

Product Risk Radar

Smarter Regulation: UK Product Safety Review

Last updated: 15 January 2024

On 2 August 2023, two years since its initial Call for Evidence, the Department for Business and Trade and the OPSS published the UK Government's reform proposals for the UK product safety regime ("the **Proposals**"). By way of background, there are 13 proposals which are anticipated to radically change the product safety landscape and impact stakeholders. The UK Government launched a public consultation on the reforms, inviting views on the long-term approach to product safety, and how to ensure that the regulatory framework is suitable for future needs. The consultation process closed on 24 October 2023. The UK Government's response to the feedback is currently being prepared and is set to be published in 2024.

The proposals

1. Radically, a move away from the existing product safety framework (derived from European Union rules) to a new cross-cutting, hazard-based approach.
2. Establish a derogation process, which would allow businesses to apply for temporary regulatory easements to expedite the supply of essential products in periods of emergency.
3. Take full advantage of digital labelling.
4. A new defined role of "online marketplace" with its own set of specific duties to ensure effective cooperation.
5. Set out due care requirements in relation to unsafe product listings.
6. For higher risk products, an increase in the level of consumer-facing information to be provided for online listings to support informed purchasing decisions.
7. Enhance the leadership and coordination role of OPSS.
8. Create a new legal data gateway with the objective of facilitating a rich source of data.
9. All notification of recalls and serious product safety incidents and other corrective action by a manufacturer or distributor is sent to OPSS, rather than the local authority as soon as there is knowledge of an unsafe product.
10. Consolidate and align existing enforcement legislation.
11. Introduction of improvement notices, civil monetary penalties, and enforcement undertakings.

Smarter Regulation: UK Product Safety Review

12. Explore options for changing inspection powers for businesses that operate from homes.

13. Review the UK product liability regime considering technological developments.

Anticipated proposed changes

Greater regulation of ecommerce

Following the Call for Evidence, the market anticipated greater regulation of ecommerce due to its revolution of global supply chains and facilitation of new business models transforming how consumers are supplied with products. The Proposals acknowledged the unprecedented challenge that ecommerce has inflicted on the legal framework. Indeed, Governments have struggled to legislate to offer adequate protection to online consumers. We have observed considerable reform in the EU to bring existing rules up to date with new technology and market conditions. Following Brexit, the UK was seen to be lagging behind EU product liability reform. As such, the Proposals have closely followed EU reform addressing enhanced consumer protection and increased regulation of ecommerce. The Proposals seek to ensure that ecommerce will be as safe as shopping on the high street, particularly concerning unsafe products.

Key elements of the proposals seek to:

- Clarify cooperation duties for new business models, particularly online marketplaces, to ensure effective cooperation.
- Set out due care requirements in relation to identification and removal of unsafe product listings, which online marketplaces will need to meet.
- For higher risk products, increase consumer-facing information on online product listings to support informed purchasing decisions.

E-labelling

Consistent with the Call for Evidence, the Proposals set out an intention to modernise the framework through optional e-labelling, whereby manufacturers can make certain marking and compliance information available digitally. The consultation noted that some respondents in the Call for Evidence suggested that e-labelling would help reduce waste, alleviate industry burdens and costs, and allow for the easy update of information. Voluntary e-labelling is not currently accepted in the EU in relation to the consumer product safety areas covered by OPSS. As such, the Proposals present voluntary e-labelling as an example of a divergence from the EU post-Brexit and an opportunity to show regulatory leadership.

Stricter compliance and enforcement powers

The Proposals also outline enhanced enforcement powers and greater data sharing for the OPSS, thus bolstering its leadership and coordination role. For example, a requirement that product recall notifications, serious product safety incidents, and other corrective action be reported directly to the OPSS, rather than to local authorities. The Government hopes that the requirement to notify the OPSS, rather than local authorities, will lessen the burden on local authorities as they will no longer need to notify of any corrective action. OPSS will receive data more quickly and be able to advise as necessary on the appropriate corrective action, which could include working with the relevant primary authority where applicable.

