

Consultation: UK Product Safety Review: Call for evidence

Summary

Which? welcomes the opportunity to submit comments and evidence to the OPSS Product Safety review.

Which? has a long history of supporting product safety through our testing and advocacy. However in recent years we have been concerned to see the resurgence of product safety issues in both traditional markets and in new online markets where significant gaps in the regime have been exposed. This strategic review is therefore an important opportunity to strengthen and update the product safety regime in the UK - both in terms of the regulatory framework and its approach to compliance and enforcement. This will be crucial for ensuring that consumers can have confidence that the regime is fit for purpose and is dealing effectively with the many challenges facing the system.

In particular we would like to highlight the following priorities for the government and OPSS.

- Urgently address the safety of products sold online by making online marketplaces responsible for the safety of all products sold through their platforms.
- Establish the OPSS as an independent statutory body at arms length from government and with a clear focus on consumer safety.
- Clarify the product safety requirements for businesses and provide robust market surveillance and enforcement informed by timely risk assessments that are based on independent expert advice and consumer input.

General comments

The UK's departure from the EU and the establishment of the OPSS create the opportunity to conduct a thorough review of the product safety regime and deliver necessary reforms to ensure the system is fit for purpose and can proactively respond to market developments and emerging risks. The fundamental principles that underpin the regime are correct, including business responsibilities for placing safe products on the market, and the precautionary principle that requires regulators to put the safety of consumers first, however the nature of products, markets and supply chains have evolved exposing gaps in the regulatory framework and enforcement regime that need to be urgently addressed.

- **The government should establish the OPSS as an independent statutory body.** Although governance is not part of the current call for evidence, this is an important part of the regime that should be considered. Whilst the establishment of the OPSS was an important step forward based on the previous situation, to realise its full potential and ensure consumer confidence in the regime, *the OPSS should be made an independent statutory agency at arms length from government, with a clear unambiguous focus on protecting consumers and the promotion of product safety.*
- **Ensure the OPSS and trading standards have the structures, resources and powers to effectively monitor compliance and enforce regulations.** Many of the issues highlighted in this consultation are national and international issues that require a proactive

central authority that can deliver a UK wide strategic, intelligence-driven approach to regulation, market surveillance and enforcement. To improve accountability and allocation of resources within the product safety system, the OPSS must address the current fragmented system that is too reliant on under-resourced local authority Trading Standards Services and ensure that the necessary skills and expertise are available to underpin compliance and effective challenge. This will include rapidly developing the skills and networks needed to meet new technological challenges. *The government should ensure that the OPSS and Trading Standards have the structures, resources and powers to fulfil their roles, including administrative fining powers and the ability to share information about investigations.*

- **Address the safety of products sold through online marketplaces.** Online marketplaces are a mainstream form of retail and our 2019 survey found that more than 90% of the UK population has shopped through an online marketplace in the previous month, with the number of sales accelerating rapidly during the Covid 19 pandemic.¹ However tests conducted by Which? have shown that large numbers of unsafe products continue to be available through these platforms. *The government should make online marketplaces legally responsible for the safety of products sold through their platforms whether they are sold by the company owning the platform or a third party seller.*
- **Develop an intelligence-led approach for responding to innovation.** Consumer confidence supports innovation, however regulations have generally been slow to respond to new developments in consumer markets, increasing the risk of safety incidents that damage trust and confidence. *The OPSS should develop a strategy for responding to innovation including the use of market data, and engagement with government and external processes, and consumers to understand new developments, and respond quickly to innovation, including introducing regulations or standards to address any safety issues where necessary.*
- **Align new product security requirements with product safety, including making online marketplaces responsible for the security of all the products they sell.** The government has announced their intention to introduce a Product Security and Telecommunications Infrastructure Bill that will require manufacturers to ensure connected devices have unique passwords, provide security updates and provide a public point of contact to make it simpler for anyone to report a vulnerability. This will help to protect users from hacking and the range of harms that can result including privacy intrusions, online scams and even physical safety risks.² *The government should ensure product security legislation is aligned with the approach recommended above with market actors, including online marketplaces, made legally responsible for the security of products that are sold by the company owning the platform or by a third party seller.*
- **Provide clearer product safety requirements and more robust market surveillance and enforcement:** The current system places great reliance on checks and assessments carried out by companies working with a complex web of mandatory product safety regulations and voluntary standards. *The OPSS should review this framework with the aim of creating greater clarity about the requirements that products need to meet to ensure consumer safety. There also needs to be more effective independent oversight of the system so that consumers can have confidence that businesses are fulfilling their responsibilities, supported by appropriate expertise.*
- **Establish a process to deliver more timely risk assessments with input from independent experts and consumers:** Risk assessments are critical in ensuring authorities respond appropriately to the risks posed by different products. *Following the UK's departure from the EU, the OPSS should establish a clearer process to deliver more timely risk assessments with input from independent experts, greater consumer engagement and*

¹ ONS internet sales as a proportion of total retail sales in the UK nearly doubled from 20% in January 2020 to 36% in January 2021

² Links to recent Which? tests of connected products is available in the Annex

assessments that reflect consumers' perceptions of risk and the publication of all relevant information. This should include better collection of data and intelligence to identify emerging issues.

- **Provide international leadership and cooperation.** Alongside business to business trade, e-commerce has facilitated a major increase in cross border purchases made by consumers, with 25% of UK online purchases coming from another country where the product may have been produced to different standards. *The government should make international cooperation a priority and play an active role in international standards bodies. This includes developing cooperation agreements with European enforcement networks that the UK had been a member of prior to leaving the EU and using the negotiation of new trade agreements, as well as our membership of regional and international networks such as the OECD and ISO, to raise product safety standards and improve enforcement cooperation. Effective border controls will remain an important part of the product safety regime.*

Responses to specific questions

1. How easy is it to understand the current framework of product safety regulation? What areas, if any, could be simplified or made easier to follow?

The current regime has evolved over many years and is relatively complex, with cross-cutting and sector-specific regulations, as well as mandatory and voluntary standards. The obligations placed on economic operators also vary according to their place in the supply and distribution chain. Compliance is largely overseen by local authorities, supported at a central level by the OPSS. Consumers are asked to report safety issues to Citizens Advice.

Despite this complexity, the general principles that underpin the current framework create a strong foundation for the system as a whole. These principles include the general safety requirement which makes it the responsibility of companies to ensure the products they place on the market are safe and the precautionary principle that supports regulatory action in cases where there may be scientific uncertainty. Clear obligations are also placed on competent authorities to intervene in situations where there is a risk to safety.

From a consumer point of view these principles require that product safety regulations and standards are comprehensive in their coverage and application so that consumers can be assured that products for sale in the UK are safe. Enforcement agencies and companies should understand their legal responsibilities, and markets operate with a very high level of compliance.

The following reforms would make the system simpler and more effective.

Greater clarity of product safety requirements within legislation would create more certainty and make it easier for companies to understand their obligations and for enforcement agencies to assess compliance. For example in response to Q8 we highlight the different approaches taken to the risk posed to children by button batteries where a voluntary standard was introduced, and blind chords where a mandatory standard was introduced. It is not clear why different approaches were taken when a mandatory standard would appear to be appropriate for both cases.

In particular, the General Product Safety Regulations that effectively act as a catch-all for products not covered by specific regulation fail to give companies clarity as to their responsibilities. The regulations refer to six different ways to assess the safety of a product including 'codes of good practice in the sector concerned', 'the state of the art and technology', and 'reasonable consumer expectations concerning safety'. Voluntary standards are also an option however the company's product may not be covered by a standard, or only partially covered. Additionally, standards usually have to be purchased which may be a barrier for small companies.

The provision of clearer requirements may be particularly relevant for SMEs that lack the resources to develop their own assessments or for companies that are using new materials or technology where the safety implications are not fully understood. For example, there is increasing concern about the use of chemicals in a range of products including toys, furniture and clothing, however the GPSD was not designed to establish specific chemical safety criteria. This leaves companies with no specific criteria to follow unless it is defined in product specific regulations.

The government could also improve the effectiveness of the system by aligning responsibilities for product safety with actors that are best placed to deliver on these responsibilities and who can be held accountable for their performance. If this principle is applied to online marketplaces, the companies that own the marketplaces should be made responsible for the safety of all products sold on their platforms including those sold by third party sellers. This would create the necessary incentives for compliance as sellers would be required to provide information that their products are safe in order to access markets, and marketplaces would have the incentive to monitor compliance to demonstrate that they were meeting their legal responsibilities to the enforcement authorities.

Finally, although it is not necessary for consumers to understand the details of the system they should understand where responsibility lies for product safety and how they can report incidents to a public authority. However the cases currently reported to Citizens Advice are significantly lower than the number of cases highlighted in consumer surveys suggesting many incidents are not reported.

Although there is a strong case for reform, any initiative to simplify or clarify the product safety framework should take care not to undermine the general principles, reduce the legal responsibilities of businesses or reduce the safety of products. To ensure this is achieved, the overarching aim of any process to simplify regulations should be to increase compliance and therefore consumer protection, rather than to increase simplicity as a goal in its own right or to meet an arbitrary goal for a reduction in regulations.

