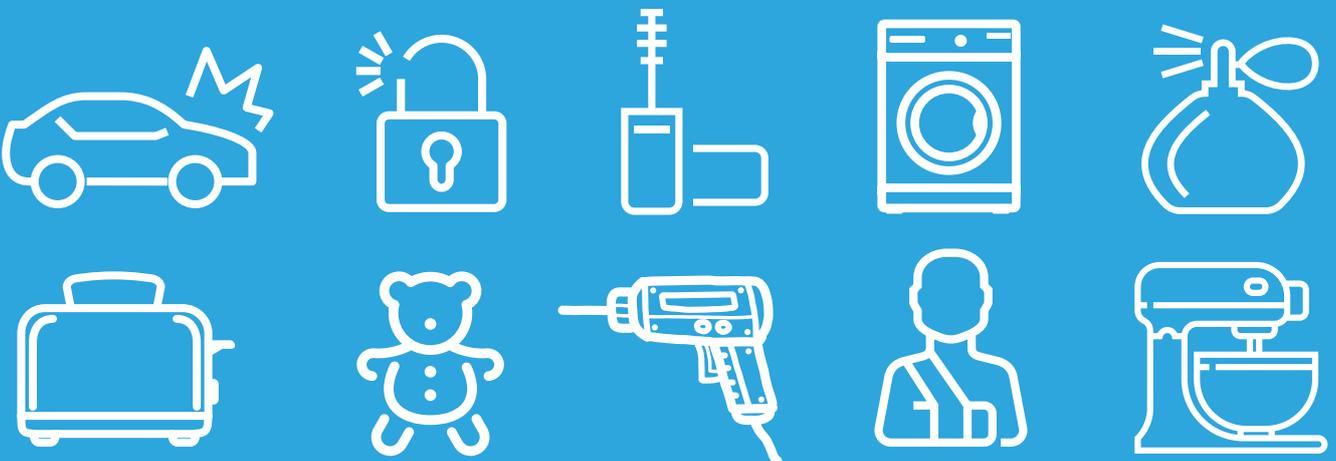


Strengthening the consumer product safety regime



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Executive summary

Recent incidents involving unsafe consumer products, including fires and deaths linked to faulty kitchen appliances, have highlighted serious flaws in the UK's product safety regime bringing into question the adequacy of the current regulatory and enforcement system, and the need for it to be strengthened.

A failing system

The safety of products is ultimately the responsibility of the businesses that produce them, but consumers need to have confidence that this is effectively over-seen. The current system is heavily reliant on individual local authority Trading Standards services to enforce product safety law and over-see product recall, along with a large focus on business certification of their own compliance. Unlike some other countries, there is no single independent body responsible for national oversight and co-ordination. Trading Standards are under strain from their broad range of enforcement responsibilities which can also make it difficult to ensure the necessary specialist expertise. At present nationally significant issues, which have an international reach, are being addressed at a local level through local authorities.

The Government has initiated a series of reviews as a reaction to fires from white goods, which in some cases resulted in deaths, starting with the Lynn Faulds Wood review in 2016,¹ this made a series of recommendations for a reformed and centralised approach. A further Working Group on Product Recall and Safety is due to report. There is also an investigation underway into the fridge freezer suspected to have caused the fire in Grenfell Tower. But no progress has been made on addressing the failure in the consumer product safety regime, and Which? has seen little willingness from the Government to act to adequately address the failings identified in this report.

Action needed

Fundamental reform of the current regime is needed so that consumers can have confidence that there is a robust system in place to ensure product safety. Any problems with product safety should be identified as soon as possible and the risk robustly assessed and managed. This includes swift action to remove unsafe products from the market and ensure that consumers are aware of any recalls or safety advice.

1 UK Consumer Product Recall: an independent review by Lynn Faulds Wood, 18th February 2016.

Strengthening UK enforcement

Reform of consumer product safety enforcement is essential in the context of over-hauling wider consumer enforcement, including the relative role of local Trading Standards, national regulators and central government. A new national system should be introduced, and the design should draw on the experience and applicability of more centralised approaches that exist in other countries.

The new national model for consumer product safety should be underpinned by the following core principles:

- Independence of the body from those it regulates
- A requirement to put consumer interests first
- Transparency in how it operates
- A pro-active approach to market surveillance
- A centre of expertise on product safety
- Ability to identify potential trends, gather intelligence and co-operate with international partners
- A duty to directly communicate and engage with consumers to ensure they are aware of safety issues.

Consumer information portal

A “one stop shop” for consumers on product safety issues, including recalls, should immediately be set up so that consumers can easily see what products have been recalled and what action they need to take on products in their own home. This information is currently available across a plethora of websites. There should be a single, reliable and publicised source.

Regulatory and standards framework

Beyond the existing issues with the product safety regime, the situation could become much more complex and, potentially, resource-intensive as the UK leaves the EU. But the UK could have greater flexibility over how it regulates product safety and Brexit could be an opportunity to improve the current system so that it can ensure consumer confidence. Brexit makes a review of both the legislative and enforcement frameworks for consumer product safety even more of a necessity to ensure an effective regime is in place for March 2019.

As the UK leaves the EU, the regulatory framework must be reviewed to ensure that it protects consumers. This should maintain the key protections and principles included within current legislation, but also ensure the greater independent oversight that is needed in place of an over-reliance on businesses to assess their own compliance across a wide range of consumer products.

Dependent on the outcome of the exit negotiations and approach to subsequent trade deals with the EU as well as other countries, the UK may not be part of the EU’s market surveillance and early warning systems or its expert advisory bodies. It will, however, have to ensure the safety of consumer products coming from a much wider range of countries, with differing levels of product safety regulation and compliance checks.

This will require the UK to build its capacity for scientific advice and expertise as it may no longer have the same access to EU agencies and advisory committees that currently provide this. The status of the national standards body, the British Standards Institution (BSI) and how it will relate to European standards bodies will also need to be resolved.

It is also essential, beyond the EU, that standards are not weakened where potential trading partners have more limited product safety regimes.

Changes to primary authority

Adding to these challenges is the current approach to primary authority partnerships between local authorities and the businesses that they oversee. The poor handling and failure to recall faulty Whirlpool tumble dryers linked to around 750 fires nationally has highlighted that this approach is not working well as it can lead to confusion over an authority's advisory and enforcement roles and how its independence is perceived.

Consumers are being put at risk by the inadequacies of the current system and so immediate action also needs to be taken to ensure people are better protected. Changes are needed to ensure that primary authority partnerships do not conflict with the product safety enforcement responsibilities of local authorities.

There needs to be an effective appeal route for when other Trading Standards departments, regulators and interested parties, such as Which? or fire authorities, believe the primary authority's advice is inadequate. There must be an immediate, clear steer from Government to local authorities that they have to take responsibility for product safety and a reiteration of the market surveillance responsibilities under the General Product Safety Regulations.

1 Introduction

It is essential that consumers can have confidence that the products they buy, from cars to cosmetics, are safe to use. While people may expect to choose products based on quality and price, safety is something that can easily be assumed.

A body of legislation and standards have been put in place over many years with the aim of ensuring that this is the case and to limit any consumer harm. Recent developments have, however, brought into question the adequacy of the current regulatory and enforcement system relating to consumer product safety.