Smarter Regulation: UK Product Safety Review

Similarly, introducing the notification requirement for serious incidents would provide a rich data source and give OPSS the ability to determine if the product involved in any reported incident was unsafe, identify similar incidents, and, if necessary, allow it to act promptly as required to protect the public. It is hoped that by the data being sent directly to OPSS, it can be tracked and used to anticipate early warnings of new and emerging risks, thus centralising national enforcement activity.

The Proposals also suggest the introduction of mandatory incident reporting to the OPSS. While we have observed the introduction of mandatory incident reporting in the EU, the UK's current risk-based model does not account for such detailed reporting. The Proposals do not indicate the level of mandatory incident reporting proposed and therefore businesses will have to wait and see what reporting burden the new legislation sets.

Consistent with changes in the EU, the Proposals seek to grant greater power to issue improvement notices, civil monetary penalties, and enforcement undertakings. Improvement notices will place the emphasis on authorities and businesses to collaborate to achieve compliance. Correspondingly, civil monetary penalties would be subject to statutory guidance and oversight by OPSS, and the recipients of the penalties would have the right to make representations and appeals. The EU has also proposed increased penalties but has left the decision as to what penalty would be appropriate to the discretion of Member States. The Proposals do not indicate the level of penalty so businesses will have to wait to learn if there will be any penalty level guidance.

Unanticipated proposed changes

Framework restructuring

The Proposals explain that in the Call for Evidence the Government heard that the product safety framework required greater consistency, coherence, and clarity, balanced against the need for regulation to be well aligned with practicable levels of risk. In response, the Government plans to overhaul the legislative framework, streamlining it to reduce duplication, remove inconsistencies, and balance any conformity and testing requirements that are not proportionate, or do not offer sufficient protection to consumers. The Proposals include a “move away from the current multiplicity of regulation towards a cross-cutting hazard-based framework underpinned by risk assessment, using standards and effective guidance to ensure agility and flexibility in an ever-changing market”. The new framework could potentially include the following changes:

- A move towards categorisation of products into a defined risk level rather than by sector.
- A cross-cutting approach for pre-market requirements across all product types of a similar risk level. For example, third-party assessments would be limited to high-risk products, due to their expense and time-consuming nature, particularly on smaller firms.
- Further detail on essential safety requirements and more detailed product-specific rules.
- The role of standards and the Presumption of Conformity may also be examined as part of a move to a hazard-based framework.

While the Call for Evidence did allude to change, a complete overhaul of the legislative framework and a move towards a cross-cutting hazard-based framework was an unexpected and substantial proposal. However, it remains to be seen how far the Government will move away from the current multiplicity of regulation.

Smarter Regulation: UK Product Safety Review

Mandatory incident reporting

Moreover, mandatory incident reporting for product-related incidents has been proposed. While we have observed the introduction of comparable requirements in the EU, mandatory incident reporting is not consistent with the UK Government's intention to reduce the regulatory burden and avoid the risk of stifling business growth. Resultantly, the thresholds will be instrumental in managing the level of regulatory burden that businesses will be faced with. Notwithstanding, the Proposals give examples of serious product-related incidents; those resulting in deaths, injuries requiring an overnight stay in hospital, or fires. The Proposal also suggests that the reporting system could be implemented in a similar fashion to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, which sets out duties to report certain serious work-related injuries, occupational diseases, and specified dangerous occurrences.

What does this mean for your business?

The consultation sought to update the United Kingdom's product safety framework, balancing the protection of consumers while allowing businesses the opportunity to innovate and grow. The consultation presents an opportunity to ensure regulatory requirements are better aligned to risk and any unnecessary costs on businesses are removed or avoided, in turn facilitating innovation and benefitting consumers through increased choice and lower prices. The consultation sought feedback and input on the Proposals from all stakeholders up to 24 October 2023. While many of the Proposals were anticipated and largely warmly received, they pose a significant overhaul to the current system, proposing a framework centred around potential cross-cutting, hazard-based safety requirements.

While the UK Government wishes to capitalise on opportunities arising from Brexit (which may involve a departure from current and future EU law in this area), manufacturers in the UK and companies importing into the UK market are advocating for alignment as far as possible between the UK and EU regimes. As such, it is yet to be seen what impact the feedback received will have on the Proposals.

Smarter Regulation: UK Product Safety Review

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