2. In what areas, if any, should product safety regulation be strengthened or improved?

Following the UK's departure from the EU, the government has greater flexibility to design a product safety system that ensures the highest levels of safety for consumers. In our answers below we identify a number of areas in which product safety regulations should be improved. Briefly these include:

- **Strengthening protections when buying from online marketplaces.** The responsibilities of online marketplaces should be urgently updated to reflect the major changes that have taken place in how and where consumers make purchases. Consumers are poorly protected by current requirements, particularly where the sellers listed on platforms may be based outside the UK. To address this, marketplaces should be made responsible for the safety of all products sold through their platforms including products sold by third party sellers. The voluntary nature of current checks by marketplaces fails to recognise their role as the primary interface for consumers with the technical, as well as commercial, ability to hold their suppliers to account for consumer safety. Platforms should also be required to remove unsafe products from being listed on their site within 24 hours and inform consumers of any action they need to take. A similar approach should be used in relation to the security of connected products - marketplaces should be responsible for ensuring that the products offered by third party sellers meet security requirements.
- **Responding proactively to issues raised by innovation in consumer markets.** The use of new technology in consumer products including connected products, software supplied separately to a product, 3D printing, VR and AI creates new challenges for product safety and has led to grey areas where current definitions may be unclear or no longer apply. The OPSS should have a clear strategy for how it will use data, engagement and horizon scanning to stay on top of market developments and respond to emerging risks.
- **Product Security.** The government will be introducing the Product Security and Telecommunications Infrastructure Bill which will seek to address the security of devices and protect consumers from the range of harms that can result including physical safety. Although dealt with under specific legislation, the responsibility of businesses (including online marketplaces) to meet the new requirements and the mechanisms to monitor compliance should be aligned with those used in product safety, including new measures proposed in our response to this consultation.
- **Enhancing risk assessment.** Following the UK's departure from the EU, the OPSS has the opportunity to ensure that there is a more robust risk assessment process that underpins the framework. This will help to ensure that the OPSS can draw on appropriate expertise to identify new and emerging risks, as well as assure consumers that when risks are identified, there is a robust, independent and transparent process for determining the appropriate intervention - including when deciding that recalls or enforcement action are needed. Relevant experts should be identified for conducting the assessments and there should be effective mechanisms for engaging the public in decision-making so that the approach reflects public perceptions of risk. The OPSS should publish detailed reports from the assessments,

including the evidence that has been taken into account and any uncertainties. This will support consumer trust in the product safety regime, as well as business understanding.

- **Clearer product safety requirements.** The balance between the use of regulation and voluntary standards should be reviewed to ensure businesses and enforcement agencies have clarity about the safety requirements that products should meet. Where standards are used they should be developed with sufficient representation from consumer groups and independent experts, and committees should be chaired by independent experts. The OPSS should engage more proactively with standard setting bodies when standards need to be updated or clarified and standards setting bodies should look at how new standards and updates can be delivered more efficiently. Dates should be published for when products meeting the old standard can no longer be produced, and sold.
- **Greater international cooperation on product safety standards and enforcement.** The UK is part of a global market and our ability to ensure products are safe increasingly relies on the strength of regulations and standards in other countries and the UK's ability to cooperate with international partners. Following the UK's departure from the EU, the government should continue to cooperate with the EU on product safety regulations and standards. The UK and EU have agreed to continue to cooperate on standards development and it is important that the British Standards Institution (BSI) can continue to work as part of European standards bodies CEN and CENELEC for the longer-term as well as the provisional continued membership that has so far been agreed. The government should also seek agreement with the EU to provide mutual access to UK and EU early warning systems and establish mechanisms for information sharing and investigations that would support enforcement cooperation.

Looking beyond the EU, the UK will now have the opportunity to agree new trade deals with other countries. These agreements should be used to maintain or raise product safety standards and increase cooperation. Maintaining health and safety standards for food and products was a clear priority amongst participants in the Which? National Trade Conversation and greater choice achieved through market access was not seen as beneficial if it resulted in a reduction in these standards.³ The UK should also play a leading role in international organisations including the International Standards Organisation (ISO), the OECD product safety working group and United Nations Conference on Trade and Development.

3. Should regulation be targeted more at the product itself or the manufacturer's systems that produce it? Please explain.

Consumer safety should be at the centre of the product safety framework and whilst there is always a place for both regulation of manufacturers' systems and regulation of the product itself, the priority should be for products to meet or exceed specific requirements. Where the risk is higher or the level of risk is uncertain, the precautionary principle requires that regulators should provide greater detail to ensure consumers are properly protected. In these cases an organisation other than the manufacturer should also check that the product meets the necessary requirements before it is placed on the market.

The balance between product specific regulation or regulation of the manufacturers' system may also need to evolve in line with market developments and scientific knowledge. For example in the case of products using new technology, companies themselves may not be fully aware of the risks involved and a regulatory approach would ensure these issues are addressed consistently and to a standard that is based on a consensus of expert opinion.

The framework also needs to be sensitive to the wide range of businesses that will have responsibilities for product safety, from large multinationals through to micro businesses and sellers

³ [National Trade Conversation](#). Which? Nov 2020

who may have little prior knowledge of product safety and little capacity for developing assessments that identify risks and put in place appropriate safeguards.

Considering examples where a regulatory approach is currently used either because of the substances used in the product (eg cosmetics) or the users of the product (eg toys), it is difficult to see how such regulations could be reduced to only covering the manufacturer's systems.

4. How could the current product safety framework do more to support innovation or the supply of new technologies to consumers? Using examples, how could it better anticipate upcoming changes in manufacture and production?

The primary purpose of the product safety regime, including the role of the OPSS, should be to ensure the safety of products, rather than to support innovation. However consumer confidence does play an important role in supporting innovation and therefore regulators can support innovation by ensuring that new products and processes are safe and are bought within the scope of product safety regulation.

Generally the product safety regime has been slow to respond to the development of new markets and products and understand the risks. Consumer electronics are an example of a category that can pose particular challenges due to their technical complexity and the pace of innovation. This can allow markets to mature and systemic problems to become entrenched before regulations are introduced. For example some of the developments referred to in this call for evidence such as online marketplaces and connected products are now well established⁴, but they are still poorly covered by product safety regulations, for example new legislative proposals have only recently been introduced to address device security. Whilst Which? supports the intention to look ahead, the evidence suggests the immediate challenge is not so much anticipating upcoming changes as responding more swiftly to changes that are already taking place.

In addition to these challenges, there are innovations in consumer products that may raise product safety issues in the future. For example, there is currently limited consumer use of 3D printing however this could increase in the future, further development and use of AI could raise important product safety issues, and products such as drones and electric scooters have become widespread in a relatively short period of time. As the central regulator, the OPSS should take responsibility for developing a strategy for how they will identify new developments and respond appropriately, including effective intelligence-gathering. The strategy should include both the process by which innovations are identified, how a risk assessment will be made as to what actions are required to protect safety and how the regulatory framework and standards process can be made more responsive and forward-looking.

Elements of this strategy should include engaging with governmental processes that promote innovation (for example Innovate UK), improving data collection and analysis on the growth of new products in consumer markets, as well as improving data collection from Trading Standards and accident and injury data. Publishing these considerations will help to promote engagement from stakeholders and accountability. It is also critical that the OPSS has the skills and knowledge to identify new developments and where appropriate understand the technology involved. For example, this will be a critical issue if the OPSS is to be responsible for the enforcement of device security as, in addition to building their own capacity, they will need to rapidly develop external contacts including a network of testing labs and researchers.

The regulatory framework and standards setting process should also be reviewed to ensure that it can respond faster to innovation. As noted, both processes are slow in recognising changes in products and markets, and then fail to develop appropriate responses in the timeframe required to reflect changes in the market.

⁴ GlobalData, UK: Electricals - Smart Home 2019-2024 report, October 2019

5. What areas of the current regulatory framework could be tailored to create more opportunities for UK innovation and manufacturing?

Better regulation and oversight of new technology will help to increase consumer confidence and support responsible businesses. Much better and earlier engagement with consumers will improve understanding of consumers' adoption of new products and how consumers use these products. Critically it will also support the OPSS in finding the most appropriate regulatory approach given the level of risk involved.

Connected products provide a good example of how the UK can play a world leading role in supporting safe innovation. The government has recently announced their intention to introduce the Product Security and Telecommunications Infrastructure Bill. This will be the first legislation of its kind in the world to address the security of devices. If delivered well this creates the opportunity to build a world leading testing and regulatory infrastructure that other nations will follow.

In future this legislation could be expanded to cover other risks relating to connected products including harms that can result from loss of connection, the connected product not performing as expected due to an upgrade or lack of upgrade, or harms caused by inaccurate or biased automated decision making.

Greater clarity in relation to software that is sold separately from a product would also create more certainty for producers and consumers.

Ensuring that the UK is actively involved in the development of international standards can also support UK innovation and manufacturing, creating a predictable and harmonised market whilst also supporting consumers' access to safe products.

6. How well is the conformity assessment system working? What are your experiences of it and of self-assessment?

Product safety tests conducted by Which? regularly identify safety issues in products for sale in UK markets including where safety is less than claimed and where the product presents a particular risk to consumers.

For example in 2020 our lab tests revealed safety problems with 12 baby sleeping bags. Seven of the failures our testing exposed were serious enough to cause a baby harm or endanger its life. The five remaining safety test failures were caused by a product not meeting the requirements of the safety standard for baby sleeping bags.⁵ Which? has also recently identified pushchairs, stair gates and child car seats that fail to pass our safety tests.⁶

Taken together our tests suggest a number of failings in the conformity assessment system. This area should be reviewed, particularly in light of the limited resources available for market surveillance and enforcement work within Trading Standards. Consumers need assurance that there is independent oversight and challenge and that those responsible for these assessments have the necessary competencies, as well as appropriate incentives and sanctions should businesses fail to fulfil their responsibilities.

