

BRC Response to the OPSS Product Safety Review – June 2021

The British Retail Consortium is the trade association for the retail industry. Our members include many household-name retailers and covers around 70% of all retail trade. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

This response has been put together by the BRC's buying community which consists of around 180 retailers and associate members who aim to sell safe and compliant goods. Some BRC members are manufacturers as well as retailers.

The BRC does not consider this response confidential and is happy for this response to be published.

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

Answer: Product safety is a large and complex area. Unfortunately, many areas are open to interpretation. This means that retailers must seek answers to technical questions. There is no central source of information or guidance, so for a single product retailers may need to look on multiple websites such as Business Companion, Gov.uk, BTHA, HSE, Europa etc.

Retailers with a Primary Authority partnership covering Trading Standards can seek Assured Advice on regulations that are enforced by local authorities (e.g. toy safety) but not on those covered by national regulators (e.g. RoHS). It is not possible to get blanket Assured Advice on due diligence systems across all applicable regulations. Not all retailers have a Primary Authority partnership.

Although retailers appreciate advice being provided by national regulators, they have found that the guidance is often written in “lawyer speak’ and not in plain English. Quite often a retailer needs to know whether a process is compliant and a yes or no answer would suffice.

Implementation guidance from the government when new legislation is introduced would be very helpful. For example, retailers are having to comply with the requirements of the Ecodesign Lighting Regulations. Although not a safety issue these UK regulations regulated by OPSS, are running alongside parallel EU regulations. As many retailers’ trade in Great Britain, Northern Ireland and the European Union this has meant duplications of labelling requirements. It has been down to the industry to work out the detail of implementing these regulations. Basic guidance in the form of plain English frequently asked questions document would make legislation easier to follow.

When developing product safety policy and regulations, the government should be mindful that retailers work to long lead times. This means that notice of changes to regulations needs to be given as far in advance as possible.

UK consumers are also buying from overseas sellers who ship to consumers directly. Are these retailers complying with UK laws? How easy is it for these sellers to understand UK legal requirements and what recourse if the goods are unsafe?

UK Retailers that supply the same product in Northern Ireland must comply with EU regulations, so legislation and guidance should reflect this, not just be centred around Great Britain as retailers have to understand how to implement both alongside each other.

The burden placed on economic operators should be to ensure the risk of injury is mitigated to an acceptable level consistently throughout the safety legislation.

The BRC advise that OPSS engages early with industry early on to understand the style and method of advice and guidance that industry requires to comply with regulations. This will help OPSS comply with section 5 of the Regulators' [code](#):

“Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply”

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

Answer: Compliance with placing 'hybrid' products on the market can be difficult for retailers. Hybrid products which could go across different areas of regulations often require clarification. This also applies to products that migrate away from the manufacturers' intended use.

Examples of hybrid products include:

- I) Teddy bear doorsteps. These weighted child-appealing ornamental products could be subject to toy safety regulations and general products safety
- II) Pet gates, that are then used as child gates
- III) “Hotties” which are microwaved and used instead of hot water bottles

There have been attempts at industry guidance before, but where possible there should be official involvement and endorsement of industry guidance.

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

Answer: Retailers feel that regulation should be targeted more at the manufacturing systems level. The manufacturer is best placed to ensure that the product is safe and compliant before it reaches consumers.

Where possible manufacturers should not be given lots of differing and complex regulations from different territories.

Question 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?

Answer: We feel that regulations need to be able to support new technologies and new methods of purchasing. For innovators and new technologies, we feel that clear regulatory guidance and FAQ-style guidance would help. OPSS guidance and Business Companion are often good resources but feel that there could be more plain English guidance. Retailers feel that regulators such as Trading Standards and OPSS on occasion seem reluctant to provide direct (i.e. yes or no answers) advice, whether on an informal basis or as Assured Advice. This is especially the case in relation to novel products or when legislation is unclear. This creates a gap, often lasting several months or years, where there is no level playing field for businesses and where consumers are at risk of purchase unsafe or non-compliant products.

Early engagement with the retail industry as early as possible is essential. The Industry will be able warn policymakers early on of potential regulatory issues.

Ultimately, if legitimate products cannot be placed on the market due to regulatory barriers which *do not make a product unsafe*, the consumer could be at a disadvantage. This is due to lack of competition, increased costs and illegitimate products placed onto the market.

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

Answer: Although we have left the European Union, retailers and manufacturers fear that divergence from EU regulations will add significant costs. In some cases, UK products may require separate testing/certification against EU standards and this can add two to three times to the costs of product compliance. Added complexity to supply chains is likely to increase consumer costs and reduce competition.

Many retailers also supply to the EU or sell in Northern Ireland where EU regulations are still applicable. Ideally, any framework should ensure that UK businesses who also wish to sell in the EU or NI are not at a commercial disadvantage.

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

Answer: Retailers have experienced resistance to the UKCA mark being placed alongside the CE mark by test houses outside of the UK.