Most prominent has been a series of incidents relating to domestic appliances. There has, for example, been an on-going failure by Whirlpool to ensure the speedy or effective withdrawal and modification of over 5 million tumble dryers (sold under the Hotpoint, Indesit, Creda, Proline and Swan brands) identified as at risk of catching fire – one of which is alleged to have caused a large fire in a block of flats in Shepherds Bush.² Deaths in house fires have also recently been linked in press reports to faulty Beko tumble dryers and fridge freezers.

More generally, the enforcement regime that underpins product safety is under increasing strain. Local authority Trading Standards departments, which carry most of the responsibility for enforcement of product safety, have rapidly diminished in many parts of the country as a result of local authority spending cuts, raising issues about the level of independent challenge that exists to ensure compliance with safety requirements.

The UK's decision to leave the EU also means that its wider approach to product safety must be reviewed. Brexit will require the UK Government to look at how a future system should be designed that is fit for purpose for the potentially more diverse and complex trading environment the UK will be part of in the years to come.

This report therefore reviews the current regulatory framework covering consumer product safety and makes recommendations for a new approach.

² http://www.london-fire.gov.uk/news/LatestNewsReleases_investigation-concludes-dryer-to-blame-shepherds-bush.asp#.WLV1Vpm-LSUk

2 How the current system works

The current system is based on a mix of regulations and standards that differ in approach and level of independent oversight, depending on the nature of the product and potential risk. Enforcement of these requirements generally falls to Trading Standards Services within local authorities, with policy responsibility for general consumer product safety falling to the Department for Business, Energy and Industrial Strategy (BEIS).

The regulatory framework

The UK's regulatory framework is currently established at EU level. Cross-cutting requirements for the majority of consumer products are currently set out in the EU's General Product Safety Directive³ which is implemented by the General Product Safety Regulations 2005 in the UK.

For most consumer products, it is businesses' responsibility to ensure conformity with these general requirements, including their safety. This is supported by a body of EU standards (or in some cases international or national standards) for specific products.

Some products that raise particular issues are subject to more specific safety regulation. This includes products used by children (e.g. toys), food, medicines, cosmetics and more complex products such as cars and electrical equipment. This is reflected in the level of delegation of responsibility for assessing and ensuring safety. European Commission decisions have been issued to address more specific products or safety issues (e.g. personal music players, internal blinds and cot mattresses). There is also cross-cutting regulation of chemicals (Registration, Evaluation, Authorisation and Restriction of Chemicals or REACH)⁴ that is relevant across consumer products.

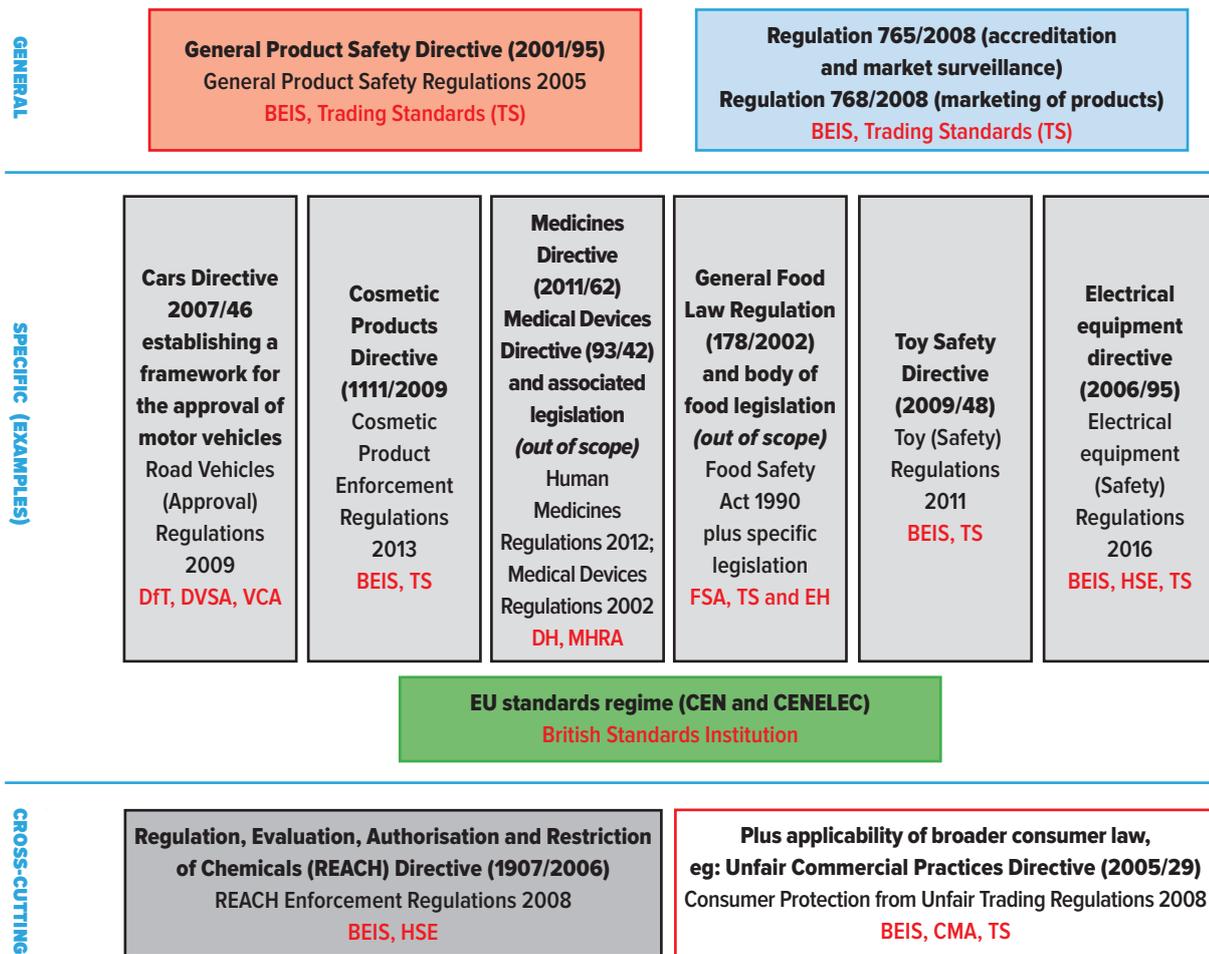
The regulatory framework differs depending on the nature of the product (as well as for certain products or categories of product within them) on issues such as:

- The role of businesses and public authorities in assessing safety
- Requirements for pre-market assessment and/or approval by public bodies or authorities
- Consideration of potential benefits or other factors as well as safety risks
- The approach to safety assessment (e.g. hazard or risk-based)

³ The General Product Safety Directive (GPSD) 2001/95/EC

⁴ Regulation (EC) 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals

Figure 1: Summary of key aspects of the regulatory framework and responsibilities⁵



