# **The fundamental reform of product safety?**

1. **THE CONSULTATION**
2. This article provides a concise summary of the significant changes that are being considered to the UK’s product safety regulation over the next 12 months. In August 2023, the Department for Business and Trade (the “DBT”) and the Office for Product Safety and Standards’ (the “OPSS”) published a Consultation on “[Smarter regulation: UK product safety review](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1175948/uk-product-safety-review-consultation-august-2023.pdf)” (the “Consultation”). The Consultation was part of the Government’s “*smarter regulation strategy*” and broader regulatory reform of product safety. The Ministerial Forward did not shy away from the potential scale of the changes, stating “*fundamental reform is necessary*”. The relatively short Consultation window closed on 24 October 2023.[[1]](#footnote-1)
3. Given the extensive scope of the Consultation (ranging from regulatory alignment with the EU to significant increases in the powers of the OPSS), the Government’s eventual response is likely to propose significant reforms to the regulatory system concerning product safety. As such, regulatory practitioners, businesses, and consumers should be vigilant.
4. The proposals stem from:
   1. The realisation that the [General Product Safety Directive](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0095) 2001,[[2]](#footnote-2) on which [The General Product Safety Regulations 2005](https://www.legislation.gov.uk/uksi/2005/1803/contents/made)[[3]](#footnote-3) are based, is being replaced in the EU by the [General Product Safety Regulations](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0988) 2023 (the “2023 EU Regulations”) from 13 December 2024.[[4]](#footnote-4) As the 2023 Regulations will not (for obvious reasons) constitute retained EU law, there is the possibility of regulatory divergence in the sphere of product safety.
   2. A concern that the current assortment of regulations relating to product safety is unnecessarily complex and disjointed. The proposed reforms are intended to simplify a system that has developed through a multitude of both EU and domestic sources.
   3. The need to respond to the challenges posed by emerging technologies and the increased use of eCommerce. For example, over 25 % of all retail sales are now made online, and this figure is likely to increase in the coming years.
5. **THE PROPOSALS**
6. The Consultation sets out 13 broadly defined proposals. Many of these appear to be directed at mirroring parts of the 2023 EU Regulations, although some divergence from the EU position seems inevitable. Despite the possibility of some regulatory divergence, the main purpose of the Consultation (and any subsequent reform) is to try and ensure that the UK’s regulatory framework for product safety continues to shadow that of the EU, with discrete areas of difference.
7. For present purposes, the headline proposals in the Consultation include:
   1. Enhancing the leadership and coordination role of the OPSS.
   2. Creating a new legal data gateway whereby manufacturers would provide information on incidents, investigations, and testing to assist the OPSS in identifying risks and vulnerable individuals.
   3. Ensuring all notification of recalls, serious product safety incidents and other corrective action by a manufacturer or distributor are sent to the OPSS, rather than the local authority, as soon as the economic operator has knowledge of an unsafe product.
   4. Introducing improvement notices, civil monetary penalties, and enforcement undertakings.
   5. Consolidating and aligning the existing enforcement legislation.
   6. Moving away from a system where products are regulated based on type to one where products are regulated according to potential hazard. Hazards in this context could include environmental impact and risk to consumers.
   7. Establishing a derogation process, enabling businesses to apply for temporary regulatory easements to speed up the supply of essential products in emergencies.
   8. Introducing e-labelling.
   9. Introducing a specific regulatory regime for the “online marketplace.”
8. It has to be said, that that the Consultation remains light on technical detail. As such, although this gives the Government significant room for manoeuvre, it does leave a certain amount of uncertainty as to the future of the regulatory landscape.
9. **CHANGE IS COMING**
10. In our view, it is worth practitioners considering some of the key headlines in the Consultation in order to anticipate the resulting probable changes to product safety regulation that are likely to follow.

**Enhancing the leadership and coordination role of the OPSS?**

1. It is important to remember that the OPSS has already engaged in a consultation regarding product safety. This initial Consultation was completed in 2021, and the OPSS published its response in November 2021, stating that the framework “[*needs to be radically reformed*](https://assets.publishing.service.gov.uk/media/619f54abd3bf7f0559e1da5f/uk-product-safety-review-call-for-evidence-response2.pdf)”. Radical reform has not been forthcoming following the initial consultation, and the slow pace of change has drawn criticism from certain corners, including the Chair of the [Public Accounts Committee](https://committees.parliament.uk/work/1292/protecting-consumers-from-unsafe-products/publications/).
2. Despite the absence of radical reform, the OPSS published two policy updates on 29 June 2023: (i) [how to challenge or appeal an OPSS enforcement](https://www.gov.uk/government/publications/safety-and-standards-enforcement-challenges-and-appeals/how-to-challenge-or-appeal-an-opss-enforcement-action) action, and (ii) its [Enforcement Policy](https://www.gov.uk/government/publications/safety-and-standards-enforcement-enforcement-policy/opss-enforcement-policy).
3. The proposals in the most recent Consultation go well beyond what has been attempted before in terms of enhancing the leadership and coordination role of the OPSS. The Consultation includes the use of OPSS guidance to set out the key functions and principles local authorities should apply when carrying out their enforcement duties. These include the methodology and processes to be followed when assessing product safety incidents and using enforcement powers.

