural or legal person who manufactures a product or has a product designed or manufactured and markets that product under that person's

name or trademark (art. 3.8). Also considered a manufacturer, for the purposes of this Regulation, is the natural or legal person that places a product on the market under the natural or legal person's name or trademark (art. 13). Importer means any natural or legal person established within the Union who places a product from a third country on the Union market (art. 3.10). And a distributor is any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market (art. 3.11). On the other hand, the "marketing" of a product ("making available on the market") means any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge (art. 3.6). And "placing on the market" means the first making available of a product on the Union market (art. 3.7).

In relation to product safety, the Regulation imposes severe obligations on economic operators, and in particular on manufacturers, importers and distributors. The manufacturer's obligations are listed in art. 9, being the first and foremost is to guarantee, when they place their products on the market, that they have been designed and manufactured in accordance with the general safety requirement established in art. 5 (art. 9.1 Regulation). Regarding importers, they are required, among other things, that before introducing a product on the market, they must ensure that the product meets the general safety requirement established in art. 5 and that the manufacturer has complied with the obligations established in art. 9, sections 2, 5 and 6 (art. 11.1). For their part, distributors, before marketing a product, will verify that the manufacturer and, where appropriate, the importer, have complied with the requirements established in art. 9, sections 5, 6 and 7, and in art. 11, sections 3 and 4, as appropriate (art. 12.1).

2. The recall of unsafe products by economic operators

When an economic operator considers that a product is dangerous (unsafe) or has reason to think unsafe based on the information in its possession, it will adopt the measures provided for in the Regulation to guarantee consumer safety. One of these measures consists of providing information to consumers so that the product is used safely ("safety warning"), in the terms provided in art. 35.1 Regulation. But there are two other specific measures: the withdrawal and the recall of the product. These measures can be taken by the economic operator on his own initiative. But the national market surveillance authority can require economic operators to take those measures, and can even take those measures itself when an economic operator does not take the appropriate corrective measures or when the risk persists, being empowered to prohibit or restrict the

commercialization of a product or to order the withdrawal or recovery of the product [art. 14.4.f) and h), and art. 16.2, 16.3.c) and 16.5 of Regulation 2019/1020].

The withdrawal of the product is defined as any measure aimed at preventing a product in the supply chain from being made available on the market (art. 3.26 Regulation). For its part, "recall" is understood as any measure aimed at achieving the return of a product that has already been made available to the consumer (art. 3.25). The distinction seems obvious. When the product is somewhere in the supply chain, and therefore has not yet reached consumers, it is withdrawn. However, when that product is already in the possession of consumers, the economic operator can request its recall. This measure, therefore, implies the loss of the possession of the asset by its possessor. It is a drastic measure, but essential, because the use of the product by the consumer can cause irreparable damage, precisely because of its dangerous nature.

In relation to the recall of the product, the Regulation imposes specific duties on some specific economic operators:

(i) The manufacturer. When the manufacturer considers or has reason to believe, based on the information in his possession, that a product that he has placed on the market is a dangerous product, he shall immediately adopt the necessary corrective measures so that the product conforms to the general principle of safety, including their removal or recovery, as appropriate. In addition, it will inform consumers and also, through the Safety Business Gateway, the market surveillance authorities of the Member States in which the product has been made available on the market thereof (art. 9.8).

(ii) The importer. A similar measure is imposed on the importer, when he considers or has reason to believe that a product that he has placed on the market is a dangerous product: he will also have to adopt the necessary measures to guarantee the safety of consumers, including its withdrawal or recovery, when these measures have not been adopted by the manufacturer (art. 11.8). In addition to informing consumers and the market surveillance authorities of the Member States, it will also have to inform the manufacturer.

(iii) The distributor. When a distributor considers or has reason to believe that a product that he has marketed is a dangerous product, he may adopt the same measures as the manufacturer or importer; among them, the recovery of the property. The distributor will inform the manufacturer or importer, as appropriate, and also the market surveillance authorities of the Member States (art. 12.4). Curiously, this precept does not impose the obligation to inform consumers that a certain product is dangerous.