Under the current conformity assessment system companies that produce products covered by the GPSD can choose whether to use a voluntary standard to assess their product or a process they have developed themselves. Allowing a company to devise its own test may be problematic, for example if the product is new the company may not have the knowledge or skills to devise an appropriate test. In relation to other products companies may be required to self certify the product, with the level of

⁵ [Which? Safety tests uncover dangerous baby sleeping bags](#), Which? 2020.

⁶ Don't buys to avoid this summer. Which? Magazine, August 2020.

independent testing dependent on the level of risk, but in most cases it will be the companies' responsibility.

In both cases there is the potential for mistakes or for a small number of companies to take shortcuts in order to reduce costs or speed up the process. It is therefore critical that there is an appropriate level of oversight to ensure that products are being appropriately assessed. Currently this oversight is usually provided by local authorities who are responsible for conducting market surveillance by examining and testing products to check they are safe, investigating allegations of non-compliance and prosecuting serious offences.

Which? recognises that the OPSS has provided additional support to local authority Trading Standards officers through training and advice however this is unlikely to have overcome the limitations placed on the service by the reductions in their budget, the small size of teams and the competing priorities that are placed on Trading Standards officers. A report published in 2015 by Birmingham University, commissioned by the Government and the Chartered Trading Standards Institute (CTSI), concluded that cuts in local authority funding had resulted in Trading Standards work becoming increasingly reactive. Product safety was one area that was identified as having become a lower priority.⁷ This is likely to have become a greater problem in the past six years and with local authorities taking on greater responsibilities, including enforcement activities relating to the pandemic.

Primary Authority Partnerships (PAPs) have been created partly to address some of these issues. A PAP is agreed between a company and a local authority to ensure the company receives consistent advice on all issues under Trading Standards remit. Concerns raised about that company by other local authorities should be referred to the local authority that has the PAP. These agreements can place considerable responsibilities on local authorities, for example one local authority has more than 70 PAPs with large international and national companies and trade associations including Amazon, Tesco, PC World, Nestle Cereal Partners, Hilton hotels and the Federation of Master Builders.⁸ We have concerns that PAPs could also create a conflict of interest if concerns that could ultimately require enforcement action are being raised about a company that the local authority has been responsible for advising.

Greater national oversight of product safety including market surveillance and enforcement is needed. The relationship between OPSS and Trading Standards should ensure that there is more accountability for their work on product safety, as well as better intelligence sharing and coordination. PAPs should be reviewed on a regular basis with the option for the national authority to take over if a review identifies areas of concern. Consideration should be given to requiring companies over a set size to have agreements with a central authority rather than a local authority.

7. Reflecting on the response to the COVID-19 pandemic (as set out in the case study), what changes could be made to help bring safe products to market more quickly?

The adjustments that were made to ensure the availability of Personal Protective Equipment (PPE) early in 2020 were understandable due to the exceptional circumstances of the pandemic. However the OPSS should be cautious in using similar strategies to speed up the approval of products in more normal times as the adjustments essentially involved reducing the level of conformity assessment. Except where there is an exceptional reason, it is not clear why it would be beneficial to waive an assessment that was previously considered necessary.

However other steps can be made to ensure that the UK can quickly and efficiently bring products to market whilst ensuring they are safe. For example, access to expertise is critical in helping authorities to respond quickly to emergencies whilst maintaining high standards. Following the UK's departure from the EU, the OPSS should ensure that the necessary, independent scientific committees are in place to advise on current as well as future product safety issues. This is particularly important as the

⁷ "The Impact of local authority Trading Standards in challenging times", John Raine, Catherine Mangan and Peter Watt, Birmingham University, March 2015 [online] (accessed 1 February 2018)

⁸ [Primary Authority Register Hertfordshire County Council](#)

UK will no longer be working with the European Commission's scientific committees eg. the Scientific Committee on Emerging and Newly Identified Health Risks and the Scientific Committee for Consumer Safety in the same way. Ensuring that these new networks are comprehensive and members are informed about how they may be asked to assist the OPSS will be important in ensuring a rapid response.

It is also a chance to improve the independence, timeliness and transparency of the advice provided.

8. What role should voluntary standards play in product safety? What are the benefits and drawbacks of linking regulation to voluntary standards?

Standards play an important role in supporting product safety, however when used on a voluntary basis it can be unclear whether the standard has been met in full, partially or not at all. Therefore where an assessment suggests a significant level of risk, mandatory standards should be used.

For example, a number of countries have reported safety incidents involving children swallowing button batteries. In Australia the government has introduced new mandatory standards in order to reduce the risk of future death and injury, however in the UK the OPSS launched an information campaign and a voluntary publicly available standard. The use of a voluntary standard to manage the risks from button batteries also contrasts with the approach taken to blind chords where the government introduced a mandatory standard to prevent injuries to children.⁹

If used appropriately, standards can offer benefits. For example, if properly constituted, the committees of experts and stakeholders that develop standards can help to ensure that there is a sound understanding of the product or product group, as well as any risks it may pose and mitigating strategies. However, unequal representation within standards committees and the need to agree a consensus can result in a standard not meeting the product safety requirements that consumers might expect. The British Standards Institution (BSI) has led the way in trying to improve consumer representation in standards setting, but given the number of standards that are being developed at any time this is a major challenge and consumer representation is still limited. Appointing independent chairs to lead committees would also help to reduce concerns about conflicts of interest.

To address this issue, when requesting the development of a standard or when deciding if a standard is suitable for adoption in regulation the OPSS should clearly state the risks that the standard is expected to address and the level of specificity that the standard should achieve and assess the final standard to ensure that it meets these requirements.

Standards may also provide greater flexibility if they are easier to change than regulation. However, the process for developing a standard, updating a standard or even seeking a clarification can be long. This is partly to enable all parties to input into the process however the result can be that the process takes two or more years.

It is important to ensure that when a new standard is introduced a clear timeframe is established for when the old standard will be withdrawn and products that use the old standard can no longer be produced and sold. The timeframe should be as swift as possible recognising that producers will need to change production processes and retailers should have time to sell the stock that they hold.

Which? has highlighted a number of standards that need strengthening to ensure consumers are protected, for example the standard for sunscreens that doesn't cover once-a-day sunscreens and doesn't adequately cover guidelines for water resistance,¹⁰ and the standard for smoke alarms which allows products to pass that take too long to sound an alarm.¹¹

⁹ [Check your blind chords and keep your home safe](#), OPSS, 2019.

¹⁰ Which sunscreens can you count on? Which? magazine, June 2018.

¹¹ Is your smoke alarm fast enough? Which? Magazine, September 2017.

9. What are the key challenges for regulating product safety in online sales? What has worked well in terms of regulation and where are the opportunities?

Online marketplaces (including social media companies where products are sold through their platform) are now a mainstream form of retail. Our 2019 survey showed that 91% of consumers had bought consumer goods from an online marketplace in the previous month. Restrictions introduced during the Covid pandemic further increased the use of these marketplaces and some of this growth can be expected to remain.¹²

Which? tests and investigations as well as tests and investigations carried out by European consumer groups and authorities¹³ have found large numbers of unsafe products available for sale through online marketplaces, including products that are subject to warnings or recall notices. These products have included children's toys and car seats, smoke alarms, USB chargers and power banks. In addition, when platforms are notified about an unsafe product it can take an unacceptable length of time for the product to be removed from the site and the same products often reappear with slightly different descriptions or sold by a different third party seller.

Which? has also completed a "Consumer Protections Benchmarking" project to look at how a range of platforms enforce their own consumer protection policies including the measures they take to verify the identity of new sellers, inform sellers about product safety requirements, block sellers where concerns have been raised and enable consumers to report potentially unsafe products. There is some variation between the platforms, however we found most processes were too weak to effectively meet their own objectives. For example, three out of five had very weak seller verification potentially enabling a seller to register with a fake identity. Platforms had varying approaches to informing sellers about product safety requirements, but we found examples of complicated or unclear information and a failure to proactively inform sellers about the guidance and require them to read it. Three sites appeared to be able to blacklist sellers that had previously been flagged as concerning. Mechanisms for consumers to report concerns were too often hard to find or difficult to complete.

Which? has identified three key challenges in relation to sales through online marketplaces:

- **Preventing unsafe products from going on sale:** The extent to which the current legislative framework is sufficiently dissuasive and appropriately targeted to prevent unsafe products being sold via sellers on online marketplaces, including incentivising appropriate policing by the marketplaces to ensure sellers are compliant.
- **Removing unsafe products from sale:** Whether the current legislative framework and/or internal policies of online marketplaces are robust enough to ensure unsafe products are swiftly removed when they have been identified, do not reappear and that consumers are informed about unsafe products.
- **Appropriate independent oversight and challenge:** Whether the public enforcement system is sufficiently targeted at online marketplaces and provides an effective challenge to sites based within the UK, EU and those originating outside of it.

Authorities have grappled with these issues for a number of years, with limited action. Test results demonstrate that current initiatives are failing and given the volume of online sales, there is a risk that the progress that has been made in improving product safety over several decades will be reversed unless more decisive action is taken.