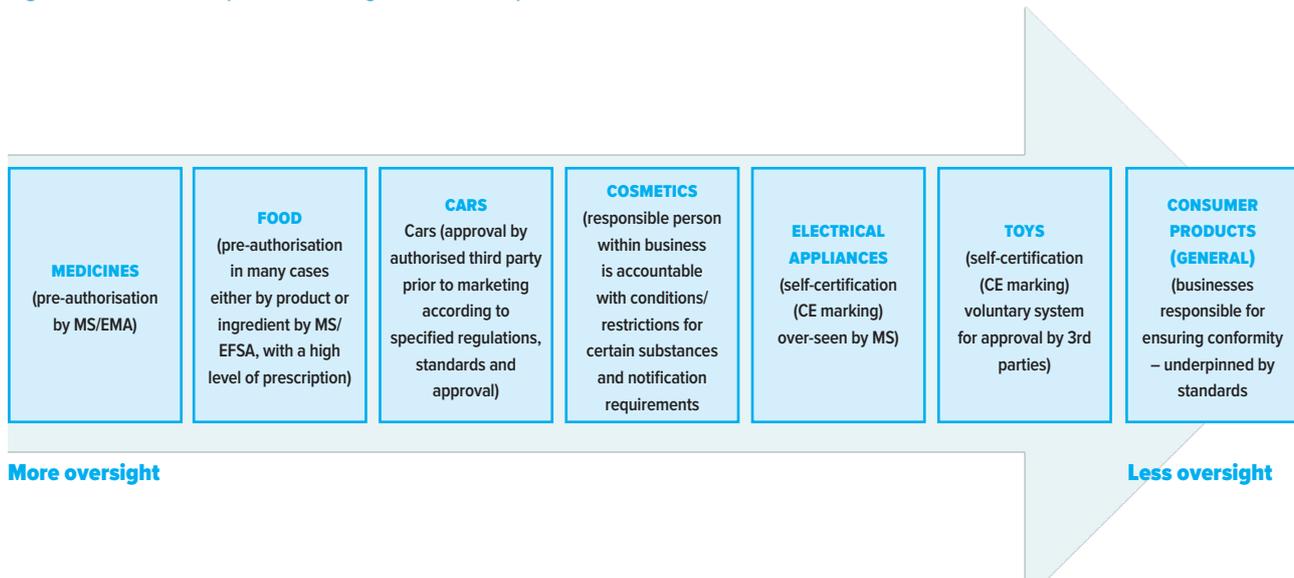
- Whether any costs or fees are imposed on businesses for safety assessments
- The systems for sharing information and early warnings on safety and the approach to product recall.

In all cases, there is a requirement to ensure safety (a high level of human health protection), but how this is ensured – and the level of independent oversight and prescription involved – varies depending on the nature of the product. An indicative spectrum of oversight across different product categories is set out in Figure 2.

Products that are ingested, or are particularly complex, for example, tend to have a higher level of pre-market, independent oversight compared to more general consumer products. For these, there is a general duty to ensure safety and a requirement to demonstrate compliance when requested by the authorities.

⁵ BEIS – Department for Business, Energy and Industrial Strategy (BEIS); DH – Department of Health; DfT – Department for Transport; DVSA – Driver and Vehicle Standards Agency; EH – Environmental Health (with local authorities); FSA – Food Standards Agency; HSE – Health and Safety Executive; MHRA – Medicines and Healthcare Products Regulatory Authority (MHRA); TS – Local Authority Trading Standards Services; VCA – Vehicle Certification Agency.

Figure 2: Extent of independent oversight for different products



This report focuses on general consumer products and does not look at medicines and food in detail as they are subject to more distinct regimes.

General conformity requirements

The General Product Safety Directive includes a requirement to only place safe products on the market – and aims to ensure a high level of protection. It specifies ways for businesses to ensure conformity through:⁶

- Voluntary national standards transposing relevant EU standards
- Member States (MS) standards
- European Commission recommendations setting guidelines on product safety assessment; product safety codes of good practice in the sector concerned
- The state of the art and technology
- Reasonable consumer expectations concerning safety.

National authorities can impose restrictions where there is evidence that despite conformity, a product is dangerous – and have to establish competent authorities to monitor compliance, set penalties and carry out checks. In the UK, this is largely the responsibility of Trading Standards and therefore falls to local authorities.

These authorities have powers to ban dangerous products and arrange withdrawal – with an emphasis on being proportionate and encouraging and promoting voluntary action.⁷ Under the current system, EU Member States have to carry out market surveillance and make it possible for consumers to make complaints about product safety. The EU’s rapid alert system for product safety (RAPEX⁸) is in place for rapid exchange of information between Member States, who are encouraged to make information available to consumers about safety issues.

6 The General Product Safety Regulations 2005, Presumption of Conformity, Regulation 6.

7 The General Product Safety Regulations 2005, Presumption of Conformity, Regulation 10.

8 Rapid alert system for dangerous non-food products or RAPEX: http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/content/pages/rapex/index_en.htm

In addition to these general requirements, regulation of certain products has been harmonised to enable them to be freely traded across the EU. The General Product Safety Directive requirements still apply in addition to these.

There has been a move away from detailed legislative requirements in recent years. The EU's approach⁹ is generally based on simplified rules supported by an EU standardisation policy. Requirements for effective conformity assessment, accreditation and market surveillance are set out, along with specific directives with additional requirements for certain products, ranging from toys to tyres and supported by more detailed standards.

Much of the current system is based on self-certification of compliance. For certain products, CE marking¹⁰ has to be provided. To be sold in the EU or EEA, manufacturers are required to self-certify that their products meet the safety requirements set out in relevant EU legislation. This applies to the following consumer products: toys, electrical products, construction products, telecommunications equipment, medical devices, machinery, equipment and safety components, personal protective equipment, satellite station equipment, gas appliances, pressure equipment appliances (other than gas), non-automatic weighing instruments and equipment, measuring instruments and recreational craft. The level of independent testing to under-pin this self-certification will depend on the nature of the risk. In most cases, it is the manufacturer's responsibility. CE marking is not, therefore, an indication of independent certification.

The standards system

Standardisation is an important part of the current approach to consumer product safety. This relies on standards that are developed by private bodies which bring together a range of interested businesses, as well as other interest groups, to agree standards. These are usually voluntary standards, although some are referenced within EU legislation.

In the UK, the main standards body is BSI¹¹ which works through a range of committees to develop standards. At EU level, standards are set by CEN and other standards bodies for electrotechnical (CENELEC) and telecommunications (ETSI) standards. These are also private bodies, comprised of the standards bodies, such as BSI and its equivalents, which operate within Member States. Iceland, Norway, Switzerland, Macedonia, Serbia and Turkey are also members of CEN.

At international level, other standards bodies exist, most notably the International Standards Organisation (ISO). The main EU, as well as UK and international bodies, are set out in Figure 3.

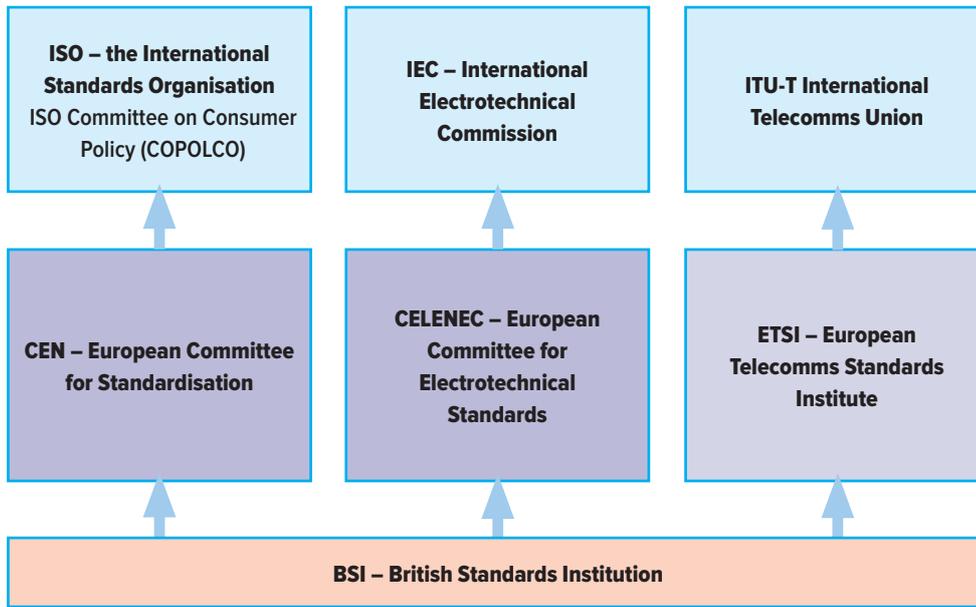
BSI also operates a Kitemark scheme which certifies product compliance with relevant standards. This is not a requirement, but a voluntary scheme