(iv) Providers of online marketplaces. It is a provider of an intermediary service using an online interface which allows consumers to conclude distance contracts with traders for the sale of products (art. 3.14 Regulation). In relation to product safety, art. 22 of the Regulation imposes several specific obligations. One of these is the duty to cooperate with relevant market surveillance authorities, traders and economic operators to facilitate any measures aimed at eliminating or, if this is not possible, reducing the risks presented by a product that is offered or has been offered online through its services. In particular, they will cooperate with the market surveillance authorities and with the corresponding economic operators to guarantee the effective recall of the products, especially by refraining from placing obstacles to such recalls. In addition, when a recall notice is issued for a certain product, the online marketplace provider will directly notify all affected consumers who have purchased the product through their interfaces and will post on their online interfaces information on recalls for product safety reasons (art. 22.8).

As stated, these economic operators are obliged to provide consumers with information in the event of a recall of a product for security reasons or to indicate how the product is to be used to ensure its safety ("safety warning"). The Regulation establishes which channels can be used to transmit this information to consumers (art. 35). Two possibilities are offered. First, if affected consumers can be identified, they will be notified directly and without undue delay. To this end, economic operators and providers of online marketplaces must dispose of product registration systems or loyalty programs that allow them to identify consumers who have purchased this dangerous product (art. 35.1 and 2). Consumers should be encouraged to register products in order to receive information about recalls and safety warnings (Recital nº 86 Regulation). Second, where it is not possible to contact affected consumers directly, economic operators and online marketplace providers will post a clear and conspicuous recall notice or safety warning through the appropriate channels, ensuring the widest possible dissemination; in particular, if available, on the company's website, social media channels, newsletters and retail outlets and, where appropriate, advertisements in the media and other communication channels (art. 35.4 Regulation).

A product recall must be done in writing, in the form of a recall notice to consumers. This recall notice must contain the following information (art. 36.2 of the Regulation): a) a headline consisting of the words «Product Safety Recall»; b) a clear description of the recalled product, including picture, name and brand of the product; product identification numbers, such as batch or serial number, and, if applicable, graphical indication of where to find them on the product; and information on when, where and by whom the product was sold, if available; c) a clear description of the risk associated with the recalled

product, avoiding any elements that may decrease consumers' perception of risk, such as by using terms and expressions such as 'voluntary', 'precautionary', 'discretionary', 'in rare situations' or 'in specific situations' or by indicating that there have been no reported accidents; d) a clear description of the action consumers should take, including an instruction to immediately stop using the recalled product; e) a clear description of the remedies available to consumers in accordance with Article 37; f) a free phone number or interactive online service, where consumers can get more information in relevant official language(s) of the Union; and g) encouragement to share the information about the recall with other persons, if appropriate. The Commission shall, by means of implementing acts, set out the template for a recall notice, considering scientific and market developments (art. 36.3).

Economic operators should stand up to the duty of easily writing the recall notice and sending it to the affected consumers, either directly (if they know who the buyers of the product are), or through its publication in the appropriate channels, as required by the art. 35.4 of the Regulation.

3. Consumer protection remedies in the event of a product safety recall: article 37 of the Regulation

Experience shows that a third of average consumers continue to use dangerous products despite seeing a recall notice (Recital nº 87 Regulation). To avoid this situation, and favor the recovery of the product, the Regulation establishes a series of measures to protect the consumer in case of product recovery. These measures, which are regulated in art. 37 of the Regulation, aim is to provide consumers with adequate mechanisms that prevent them from continuing to use dangerous products.

According to art. 37.1, the economic operator responsible for the recall will offer an "effective, cost-free and timely remedy". It must be a solution that is "as simple as possible" for the consumer (Recital nº 88), which makes it possible to adequately protect the health and safety of consumers, as well as their economic interests. Indeed, the consumer must be protected because he has purchased a dangerous (unsafe) good, and precisely for this reason its use is discouraged, because it may cause harm to his health or personal safety. It is necessary to provide the consumer with instruments that allow him to bring the good into conformity (make it a safe good), or that he can obtain a refund of the value of the product, if the consumer decides to return it for safety reasons.