It should be noted that many unsecure connected products are also sold through online marketplaces. With the introduction of new legislation covering the security of devices it is important that the following recommendations for improving the safety of products sold online are also used to improve the security of products sold online.

¹² [Online marketplaces and product safety](#). Which? 2019

¹³ Online product safety – trends and challenges, OECD digital economy papers no. 261, OECD, 2016

In our response to question 10 we refer to some of the proposals that are being considered in EU legislation as well as some of the commitments that online marketplaces have made following legal action in the US.

10. Thinking particularly about new models of distribution and supply (including online sales and the sharing economy), is it always clear where responsibility / liability for product safety lies?

E-commerce includes several different models of distribution and supply, including businesses selling products through their own websites and through online marketplaces, as well as private individuals selling new or second hand products through online platforms. Online marketplaces also have a variety of different models including platforms that sell their own products and products from third party sellers, platforms that only sell products from third party sellers, and platforms where the third party sellers are either companies or private individuals or both. It should be noted that social media platforms are also increasingly offering marketplace services.

E-commerce has also facilitated an increase in purchases from other countries, either directly from the websites of companies based in other countries, from marketplaces based in other countries, or from third party sellers in other countries offering products through UK based marketplaces. Consumers may often be unaware that they have purchased a product from another country and even if they are, many may be unaware that the product may have been produced to different standards than those used in the UK. Given the sheer volume of small packages arriving in the UK it can be difficult for authorities to check the safety of products at the border. If information is not provided it may also be difficult to trace or hold the manufacturer to account.

Online marketplaces also use different distribution models to deliver products to consumers including fulfillment houses that are either owned and run by the marketplace or by a separate company. These fulfillment houses generally act as a distributor and do not alter the structure, composition or presentation of the product in a way that might change its safety properties.

These variations have undoubtedly complicated the traditional definitions of retailer, manufacturer and distributor meaning it is not clear where responsibility / liability for ensuring product safety lies. In particular many consumers assume that online marketplaces have the responsibilities of a retailer. In 2019 Which? surveyed consumers about their understanding of where responsibilities lie in relation to online marketplaces and found that 59% of consumers assume that online marketplaces have sole or joint responsibility for ensuring that the products sold on their platforms are safe, and 79% assumed that online marketplaces had some responsibility for recalling items. When made aware of marketplaces actual responsibilities, 70% of marketplace users think the law needs changing so that marketplaces are legally responsible.¹⁴

Several measures have been proposed for improving the traceability and accountability of sellers including:

- Marketplaces should make it clear whether a consumer is making a purchase from a business or a private individual and the impact this has on their consumer rights.
- Manufacturers that are not based in the UK and who make products covered by sector specific legislation should publish their name and contact details on the packaging and should have an authorised agent in the UK.
- Fulfillment houses should be able to demonstrate that the products they handle that are covered by sector specific legislation conform to safety requirements.

Implementing these steps in the UK might provide consumers with more information and may improve the ability of authorities to identify companies - particularly companies not based overseas. However, the authorities will still not be able to enforce regulations in relation to these sellers and

¹⁴ Online marketplaces and product safety, Which? Nov 2019.

crucially online marketplaces are not required to take any action beyond removing products that authorities or consumers have identified as unsafe.

Given these limitations and the number of unsafe products that are still made available to UK consumers through online marketplaces, a more effective approach would be for online marketplaces and fulfillment houses to have responsibilities along with other economic actors under the General Product Safety Regulations and sector/ product specific regulations. This would make marketplaces and fulfillment houses responsible for the safety of the products they sell or handle, with a defence of due diligence.

The same principle should also be applied to improving the security of connected products. The majority of these products are currently sold through online marketplaces and unless marketplaces are made legally responsible for the data security as well as the safety of the products sold through their platforms, the UK will struggle to effectively enforce the new Product Security and Telecommunications Infrastructure Bill. The government has itself linked the issue of device security and product safety. In its April response to the Call to Views on the legislation, it said: *'The government is reviewing the UK Product Safety framework to ensure it is fit for purpose, protects consumers and enables businesses to innovate and grow. The review will consider the impact on product safety of new technologies and new business models. E-commerce will be considered as part of this review. The government will ensure that the approach taken to regulating the security of online products works with the broader approach to product safety adopted once the impact of these business models on safety have been appropriately reviewed.'*¹⁵

Our recommendations are set out in detail in our policy paper "Online marketplaces and product safety"¹⁶, but the key actions that we think are needed that relate to these regulations are:

- The general safety requirement that applies to economic operators, including producers, importers and distributors (including retailers), in the General Product Safety Regulations 2005 (GPSR) and sector-specific product safety legislation should also apply to online marketplaces along with a defence if they exercised all due diligence.
 - As part of this, online marketplaces should enhance their checks before including sellers on their sites, so that evidence of compliance with safety requirements is a condition of their listing as well as ensuring that products and their manufacturer are clearly identifiable. Responsibilities should also be applied to fulfillment service providers.
- The actions that are required by online marketplaces when unsafe products are identified should be clarified.
 - Online marketplaces should be required to respond within 24 hours and remove unsafe products once they are identified.
 - Online marketplaces should also be required to inform consumers of safety issues and any action needed, to ensure that their suppliers carry out recalls effectively and to prevent recalled products from being listed again.
- UK law should place a requirement on online marketplaces to make it clear to consumers whether they are buying from a trader, a consumer, or directly from the company that owns the marketplace and clearly and accessibly explain the rights that apply.
- The UK should also seek opportunities to cooperate with international partners to improve product safety standards internationally, remove technical and procedural difficulties that limit the exchange of data on dangerous products and increase enforcement cooperation through bilateral agreements, including trade agreements, WTO e commerce negotiations, the International Consumer Protection Enforcement Network, UNCTAD and the OECD product

¹⁵ [Government response to the call for views on consumer connected product cyber security legislation](#), 2021.

¹⁶ [Online marketplaces and product safety](#). Which? 2019

safety committee.

A legal case in the US demonstrates that Amazon can take responsibility for the safety of its own products and those sold by sellers. The judgement found that Amazon had been selling children's school materials which contained levels of toxic metals above what is legally permitted. As a result, Amazon entered into a nationwide legally binding agreement to block the sale of children's school supplies and jewellery on Amazon.com unless the seller provided lab reports and other proof that the products are not toxic.¹⁷ Unfortunately this judgement only applied to Amazon and to sellers on the Amazon marketplace. Two further cases in California, courts have found that Amazon can be held liable for injustices a consumer suffered from defective products even though Amazon neither manufactured nor sold the product.¹⁸

In order to properly protect consumers it is necessary to ensure all marketplaces have the same legally binding responsibilities.

Companies renting products to consumers

Renting products to consumers is a relatively well established model, but may grow in importance as consumers' seek to reduce their impact on the environment and online applications facilitate easier and more frequent loans. Renting cars, scooters and bicycles is already widespread but in future the same model could be used to lease more items.

Companies are responsible for the safety of products that they rent to consumers. When items are rented frequently and not returned to the company that provides the service, there is a risk that the product may have been damaged or have become worn and pose a safety risk. In these cases, companies must regularly check that the products they are renting meet safety standards. The frequency of checks should be proportionate to the risk given the nature of the product and how regularly it is used. In the case of longer rentals, consumers can expect that the product will be checked by the company before it is lent to another consumer.

Sharing economy - See response to question 11

11. To what extent are product safety issues arising from consumers producing (e.g., 3D printing) and / or hiring out and selling products to each other?

Consumer use of 3D printing is currently limited however this should be monitored to ensure that changes in technology or price don't lead to a rapid increase. 3D printing is used by some manufacturers and could have a more significant impact on some markets in the future, either as a way to produce components or spare parts that are sold to consumers, or to produce components that go into finished products or finished products that are sold to consumers.

This raises a number of complex issues in relation to the responsibility of the different parties including the company or individual who originally sent the data set. We encourage the OPSS to monitor these issues and, where appropriate, take a lead in working with relevant stakeholders (including international partners) to prevent gaps in regulation and oversight.

Consumer to consumer sales, exchanges and sharing of products that they own (including household products, tools, cars, accommodation etc) can benefit consumers by giving them access to cheaper products. These transactions also help meet consumers' desire to reduce their impact on the environment by reducing consumption, increasing the lifetime of products and reducing waste. Our 2019 survey showed that 30% of consumers' most recent online purchases were of second hand products, this rose to 45% amongst 25-34 year olds. 83% of these purchases were from an individual and the remainder from a business.

¹⁷ [AG Ferguson: Amazon must remove toxic school supplies, kids jewelry from marketplace nationwide](#). Office of the Attorney General, Washington State. 2019

¹⁸ [Another court gets on \(Hover\) board with Online Marketplace Liability for Defective Products](#). National Law Review, 2021

These transactions are generally facilitated through online platforms, some of which are large companies in their own right for example eBay and AirBnB, however some may be small not-for-profit schemes. The loan of an item can be in return for a fee or not involve any fee.

In many cases consumers will be aware that they are making a purchase from a private individual and the product they are receiving is second hand or made by an individual, however they may not be clear whether the platform has taken any steps to ensure the safety of the product. In the case of large, well established platforms, they may assume the platform takes a higher level of responsibility than is actually the case. It should be a legal requirement for this information to be included in the product description including a clear explanation of what this means for the consumer's rights.