9 https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en

10 https://ec.europa.eu/growth/single-market/ce-marking_en

11 <https://www.bsigroup.com>; <https://www.cen.eu>; <https://www.cenelec.eu/>; <http://www.etsi.org/>; <https://www.iso.org>.

Figure 3: The main UK, EU and international product standards bodies



that manufacturers may choose in order to demonstrate compliance to their customers. This is more prominent in certain sectors than others, for example personal safety equipment or fire prevention, although is used for some household appliances.

Under the current system, once a European standard is published, CEN and CENELEC members are required to implement it and withdraw any pre-existing standards that conflict. CEN co-ordinates with ISO and ISO standards have primacy.

Specific product regulation and standards

The following examples give an overview of how more specific requirements are in place for certain types of consumer product.

Cars

Cars are covered by the general product safety requirements. Additional EU legislation sets out specific requirements for car safety. Directive 2007/46¹² sets out the Whole Vehicle Type Approval System (WVTA) which enables a vehicle manufacturer to obtain certification for a vehicle type in one EU country and then market it EU-wide. A range of specific EU regulations as well as regulations established by the international standards body, the United Nations Economic Commission for Europe (UNECE)¹³, apply. There is a general obligation on manufacturers to ensure safety and compliance. Competent authorities appointed within each Member State over-see this.

The Driver and Vehicle Standards Agency (DVSA) is the competent authority responsible for enforcement for car safety in the UK under Directive 2007/46.

12 Regulation (EC) 2007/46 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles.

13 UNECE World Forum for the Harmonisation of Vehicle Regulations (www.unece.org).

The certification body for compliance with EU and UNECE regulations is the Vehicle Certification Agency (a third party body under the Department for Transport). The DVSA has a website where consumers can report a safety problem and enables people to search to see if there are any issues with their car. This can also be accessed from other sites such as the Motor Ombudsman. An industry Code of Practice sets out the approach to Vehicle Safety Defects and Recalls.

The European Commission has proposed a new Regulation to replace Directive 2007/46.¹⁴ This follows a ‘fitness check’ and calls for a tighter system in light of the VW emissions scandal. The draft Regulation aims to make vehicle testing more independent and increase market surveillance. It would therefore clarify obligations on Member States as well as economic operators and introduce stricter market surveillance provisions. This includes clarification of recall and safeguard measures. The overall intention is to “restore the citizens’ trust in the capability of the regulatory system to ensure an adequate level of protection for health and the environment.” This is unlikely to be in place before the UK leaves the EU.

Cosmetics

The EU’s Cosmetic Regulations (2009)¹⁵ require that cosmetic products are safe for human health when used under normal or reasonably foreseeable conditions of use. A list of prohibited and restricted substances is annexed to the Directive along with requirements for colourants, preservatives and UV filters.

Businesses are required to appoint a ‘responsible person’ for product safety. A product information file has to be available and kept for 10 years after the last product was placed on the market. Notification to the European Commission is also required prior to marketing (this goes to all Member States and is included on the Cosmetic Products Notification Portal). There is a specific requirement for nanomaterials to be notified 6 months before marketing because of concerns about their specific properties which may differ from substances in their usual form.

BEIS is the UK competent authority, with enforcement falling to Trading Standards. Member States are required to monitor compliance under the Regulations. They should perform appropriate checks of cosmetic products and economic operators on an adequate scale, through the product information file and, where appropriate, test. A review of the effectiveness of market surveillance is also required by Member States every four years.

Toys

The Toy Safety Directive (2009/48) and the Toy (Safety) Regulations 2011 which implement it in the UK, require manufacturers to ensure that they have

¹⁴ European Commission Proposal for a Regulation on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, 27.1.16.

¹⁵ Regulation (EC) 1223/2009 on cosmetic products, which came into force in July 2013.

been designed and manufactured in accordance with the safety requirements set out in the Directive. Toys, including the chemicals they contain, should not jeopardise the safety or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the behaviour of children.

The Directive provides for self-certification of conformity and use of the EC declaration (CE marking), with a requirement on manufacturers to keep technical documentation for 10 years and make sure that continuing production runs of the same toy remain in conformity. They must also investigate and record any complaint made in relation to the toy and keep a register of complaints, non-compliant toys and recalled toys; bring non-conforming toys into compliance; tell authorities if there is a safety risk; provide information to authorities on request and identify the other economic operators in the supply chain.

Member States have to take all measures necessary to ensure that toys are not placed on the market unless they comply. They have to designate a notifying authority responsible for setting up and carrying out procedures for the assessment and notification of conformity assessment bodies for the purposes of the Directive. BEIS is the competent authority with enforcement falling to Trading Standards.

Member States are obliged to carry out market surveillance. In the case of non-compliance (e.g. with CE marking), the Member State must take appropriate measures to restrict or prohibit the toy being made available on the market, or ensure that it is recalled or withdrawn from the market. BSI has a series of standards relating to toy safety (BS EN 71). The Lion Mark (of the British Toy and Hobby Association) also certifies that the product meets them.

The role of scientific advice

The regulatory framework is underpinned by risk analysis, the process of assessing and managing risk, as well as ensuring effective risk communication. Risk assessment generally includes hazard identification, hazard characterisation, exposure assessment and risk characterisation. Risk is the likelihood that a hazard will achieve its harmful potential. Risk will therefore take account of aspects such as the likelihood and scale of exposure.

Risk management involves considering the risk assessment alongside other relevant factors and deciding what action needs to be taken in order to control the risk. This can include how precautionary to be, where there is scientific uncertainty, for example. When done well, risk communication should run throughout the process so that all necessary information is fed in, including views about public perceptions, in order to determine what is a socially acceptable level of risk. Responsibility for these stages and their scope can differ, depending on the type of product, as well as the extent to which this is set down as a business or government responsibility.

An important aspect of how risk analysis is applied under the current approach, particularly for more sensitive products such as medicines, food and chemicals, has been government oversight and a functional split between assessment (the science) and management (where wider economic and societal

considerations can come into play). This is a physical separation in many cases, with specific agencies or independent scientific committees established to conduct risk assessments or provide advice, generally based on data submitted by industry or trade associations, with follow up in some cases (e.g. by Member States in the case of chemicals, based on a shared work plan (CoRAP¹⁶).

Several committees help determine which approach should be taken to assessing the safety of consumer products. Some of these sit within EU agencies; others within DG Santé, the European Commission Directorate-General with responsibility for health protection. Appointments are generally based on an open call for experts and subject to a declaration of interests, with varying degrees of scrutiny of these interests.