For art. 37 to come into play it is not enough that the product be unsafe. It is also necessary for there to be a recall of products for safety reasons initiated by an economic operator or ordered by a competent national authority.

3.1. Remedies offered to the consumer: repair, replacement and refund of the value of the product

Pursuant to art. 37.2 , "without prejudice to any other remedies that the economic operator responsible for the recall may offer the consumer, the economic operator shall offer the consumer the choice between at least two of the following remedies: (a) the repair of the recalled product; (b) a replacement of the recalled product with a safe one of the same type and at least the same value and quality; or (c) an adequate refund of the value of the recalled product, provided that the amount of the refund shall be at least equal to the price paid by the consumer". These measures are reminiscent of those contemplated in art. 13 of Directive 2019/771, of 20 Mat 2019, on certain aspects concerning contracts for the sale of goods. In the case at hand, the measures are aimed at eliminating the risk that this product poses to the health and safety of consumers. They are, therefore, measures aimed at turning this dangerous product into a safe one.

The enumeration is not taxative. As expressly enshrined in the law, the economic operator may offer consumers other solutions. If so, these other solutions will be added to at least two of the three listed in letters a), b) and c) mentioned above. Nothing prevents the operator from offering the consumer the three options contemplated in these three letters if they wish. In addition, the economic operator can ask the consumer to repair the good himself (art. 37.3) or to dispose of it (art. 37.4).

The specific measures offered by the economic operator must already be included in the recall notice, which must contain a "clear description" of them [art. 36.2.e)]. But nothing prevents the operator from offering a specific consumer, or in general to all consumers, some additional measure to those mentioned in the recall notice.

The first measure is "the repair of the recalled product". The second is "a replacement of the recalled product with a safe one of the same type and at least the same value and quality" [art. 37.2.a) and b)]. The Regulation does not define what is repair and replacement. But they must be understood in a similar way as Directive 2019/771 does. To repair the product is to carry out the actions necessary for the product to be safe, eliminating the risk to the health and safety of consumers. Repair should only be considered a possible solution if the safety of the repaired product can be guaranteed

(Recital nº 91 Regulation). Replacement of the product implies returning the dangerous good and receiving, in its place, a safe good of the same type. The replacement works especially when it is a specific manufacturing series that presents safety problems. In such a case, the consumer can receive a product of the same brand and model, but from another series that does not have these safety deficits.

The third measure is "an adequate refund of the value of the recalled product, provided that the amount of the refund shall be at least equal to the price paid by the consumer" [art. 37.2.d)]. Although it is not indicated in the norm, the exercise of this measure causes that the consumer surrenders possession. For this reason, there is no right to reimbursement if the asset is already lost or destroyed, due to the fault of the consumer or to a fortuitous event. The refund is framed, therefore, as a quid pro quo of the return of the product: as the consumer returns the good, he can claim an amount of money (refund). Specifically, he may claim the greater of the two following sums: the price paid by the consumer or the value of the product at the time the recall occurs (that is, when the good is disposed of). The "value of the product" is the market value of that product at the time of diving up the possession. Bearing in mind that it is common for a used product to suffer a significant depreciation in value, and that this value will be even greater because it is a dangerous product, it will be normal for the refund to be for the amount paid as a price. The claimant consumer bears the burden of proving what that price is.

As can be seen, the repair does not imply a true recall of the product by the economic operator, because of the product, already repaired, returns to the hands of the consumer. The same does not happen with replacement and refund of the value, since in them the dangerous product definitively leaves the consumer's assets.

The solutions offered by the economic operator will be cost-free for the consumer (art. 37.1). For this reason, the consumer shall not bear the costs of shipping or otherwise returning the product. For products that by their nature are not portable, the economic operator shall arrange for the collection of the product" (art. 37.5).

