

The Office for Product Safety & Standards (the “OPSS”): what’s it all about?

By Tim Green KC and Douglas Maxwell

Introduction

1. 21 January 2023 marks the fifth birthday of the Office for Product Safety & Standards (the “OPSS”). Despite its significant role, the functions and work of the OPSS are arguably not as well-known as they might be. This article is a short summary for busy regulatory practitioners of the OPSS’s purpose, powers, and impact.

When and why was the OPSS established?

2. The OPSS was established in January 2018 partly in response to the recommendations of the [Working Group on Product Recalls and Safety](#). It took over a range of statutory duties and powers which were formerly held by the “Local Better Regulation Office”, the “Better Regulation Delivery Office” and latterly, with the incorporation of the National Measures and Regulation Office, “Regulatory Delivery”, a directorate of the Department for Business, Energy and Industrial Strategy (the “BEIS”).
3. OPSS’s stated purpose is “[to deliver consumer protection and to support business confidence, productivity and growth.](#)”

What products come within the scope of the OPSS?

4. In short, the OPSS is:
 - the national regulator for all consumer products *except* for **vehicles** (regulated by the Driver and Vehicle Standards Agency), **medicines** (regulated by the

Medicines and Healthcare product Regulatory Agency) and **food** (regulated by the Food Standards Agency).

- the national regulator for legal metrology, ensuring weighing and measuring instruments are accurate and reliable.
5. The OPSS also leads Government policy on product safety, metrology, hallmarking and market surveillance, and is responsible for product safety at the UK's borders. It leads standards and accreditation policy across Government, working with the British Standards Institution and the United Kingdom Accreditation Service, providing benchmarks for the manufacture of safe products and assuring the quality of testing, calibration and certification services.

What powers does the OPSS have?

6. As the national regulator of most consumer goods, the OPSS oversees [regulatory enforcement](#), identifying risks, and manages large-scale product recalls. The OPSS has extensive powers that vary depending on the type of product. These powers include:
- **Information Notices** - for example, under the Construction Products Regulations 2013 (SI: 2013/1387) [reg.13](#). Such notices will likely take the form of a series of questions, requests for information such as test results and information relating to any corrective action(s) taken.
 - **Notices to Warn / Requirement to Warn**– for example, under the Construction Products Regulations 2013 (SI: 2013/1387) [reg.12](#) or the General Product Safety Regulations 2005 (SI: 2005/1803) [reg.13](#). Such a notice can include requirements such as publishing warnings, ensuring a product carries a warning of the risks identified in the notice and giving appropriate warnings to any person supplied with the product in good time.

- **Prohibition Notices** – for example, under the Construction Products Regulations 2013 (SI: 2013/1387) [reg.11](#). Such notices can be made when the Secretary of State, has “*reasonable grounds*” for suspecting an offence under [reg.4](#) or [reg.5](#) of the 2013 Regulations, or they consider there are ground for service in accordance with [Sch.1](#). A prohibition notice may include a requirement that the relevant product is recalled. Further, the Secretary of State has relatively broad powers to impose such conditions as they consider appropriate.
- **Prosecution and imposing monetary penalties** –failure to comply with the requirements of a statutory notice may involve a prosecution or the imposition of a monetary penalty. The OPSS will have regard to the provisions of the [Code for Crown Prosecutors](#). In respect of some non-compliance, the OPSS may apply for the forfeiture of a dangerous product.

How does the OPSS publicise its activities?

7. The OPSS published details of [product recalls, product safety reports and product safety alerts](#) online. It follows that manufacturers might escape prosecution, but still face substantial reputational risks from OPSS intervention.
8. Such notices give details of the product, such as its brand, country of origin and description. They then identify the hazard and regulatory breach and set out the “*corrective action*”, for example “, *the local authority are requiring the recall of the product from end users*” and “*the listing has been removed by the online marketplace*”.

How should you respond to an OPSS investigation?

9. The OPSS has extensive powers under their [enforcement policy](#). Broadly speaking, it has an escalating range of responses depending on the risk arising from the breach of duty and the culpability of an alleged offender. Anyone served with an Enforcement Notice should consider

taking specialist legal advice, as the consequences for failing to comply can be severe. A Prohibition Notice will fall into the public domain. For example, contravention of a Prohibition Notice concerning construction products is a **criminal offence** (see, the Construction Products Regulations 2013 (SI: 2013/1387) [reg.11\(5\)](#)).

10. In terms of process, OPSS enforcement is similar to that of Trading Standards but with a much shorter timetable. Compressed within a period of just 35 days: letters are sent, Information Notices are issued, exchange of written submissions take place, and an enforcement position is taken (e.g. no further action, product recall, prosecution).

Is there an appeals procedure?