There are also significant issues with the availability and capacity of Conformity Assessment Bodies (CAB). The few bodies (where they exist) are dealing with a significant number of assessments. This could lead to a backlog later this year leading to increased prices for consumers and a lack of consumer choice.

Retailers have told us of a lack of CAB capacity in these areas:

Pyrotechnics (at the time of writing there is no CAB for pyrotechnics)
Construction Products
Personal Protective Equipment

Carabiners: EN 12275 standard
Ice axe: EN 13089 standard
Crampons: EN 893 standard
Ropes: EN 892 standard
Spindles: standard EN 568
Lanyards: standard EN 354
Harnesses: standard: EN 12277
SO 12402: International standard for personal flotation devices (lifejackets and buoyancy aids)
BS EN 13138-1:2014 Buoyant aids for swimming instruction
Radiators (EN 442)
Screws and Dowel Type Fasteners (EN 14592)

Question 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?

Answer: Where appropriate there could be relaxations to testing/certification requirements. Retailers in most cases strive to place safe and compliant goods on the market. As well as the moral and ethical issues, association with poor quality or non-compliant goods carries significant reputational and public perception risks.

However, any relaxing of regulations and/or enforcement should be handled cautiously to avoid opening up the market for cheap, unsafe, poor quality products from disreputable retailers and manufacturers. This would lead to consumer detriment and increased costs for legitimate retailers who have to unfairly compete with disreputable retailers.

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

Answer: Voluntary standards are often a quicker and easier alternative to formal regulation and are often developed by industry, from an industry perspective. This means that they can often be developed and implemented quickly by businesses. For standards to achieve widespread support and use they should be free and easily available.

However, there is a perception that it is mainly only the larger, more established businesses that follow voluntary standards. Standards should lead to a fairer playing field, rather than situations where standards followers invest time and resources into enforcing standards that others willingly ignore. Providing the Publicly Available Specification (PAS) for button batteries at no cost was a good step towards helping smaller retailers to sell safer goods. We hope that this free to access approach from OPSS will continue.

For a standard to have value it usually needs to fill in a gap in regulation or provide a widely recognised trust mark that the consumer can understand and recognise.

Question 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?

Answer: It is well known that the role of third-party platforms in this area is sometimes challenged. It is equally clear that platforms themselves may not have information about the many thousands of products on their sites. Where they act as sellers, of course, the rules are different. It's not always clear who has responsibility, is it the platform or seller?

Recalls through sales online and by electronic payments methods are easier to initiate as there is a record of the original purchaser. Although not unique to online sales, the rise in sharing economies, upcycling and sharing should be taken into account. The challenge here is locating who has possession of goods subject to a recall.

Question 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?

It is not always clear where responsibility lies. We've considered platforms in the previous answer.

Consumers are increasingly turning from purchasers into hirers. For example, instead of purchasing a car, consumers enter into relatively short hire agreements, where for one monthly payment all the costs and liabilities associated with car purchases (e.g. tax, maintenance) are covered. In this case, it appears that the consumer is entering into a service agreement rather than a purchasing agreement. For consumers, this model, which could easily be adopted into other areas such as

white goods, technology etc could be very appealing. The liability on the business here is to provide a safe service, as well as providing safe goods.

There is also incoming legislation around 'right to repair'. There is a potential issue around non-genuine or poor quality parts being used in repairing electronic goods. The retail industry has concerns that these parts could be installed leading to *previously* safe goods being made unsafe. The other effect would be that less energy-efficient products get used for longer.

Question 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.

Answer: The Government is implementing 'right to repair' legislation. This will compel manufacturers to make spare parts available to competent repairers. The retail industry has concerns that consumers will be able to easily manufacture, or otherwise acquire specialist tools and parts that should only be made available to competent repairers. This could lead to a risk of injury and/or poor quality repairs. Although the industry has no issue with reducing waste and encouraging environmentally friendly policies, some repair tasks require a degree of skill to prevent risk of injury.

For spare parts made, loaned or otherwise shared by consumers we would like to know where this places liability for unsafe goods? For example, a product fails and a consumer makes their own spare part or downloads instructions/specifications from a third party website (either for free or at a cost). This part then causes a fire or personal injury. Is the manufacturer or retailer still liable?

BEIS will recall the report into 3D Printing (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923615/3D-printing-spare-parts-consumer-appliances.pdf) where numerous safety issues were identified (see point 4.2.3.4 in the report)

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

Answer: We believe that consumers feel that if a product is on sale in-store or online it is automatically a safe product. We know that this is not always the case. There should be clear contact details on goods to ensure that a consumer can easily and quickly contact a responsible person (e.g. manufacturer or distributor) to report an unsafe item.

Question 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?

Answer: Voluntary pledges are a good start, but they are just voluntary. There are questions over enforceability of pledges.

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

Answer: Fashion buyback where retailers buy back previously used clothing is becoming increasingly popular and is an example of where product lifecycles may go in the future.

There should be a holistic joined-up approach across the whole supply chain. Legislation needs to flow and align to cover new and end of life requirements. Legislation should also take into account the recycling and disposal requirements of goods.