Platforms also have a responsibility to ensure sellers are aware of their responsibility to ensure the product they are selling or lending is safe. Consideration should be given to whether some platforms, where there may be a higher level risk, should also have a responsibility to require safety certificates or other evidence that safety checks have been carried out on a regular basis. Some platforms also have mechanisms for consumers to return products that do not meet basic standards however this does not address immediate safety concerns.

A recent Which? Consumer Protections Benchmarking project that looked at how a range of platforms enforce their own consumer protection policies found that Etsy, a popular marketplace for individuals and businesses selling handicrafts, could do more to highlight safety requirements to new sellers. With more individuals selling products online there may be a need to review the definition of when an individual is effectively running a business and should therefore adopt the same responsibilities as a business.

12 Have you any insights on whether consumers know what to look out for to ensure a product is safe when buying online and /or how to raise safety concerns? How could these processes be made easier or clearer?

Consumer engagement with product safety is a critical issue - although consumers ultimately have to rely on businesses and regulators to ensure the products they choose are safe.

Our 2019 survey of consumer attitudes to online marketplaces suggests that in these markets, product safety is not something many consumers spontaneously think about. Instead it is generally assumed that products on sale are safe. Our surveys suggest consumers may pay particular attention to the safety of some products more than others where they perceive there may be a greater risk, however their checks are often based on 'rules of thumb'. The main reason given for not thinking about the risk of unsafe products was that they choose 'trustworthy' sellers.

When asked how they assess the safety of products for sale on online marketplaces, consumer reviews was mentioned as an important factor in this assessment. Good reviews were seen to indicate a good quality, and therefore safe, product.¹⁹

However, Which? investigations have revealed the widespread selling and use of fake reviews which suggests reviews are far from being a reliable indicator of whether a product is either good quality or safe.²⁰ Which? has also found examples on eBay of sellers sharing reviews across different products. In some cases this resulted in positive reviews for a genuine product also appearing in the listing for counterfeit and even recalled items.²¹ The Competition and Markets Authority began an investigation into major websites that host online reviews in May 2020.²²

¹⁹ [Online marketplaces and product safety](#), Which? 2019

²⁰ [Fake it when you rate it: Which? exposes the shoddy products being boosted by fake reviews](#), Which? 2019

²¹ [How eBay's review system is promoting fake, counterfeit and even dangerous products](#), Which? March, 2020

²² [CMA investigates misleading online reviews](#), Competition and Markets Authority, 2020

Consumers may also look for a recognisable mark such as the CE marking, that has recently been replaced with the UKCA mark, except in Northern Ireland where both marks will be used. However many consumers will assume this mark is based on an independent assessment of the product rather than self assessment. There have also been several examples of products carrying fake CE marks.

If a consumer is concerned they should be able to access a single website that will give them information about which products are subject to warnings or recalls and explain how different labels can help them choose products that meet safety standards. There should also be information about what action to take if they are concerned that a product they have bought is unsafe. Although the OPSS has made progress in bringing different alert systems together²³, there still needs to be a single, well-known source of information easily accessible to the general public to use.

As mentioned above, marketplaces should be legally responsible for ensuring that consumers have information about whether the seller is a business or a private individual and where they are based. The marketplace should also provide a clear explanation of what this means for the consumer's rights.

As well as informing consumers about the safety of products it is important that authorities and businesses listen to consumers' concerns and perspectives in relation to safety. There should be simple processes for consumers to raise concerns about an unsafe product with the retailer and with the authorities. Which? recently conducted a benchmarking project of five popular online marketplaces that suggested most marketplaces could do more to make these reporting mechanisms accessible to consumers. The OPSS should also take greater account of public attitudes towards product safety within its approach, including attitudes towards particular safety issues.

13. What role should voluntary commitments, such as the Product Safety Pledge, play in consumer protection from unsafe products? Can you share any evidence or experiences of the benefits and drawbacks?

Which? welcomes any initiative that improves product safety and we recognise that there is an important role for voluntary commitments that go beyond what is required in regulation. However on the basis of our tests and investigations into the safety of products sold online, as well as similar tests run by consumer groups and authorities in Europe, we do not believe that voluntary commitments such as the Product Safety Pledge have been effective in delivering the necessary improvements in the safety of products sold online and therefore regulatory reform is urgently needed.

Despite the adoption of the Product Safety Pledge our tests and investigations have continued to reveal large numbers of unsafe products sold online, including products that are the subject of warnings and recall notices. We also have examples of products that have been notified to online marketplaces reappearing on their platforms from other sellers.

We are concerned that the reviews of the Product Safety Pledge are based on aggregate figures and do not give information about the performance of individual platforms. The 2019 review did highlight that although three of the platforms had taken actions to provide information or training to sellers on compliance with product safety legal requirements – one had not taken any steps to do this. Assessments tend to highlight the number of actions that the platforms have taken, rather than an independent assessment of whether the pledge has been effective in reducing the number of unsafe products available online.

Although the Product Safety Pledge commits marketplaces to remove products that authorities or consumers have identified as unsafe, we have found that products can reappear after a few days.. The businesses have not accepted responsibility for ensuring the products they sell meet safety standards. The pledge has limited coverage as it only applies to a small number of signatories and does not apply to many of the marketplaces that UK consumers use. It is also a voluntary

²³ <https://productrecall.campaign.gov.uk/>

commitment and therefore cannot be enforced. It should also be noted that the pledge is predominantly reactive, requiring marketplaces to remove unsafe products after they have been identified. The only proactive measures to prevent unsafe products being sold are related to the provision of information and training. The marketplaces do not undertake to perform any checks themselves.

We have concerns that pursuing this type of approach through a UK safety promise is unnecessarily delaying government action to protect consumers that is long-overdue.

14. What might a typical product life cycle look like in the future as we move towards a circular economy? Can you provide examples, including connected and second-hand products?

The manufacture and disposal of consumer products is a major contributor to the UK's energy use, resource use and waste, and therefore extending product life cycles and moving to a more circular economy can play an important role in a more sustainable future.

Sustainability is an increasing area of focus for Which? We support the government's commitment to significantly reduce carbon emissions, support biodiversity and reduce pollution and will work to ensure consumers have the information and choices they need to play their part in the changes that are required.

An approach to greater circularity will depend on manufacturers, retailers and consumers making sustainable choices through the whole life cycle of a product. It will need to encompass standardised sustainable approaches to the design and manufacture of products, empowering consumers to make more effective purchasing decisions and use products in a more sustainable way, extending the lifetime of products and proactively minimising waste through right to repair initiatives and take back schemes for the return or sell-back of used products. New business models, including circular business models, regular servicing for products with longer lives, and buy back schemes could play an important role in supporting these changes.

Some of the changes we expect to see as part of a more circular economy include:

Design and production: an important step towards reducing resource use will be for products to use fewer resources in production, for more of those resources to be recycled and for all products to have a longer lifetime and be more easily recycled at the end of their life. This will involve the use of new materials and processes that should meet environmental standards but also continue to meet product safety standards. Ecodesign regulations, extended guarantees and warranties and clear labelling can all be used to require or encourage producers to adopt these objectives.

Repair: The results of a Which? survey indicate that a significant number of consumers have replaced products because they broke down (60% washing machines, 49% dishwashers, 40% fridge-freezers).¹ Consumers often replace products because they assume it will be too expensive or too much hassle to repair. In fact our research shows this not to be the case. Most repairs cost between 10% and 25% of the original appliance cost, and with the right skills, many fixes are free. The UK has introduced new regulations to make it easier for consumers to repair products that they have purchased by requiring manufacturers to make spare parts and manuals available and ensuring that repairs do not invalidate a product's guarantee or warranty.

Supporting durability: a key challenge is to make products last longer. Products can be designed to operate safely for longer but companies can also help to ensure products remain safe by providing affordable servicing or providing information about how long a product can be safely used, or in the case of a connected product, monitoring its performance.

Lending: There is a growing trend towards consumers lending products to other consumers. Online platforms are often used to link consumers. This is likely to be most relevant for larger products that may not be used on a very regular basis, for example garden or DIY tools.

Resale: rather than throw products away when they are no longer needed, consumers are increasingly buying and selling second hand products through online platforms, potentially giving them a second life with a new owner. Which? research reveals a large active market, with 69% of consumers have bought used in the last two years.²⁴

Renting products: in the future businesses and consumers may increasingly choose to adopt a renting or pay per use model for some products. This would enable consumers to make either a one-off payment or a regular payment to rent a product for a period of time, this could be anything from an hour or two for a car or a DIY tool, to an ongoing contract in the case of a mobile phone, TV or another household product. The company would be responsible for servicing, repairing and then recycling or reusing products at the end of their useful life. Companies would also be responsible for updating the products so consumers have access to a new or more recent model.

Recycle: at the end of a product's life the product should be recycled. The materials or component parts should be able to be reused or recycled to create safe new products, Where disposal is still required proper facilities should be available to do this safely.

Many connected products pose a particular challenge in terms of sustainability as they tend to have a relatively short lifespan and the production of the product often accounts for a large proportion of the total resource use. Short lifespans can be linked to the companies' marketing and desirability of buying the latest model, hardware that is less durable and the fact software updates are often only available for a short period of time.

Manufacturers could support extending the lifespan of connected products using the strategies highlighted above. In addition they could:

- Provide consumers with assurance on data security by providing security updates for a significantly longer period of time and providing data wiping guarantees for any device returned to them.
- Actively market and promote refurbished products to consumers so they are as desirable as a new device
- Assure consumers in relation to performance by testing second hand devices,
- Reduce financial risk (by providing warranties that are the same as for new products). Pricing should also incentivise the purchase of more sustainable products.