Comparing it with the remedies legally provided for the lack of conformity of the goods in Directive 2019/771 and in arts. 114 et seq. LGDCU, it is plain that the Regulation contemplates only three measures, while in the aforementioned Directive there is a fourth: the reduction of the price. The exclusion of the price reduction in the case of lack of safety of a product obeys to an obvious reason: the price reduction does not "correct" the lack of safety of the product, since it implies that the consumer keeps the dangerous product, but obtaining a price reduction.

The Regulation does not allow the consumer to request compensation for damages caused by the dangerous product. But it is clear that the consumer may request this compensation in accordance with national law, as stated in Recital nº 91 of the Regulation.

As a rule, the economic operator must offer the consumer at least two of these three measures: repair, replacement and refund. After the offer, the consumer must choose the one that interests him the most. That choice will be exercised through extrajudicial communication.

This rule has an exception: "by way of exception to the first subparagraph, the economic operator may offer the consumer only one remedy where other remedies would be impossible or, compared to the proposed remedy, would impose costs on the economic operator responsible for the product safety recall that would be disproportionate, taking into account all circumstances, including whether the alternative remedy could be provided without significant inconvenience to the consumer" (art. 37.2.II).

The economic operator may offer only one of the three measures when the other two are "impossible". It must be an objective impossibility, which can never affect the refund (technically it is always possible to pay money). Therefore, the impossibility must affect both repair and replacement. In such a case the economic operator can offer the consumer only the refund.

It may also offer a single measure to the consumer when the other two entail "disproportionate costs" for the operator. Neither the text of the Regulation nor the Recitals clarify how this expression should be interpreted. Remember that a similar formula is used by Directive 2019/771 in its art. 13.2 so that the seller can oppose the repair or replacement of the non-conforming good requested by the consumer. Although there is a small difference between both normative texts, it seems reasonable to interpret them in a similar way in both texts.

In practice, finding out when the other two measures are disproportionate can be difficult. It is true that the repair can be very expensive for the economic operator, and for this reason it could be considered disproportionate. The same can happen with replacement, although in the case of mass-produced goods it seems difficult to claim disproportion. On the other hand, it is difficult to consider disproportionate the refund of the value, since it normally consists of the return of the purchase price, and unless it is a high-priced product (for example, a vehicle), it can hardly be claimed disproportion.

On the other hand, the Regulation provides that "the consumer shall always be entitled to a refund of the product when the economic operator responsible for the product safety recall has not completed the repair or replacement within a reasonable time and without significant inconvenience to
the consumer" (art. 37.2.III).

Pursuant to this rule, if the consumer requests the repair or replacement of the product, and a reasonable period of time elapses without the repair or replacement taking place, the consumer will always be entitled to a refund. That he will have it "always" means that he will be able to request a refund, even if that refund is not one of the two measures that the economic operator has offered to the consumer. This will happen, for example, when the operator only offers repair and replacement, and the consumer chooses the repair; if it does not repair within a reasonable period of time, the consumer may request a refund of the value of the product or, if it is higher, of the price paid.

The expressions "reasonable time" and "without significant inconvenience to the consumer" must be interpreted in a similar way that in Directive 2019/771. The reasonableness of the duration of the term will depend on whether repair or replacement is requested, and on how much time a diligent economic operator may need to bring that good back to the required security (repair) or procure another good of the same type that is safe (replacement). On the other hand, if the product is still dangerous after the repair or replacement, for the same reasons that led to it being repaired or replaced or for different ones, the consumer may also request a refund.

It should be noted that, in the event of recovery of a product in accordance with the Regulation, "there should be no time limitation to activate the remedies" (Recital nº 88). This seems to say that the exercise of the measures available to the consumer (those offered by the economic operator and, where appropriate, reimbursement, in accordance with article 37.2.III) are not subject to a statute of limitations. Nor is the recall of the product subject to a guarantee period (period for evidencing the lack of safety of the product). Even if many years have passed since the product was manufactured, introduced into the European Union or placed on the market in the Union, a recall notice may be issued giving the consumer the right to request solutions from the relevant economic operator.

