

Response to the Office for Product Safety and Standards consultation on the Smarter Regulation: UK Product Safety Review

By email to: productsafetyreview@beis.gov.uk

About Us

1. Consumer Scotland is the statutory body for consumers in Scotland. Established by the Consumer Scotland Act 2020,ⁱ we are accountable to the Scottish Parliament. The Act provides a definition of consumers which includes individual consumers and small businesses that purchase, use or receive products or services.
2. Our purpose is to improve outcomes for current and future consumers and our strategic objectives are:
 - to enhance understanding and awareness of consumer issues by strengthening the evidence base
 - to serve the needs and aspirations of current and future consumers by inspiring and influencing the public, private and third sectors
 - to enable the active participation of consumers in a fairer economy by improving access to information and support.
3. Consumer Scotland uses data, research and analysis to inform our work on the key issues facing consumers in Scotland. In conjunction with that evidence base we seek a consumer perspective through the application of the consumer principles of access, choice, safety, information, fairness, representation, sustainability and redress.
4. We work across the private, public and third sectors and have a particular focus on three consumer challenges: affordability, climate change mitigation and adaptation, and consumers in vulnerable circumstances.
5. Consumer Scotland welcomes the opportunity to participate in the consultation on the UK Product Safety Review (“the Review”).

Summary

6. As the statutory and independent consumer body in Scotland, we are in principle supportive of the proposal to Review product safety regulations in the UK to ensure that

they are coherent, up to date, risk-based and proportionate. We believe that consumers' rights to be protected from goods and services which are unsafe or of unacceptably poor quality should continue to be central to any revised product safety regime.

7. In general, we would welcome further detail on the underlying evidence base and precise effect of proposals, such as the suggestion to shift from sectoral regulation to a product hazard-based approach.
8. In terms of e-labelling, we would welcome assurances that product safety information will be easily accessible to consumers who are unable to access QR codes, or have limited ability or opportunity to navigate menus on online devices to access safety information on them.
9. We welcome the proposal to work on mechanisms to better protect consumers from purchasing products that are unsafe online. We support proposals to tackle the issue of unsafe product listings and re-listings on online markets in particular.
10. Consumer Scotland welcomes the ambition to enhance the role OPSS plays in the enforcement landscape; however, we have concerns regarding any lessening of the proposed removal of the requirement to notify local authority trading standards of recall, as this may risk delays and less effective tackling of unsafe products within communities. We welcome the consolidation and better alignment of inspection and enforcement powers in this area.

Background

11. Product safety remains an issue central to consumer protection. In the *OPSS Public Attitudes Tracker – Wave 2* report, published in February 2023, one in ten respondents who bought a product within the last 6 months reported experiencing a product safety issue of some kind.ⁱⁱ The Consumer Protection Study 2022ⁱⁱⁱ estimated that between April 2020 and April 2021, just under 14% of all 229.8 million consumer detriment incidents experienced within the UK related to faulty, unsafe or broken goods. This equates to over 30 million incidents across the UK in the twelve month period.
12. The report found there was no significant difference in experience of detriment between Scotland and the UK nations overall. Scotland has around 8.2% of the UK population, which allows us to estimate that roughly 2.5 million incidents related to faulty, unsafe or broken goods were experienced by consumers in Scotland over the year between April 2020 and April 2021.

13. While this category does not isolate unsafe goods, it provides some indication of the potential scale of product safety issues.
14. Consumer Scotland notes that following the UK's departure from the European Union, the UK Government is in the process of reviewing and reforming retained EU and domestic legislation. We recognise that this Review is part of the UK Government's Smarter Regulation programme, announced in May 2023.^{iv}
15. In general, we support the proposal to review product safety regulations in the UK to ensure that they are coherent, up to date, risk-based and proportionate following the UK's departure from the European Union. For example, we support the pragmatic approach the UK Government is taking with its plans to legislate for the continuation the recognition of CE markings, alongside UKCA markings.^v However, it is essential that consumers' rights to be protected from goods and services which are unsafe or of unacceptably poor quality continue to be central to any revised product safety regime.
16. The Review comes against a backdrop of changed consumer behaviours and increasingly complex supply chains due to a rise in online shopping, which was heavily influenced by the COVID-19 pandemic. While in August 2013 online retail sales accounted for 9.7% of all UK retail sales, in August 2023 this was 24.9%, and around a quarter of all retail sales in the UK are now consistently made online each month.^{vi} The OPSS Public Attitude Trackers show that around 6 out of 10 people had made an online purchase over the preceding 6 months.
17. Together with technological developments over the last decade, the increase in online transactions has significantly changed the consumer landscape. With consumers often not being able to physically inspect goods before purchase, and online market places hosting goods from a wide range of sellers, consumers are potentially at greater risk of harm and it is vital that such risks are proactively and effectively mitigated or removed where possible.