An example of a more sustainable business model for connected products is the Fairphone modular design model that allows consumers to swap parts for repair when they have faults. The modules cost as low as £19-£60. Fairphone retains ownership and responsibility for the product, which incentivises the design of high quality, low maintenance and durable products. Modularity also supports a leasing model for B2B contracts after which the phone is sold on the second-hand market. Fairphone achieves a reduction in carbon intensity of the product by extending its lifespan from 3 years use to 5 years, and enhanced repairability may extend its life span further still. Modular designs however limit ingress protection and therefore features like waterproof and dustproof are not present.

Connected products also raise particular product safety issues as the availability and installation of software updates can alter the safety of the product, for example:

- an update can alter the functionality of the product such that it creates a safety risk,
- the failure to provide a security update can result in the product being more easily hacked, which can in turn create a safety risk.

Second hand products.

²⁴ Nat rep sample of 2000 UK consumers, March 2021.

From books and clothes sold in charity shops to second hand cars, second hand purchases have always been a feature of consumer markets, however this is growing as consumers become more aware of sustainability issues and online platforms facilitate sales. In addition to this growth in traditional second hand markets, some circular business models may blur the distinction between items that are new and second hand, owned and rented.

For example Bundles, based in the Netherlands, has disrupted the conventional household appliances ownership model by offering pay-per-month and pay-per-use contracts. The household appliances are Bundles property, Bundles recovers them, repairs parts, and sells them back to another customer at the end of a contract. If the machine cannot be repaired, it is sent to a supplier that can reuse the spare parts. Bundles collaborates with Miele and uses digital technologies, such as IoT and Big Data. Bundles contracts can be economically advantageous and all their devices are energy efficient.

15. How can we build in flexibility to the regulatory framework to adjust to changes in product life cycles and technology, including changes in understanding of risk? How do businesses integrate safety considerations with other aspects of product regulation such as environmental considerations?

Design and production: The use of new materials and processes to meet enhanced environmental standards must not undermine product safety. Manufacturers should follow the precautionary principle and ensure necessary tests are conducted to ensure safety. More modular designs could reduce risk as they create the opportunity to change poor performing elements of a product, however they may also increase risks as connections between different modules cannot be permanently sealed.

Repairs: While some simple repairs can be undertaken by consumers, other repairs require a trained tradesperson and manufacturers should clearly indicate the level of knowledge and skill needed and the risks associated with different repairs. Guarantees and warranties should not be invalidated by a repair if it has been completed according to the manufacturer's instructions.

Lending: If a C2C loan is facilitated by a platform, the platform should provide clear advice about not lending products that may be unsafe and request that all safety information is passed to the person borrowing the product. The person borrowing the product should receive advice to check the safety of the item, refer to any safety information provided and inform the owner if the product has been damaged through their use of it.

Resale: Platforms should inform sellers about their responsibilities in relation to product safety and if the manufacturer has enabled a consumer to register their product, then it should be possible to transfer this registration to the new owner so that they are aware of any product safety information. In relation to some larger products, companies may be able to service or test the product and put it back on the market with a new guarantee that covers the safety of the product..

Security updates are critical to the safety and sustainability of technology products.²⁵ Which? has called for new product security legislation to establish a set period of time during which security updates should be made available. This should reflect consumers' expectations of the lifetime of that product and will therefore help to extend the lifetime beyond what can currently be a short period of use and ensure that the product remains safe from hacking. Software providers should also be responsible for any updates that affect the functionality of the product including faults that cause harm or injury.

Recycling and disposal: facilities should be available for the safe recycling or disposal of all products.

²⁵ Links to recent Which? Investigations are available in the annex

16. For how long should responsibility for the safety of the product lie with the manufacturer? What responsibilities should apply to software integral to products, second-hand goods or supply of replacement parts?

Companies are currently responsible for the safety of products they place on the market and are liable for the safety of products they produce, supply or sell under the Consumer Protection Act 1987. This includes software embedded in the product. A person making a claim does not have to be the owner and therefore an individual who has purchased the product second hand can bring a case in the same way as the original owner.

Producers and importers should also be responsible for all software updates that change the functionality of the product, as well as the failure to provide a security update that results in a security issue occurring during the period for which they have responsibility.

Replacement parts if fitted according to the manufacturers' instructions should be covered by the manufacturers' liability.

Repairability and second hand sales are an important contribution to improving sustainability and companies should ensure both repairs and second hand sales can happen safely by providing safety information about their products online so this information is available to the person making a repair or using the product.

In relation to connected products, data security is an important issue that impacts on sustainability and safety.²⁶ The Product Security and Telecommunications Infrastructure Bill currently only requires companies to be transparent about how long updates will be made available. Which? has called for legislation to go further and establish a set period of time during which security updates should be made available. This should reflect consumers' expectations of the lifetime of that product. Information about how long updates will be available for the product should be made easily available to consumers at point of sale, as that is the point at which a consumer will make a purchasing decision, but should also be available on the company's website for reference at a later date, or if the product is sold second hand.

Consumers are also likely to reset the device in order to remove their personal data, therefore the consumer purchasing a second hand device should be informed if they need to reinstall updates that may have been removed as part of this process. Despite an active second hand market in some connected products such as phones, the Product Safety and Telecommunications Infrastructure Bill does not currently cover second hand products.

When a product ceases to receive security updates, in some cases it may be possible for a consumer to turn off the connection and continue to use it. This would enable consumers to continue using a product for longer but manufacturers should clearly explain how this will affect the functionality of the product and any implications this may have for safety. In some cases the product will effectively become redundant. These issues are not currently addressed in the Product Security and Telecommunications Infrastructure Bill, however the government could use secondary legislation to align the achievement in the bill more closely with their commitments to reducing waste and resource use.

17. How is enforcement of product safety changing in light of new products (e.g., connected devices, 3D printed) and new ways of distributing products (ecommerce, sharing economy). What are the greatest challenges?

²⁶ [A fridge too far? The smart appliances that cost a grand more but may only last two years](#), Which? [Why some second-hand phones could be a security risk](#), Which?

Enforcement is often hampered by the lack of appropriate regulation that recognises new processes and the failure to place responsibility for product safety on the market actors that are best placed to deliver it. New products or market developments should be addressed in regulation more quickly so the OPSS can use its enforcement tools to ensure compliance. These issues are dealt with in greater detail below.

Online sales: As described in Q9, 10, 11 the enforcement of legal responsibilities in relation to the safety of products sold online can be particularly difficult if the seller is not located in the UK. Requiring sellers to have authorised agents in the UK would be a step forward, however the system is open to abuse with agents turning out to be nothing more than a PO Box number, agents unable to contact the seller or no longer being in contract. As described in the previous answer, online marketplaces and fulfillment houses should be made legally responsible for ensuring the safety of products sold through their platform. This will incentivize marketplaces to conduct more checks themselves and ultimately take action to ensure products are removed if products are not safe. Marketplaces are best placed to perform this role as they can oversee their sellers and prevent unsafe products from going on sale.

Connected and digital products: As noted above, connected products create a particular challenge for product safety as safety issues can arise from weak passwords and a lack of effective or up to date security updates. These issues will be addressed in the new Product Security and Telecommunications Infrastructure Bill.

There are also gaps in regulation covering digital products as software that is not sold as part of a product but may affect the functionality of a product is not clearly covered in product safety legislation. This gap should be addressed to provide clarity about the responsibility of all providers including software providers.

To support enforcement of legislation relating to any software updates there should be clarity about the responsibilities of the manufacturer and the consumer, as well as the length of time during which updates should be provided. Enforcement agencies should also have the skills and expertise to assess whether the updates meet the legal requirements and the powers to investigate and, if necessary, require a company to take corrective action or recall the product.

3D printing: 3D printing raises a number of new challenges for product safety depending on where it is used in the supply of products. For example, a company may provide a data set to a consumer who then prints a product or spare part using plastic from a second company. In this case the company providing the data set and the company providing the plastic will be responsible for the safety of the final product if their own products have been used in the way specified. Proving that the data set or raw material was unsafe could present challenges and, particularly in the case of the data set, this may have been sent from another country with very little information to identify the company or individual.

In the short to medium term it is more likely that businesses will be established that print a range of small products or parts for consumers, or companies will use 3D printing to create components for a company that assembles the parts into a final product that is sold to consumers. In this case the final manufacturer will be responsible for the safety of the product however the supply chain will make it difficult to find the source of faults and ensure safer processes are used in future.

In addition to regulatory challenges, enforcement is limited by the capacity of enforcement agencies. The majority of enforcement is the responsibility of local authority Trading Standards services, which is poorly suited to addressing new and emerging issues where specialist knowledge or skills may be required or where an agreed approach hasn't been established. In these cases the OPSS should take a proactive role in establishing precedent by taking enforcement action itself or developing new regulations where this is required.

A more consumer focused OPSS would also be well placed to liaise with other regulators working in this area to benefit from their insight and establish a common approach, for example the Health and Safety Executive, the Competition and Markets Authority and international authorities with responsibility for product safety. International cooperation will be particularly important as many of these technologies enable cross border purchases or involve international companies which creates particular challenges for the enforcement of regulations.