3.2. What economic operator is obliged to offer these remedies?

It is necessary to find out which economic operator is the one that has to offer the consumer the solutions that eliminate the risk presented by the dangerous product. The

art. 37.1 of the Regulation sets out that "the economic operator responsible for the product safety recall shall offer the consumer an effective, cost-free and timely remedy".

The economic operator "responsible for the product safety recall" is the economic operator that takes the recall measure. This measure can be adopted by the manufacturer (art. 9.8), the importer (art. 11.8) or the distributor (art. 12.4). More debatable is whether it can be adopted by the providers of online marketplaces. Of art. 22.12.c) it is inferred that the answer must be negative, since this subject is obliged to cooperate with the market surveillance authorities and with the economic operators to guarantee the effective recovery of the products [art. 22.12.c)]; but it does not require that he himself decides the recall. However, it turns out that providers of online marketplaces are obliged, like economic operators, to provide consumers with information on the safety of products and, in particular, to send them the safety warning or recall notice (article 35.1 and 4). It could be deduced therefrom that, if they communicate the recall notice, they are obliged to offer the consumer the corrective measures. In my opinion, the correct solution is the first one. And there is a definitive argument to exempt providers of online marketplaces from this obligation: the letter of art. 37.1. This obligation is incumbent on "the economic operator responsible for the recall. And the provider of online marketplaces is not an economic operator. This is the result of the definition of economic operator (contained in article 3.14), which is an agent other than the providers of online marketplaces (defined in article 3.15); when the legislator wants to allude to the two figures, refers to economic operators and providers of online marketplaces (as it does, for example, in art. 35.1 and 4), which shows that the latter do not are included in the first group.

The economic operator "responsible" for the recall is the one that prepares and communicates the recall notice to consumers. If this notice describes the solutions that the consumer can choose in accordance with art. 37 [art. 36.d.e)], this indicates that the writer of the notice is the one who offers these specific solutions, and, therefore, the one who "responds" to the consumer. And that is how it must be, even if that operator is not truly responsible for the lack of security of the product. Thus, for example, the distributor issuing the recall notice will respond to the consumer for the lack of safety of the product, even though the dangerous nature of the product is due to its incorrect manufacture.

The recovery measure may have been taken directly by the market surveillance authority. Indeed, the national authority can require economic operators to adopt the necessary measures to avoid the risk, and among them, the recall of the product. And if the economic operator does not adopt these measures or despite this the risk persists, the market surveillance authority may itself adopt the appropriate measures, including the recall of the product [art. 14.4.f) and h), and art. 16.2, 16.3.c) and 16.5 of Regulation 2019/1020].

In this hypothesis, the economic operator obliged to offer consumers the solutions of art. 37 Regulation will be that economic operator to whom the market surveillance authority addressed requesting the taking back of the unsafe products.

3.3. The repair of the product by the consumer

The Regulation allows that sometimes the consumer is the one that repairs the product, and not the economic operator. In this sense, art. 37.3 states that "Repair by a consumer shall only be considered an effective remedy where it can be carried out easily and safely by the consumer and where envisaged in the recall notice. In such cases, the economic operator responsible for the product safety recall shall provide consumers with the necessary instructions, free replacement parts or software updates. Repair by a consumer shall not deprive the consumer of the rights provided for in Directives (EU) 2019/770 and (EU) 2019/771".

The rule is that the repair must be carried out by the economic operator (himself or someone whom he entrusts with the task). But sometimes it may be convenient (and cheaper for the economic operator) for the consumer to carry out the repair himself. For this option to be viable, two requirements must be met: that it be easy for the consumer to repair it and that he or she can carry it out safely. "Ease" and "safety" are indeterminate legal concepts, which will have to be assessed according to the parameter of the average consumer, and not of that specific consumer. The Regulation poses some examples of repairs that can be carried out by the consumer: the replacement of a battery or by cutting excessively long drawstrings on a children's garment (Recital nº 92). There are, therefore, relatively simple operations. The second requirement is that the self-repair is provided for in the recall notice. If it is not provided for in the notice, the economic operator cannot require the consumer to repair the product himself but will have to bear the fact that the consumer sends it to him to be repaired by the operator himself.