Vision for a Future Framework

18. Consumer Scotland notes that the Office for Product Safety and Standards (OPSS) was created in January 2018 as the product safety regulator for most consumer goods, excluding food, medicines, and vehicles. While it aims to deliver consumer protection, it also aims to support business confidence, productivity and growth. We recognise that this means OPSS must safeguard consumer interests, whilst taking those of businesses into account. Consumer Scotland's definition of consumers includes small businesses (>50 employees) that purchase, use or receive products or services and we are aware of

a range of pressures being experienced by small businesses. The cost of living crisis was identified as the main obstacle to growth in the Big Small Business Survey published in June 2023,^{vii} The domestic economy and credit availability have also been mentioned as key factors.^{viii}

19. While we acknowledge the importance of regulation being proportionate, coherent and risk-based, we consider the primary purpose of the product safety regime is to protect consumers from harm, and we therefore consider consumer safety should be prioritised in these reforms.

20. A literature review of consumer vulnerability recently published by Consumer Scotland notes that, while the availability of e-commerce and other digital transactions now offer consumers a wider range of choices in potentially global markets, a lack of digital skills or access can result in sub-optimal outcomes for consumers.^{ix} Digital technology can be the source of new power imbalances between consumers and traders, and it has been argued that in digital markets most, if not all, consumers are potentially vulnerable.^x This risk should be considered when looking at the appropriate balance of regulation in online markets, and the approach taken in this reform should be consistent with other recent reforms such as the Online Safety Act and the Digital Markets, Consumers and Competition Bill.

Bringing Products to Market

21. In principle, we support streamlining of the legal framework for bringing products to market, to encourage innovation and growth and provide greater consumer choice. However, this must also seek to make markets safer for consumers, to improve their ability to understand potential hazards, and to exercise their rights, in line with the consumer principles of information, safety and redress. In the absence of more detailed proposals, it is not yet possible to assess whether these reforms will adequately protect consumers.

22. We note the proposal *“to regulate only when necessary and directly focused on potential hazards and harm”* by shifting away from sectoral regulation towards cross-cutting, hazard-based safety legislation. This would mean categorising safety requirements according to the type of safety hazard a product may present, instead of what type of product it is.

23. Assessing whether a product presents a risk and how high this risk is, is more subjective than determining what sector it can be categorised under, or the hazard it presents. If a hazard-based framework is to be explored, it will be necessary to distinguish between

product hazard - the intrinsic potential to cause harm – and product risk - the severity and probability that harm is caused, in a particular product, designed for a particular use, as these may diverge.^{xi} For example, cosmetics may have a generally low risk, but may still contain products that can cause severe irritation or allergic reactions to those with increased sensitivity or where higher doses than recommended are taken.

24. In addition, it is important that any assessment of risk takes into account the needs and characteristics of those consumers most at risk of harm, rather than simply using an “average” consumer as a yardstick. We would argue for a precautionary approach to be applied when determining the risk of harm.

25. We have concerns that the proposed shift may lead to mis-categorisation or present the opportunity for regulatory loopholes that may put consumers at risk. In particular, we note that proposals to remove third party certification would require appropriate audit and monitoring to check that self-certification was adequately protecting consumer interests. In addition, while we can see benefits in providing extensive guidance and advice to business at a pre-market stage, we would caution against a removal of any regulatory or legislative measures which require sanctions or enforcement to ensure compliance. We would welcome more clarity on how a hazard-based framework can meet the needs of all consumers.

E-labelling

26. We note the proposal to remove the requirement that UKCA conformity marking and manufacturers’ details can only be provided physically on products, and to give firms the option to supply this information on the screen of the device instead, as well as not having to provide a physical label. Consumer Scotland is not in principle against accessible e-labelling on those electronic devices which have screens, and which allow consumers to access the necessary safety information during the lifetime of their product.

27. However, a move towards e-labelling on such common use consumer products as phones and tablets should be backed up by an adequate level of consumer support. The *OPSS Public Attitudes Tracker – Wave 2* report, published in January 2023, notes that the majority of respondents indicated that they prefer accessing safety information through a physical product/label (53%).^{xii} Only 7% would prefer a QR code printed on the product or label, and 4% would prefer to access through a screen on the device or in device settings. As such, the evidence does not demonstrate widespread consumer support for these plans at present.