11. Once the OPSS has made its decision in respect of a particular product, there is a mechanism for a manufacturer to challenge that decision, but the nature of that appeals process will depend on the particular circumstances, most significantly the type of product.
12. For example, where a Prohibition Notice is served of a construction product, the appeals procedure is by way of “representations” under [Sch.3](#) of the Construction Products Regulations 2013 (SI: 2013/1387). The Secretary of State has the power to consider such representations and revoke the notice *or* appoint a person to consider those representations, and the recipient may make oral representations to the appointed person.
13. Representations could potentially include the due diligence defence (for example, the Construction Products Regulations 2013 (SI: 2013/1387) [reg.23](#) and the General Product Safety Regulations 2005 (SI: 2005/1803) [reg.29](#)) or challenges to the proportionality of the notice.
14. Such representations take the form of a relatively informal quasi-judicial process in which the Secretary of State will appoint a lay chair with legal assistance to hear oral representations at the OPSS’s offices in Birmingham. Evidence is in writing. The appointed person will then report

to the Secretary of State. Having considered the report, the Secretary of State must decide whether to revoke or vary (but not more restrictively) a Prohibition Notice or retain it as it is. The appointed person will give reasons for their decision in writing. This can provide helpful mitigation in respect of an alleged breach, even if the decision of the OPSS is not overturned. The procedure to appeal the final decision of the Secretary of State would potentially be by Judicial Review.

What about the Codes of Practice?

15. The OPSS has sponsored the British Standards Institution (the “BSI”) to develop and publish two Codes of Practice.
 - **PAS 7100:2022** “*Product recall and other corrective actions – Code of practice*” came into effect on 31 March 2022 (superseding PAS 7100:2018). PAS 7100:2022 is designed to support businesses in preparing for and dealing with product recall or other corrective action and focuses on the development of a product safety incident plan (“PSIP”), which forms part of a product safety management plan (“PSMP”). PAS 7100:2022 among other things incorporates changes following the UK’s exit from the EU and new sections for online marketplaces, repairs and refurbishments.
 - **PAS 7050:2022** “*Bringing safe products to the market – Code of practice,*” which came into effect on 31 March 2022. PAS 7050:2022 is intended to assist businesses in meeting their obligations under the General Product Safety Regulations 2005 (SI: 2005/1803). Part I of PAS 7050:2022 is intended for businesses, including manufacturers, designers, importers, distributors, repairers, refurbishers and the operators of online marketplaces for consumer products, to assist them in ensuring that only safe products reach the consumer. This is underpinned by the preparation of a PSMP by businesses. Part II is intended for regulators that support businesses in meeting the guidance in Part I and the implementation of a PSMP.

What other activities does the OPSS undertake?

16. The OPSS has commissioned important research into [product safety policy, delivery and enforcement](#). Of particular note are the OPSS papers concerning:
- [Insight into product recall effectiveness](#)
 - [Study on the Impact of Artificial Intelligence on Product Safety](#)
 - [Characteristics of modern domestic fires and the implications for product performance testing](#)

The Report Card after five year

17. Establishing the OPSS was a significant step. Its stated vision was for a “*trusted product safety system that delivers protection for consumers, fairness for business and a competitive market place defined by outcomes of safety and public confidence*”.
18. In five years since its birth, the OPSS has seen a sharp increase in scope and confidence, including:
- a budget increase of **540%** in five years, from £10m in 2018 to £64m in 2023;
 - taken on the *new*, and as yet untested, role as the Regulator for Construction Products;
19. Unlike the National Trading Standards or the Financial Conduct Authority, which operate with a wide degree of autonomy from central government, the OPSS sits within a Ministerial Department where it relies on Ministers to set the strategy, policy and framework. So, while the OPSS is a powerful national regulator, it is also vulnerable to sudden changes in the political weather.

20. Looking forward, the OPSS's "[Product Regulatory Strategy 2022-2025](#)" shows that the OPSS seeks to respond to regulatory challenges at a macro level including:
- learning from events such as the Grenfell Tower Fire;
 - adapting to technological developments; and
 - promoting environmental considerations (see also the Government's related work on the [Energy-Related Product Policy Framework](#)).
21. Practitioners will note that unlike other national regulators like the FCA or HSE, the OPSS has not yet set out what it considers to be the key indicators of its own performance. Industry and consumers would benefit from better analysis of types of enforcement, trends in enforcement and how information is conveyed to industry and consumers (perhaps using the approach of the Financial Conduct Authority as an example). Further, the approach the OPSS takes to balancing its duties to a competitive market, with its stated role as the champion of consumer rights, remains difficult to predict due to the pervasive influence of Ministerial discretion.
22. The OPSS is likely to play an increasingly dominant part in regulatory enforcement. It may not be a household name, but when the extensive powers, the (ever-increasing) budget and the scope of responsibilities are combined, it becomes clear that over the last five years, the OPSS has grown into a powerful player in the sphere of product litigation and regulation.

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Friday 20 January 2023