When these requirements are met, if the consumer chooses to repair the product, he will have to notify the economic operator. And this will give him the precise and necessary instructions to carry out the repair, also providing him, if necessary, with spare parts or software updates, if these parts or updates are essential to carry out the repair. The delivery of these parts or updates will be at no cost to the consumer. This expression is superfluous, since art. 37.1 indicates that any solution offered by the economic operator will be cost-free for the consumer.

If the consumer follows the installation instructions, but the product continues to be dangerous (its safety deficits are not corrected), the consumer may request the "classic"

repair (to be repaired by the economic operator), any other measure offered by the operator, or even e refund of the value of the product (arg. art. 37.2.III).

"Repair by a consumer shall not deprive the consumer of the rights provided for in Directives (EU) 2019/770 and (EU) 2019/771". If the consumer repairs himself the product following the instructions provided by the economic operator, and then the product shows a lack of conformity (under the terms provided in art. 6 and 7 Directive 2019/771), the seller will be responsible for it, and the consumer may exercise against the seller the Remedies for lack of conformity provided for in art. 13 Directive 2019/771.

This will happen even if the lack of conformity is a consequence of the repair carried out by the consumer himself, provided that he has faithfully followed the repair instructions. This is a logical solution: if the consumer does what the economic operator asks him to (repair the good himself following certain instructions), and as a result of that repair the good becomes not conforming, the seller will respond to the consumer for that lack accordingly, though the lack of conformity did not exist at the time when the goods were delivered, as generally required by art. 10.1 Directive 2019/771. In this case, the seller will respond to the consumer *ex* art. 37.3 Regulation, but the seller may later pursue remedies against the person responsible for the lack of conformity (right of redress), as allowed by art. 18 Directive 2019/771. This person is the economic operator who provided the consumer with the instructions (erroneous, deficient, unclear or confusing) on how to repair the product himself to make it safe. Obviously, if the repair instructions are sufficient and clear, and it is the consumer himself who negligently repairs the good, the lack of conformity is solely attributable to the consumer, so he will not be able to claim against anyone.

3.4. The disposal of the product by the consumer

Art. 37.4 of the Regulation provides the following: "disposal of the product by consumers shall only be included in the actions to be taken by consumers under Article 36(2), point (d) where such disposal can be carried out easily and safely by the consumer and shall not affect the right of the consumer to receive a refund for or replacement of the recalled product under paragraph 1 of this Article".

The economic operator can ask the consumer to dispose of the product himself. Two conditions are required. On the one hand, that the elimination can be carried out by the consumer "easily and safely". On the other, that this disposition request be included in the recall notice. The provision refers to art. 36.2.d), which requires that the recall notice clearly describes the instruction to immediately stop using the unsafe product. It seems

that the correct referral should be to letter e) of that art. 36.2, since art. 37.4 refers to "the actions to be taken by consumers", and these actions are the remedies offered to the consumer in letter e), which in turn refers to art. 37. In any case, it is not important, because what is truly decisive is that the recall notice mentions the disposal of the product by the consumer.

Unlike what happens in art. 37.3, art. 37.4 does not require that instructions for disposal of the product be included in the recall notice. It is true that the presentation of the product and the labeling may include warnings and instructions for its safe use and disposal [art. 6.1.d)]. But that is not enough. It would have been nice to expressly require this mention in the recall notice. Like art. 36.2 seems to contain a closed list of mentions that must be included in the recall notice, it is doubtful if disposal instructions can also be required. But the positive answer seems the most appropriate. Please note that disposal of a product must be done according to an established procedure. As the Regulation states, "disposal should be carried out with due consideration of the environmental and sustainable objectives set at Union and national levels" (Recital nº 92). In short, if the consumer is asked to remove it, it must be given guidelines to act correctly.