18. How well does the current system for corrective action and recalls work? How could the regulatory framework better support it?

Recalls and corrective action play a critical role in protecting consumers by ensuring unsafe products are identified, repaired or removed before they can cause further injury or harm. Although improvements have been made, action is still needed to make it easier for Trading Standards and the OPSS to require a company to instigate a corrective action or a recall.

Previous high profile cases have highlighted the need for recalls or corrective action to be made promptly and for the action to be more effective in removing these products from use, or making the necessary changes. For example, despite faulty Whirlpool tumble dryers being linked to over 750 fires, it took a sustained campaign and the threat of a judicial review for a full recall to be announced in 2019. Other recalls only appear to have taken place after the issue was exposed in the media or the product had been linked to a serious injury or even a death.

Following a number of reviews and working groups,²⁷ a new Publicly Available Standard (PAS) was developed in 2018 that gives companies and authorities guidance on how and when to conduct voluntary recalls and other corrective actions, and how the recall can be monitored. The PAS makes use of recent behavioural science and how new technology can be used to support a recall and is a step forward, however it should be noted that it only relates to voluntary actions.

A major challenge remains in relation to mandatory actions and the process by which Trading Standards and OPSS can require a company to take corrective action or a recall. This process is currently frustrated by the ability of companies to request arbitration or a risk assessment before agreeing to take action. There is now an opportunity for the UK to streamline this process and give authorities the power to require prompt remedial action, or a recall where this is necessary. This will protect Trading Standards limited resources and ensure action is taken promptly and efficiently to protect consumers. Improvements can also be made to the delivery of recalls including the OPSS taking a more proactive role in communicating information about a recall and not leaving it to the business involved.

Online marketplaces also have a critical role to play in ensuring a recall is being effectively delivered. In too many cases consumer groups have found products for sale on online marketplaces that are subject to warnings or recalls. Even when these products are removed they have sometimes reappeared within a few days.²⁸ In some cases the manufacturers of connected products can also take corrective action through an update or inform the consumer about a recall. If a consumer registers a product this can also help manufacturers to inform consumers about correction action or a recall. However companies need to be clear how a consumer's data will be used as some consumers may be wary of receiving marketing or other material.

As the UK is increasingly part of a global market it is also important that the OPSS monitors international recall databases to identify products that are available in the UK and are the subject of a warning or recall in other countries. Following the UK's departure from the EU, products that are the subject of a warning or recall in the EU are not automatically banned from sale in the UK. The

²⁷ In 2016 Lynn Faulds Wood was asked by the Government to lead a review of consumer product recall. Another Working Group on Product Recall and Safety was set up in October 2016 chaired by Neil Gibbins, to build on the work of a previous Recall Review Steering Group.

²⁸ [Dangerous toys and killer car seats listed for sale at online marketplaces like Amazon and eBay](#), Which? Nov 2019. [Amazon.com, eBay and Wish found selling dangerous recalled products](#), Which? Dec 2020.

Government should make cooperation on product safety alerts an important element of future trade deals.

The OPSS has made progress in creating a UK platform to provide consumers with information about recalls following the UK's departure from the EU. The website is easily available if a consumer searches for product recall, however once on the site it does not appear to be possible to search for a product. This suggests consumers may need to search through a list in order to check if the product they are concerned about is included.

19. When it comes to product enforcement, how well does the system deliver transparency and confidence while maintaining confidentiality? Please explain.

Transparency has an important role in strengthening the product safety regime. It helps to inform businesses about the functioning of the product safety regime and encourages compliance. It can also encourage stakeholders to share information relevant to the case and provides reassurance to responsible businesses and consumers that the system is working effectively. Currently it can be difficult for a consumer to find out about a product safety issue and this is likely to undermine confidence.

The OPSS currently publishes details of enforcement actions they have taken that have a statutory basis. Where actions are taken on a non statutory basis they 'may consider whether it is appropriate to publish details of the agreement.' (section 7.6)²⁹ They do not publish details of cases that have been resolved through the provision of compliance advice guidance or support, cases where action has been overturned, or where they have determined it would be inappropriate.³⁰

Trading Standards face significant limitations on their ability to warn consumers about specific products or companies unless they have the company's consent or the information has been shared through a public court hearing. These rules should be reviewed to give Trading Standards the ability to inform consumers about potential safety issues.

The OPSS has the opportunity to make greater use of their soft powers by publishing information about investigations that are taking place and the results of risk assessments. This would support compliance by raising business and other stakeholders' awareness of the OPSS, including the issues that are of concern and how they are being addressed. Examples of regulators that have adopted a more transparent approach include:

- The CMA has recently consulted on the approach it takes to transparency when dealing with consumer enforcement cases.³¹ Its revised note states that the CMA will normally expect to identify publicly all parties which are the subject of CMA consumer enforcement action in a case. This would be a great improvement if a similar approach was adopted for product safety cases.
- The Food Standards Agency holds open board and scientific committee meetings and provides more details about its risk assessments.

20. What toolkit of enforcement duties and powers is needed for effective enforcement now and in the future? Do enforcement authorities have the right tools they need, including data availability, to do the job?

There are major gaps in the enforcement powers, tools and resources available to the OPSS and Trading Standards which inhibit their ability to ensure product safety. However taking this into account, we are concerned that there is more that the OPSS could be doing to take a more proactive

²⁹ [OPSS Enforcement Policy \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³⁰ [OPSS Enforcement Policy \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³¹ <https://www.gov.uk/government/consultations/consumer-enforcement-transparency-consultation>

approach using the powers that it currently has. For example recent incidents suggest a reticence to intervene or to provide public information about areas where there are concerns about compliance with product safety rules.

We are concerned that this reticence may be the result of the other regulatory functions that limit the organisation's ability to intervene or share information. The OPSS would be a more effective product safety regulator if it was arms' length from the government, had an independent board and had a clear and unambiguous duty to protect consumer interests and public health, as is the case with the Food Standards Agency, for example. Previous proposals to review the OPSS's governance are therefore an essential part of any review of the product safety regime and still need to be taken forward.

Enforcement powers

The OPSS and Trading Standards have powers to obtain information as part of an investigation, issue suspension notices, issue requirements to mark and warn, withdrawal notices and recall a product. They can also issue simple cautions. However in order to enforce these actions or issue fines they are required to start criminal proceedings which require legal resources, and are costly and time consuming. This can be a disincentive for authorities to pursue cases and can allow companies to game the system. Without effective administrative fining powers both the OPSS and local authorities lack the necessary powers to effectively encourage compliance. Fines are also too low to act as a disincentive for larger companies.

Granting the OPSS administrative fining powers would also bring them into line with the powers held by other regulators and the powers they have in relation to other responsibilities that they hold. It is notable that the fines issued by OPSS since they were established all relate to their environmental responsibilities, no fines have been issued in relation to product safety.

The OPSS should also review whether additional powers may be necessary to address issues arising from new products or new markets and distribution models, for example if an online retailer or platform is failing to comply with product safety regulations it may be necessary to require an ISP to block their website to prevent unsafe products being purchased and encourage compliance.

Structure and resources

Trading Standards lack the resources and structure to effectively enforce product safety regulations in a modern economy. Trading Standards budgets have been cut over a number of years and many authorities have small teams that lack the necessary resources and expertise. Regular market surveillance and investigation has been deprioritised in favour of more urgent tasks, and Trading Standards officers have been asked to conduct a range of different tasks according to local priorities. There is also concern that important skills and knowledge is being lost due to the difficulty of recruiting new Trading Standards when officers retire.³² National Trading Standards does provide some co-ordination and guidance however this is not sufficient to address the structural challenges that the service faces.

Primary Authority Partnerships (PAPs) are an increasingly important tool in supporting product safety, however there is limited oversight of their effectiveness. In order to ensure they are meeting their objectives a review should be undertaken and where issues are identified recommendations made for strengthening the system. The review should cover the capacity of Local Trading Standards teams to provide the advice and oversight that a company requires. This may be relevant to PAPs agreed with large international companies which have complex models and needs, where a local authority is not best placed to provide advice and, where necessary, challenge the company on its practices. We are also concerned that PAPs can lead to a conflict of interest in certain cases. It is important that businesses can get the support that they need to understand their responsibilities and comply with relevant requirements, but it also needs to be clear that when law is breached they will be held to account. There have been examples of recent cases where local authorities' role in a PAP may have

³² [CTSI Workforce Survey 2020](#)

caused a delay in taking enforcement measures to protect public safety. The OPSS should have an important role ensuring that local authorities that take on a PAP have the necessary skills and expertise to do this effectively.

Data collection and analysis

The collection and analysis of data should play a critical role in identifying new product safety issues and prioritising products or forms of distribution that are resulting in a high level of harm. This need was recognised by the Working Group on Product Safety and Recalls in 2017, which found that “systematic and sustainable ways to capture and share data and intelligence should be established and agreed by relevant parties”.³³

Despite this, the UK still does not have a comprehensive accident and injury database that combines information from sources such as accident and emergency, Trading Standards, fire brigades etc. Even within Trading Standards, data is not collected centrally. The creation of a UK wide database is the responsibility of the OPSS as the central regulatory authority and would support the identification of emerging issues and help prioritise national work on product safety according to where the need is greatest.