**New improvement notices, civil monetary penalties, and enforcement undertakings?**

1. The Consultation proposes providing authorities with the power to issue improvement notices and civil monetary penalties. In the context of defective products, these new powers would mirror those currently held by the Health and Safety Executive and Environment Agency.
2. In an earlier [article](https://www.hendersonchambers.co.uk/2023/01/23/the-office-for-product-safety-the-opss-whats-it-all-about/), we highlighted that the nature of an appeal against an OPSS Notice was dependent on the circumstances and most often dictated by the type of product. The Consultation appears to propose a unitary right to make representations, and a single appeals procedure streamlining and clarifying the current approach. However, until further details are provided, it is difficult to assess the impact of this proposal.

**The centralisation of product safety?**

1. The proposals appear to seek to centralise product safety within the OPSS at the expense of local authorities. For example, if enacted, the reforms proposed in the Consultation could result in a shift whereby most enforcement actions relating to product safety move from the local level with Trading Standards to the national level with the OPSS.

**Will notifications of recalls, serious product safety incidents and other corrective action need to be sent to the OPSS?**

1. The Consultation proposed making the OPSS the single point of contact to report an unsafe or recalled consumer products. Again, this proposal if enacted would be a centralising measure with the aim of removing any uncertainty and giving more focus to both product safety policy and enforcement .
2. In terms of the process for reporting of product safety failings, the Consultation again proposes to adopt the existing system regulating health and safety at work. The Consultation envisages a procedure for reporting defective products that is modelled on the obligations for reporting accidents at work through the Reporting of Injuries under the Diseases and Dangerous Occurrences Regulations 2013 (“RIDDOR”).
3. How this RIDDOR for products regulation will operate is still uncertain, but when the details of what the new reporting obligations mean in practice are published, businesses and their advisors will need to familiarise themselves with any new reporting duties and procedures. Notably the proposals state that it may be a criminal offence for a business (online or physical) to fail to comply with the new reporting duty to the OPSS, and where a failure is identified, the OPSS could be given the powers to exercise “*additional enforcement actions*”. However, until the Government’s response is published, we are left in the dark as to how this would operate in practice.

**The consolidation and alignment of enforcement legislation?**

1. The Consultation proposes the consolidation of ***all***existing enforcement regimes currently contained in, among others, the Consumer Rights Act 2015, the Consumer Protection Act 1987, the General Product Safety Regulations 2005, and many sector-specific regulations.
2. This proposal points towards the creation of a unitary system of compliance, withdrawal, recall and offences. Again, due to the lack of detail in the Consultation document, it is not entirely clear what these proposals would mean in practice.

**Can the product safety regime keep pace with technological changes?**

1. The Consultation recognises that traditional definitions of “product” and “defect” are not always suitable in relation to modern and emerging technologies, such as products where software is updated. The Consultation seeks to modernise the regulatory system to reflect technological change, but in practice this will probably mean regulations are introduced to “catch up” with older developments such as online marketplaces and updatable software.
2. Given the rapid pace of technological development, particularly in the field of generative AI, one of the biggest challenges will be how to ensure that the regulatory system can keep pace with emerging technologies.
3. **WHAT NEXT?**
4. The Government is facing the pressing questions of (i) whether it wishes to maintain regulatory alignment with the EU as a result of the [General Product Safety Regulations](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0988) 2023; (ii) how the regulation of product safety can be effectively enforced and monitored; and (iii) how the regulation of product safety can be updated to suit today’s marketplace and technological developments.
5. In responding to these challenges, the Consultation:
   1. both mirrors and diverges from recent EU reforms, for example by introducing mandatory incident reporting (in line with the EU), but moving away from existing product specific prescriptive rules (diverging from the EU);
   2. seeks to enhance the role and powers of the OPSS to create a more uniformed regulatory system backed by criminal and new civil sanctions; and
   3. attempts to modernise the system for today’s marketplace and technology.
6. Following the Consultation’s closure on 24 October 2023, regulatory practitioners, consumers, and businesses will need to be alert to the Government’s response due to the potential for “radical” change. Once this response is published, we will provide an update and commentary on the impact and scale of the reforms.

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1. The OPSS has also entered into a [consultation on the new approach to the fire safety of domestic upholstered furniture](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1183806/smarter_regulation_consultation_on_the_new_approach_to_the_fire_safety_of_domestic_upholstered_furniture.pdf), [↑](#footnote-ref-1)
2. Council Directive (EC) 2001/95 [2001] OJ L11/4 [↑](#footnote-ref-2)
3. The General Product Safety Regulations 2005 (SI 2005/1803) [↑](#footnote-ref-3)
4. Council Regulation (EU) 2023/988 [2023] OJ L135/1 [↑](#footnote-ref-4)