The disposal will not affect the consumer's right to replacement or refund, if these rights are offered to the consumer by the operator. If the economic operator asks the consumer to dispose of the item himself, he cannot at the same time offer to repair it. They are incompatible measures. But the operator can offer the replacement or refund. In fact, these last two measures must necessarily be offered (because as a rule he must offer at least two between repair, replacement and refund). Therefore, the usual case will be for the operator to offer the replacement or refund, and at the same time ask the consumer to dispose of the good himself.

The exercise of replacement or refund cannot be made subject to the proof that the good has not been disposed of by the consumer. The Regulation does not require it. Therefore, the operator may not refuse to replace or refund the money on the grounds that the consumer has not disposed of the product.

3.5. Measures in favor of the consumer or any owner of the product?

In the event of a recall of products for safety reasons, the economic operator will offer the consumer a solution, in the terms provided in art. 37 Regulation. The Regulation contains a definition of "consumer" very similar to that of other Union texts: "any natural person who acts for purposes which are outside that person's trade, business, craft or profession" (art. 3.17).

Accordingly, it seems that the Regulation does not apply when the purchaser of the product uses it for his professional activity. This will happen, for example, with the air conditioning equipment purchased and installed in the professional office of the lawyer or in an ophthalmological clinic. Despite being dangerous, it would not be subject to the solutions in case of recall.

This solution is not reasonable, because in these cases the health and safety of the buyers is also at stake, and even of those other people who simply passively "enjoy" the benefits that this product theoretically brings about (the clients of the lawyer or ophthalmologist's patients). For this reason, it must be argued that economic operators and providers of online marketplaces must provide the information contemplated in art. 35.1 Regulation (safety warnings and recall notices) to all customers who have purchased that product, and that the information offered through general channels (art. 35.4) will benefit all owners of the product, including sub-purchasers. For this reason, when the owner of a product contacts the economic operator that has issued a recall notice, this cannot "discriminate" based on whether or not the purchaser is considered a consumer. This interpretation is in accordance with art. 8 LGDCU, which uses a broad concept of consumer when referring to the basic rights of consumers. In this precept, the consumer is not the one who acts regardless of his business or professional activity, but any citizen.

4. Compatibility with the remedies for lack of conformity provided for in Directives 2019/770 and 2019/771

The consumer´s rights in art. 37 Regulation are compatible with the regime for lack of conformity in the sale of consumer goods established in Directives 2019/770 and 2019/771. The art. 37.1 Regulation is clear: the provisions of this provision apply “without prejudice to Directives (EU) 2019/770 and (EU) 2019/771”

As is known, Directive 2019/771 regulates the lack of conformity in the sales of consumer goods. However, the reference to Directive 2019/770 may be surprising, because it deals with the lack of conformity in contracts for the supply of digital content and digital services. This surprise disappears when it is verified that this Directive also applies to any tangible medium which serves exclusively as a carrier of digital content (art. 3.3 Dir. 2019/770), such as DVDs, CDs, USB sticks and memory cards, which are "products” for the purposes of the Regulation and may also be unsafe (Recital nº 88 Regulation).

A dangerous product (unsafe product) can be considered as a good that does not conform to the contract, and for this reason the consumer may exercise against the seller the rights that arise from the lack of conformity of the good. This was already the case under the old Directive 1999/44/CE and arts. 114 et seq. LGDCU before its reform by RD-Ley 7/2021 (this RD-Ley incorporates into Spanish law the Directives 2019/770 and 2019/771). Indeed, a dangerous good does not have the quality that the consumer can legitimately expect [art. 116.1.d) LGDCU, in its old wording], and for this reason it must be considered non-conforming[2]. With the new regulation the situation is clearer.