The overall approach reflects that it is more robust and less open to abuse if assessments are made by a group of independent, multi-disciplinary experts. This is very similar to the UK's approach to scientific advice, although national capacity has been limited because of EU competence. In some cases, Member State experts conduct the assessments either as part of an expert group (e.g. for medicines), or as an initial assessment subject to wider scrutiny by other Member States or the relevant agency (e.g. pesticides).

The main bodies at EU level for general consumer product safety are:

- the Scientific Committee on Consumer Safety (SCCS)¹⁷ – which covers health and safety risks of non-food consumer products (e.g. cosmetics, toys, textiles) and services (e.g. tattooing, artificial tanning)
- the Scientific Committee on Health, Environmental and Emerging Risks (SCHEER)¹⁸ – which deals with emerging or newly identified health and environmental risks.

More specific agencies exist that cover specific products e.g. the European Medicines Agency (EMA) which has scientific committees comprised of Member State representatives, the European Chemicals Agency (ECHA) which has committee members proposed by Member States and the European Food Safety Authority (EFSA) which has scientific panels of independent experts appointed through an open call.

At UK level, the most relevant committees for general consumer product safety, taking into account that most risk assessments are carried out at EU level, are the Committees on Toxicity, Carcinogenicity and Mutagenicity¹⁹ which sit within the Department of Health. There is not a national equivalent for all of the EU bodies.

¹⁶ <https://echa.europa.eu/information-on-chemicals/evaluation/community-rolling-action-plan/corap-list-of-substances>

¹⁷ https://ec.europa.eu/health/scientific_committees/consumer_safety_en

¹⁸ https://ec.europa.eu/health/scientific_committees/scheer_en

¹⁹ Committees on the Toxicity, Carcinogenicity and Mutagenicity of Chemicals in Food, Consumer Products and the Environment.

The precautionary principle

The precautionary principle is explicitly referenced within some of the key legislation dealing with product safety (e.g. toys, cosmetics, general product safety, as well as general food law) in order to address situations of scientific uncertainty, but where there is some evidence of a risk to health. The principle allows temporary measures to be adopted to protect consumer health until a fuller risk assessment is conducted.

It has been a controversial principle over some trade issues, particularly between the EU and US, where the EU has refused to accept products from countries outside of the EU that don't conform with its legislation based on this principle. The principle, or at least its concept, is however included within the international trade agreement that deals with health protection.²⁰

Although the principle is usually presented as a risk management choice, its effective application also relies on a robust and transparent approach to risk assessment that is explicit about uncertainties, their potential consequences and how they can or cannot be addressed.

Proposed changes to EU regulation and surveillance

In 2013, the European Commission proposed a new Regulation on Consumer Safety to replace the general requirements under the GPSD.²¹ This has, however, made little progress, but a new Goods Package of legislation is expected later this year which is expected to include market surveillance within it.

Four main areas for improvement that were identified by the Commission were:

- Procedures for mandating standards for products not covered by other legislation
- Harmonisation of safety evaluations
- Market surveillance co-operation and co-ordination, including operation of RAPEX and on-line distribution channels
- Alignment with the EU's free movement of goods package.

A separate market surveillance regulation that was proposed also had the aims of simplifying requirements, introducing stronger border controls and giving powers to market surveillance authorities to charge economic operators fees where they require corrective action. It is unlikely that this will be in place before the UK leaves.

20 The World Trade Organisation's Agreement on Sanitary and Phytosanitary (SPS) measures, states that: "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

21 http://ec.europa.eu/consumers/archive/safety/psmsp/docs/psmsp-act_en.pdf

3 Challenges facing the system

There are a number of challenges facing the system – and weaknesses within it – that raise fundamental questions about its ability to protect consumers adequately going forward.

Recent safety issues

Recent product safety issues at national level have brought into sharp focus the adequacy of the system in protecting consumers and how the consequences when something goes wrong can be devastating.

Over 5 million Whirlpool tumble dryers (sold under the Hotpoint, Indesit, Creda, Proline and Swan brands) have been identified by the company as at risk of catching fire. The dryers have not, however, been subject to a recall. Whirlpool has instead instigated a programme to fix affected machines. These dryers have been linked to over 750 fires. London Fire Brigade considers that one of these faulty dryers, which was waiting to have the company's proposed fix applied, was the cause of a large fire in a block of flats in Shepherd's Bush. Which? has been critical of the response of the company, and the local authority that over-see's it, and subsequently initiated judicial review proceedings. This resulted in Peterborough Trading Standards issuing a safety notice and Whirlpool updating its advice and telling consumers to stop using affected machines – but to date, there has still been no recall.

In 2016 a coroner ruled that a Beko tumble dryer had caused a house fire that resulted in the death of a woman in Birmingham. In this case, the company had been aware of an issue with these machines as a different fault in the machines had previously caused 20 other fires. Despite this, Beko had concluded at the time of her death that the machines did not need to be recalled. A Beko fridge freezer is also said to have caused the death of a man in a house fire in 2010.

Other safety issues have emerged that have led to large scale recalls. Vauxhall recalled over 200,000 Zafiras for correction in December 2015 because of a risk they could burst into flames. In 2017 they also recalled the Corsa D because of a similar problem, highlighted by the BBC's Watchdog programme.

Which?'s own testing and reports received from consumers have also highlighted a range of additional issues, including exploding washing machine doors,²² unsafe sunscreens²³ and potentially deadly carbon monoxide alarms.²⁴

22 Exploding washing machines, Which? magazine, May 2016

23 Best buy sunscreens you can rely on, Which?, June 2017

24 Carbon monoxide alarms, Which? magazine, November 2016

Common themes

These product safety issues have been handled differently by the companies responsible, but there have been common themes:

- A lack of response despite evidence of a problem, both in terms of:
 - initiating a recall
 - rectifying a fault
 - pro-active and effective communication with consumers
- In some cases (e.g. Whirlpool), potentially dangerous advice has been issued about the safety of using appliances and under what circumstances
- No centralised source of information to make consumers aware that a product they have bought may have a problem or needs to be returned
- Inadequate response from the local authority or government body responsible to ensure that the company is taking action and fulfilling its legal responsibilities.

Limited and reducing enforcement resources

A key concern is the inadequacy of current enforcement and market surveillance requirements for product safety. This partly reflects the limitations of local authority resources with Trading Standards Services covering a broad range of consumer and wider enforcement responsibilities.

The Chartered Trading Standards Institute (CTSI) has reported that some local authority services have been cut by as much as 80%. A report published by Birmingham University in 2015²⁵ commissioned by CTSI and the Government highlighted that Trading Standards work was becoming increasingly reactive and that there had been a lot of expertise lost. Product safety was one issue that was identified as having become a lower priority:

“The survey and case studies highlighted a shift from a focus on vital regulatory activities such as checking weighing equipment, analysing food samples, testing the safety of products, to more publicly visible responsibilities that directly address contemporary community concerns, e.g. protecting the vulnerable from rogue traders, scams and door-step crime, and contributing to other public health and social issues such as alcohol and substance abuse.”

A review by the National Audit Office published at the end of 2016²⁶ highlighted that local Trading Standards have overall lost 56% of full-time equivalent staff since 2009. Twenty services in England have reduced funding by over 60% since 2011 and some now have only one qualified officer.