Since leaving the EU the UK authorities have lost access to vital EU intelligence-sharing networks – such as the early warning system that operates alongside the EU Safety Gate. This means the UK has to wait until the European alerts are made public. The UK and EU should urgently take forward the commitment made in the UK-EU trade deal to negotiate mutual access to each other’s rapid alert systems for non-food consumer products in line with the six month target set out in the annex of the trade deal. The UK government should also be actively seeking similar agreements with other countries either as part of trade negotiations or independently from these discussions.

In addition to the creation of such a database there is also the need to improve awareness of reporting systems so that consumers know how to report a safety issue and are confident that the time taken to do so is worthwhile.

International enforcement cooperation. E Commerce has facilitated a major increase in cross border purchases, with 25% of UK online purchases coming from another country where the product may have been produced to different standards. Many of these products are purchased through online marketplaces. As stated above, Which? has called for marketplaces to be made legally responsible for products sold through their platforms; however there is also a need for international co-operation to raise product safety standards internationally and improve enforcement cooperation.

Following the UK’s departure from the EU, the UK is no longer a member of the networks that facilitated enforcement cooperation with European partners. The UK should seek to reestablish cooperation with these partners and seek agreements for information sharing and cooperation in enforcement with new partners.

Wider trade negotiations should also be used to advance cooperation on product safety matters. This can be done in a proactive way for example by the UK promoting shared product safety alert systems and cooperation on cross border enforcement. But it also needs to be ensured that trade deals do not limit the ability of the UK’s product safety regime to be updated and strengthened (eg. ensuring that negotiating objectives published by potential trading partners to prevent online marketplaces being made liable for the safety of products sold on their websites are not achieved). The UK should also be playing a leading role in OECD and UNCTAD discussions on improving product safety and work to be part of wider international initiatives that ensure cooperation and sharing of information across jurisdictions.

³³ Gov.UK, “Working Group on Product Recalls and Safety”, 30 March 2017 [online] (accessed 25 October 2017)

Border controls. Following the UK's departure from the EU and the growth in cross border ecommerce, effective border controls have become a critically important area for product safety. Challenges include the need to check products that would previously have been imported as part of the EU single market as well as thousands of small packages arriving from countries that often have different standards and product safety regimes. The OPSS has been given responsibility for these issues and is supporting trading standards with additional resources, but this should remain a priority issue.

21. How could greater use of technology and innovation support more effective, business friendly enforcement and compliance?

New technology can play a role in supporting companies, and enforcement agencies to better monitor the performance and safety of products and services, improving their understanding of risk levels, their awareness of safety incidents and their ability to respond.

Internet of Things: The internet of things allows two connected devices to exchange information in real time including information on a product's performance and safety issues. This information can be accessed by companies and the connection used to take remedial action, which might be in the form of a software update or a message to the user.

RFID tagging: RFID tagging can be used for tagging, tracking and return systems. This technology enables tracking and inspection of goods and assets through the manufacturing, distribution, use and reuse/ recycle process. This enables companies to understand how their product is used and the risks involved. If necessary it could also be used to monitor a product recall.

Blockchain: Blockchain is an open-access, highly secure digital record of transactions. This allows assets to be tracked more securely as they change hands and transform along complex supply chains. It could also be used to record the ownership of products. This may be particularly useful if products are increasingly sold or reused in second hand markets.

Social media and consumer reviews: software that automatically monitors publicly available social media discussions and consumer reviews can help companies and enforcement agencies identify safety issues with products. The same channels can also identify how companies can most effectively communicate information about what consumers should do in the event of a safety issue.

Data: The collection and analysis of data should play a critical role in supporting the UK's product safety strategy. In particular the UK should have an injuries database that draws information from a wide variety of sources and a national product safety recalls database that provides information about product safety warnings and recalls. It is critical that this links to international databases so that authorities responsible for border controls can identify unsafe products entering the UK.

22 When it comes to product liability, do consumers have the right tools and information to take action on their own behalf? Please explain.

Consumers have rights under the Consumer Protection Act 1987 to claim compensation against the producer or retailer of a defective product if it has caused damage, death or personal injury. These rights cover any person that has suffered injury and are not limited to the owner of the product.

However consumers may struggle to access information and support to make a claim or may be put off by the expense, complexity and delays involved in a contested product liability claim. Even before the COVID pandemic these cases could take a considerable length of time. The delays caused by recent disruptions will only increase these challenges and dissuade many consumers.

There are also limited opportunities for consumers to take collective action in relation to product safety issues. Group Litigation is possible, however it is relatively difficult to organise and is an

expensive option for consumers. Enabling consumer groups to bring collective action cases on behalf of consumers on an opt out basis would be an effective means to ensure groups of consumers who have been impacted by a product safety issue could get compensation. As many consumers may be wary of the expense and risk of launching their own legal actions this may be the only way they can access compensation.

Although more can be done to enable consumers to take action, this places a considerable burden on individuals, particularly groups that have low incomes, fewer educational qualifications or face other barriers to accessing legal services. This underlines the importance of a preventative approach that ensures fewer consumers are exposed to unsafe products in the first place.

23. Does the current framework adequately protect all people in society, including vulnerable groups and those with particular needs? And could it be improved?

Particular consumers may be vulnerable to product safety risks for a number of reasons including their age, a disability, a difficulty in reading instructions, lack of experience in using a particular product or because of their situation (for example at the time they use the product they are rushed or distracted or not feeling well). All these scenarios should be considered in the development of standards and requirements.

Children are a particularly vulnerable group and there have been a number of incidents that suggest authorities and companies are not giving sufficient attention to the risks they face from products that they may come into contact with even if they are not designed specifically for use by children. Examples include products that may appeal to children because they are designed to look like food or a toy. In the US there have also been recent recalls of treadmills as a result of incidents involving children. As well as the introduction of specific regulations, some products may also require a higher level of conformity assessment including third party testing and certification.

Although there is not a strict correlation between the cost of a product and its safety, it is reasonable to assume that consumers with low incomes may continue to use products for longer or purchase cheaper or second hand products that may be less safe and therefore put them at risk.

Engaging with a broader range of consumers and stakeholders to fully understand how they use products and the challenges they experience will support better understanding, as well as careful analysis of accident and injury data. For example RIDC³⁴ conduct research and advocacy to support the needs of consumers with disabilities.

25. How can we ensure the processes for consumer recourse are accessible to all kinds of consumer?

As noted in our response to Q23 there are a number of issues including cost and complexity that could act as barriers for consumers seeking recourse following an injury suffered as a result of a product fault. These include the cost (in terms of money and time), the complexity of the process (both imagined and real) and people's lack of familiarity with legal processes. These barriers are likely to be magnified if a consumer has a low income, limited educational qualifications, or if English is not their first language.

ADR can provide a more accessible and affordable means of redress, however approved ADR schemes are often unavailable in non regulated sectors as membership is voluntary and most companies choose not to join. The ADR landscape can also be confusing with companies not required to signpost schemes that they belong to and a confusing array of different providers in sectors such as retail. If consumers do manage to find a suitable provider, there is considerable variety in the service they receive with some schemes suffering from long delays. However these problems should not cloud the fact that there is also some very good practice within the sector and ADR can help

³⁴ Research Institute for Disabled Consumers <http://www.ridc.org.uk/>

consumers to get redress that they otherwise would not have received.

In relation to all forms of redress better engagement with civil society groups that work with consumers who may be less able to access recourse will help to understand the barriers they face and devise strategies to overcome them.

As noted above, the challenges in accessing recourse, and the fact that recourse may provide poor consolation in the case of physical harm suffered as a result of a product safety issue, underlines the importance of taking a preventative approach to all product safety issues.

About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

Annex:

Recent Which? product safety investigations

- Don't buy teeth whitening products from online marketplaces, May 2021.
- Online marketplaces fail to remove banned products – even after consumers report them, Which? finds, December 2020.
- Which? safety tests uncover dangerous baby sleeping bags, September 2020.
- Two-thirds of the 250 products tested from Amazon Marketplace, AliExpress, eBay and Wish fail safety tests, February 2020.
- Which? testing finds almost half of Christmas tree lights from online marketplaces are dangerous, December 2019.
- Amazon and eBay safety issues spark Which? call for stronger regulation of marketplaces, November 2019.
- eBay potentially putting lives at risk with killer alarm listings, October 2019.
- Power failure: Online marketplaces flooded with unsafe electrical appliances, September 2019.
- Revealed: the terrifying smoke alarms that will fail when you need them, May 2019.
- Cheap and deadly – Which? warning on the 'Killer car seats' still on sale, February 2019.
- Worries over unsafe toy slime grow ahead of Christmas, December 2018.
- Which? reveals the children's Halloween costumes that fail fire safety tests, October 2018.
- Children's toy slime on sale with up to four times EU safety limit of potentially unsafe chemical, July 2018.
- The lethal carbon monoxide alarms we found on Amazon and Ebay, June 2018.
- Watch out for 'killer car seats' on sale this Christmas, December 2017.

Recent Which? product security investigations

- TP-link camera security flaw discovered in Which? tests as 'IoT law' moves closer, July 2020.
- Could your smart home be hacked? June 2017.
- The cheap security cameras inviting hackers into your home, October 2019.
- More than 100,000 wireless security cameras in the UK at risk of being hacked, June 2020.
- The smart video doorbells letting hackers into your home, Nov 2020.
- Hyperoptic router 'at risk of being hacked', April 2018.
- Could my baby monitor get hacked? June 2021.
- Cheap smart plugs could expose you to hackers, or even cause a fire, Oct 2020.