"No deal" Brexit: last minute Guidance on changes to Product Liability & Safety Legislation

By Toby Riley-Smith QC

A "no deal" Brexit is still a real possibility.

On 25 March 2019 HM Government published guidance on the proposed changes to product safety legislation in the event of a "no deal" exit from the European Union.

This Guidance is essential reading for product liability and product safety practitioners – summarising, as it does, the practical effect of one of the statutory instruments that will come into force in the event that the UK withdraws from the EU without a deal, namely the *Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019*. Some key points are identified in this Alerter.

"UK PRODUCT SAFETY AND METROLOGY GUIDANCE IN A 'NO DEAL' SCENARIO"[1]

1. The draft *Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019*[2] - which have been approved by both Houses of Parliament but still await ministerial signature - will make necessary amendments to our domestic product safety legislation in the event that the UK leaves the EU without a deal.

2. These amendments are intended to create a framework for a UK market to replace that of the EU market.

3. Although they are not intended to alter the product safety landscape, they do, however, introduce a number of important changes to both the *Consumer Protection Act 1987* (**CPA**) and the *General Product Safety Regulations 2005* (**GPSR**).

Distributors become importers

4. UK businesses which bring products into the UK from an EEA Member State, and who are currently simply "distributors" of those products, will from "Exit Day" become "importers" of those products. As such, these entities will acquire new legal liabilities and duties.

Civil liability under the CPA

5. One of the "persons" currently liable for defective products under the no-fault regime of the *Consumer Protection Act 1987* is the "*first-importer*"

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788839/uk-product-safety-and-metrology-guidance-no-deal-scenario.pdf
[2] http://www.legislation.gov.uk/ukdsi/2019/9780111180402/contents

into the EU – currently defined by section 2(2)(c) as "*any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another*".

6. This section will be amended. The words "*a member State from a place outside the member States*" will be replaced by the words "*the United Kingdom*".[3]

7. This could have a significant effect on any UK "*person*" who imports products from members states of the EU. Previously, these entities (including many UK distributors) were not the "*first-importer*" of such products into the EU and therefore were not potentially liable under the CPA scheme.

8. But if the Regulations come into force, then they will henceforth be classified as the first-importer into the UK, and will suddenly find themselves potentially liable for any defective products that they supply.

9. This change would have considerable implications for UK based distributors of products from the EU and, of course for their insurers.

New duties under the GPSRs

10. The definition of a "*producer*" under the GPSR reg.2(b)(ii) currently includes **"***the importer of the product from a state that is not a Member State into a Member State*". The draft Regulations will amend this definition to read: "*person established in the United Kingdom that places a product from a country outside the United Kingdom on the market*".[4] It follows that any

[3] SI, sched.3, s.3
[4] SI, sched.9, s.2(e)

entity importing goods from the EU into the UK will henceforth be a "*producer*" under the GPSRs.

11. This change of status will confer important additional responsibilities on these new importers/producers for checking the compliance of products. These include complying with an enhanced set of requirements to check product compliance as well as to maintain documentation and ensure their address appears on the product. There is an 18-month transitional period for these new importers during which they can put their details on documentation accompanying the product, rather than on the product itself. A slightly different regime applies to cosmetic products.

12. The EU has also recognised that in the event of a "no deal" departure there will be similar consequences for EU distributors of UK products who will now become importers into the EU.[5]

13. There are also consequences for UK-based exporters. Products exported from the UK to the EU internal market after "Exit Day" will need to be labelled with the details of an importer that is based in the EU or EEA.

14. HM Government recognises that additional burdens will be placed on UK Companies. The Explanatory Memorandum to the original draft of the SI stated that *"Existing offences will continue to apply – on economic operators, including importers post exit (who pre exit would have been subject to the less onerous duties of distributors).*[6]

[5] https://ec.europa.eu/info/sites/info/files/qa_brexit_industrial_products_en.pdf

[6] 7.17(f), http://www.legislation.gov.uk/ukdsi/2019/9780111176368/pdfs/ukdsiem_9780111176368_en.pdf

Statutory defence under s4(1)(a): compliance with enactments and EU obligations

15. The statutory defence to a civil claim under the CPA in section 4(1)(a) – namely that a product's "defect" is attributable to compliance with "*any requirement imposed by or under any enactment or with any EU obligation*"- will now apply only to UK enactments and retained EU obligations.

16. It follows that, in civil proceedings relating to a defect in such a product, a defendant can only rely on any EU obligation if it has been retained after Exit Day.

Notified bodies

17. Conformity assessment of a product currently has to be carried out by an EU-recognised Notified Body.

18. There is a new UK Conformity Assessed marking (**UKCA**) which may be used for products to be placed on the UK market. All existing active UK Notified Bodies will become UK Approved Bodies. They will be able to carry out conformity assessments for products to be placed on the UK market for the product areas for which they are approved. They will not be able to carry out conformity assessments for products to be placed on the EU market.

19. The Department of Business, Energy and Industrial Strategy (**BEIS**) has compiled a register of Approved Bodies, with their approved body identification numbers, the activities for which they have been approved and any restrictions on those activities.

20. The UK will continue to recognise EU Notified Body conformity assessments, intended to be for a time limited period (unspecified) so

manufacturers and importers will still be able to place goods on the UK market lawfully bearing the CE marking where they have been assessed by an EU Notified Body (where required).

Product recall changes

21. The obligation to ensure that products presenting a serious risk are recalled, withdrawn or prohibited on the market will rest with the market surveillance authorities who must now inform BEIS without delay.

22. The RapEx database will no longer be available to the UK. BEIS will be responsible for establishing a UK database of product safety and market surveillance information to replace the current EU structures. [7] It is intended that this product safety database will be available from Exit Day.

Conclusion

23. The draft *Product Safety and Meterology etc (Amendment etc) (EU Exit) Regulations 2019* are intended to ensure continuity in the event of a "No deal" Brexit. They are chiefly concerned with updating references and definitions in existing legislation to enable it to function on and after such an exit. Some of the changes, however, are significant. In the event of a "no deal", it will therefore be important for product liability and product safety practitioners to consider their impact. And a good starting point is HM Government's new Guidance.

TOBY RILEY-SMITH QC

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[7] SI, sched.9, s.6