Trading Standards not only need to have the resources for market surveillance to be effective, they also need to have sufficient expertise. Compliance is rightly the responsibility of businesses and many will recognise the reputational risk of failing to ensure this. But the regulatory framework also relies on competent

25 The impact of local authority trading standards in challenging times, John Raine et al, Birmingham University, March 2015

26 Protecting consumers from scams, unfair trading and unsafe goods, National Audit Office, December 2016

authorities having the ability to challenge businesses, where non-compliance is a problem and to understand when there is a potential risk.

To be effective, this challenge requires specialist expertise. The CTSI has a 'lead officer' scheme, with officers leading on particular aspects of Trading Standards work, but this is voluntary and advisory. Reforms to the consumer protection landscape in 2011 led to the creation of a National Trading Standards (NTS) Board to allocate funding and co-ordinate work through national teams, led by an interested local authority. There is not, however, a national team for product safety. Even when teams exist, their resourcing and general status of NTS means that they are still limited in scope and resources. There is therefore insufficient resource and expertise to operate an effective enforcement regime.

Weakness of the primary authority regime

The approach to enforcement can also mean that safety problems are not dealt with swiftly or robustly enough, even when they are identified.

Primary authority partnerships between local authority Trading Standards departments have been heavily promoted by Government to ensure consistency and promote better regulation. In principle, these make sense, as they mean that companies that could be operating in different parts of the country have a single local authority as their point of contact for advice on compliance issues. However, it means that the authority that advises a business on how it should comply, and in effect signs off whether or not it is doing enough to comply, also has the responsibility to step in and take enforcement action when something goes wrong.

The approach of Peterborough City Council Trading Standards, primary authority in the Whirlpool case, suggests that this emphasis on primary authority is causing confusion in relation to the role of Trading Standards in market surveillance - and their legal responsibility to ensure that unsafe products are dealt with effectively, including requiring a recall if necessary.

The Regulatory Enforcement and Sanctions Act 2008 sets out how primary authorities operate:

“The primary authority has the function of – (a) giving advice and guidance to the regulated person in relation to the relevant function; (b) giving advice and guidance to other local authorities with the relevant function as to how they should exercise it in relation to the regulated person.”

It also states that the primary authority may make arrangements with the regulated person as to how it will discharge its function.

Enforcing authorities (if different from the primary authority) must notify the primary authority before taking any enforcement action. If the primary authority determines that the proposed enforcement action is inconsistent with advice or guidance it has previously given, it can direct the enforcing authority not to take enforcement action. There is currently no route for other local authorities (enforcing authorities) or public interest groups, such as Which? or in the case of the Whirlpool case, London fire authorities, to seek an appeal or review of the primary authority's advice if they think it is

inadequate – other than through judicial review, as Which? initiated against Peterborough City Council.

Local authority responsibilities are, however, clear within the Consumer Product Safety Regulations 2005:

“An enforcement authority shall in enforcing these Regulations act in a manner proportionate to the seriousness of the risk and shall take due account of the precautionary principle. In this context, it shall encourage and promote voluntary action by producers and distributors. Notwithstanding the foregoing, an enforcement authority may take any action under these Regulations urgently and without first encouraging and promoting voluntary action if a product poses a serious risk” (Regulation 10(5)).

The current approach to primary authority advice therefore risks hampering action needed to protect public safety. It is important that it is reviewed, any ambiguity over local authorities’ role in giving advice and being the enforcing authority is addressed and an appeal mechanism put in place so that primary authority advice given by a local authority can be challenged.

Over-reliance on businesses to comply

The resource pressure on enforcement also brings into question whether there is the right balance between company self-checks and independent oversight in relation to some specific consumer products.

As already set out, the European Commission has, for example, identified weaknesses in the way that car safety is currently regulated and issued proposals aimed at enhancing the level of independent oversight of compliance. Which? has previously raised concerns about the system, including the failure to sufficiently publicise recalls and an over-reliance on manufacturers to do the right thing and initiate recalls. A Which? report in 2013²⁷ for example highlighted several incidences where we considered a recall was warranted, but the VOSA (the body responsible prior to the DVSA) failed to act. More recently, a recall by Vauxhall of its Corsa D was only initiated following reports of a fire risk to BBC’s Watchdog.

Which? raised concerns about cosmetics regulation when it was last reviewed. Our research on the use of nanomaterials in cosmetics, for example, raised issues about a lack of appropriate expertise to deal with complex and emerging scientific issues. When we tried to ensure a face cream made with fullerenes, a type of nanomaterial that the EU’s SCCS had raised safety concerns about, was removed from sale in a high street retailer, the responsible Trading Standards department had no knowledge of the issues raised by nanomaterials or the SCCS’s opinion. The Department for Business, Innovation and Skills (BIS), now BEIS, would not intervene, merely reiterating that the Regulations required companies to ensure products were safe.

Our testing²⁸ has also repeatedly found problems with sunscreens and highlighted how EU and therefore UK requirements are weaker than in other

²⁷ Time to Recall, Which?, July 2013.

²⁸ Best buy sunscreens you can rely on, Which?, June 2017

countries such as Canada and Australia. We have consistently found that some products do not provide the level of protection that is claimed, raising questions about the regularity and appropriateness of testing by cosmetics companies and how this is over-seen.

Leaving the EU, therefore, provides an opportunity to review the balance of responsibilities and level of independent oversight across key product sectors.

No co-ordinated recall information

When something does go wrong, there is currently no simple way for consumers to find out about it. There are several routes for recall and safety information and a range of sources of advice about unsafe products and recalls.

The CTSI website could be a central source. But other sites also exist, including: Electrical Safety First, the UK Association of Fire Investigators, the EU's RAPEX system, the Information and Communication System for the pan-European Market Surveillance (ICSMS) and the Organisation for Economic Co-operation and Development (OECD) product recall portal. Specifically in relation to car safety, there is the DVSA site. The Association of Manufacturers of Domestic Appliances (AMDA) has also set up a website for consumers to register appliances so that they can be quickly notified if there is a safety issue.³¹ These sites generally enable consumers to search to see if there have been any issues with a product that they have bought, rather than setting out all affected products.

The number of sites available causes confusion and means that consumers can easily miss important recall information, or fail to appreciate its importance. One single, reliable and well-publicised site that is an authoritative source of information and advice is therefore needed.

Slow response to Government reviews

In view of the issues with product related fires set out above, particularly the death of a man in a fire caused by faulty Beko fridge freezer, Lynn Faulds Wood was asked by the Government to lead a review of consumer product recall. The review was commissioned in 2015 and reported in February 2016.²⁹

The review stressed an urgent need to improve the processes involved in dealing with unsafe products and recalls in the UK. Ms Faulds Wood raised a particular concern about the inadequacies of market surveillance in view of the limitations of Trading Standards. Her recommendations included:

- create an official national product safety agency or 'centre of excellence' to show leadership and co-ordinate
- set up an official trusted website (for up to date information about unsafe products and recalls – as exists in other countries)
- improve funding, training resources and procedures for market surveillance
- explore alternative funding solutions to improve the recall system
- provide clearer "what does good look like" guidance for businesses on recall (e.g. by BSI)

- urgently map the organisations involved in product recall and ensure better data and information sharing
- reintroduce a national injury database (as in the US)
- improve consumer interest and involvement in the recall process.