To complying with the requirement for conformity, the goods shall "possess the qualities and other features, including in relation to… security normal for goods of the same type and which the consumer may reasonably expect" [art. 7.1.d) Dir. 2019/771 and 8.1.b) Dir. 2019/770]. An identical rule is reproduced in art. 115 ter.1.d) LGDCU, in the currently valid version. As can be seen, the precept expressly refers to the "safety" of the good as a parameter to measure conformity.

In the event of the sale of a movable good that is dangerous (not safe), the consumer may exercise the remedies due to lack of conformity (art. 13 Directive 2019/771) or the measures of art. 37 of the Regulation, as long as the requirements settled in each of these regimes are met.

Thus, to exercise the rights of art. 37 of the Regulation it is necessary that an economic operator has issued a recall notice and has offered at least two of the three following measures: repair, replacement or refund of money. In this model there is no term for manifesting the lack of security, nor a time limit for the exercise of the right. On the other hand, the consumer can also claim in accordance with the Directive 2019/771, as long as the sale is subject to its scope. As the dangerous good is a non-conforming good, the consumer shall be entitled to have the goods brought into conformity (repair or replacement), to receive a proportionate reduction in the price, or to terminate the contract (art. 13.1 Directive 2019/771). In this case it is not necessary for an economic operator to have issued a recall notice, nor for an operator to address the consumer offering solutions to correct the lack of security of the good. It is enough for the consumer to prove that this lack of conformity exists, that is, that the product is not safe. In addition, the lack of conformity must be manifested within a maximum period of two years (art. 10.1 Directive 2019/771; three years in Spanish law, art. 120.1 LGDCU). And in Spanish law the exercise of the right is subject to a limitation period of five years (art. 124 LGDCU).

[2] Manuel J. MARÍN, "Comentario al art. 116", in R. BERCOVITZ RODRÍGUEZ-CANO (Dir.), *Comentarios al Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios*, Cizur Menor, Thomson-Aranzadi, 2015, p. 1689.

Depending on the circumstances mentioned, the consumer may exercise the remedies of art. 37 of the Regulation or those included in art. 13 Directive 2019/771. Or it may even be that the conditions of the two systems are given, and the consumer can exercise the whole of remedies. The latter is highlighted by the Regulation itself: if the consumer receives a recall notice with a description of the remedies available to the consumer, the consumer should act according to the instructions in the recall notice. Nevertheless, he or she should not be deprived of the possibility to ask for remedies from the seller based on non-conformity of the dangerous goods with the contract (Recital nº 89).

Anyway, the consumer may not use the remedies of the two models that are incompatible with each other *at the same time*. Thus, the consumer may not request to the economic operator repaying ex art. 37 Regulation and simultaneously ask to the seller the replacement ex art. 13 Directive 2019/771. He will not be able to ask the operator for a refund and simultaneously the repair or replacement to the seller. Once the economic operator has executed the remedy requested by the consumer as a result of the recall of the product, the consumer is no longer entitled to a corrective measure for non-conformity of the good for related reasons with the fact that the product is dangerous (but he could claim for other lacks conformity), because the lack of conformity no longer exists (Recital nº 90 Regulation). A similar situation occurs when the consumer invokes his right to a corrective measure due to the lack of conformity of the good; in this case he will not have the right to a remedy of art. 37 Regulation for this safety problem (Recital nº 90). But here you need to do nuances. If you successfully exercise the repair or replacement ex art. 13 Directive 2019/771, the good is no longer insecure, so that the consumer will not be able to use the remedies of art. 37 Regulation. The situation is similar when the consumer terminates the contract in accordance with art. 16 Directive 2019/771: after the termination of the contract, the consumer must return the good to the seller, so that, since the consumer no longer has an unsafe product in his possession, there is no room for the remedies of art. 37 of the Regulation. But the situation poses more problems when the consumer obtains a price reduction ex art. 15 Directive 2019/771. Because it is doubtful whether, after obtaining this price reduction, he can exercise against the economic operator the repair or replacement of the product ex art. 37 of the Regulation, or even asks for refund of the value of the product.