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

Answer: A product made to last longer could have an environmental impact in terms of energy efficiency and the possibility of REACH, RoHS etc changes. This could mean that banned/restricted substances remain in circulation longer.

There should be more consultation and an ability for retailers to request guidance and legislation where they see a gap.

OPSS could create a new fast track rapid action group just looking at new and emerging issues to address new safety or product risks. Retailers feel that the current process takes too long.

Question 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?

Answer: The responsibility should lie with the manufacturer through the foreseeable use of the item. The 'right to repair' legislation has brought about time limits for manufacturers to supply spare parts for certain electrical items. This is a step towards manufacturers being accountable for the performance and durability levels at the design and manufacture stage.

Consumers are increasingly sharing goods and recycling and upcycling. Unless consumers make significant modifications (at their own risk) the responsibility for product safety should still rest with the manufacturer.

There is also a question if how many parts get replaced before the responsibility shifts between manufacturer, retailer and repairer?

Question 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?

Answer: The challenges around 3D are whether 3D printed parts and products are safe and durable. Enforcement of these can be challenging if the producer of the intellectual property (e.g. the part designer) cannot be located. The same challenges are there for software products. Also if a consumer or repairer manufacturers their own part which is defective then where does liability lie? The manufacturer has made a safe product but a defective spare part has now made a previously safe product unsafe and the blame and negative publicity could go to the manufacturer or retailer.

Consideration should also be given to software that alters or changes the performance of a product. For example, software that claims to speed up phones and tablets etc but can lead to batteries overheating need to be regulated.

The previously mentioned BEIS study into 3D Printing needs to be considered. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923615/3D-printing-spare-parts-consumer-appliances.pdf

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

Answer: It has traditionally been difficult to capture consumer ownership data and with the increase in the circular economy this has been made even more difficult. Retailers have found that trying to acquire customer data at the point of sale problematic. This is due to a consumer reluctance to supply personal data, even if it is for a legitimate, benevolent cause such as notification of recalls. The circular economy where consumers share, donate, upcycle, recycle or sell on goods has meant that the original purchaser doesn't always have the goods, or know where the goods are now located.

Online payments and those made by the retailer provides the transaction references and the payment provider contacts that individual without the need for the sharing of personal data. A payment provider is also more likely to have a current email, phone number, etc than a retailer, especially if the product is several years old.

We believe that the best method of improving consumer engagement is through consumer advice and education. Timely reminders that product device registration is free and could prevent injury etc would increase consumer device registration.

Recalls should also be targeted differently. Social media is more likely to have a wider reach than newspapers these days and not all authorities have changed their thinking to consider that.

The Government should ensure that the UK has product safety trend data available from healthcare providers and where possible link it into RAPEX.

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

Answer: Part of product safety enforcement involves advice and education. Retailers are aware that it may be necessary to name them and their products in official communications. This also helps maintain, integrity and transparency in the system.

Question 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?

Answer: Effective enforcement begins with educating and advising consumers and businesses who place products on the market, either as manufacturers, importers, retailers, or distributors. The retail industry has a good working relationship with enforcers through Primary Authority arrangements and regular dialogue with BEIS and OPSS. The industry often relies on OPSS as enforcers of legislation for advice and answers to technical questions.

This advice is very welcomed by the retail industry, but retailers have advised that the advice is sometimes written in 'lawyer-speak' leading to difficulties in interpretation. We believe that enforcement resources and costs would be reduced if OPSS and BEIS could always ensure that advice and guidance to businesses is clear, plain English and ideally accompanied by FAQs. Where possible information should all be in one easy to read and understand resource without the need for too many 'clicks'.

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

Answer: As with the answer to question 20, clear, plain English advice and guidance from regulators would support business compliance. Retailers have welcomed the greater number of opportunities for BEIS and OPSS engagement through online training and seminars.

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

Answer: Consumers are unlikely to be aware of where product liability lies. For example, consumers can claim against a retailer under the Consumer Rights Act 2015 for unsafe goods. However, they could also have rights against the 'producer' under the Consumer Protection Act 1987. Product liability is seen by consumers as an area where legal advice is needed, unlike 'small claims' which can generally be carried out by a consumer without needing professional legal advice.

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

Answer: It may be beneficial to create an explicit requirement, either in standards or regulations, for manufacturers to consider how their product might be used by a diverse range of consumers, for example, those with disabilities or from different cultures. We would welcome a conversation with OPSS on how best to approach this with consumers.

Question 24: Are there any examples of, or issues where, the impact of regulation is different for people from different groups in society?

Answer: It is important for enforcers to understand and engage with the communities they serve. This can help drive a culture of compliance.

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

Answer: People who were born outside the UK, young people and people from certain minority groups may have lower awareness of the regulations which protect them in relation to product safety and consumer rights. As a result, they may be less likely to report unsafe products or a breach of consumer law, and less likely to exercise their consumer rights.

Targeted education at these groups will raise awareness and lead to better compliance outcomes.

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