The Government response to the review was, however, very limited. It dismissed the idea of a national consumer product safety body on the grounds that this would be inappropriate given the state of government finances. It suggested instead that the 'centres of excellence' idea be pursued, but by stakeholders, rather than by government - and saw this as a virtual centre, rather than a physical body. A Steering Group was set up to look at this and also other aspects of the recommendations, such as the need for guidance. The membership of this Recall Review Steering Group was announced on 1st July 2016.

Following the Shepherd's Bush fire the Government set up another Working Group on Product Recall and Safety in October 2016, to build on the work of previous Recall Review Steering Group to develop options to improve the system of product recalls and safety, including looking at the causes of fire in white goods and the action needed to reduce them. This is being chaired by Neil Gibbins, the Former Deputy Chief Fire Officer of Devon and Somerset. It is looking at:

- registration of electrical products at the point of sale
- the development of a code of practice for product recalls including the peer review of risk assessments
- improving the information available to consumers and the role of consumer education
- ways to improve the capture and use of data relating to faulty electrical goods
- the value of marking white goods to preserve their identification through fire.

Despite these reviews, there have not been any significant changes to the way that product safety is handled and enforced. It is therefore essential that the Government acts to ensure that the system is strengthened.

4 Issues raised by exiting the EU

The decision to leave the EU presents an opportunity to review the regulatory regime and address its weaknesses, while holding on to important consumer protections.

Scope for change

There is a lot of uncertainty about what the nature of the relationship between the UK and EU will be when the UK leaves. The amount of divergence from the current approach will depend on the UK's relationship with the EU going forward, as well as any trade deals that are established with the EU and other countries. Depending on the terms of the negotiations, the UK could be outside the EU regulatory and standards regime, but still bound by it for trade with the EU. It also means that the UK is likely to need to take on much greater responsibility for enforcement and checks of imports, along with checks on exports in order to assess compliance with new customs controls.

Transposing current requirements

The Government has stated that all EU legal requirements will be transposed into UK law on the date that the UK leaves. This provides reassurance that current protections and the principles that underpin them will be retained. Key features of the existing regulatory regime that will be important include:

- the aim of a high level of health protection
- a recognition that some products will require more specific regulation and greater independent oversight
- a recognition that some products (or production methods associated with them) may raise issues in relation to choice and information requirements that go beyond scientific risk assessment
- the importance of independent scientific advice to underpin regulation
- the application of the precautionary principle.

It will, however, be important to clarify the UK's future relationship with EU technical and scientific bodies and agencies that are referenced within current EU legislation and bring it into effect. These 'operational' aspects include, for example where EU agencies (eg. ECHA) have a role in conducting safety assessments under the legislation. Other bodies such as the SCCS and the SCHEER also currently have specific responsibilities.

The UK will therefore need to either reach agreement on continued co-operation or replicate these functions and technical expertise at national level. In any case, additional national scientific expertise will be needed.

Maintaining an independent and transparent system, with a distinction between the assessment and the management of risk, will be crucial. A lot of research that underpins these safety assessments is also currently funded at EU level. There also needs to be a source of independent experts and research to undertake and inform risk assessment.

Standardisation

The UK's relationship through BSI with the EU's standards setting organisations will need to be clarified so that it can continue to be part of CEN and CENELEC, or at least co-operate with them. BSI's continuing involvement with the European standards bodies would require a statute change agreed by the other members of CEN and CENELEC, as private membership bodies.

If this cannot be ensured, it may be that the UK will have to relate more directly to the international bodies – ISO, rather than CEN; IEC rather than CENELEC if outside the EU. As the UK seeks to establish trade agreements with a wider range of countries, it will be important that it is able to maintain robust standards and enforce them.

Under World Trade Organisation (WTO) rules, international standards bodies, such as ISO, may take on greater significance. The UK will therefore need to influence these bodies, as they may ultimately shape the level of protection UK consumers can expect as they can be used as a benchmark in any trade disputes. Two WTO agreements will be of particular importance: the Sanitary and Phytosanitary (SPS) Agreement³⁰ which covers measures introduced on the basis of human, animal or plant health protection; and the Technical Barriers to Trade (TBT) Agreement³¹ which becomes relevant for measures such as labelling and specifically references ISO standards.

Enhancing protection

The EU exit should be seen as an opportunity for a fundamental re-think of the UK system while aiming to retain the benefits from the current regulatory framework. Areas where there is scope to go further and strengthen the current regulatory and standards requirements include:

- assessing whether some of the boundaries and distinctions between product categories are appropriate
- implementing more independent oversight and checks in some areas, for example, in relation to car safety and for cosmetics
- stronger market surveillance and enforcement requirements.

Stronger national enforcement

Most of the weaknesses identified in the previous section largely relate to how current legal requirements are implemented and enforced. This includes, for example, the level of oversight or challenge when businesses

30 https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

31 https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

have responsibility for assessing and managing safety and the effectiveness of market surveillance and recall systems. Options for how this could be done are proposed in the following section.

Post-Brexit the UK could be outside the market surveillance co-ordination mechanisms under the General Product Safety Directive, including the RAPEX alerts. Other systems exist that the UK could remain linked into (for example through the OECD), but these are different in scope. The UK will therefore need to improve national-level market surveillance as well as co-ordination arrangements with other countries, both EU and wider.

International engagement

The UK will need to continue to engage with international bodies responsible for regulatory harmonisation more widely, particularly where it currently engages as part of the EU. Once the UK leaves the EU, these bodies are likely to take on greater significance, along with ISO and IEC. They include:

- **Cars:** The World Forum for Harmonisation of Vehicle Regulations (Working Party (WP29) of the Sustainable Transport Division of the United Nations Economic Commission for Europe (UNECE) which sets regulations for car safety.
- **Cosmetics:** The International Cooperation on Cosmetics Regulation (ICCR) is a voluntary international group of cosmetics regulatory authorities from Brazil, Canada, the European Union, Japan and the United States.
- **OECD:** The Organisation for Economic Co-operation Development (OECD) Working Party on Consumer Product Safety.

5 Designing a more robust system

There is an urgent need to re-design the consumer product safety system in a way that builds on current strengths, but ensures the fundamental weaknesses are addressed.

Current strengths

The current regulatory framework for consumer product regulation has several strengths in that:

- It distinguishes certain higher risk (or more sensitive) products that require more prescriptive requirements and greater independent oversight of safety and those where it is more appropriate for businesses to ensure compliance, supported by a system of standards (some of which are mandated)
- It recognises the importance of market surveillance by competent authorities and includes requirements for Member States to intervene if businesses are not fulfilling their responsibilities
- It establishes an ‘early warning’ system of intelligence sharing
- At a more general level, it recognises the importance of independent expert advice to underpin regulation (e.g. through the EU’s SCCS)
- It recognises the importance of the precautionary principle when dealing with uncertainty (although this varies depending on the product and regime)
- It also recognises (within some specific product regulation) that other factors may influence consumer perceptions of risk and that consumers have a right to make informed choice on aspects beyond safety (e.g. welfare or other social or ethical concerns).

Current weaknesses

There are several weaknesses. The most significant ones relate to how the regulations are implemented and enforced in the UK – particularly in relation to market surveillance:

- There is a lack of central oversight and specialist expertise – as responsibility largely lies with local Trading Standards departments, often acting as primary authority for a business
- The EU system relies on a level of specialist competent authority that is able to conduct market surveillance. It is questionable whether this is being fulfilled in the UK. Severe cuts have been made to many local authority Trading Standards Services. In recent years, local authorities have also been encouraged to take more of an advisory role and to avoid burdens on businesses

- There is a lot of trust in businesses “to do the right thing” in some sectors. This again points back to the role of enforcement. But it is unlikely that consumers would appreciate how much of the system is based on self-certification - whether CE marking or role of a ‘responsible person’ for cosmetics safety. Pressure on Trading Standards means that independent challenge to underpin this is increasingly unlikely.

Learning from other countries

Centralised systems for over-seeing product safety exist in other countries. While not directly applicable to the UK situation, they are useful in shaping a new approach.

The US Consumer Product Safety Commission

The Consumer Product Safety Commission (CPSC) is an independent federal regulatory agency with a public health and safety mission to protect the public from unreasonable risks of injury and death from consumer products. It was created in 1972 by the Consumer Product Safety Act (CPSA). It is also responsible for separate laws such as the Federal Hazardous Substances Act (FHSA). Its budget for 2016 was \$125 million. It is overseen by 5 Commissioners appointed by the President and confirmed by the Senate for staggered seven-year terms, with the Chair selected among them by the President and also confirmed by the Senate. It advises on the development of voluntary standards, issues and enforces mandatory standards or bans on hazardous consumer products, investigates potential hazards and recalls unsafe products or arranges for their repair. It has a central, searchable website that provides information on recalls (www.saferproducts.gov). The CPSC covers the responsibilities of Trading Standards for product safety within the UK. However, it also overlaps with the work undertaken by BSI on voluntary standards and the Health and Safety Executive on hazardous substances. It has the benefits of a safety-only mission, it is an independent agency, separate from the bureaucracy of a large government department and it has scientific, engineering, and social science expertise. However, it also has a statutory prohibition on freely communicating with the public about safety issues, limited resources and insufficient authority to issue mandatory recalls when needed.

Australia: the Consumer and Competition Commission

In Australia, general consumer product safety monitoring and oversight is the responsibility of the Australian Consumer and Competition Commission (ACCC) and state and territory consumer protection agencies. The ACCC administers a national recall system for specific and general consumer products. This includes a central product safety website which includes information on all recalls as well as guidance for businesses on how to conduct recalls. The equivalent to the ACCC in the UK would be the Competition and Markets Authority (CMA) which currently has no responsibility in relation to product safety. Consumer organisations have concerns, however, that the system does not work well and are calling for changes as part of the current review of consumer law.

The Netherlands: The Food and Consumer Product Safety Authority

The Food and Consumer Product Safety Authority (NVWA) monitors food and consumer products to safeguard public health and animal health and welfare. The Authority controls the whole production chain, from raw materials and processing aids to end products and consumption. Its independent Office for risk assessment and research (BuRO) advises ministers on food and consumer product safety (as well as animal health and welfare). It has an Intelligence and Investigation Service (NVWA-IOD) that focuses specifically on organised and international crime. Its remit includes cosmetics. The NVWA also oversees product recall.

It is therefore important to draw on these different models in order to establish a new centralised mechanism to restore confidence in consumer product safety for the UK.

6 Conclusions and recommendations

The main issues with the current system that need to be addressed can be summarised as:

- A fragmented system, heavily reliant on local authorities, with no central focus to co-ordinate or provide expertise on consumer product safety issues
- A heavy reliance on companies to ensure compliance (including for recall) as a result of limited enforcement resources and an emphasis on light touch regulation
- A wider issue of potential conflicts within the system as Trading Standards departments are encouraged to develop primary authority partnerships with businesses
- The absence of an authority able to pro-actively review or consider appeals regarding Trading Standards' enforcement decisions
- A lack of co-ordinated intelligence on potential product safety issues.
- No single source of information on consumer product safety recalls.

An enhanced approach

These issues all point to the need for greater central co-ordination³² and support and a much more consumer-focused approach at arms' length from the industries concerned, as exists in some other countries – while ensuring that businesses are ultimately responsible for compliance with safety requirements.

Even before the UK's decision to leave the EU, the weakness in market surveillance was an issue identified in European Commission proposals to reform the General Product Safety Directive and the Directive covering cars, although these have made little progress, and are unlikely to be resolved before the UK's exit. A more complex trading environment as the UK seeks new trade deals, combined with the UK taking on greater responsibility for checks currently co-ordinated at EU level, is likely to mean that the system will come under greater pressure.

Moving forward in the short-term as well as longer-term post-Brexit, the opportunity needs to be taken to overhaul the national system, ensure that it is fit for purpose and can assure consumer confidence in the coming years.

³² Although cars stand out for having a central safety body, the above issues still apply with a heavy reliance on companies to act on a voluntary basis. Although there is a central database of recalls, this relies on companies taking action and requires consumers to search by model type.

Improving regulation

The current regulatory framework and principles that underpin it are broadly appropriate and should be transposed through the Repeal Bill.

Operational aspects such as how the UK continues to co-operate with scientific, technical and standards bodies that are referenced in the legislation – or whether the UK instead replicates them at national level – also need to be addressed as part of the negotiations. Unless this is resolved, key aspects of the current controls, such as the role of EU agencies or scientific committees in assessing safety will no longer be applicable. In any case, the UK will need to enhance its scientific expertise and technical capability on product safety issues.

There is also a real opportunity, beyond the Bill, to review the current regulatory framework, keeping key protections, while also looking at areas where measures need to be strengthened. This includes reviewing the balance of responsibilities placed on businesses compared with public authorities and the need for greater independent oversight. This is particularly an issue for some products e.g. cars and cosmetics.

Fundamental reform: a centralised approach

Most of the weaknesses identified with the regulatory framework could be addressed if there was much stronger independent oversight and centralised expertise that would provide sufficient challenge to company responsibilities for ensuring safety – and crucially, ensure effective action when a safety problem is identified.

There are a range of options for how a national consumer product safety body could operate and international experience can be informative in designing a new model.

The key features of such a body would be:

- Independence from those it regulates
- A requirement to put consumer interests first
- Transparency in how it operates
- A pro-active approach to market surveillance
- A centre of expertise on product safety
- Ability to identify potential trends, gather intelligence and co-operate with international partners
- A duty to directly communicate and engage with consumers to ensure they are aware of safety issues.

Changes to primary authority

It is important that consumer protection is strengthened while these more fundamental changes are being implemented. Urgent changes are needed to ensure that primary authority partnerships do not conflict with the product safety enforcement responsibilities of local authorities. There needs to be an effective appeal route when this boundary becomes blurred and where the primary authority advice needs to be challenged as inadequate, for example:

- a change to the Regulatory Enforcement and Sanctions Act 2008 and associated statutory guidance on primary authority partnerships is needed to allow primary authority enforcement decisions to be appealed
- designation of a national authority that would have oversight of decisions and consider any appeal
- the ability for other Trading Standards Departments, regulators, but also other interested parties, including Which? and fire authorities, to make an appeal.

There also needs to be a clear steer from Government to local authorities that they have to take responsibility for product safety and a reiteration of the market surveillance responsibilities under the General Product Safety Regulations.

Consumer information portal

There needs to be a central source of all information relating to product safety recalls established immediately. A “one stop shop” for consumers on product safety issues, including recalls, is needed so that consumers can easily see which products have been recalled and what action they need to take. This information is currently available across a plethora of websites. There should be one single, reliable and publicised source.



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