28. Bearing the principles of representation and fairness in mind, we recommend conducting further research into the root cause of consumers' unease with e-labelling, and how concerns or potential harm can be alleviated, before any e-labelling proposals are progressed.
29. We also have concerns regarding the potential negative impact e-labelling may have on consumers who are at risk of digital exclusion due to a lack of (reliable) internet access, or who do not have the confidence, skills or resources to have meaningful digital access. Following further research, consideration might be given to implementing a mechanism allowing consumers the choice between electronic or printed labelling. Where e-labelling is deployed then it is important that menu designs are inclusive and user-friendly, and e-labels easily accessible.
30. The European Commission allows voluntary e-labelling for certain medical devices,^{xiii} marine equipment,^{xiv} and fertilising products, while expansion to detergents, cosmetics and chemicals is currently under consideration.^{xv} However, the regulation passed in June 2023 with regard to the energy labelling of smartphones and slate tablets, still did not include e-labelling.^{xvi} We note that the products where the EU allows e-labelling are not in widespread consumer use, and would welcome information on whether OPSS has considered a similar approach.

Online Supply Chains

31. We welcome the Review's focus on online purchasing and are supportive of the UK Government's ongoing efforts to strengthen frameworks and enforcement for the benefit of consumers online, such as the ongoing work on a Digital Markets, Competition and Consumers Bill^{xvii} and through the work on online choice architecture by the Competition and Markets Authority.^{xviii} We endorse the intention to ensure that products bought online are as safe as those bought on the high street.
32. We are broadly supportive of proposals to tackle the listing and re-listing of unsafe products. These proposals would impose duties on online platforms to cooperate with enforcement authorities to provide information and take appropriate actions if products are unsafe or non-compliant. We consider that there could be a case for an additional duty on marketplaces to have a compliance function established in the UK which is responsible for ensuring appropriate policies, processes and systems are in place to address the availability of unsafe products. We acknowledge that any measures taken to

set out due care requirements will have to strike a careful balance between consumer choice and product safety.

33. We would welcome clarity for consumers on where the burden of ensuring that a product is safe will lie and who is liable when it is not. When an unsafe product is sold online directly from a business, there is a degree of accountability as the consumer knows whom to turn to. This means that the consumer principle of providing consumers with the opportunity to seek redress can be put into practice. This is more difficult when an item is purchased online from a third party seller via an online marketplace.
34. The *Wave 3* report noted that levels of concern about safety of a product from outside the EU/ UK on an online marketplace are consistent at 65%, and the Call for Evidence Response for the Review^{xix} highlighted concerns from consumer groups around transparency about who the seller was and whether they were a third party. It also confirmed that levels of non-compliance with product safety regulations are significantly higher amongst third-party sellers. Consumer Scotland welcomes any measures that can be taken to address these issues by facilitating proactive measures to increase transparency, compliance, and product safety. We welcome the proposals to ensure that consumers purchasing online will receive clear information including key product safety information, warnings, and details of what tests have been carried out regarding safety.
35. We note that other jurisdictions have taken similar steps, such as the United States Congress, which passed the INFORM Consumer Act in June 2023.^{xx} The Act determines that online markets must collect a bank account number, a tax identification number, and contact information from high-volume third-party sellers, who enter into 200 or more transactions over a continuous 12-month period. Similar mechanisms may be worth exploring when considering the detail of mechanisms to increase transparency and accountability of third-party sellers operating in online markets in the UK. We note that this should not remove the ultimate liability of manufacturers, but may enable the distributors to identify product safety issues and take action more easily.

Compliance and Enforcement

Recall and Incident Notification

36. Consumer Scotland supports including OPSS in notifications; however, we have some concerns regarding the possible removal of the requirement to notify local authority trading standards of recalls. Local authority trading standards officers tend to be based in the community and often have relationships with businesses on the ground. Consumer Scotland is concerned that diverting reports away from local authority trading

standards to OPSS could result in enforcement being less agile, increasing the risk of delayed responses and missed opportunities to resolve matters using the benefit of constructive, pre-existing relationships.

37. We also recognise that trading standards officers have expertise in a wide spectrum of sectors and complaints, whereas OPSS has a more defined focus and may be more likely to refer to different departments, or back to trading standards, which could add time. We would welcome more clarity on what referral procedures would look like and how they would be designed in such a way that the safety of consumers is safeguarded as efficiently and effectively as possible.
38. We are not aware of evidence suggesting that centralising reporting functions leads to better outcomes for consumers and would propose that, where reports are made to OPSS, local trading standards services are automatically copied in and vice versa where appropriate.
39. In the context of recall, it is worth noting that Consumer Scotland has a statutory duty to establish and operate, or secure the establishment and operation of, a publicly available database of recalls of goods in Scotland. On a UK-wide level, OPSS launched the Product Safety Database (PSD) in April 2022, just as Consumer Scotland came into existence. Having a recall of goods register that consumers can access aligns with the consumer principles of safety, information, access and redress. We highlight that Consumer Scotland and OPSS are working together to explore how far the PSD goes to delivering the requirement placed upon us in the Consumer Scotland Act. We note the UK Government's view that the full potential of the PSD is hindered by its limited functionality, including the need for more detailed product and business information, so that multiple notifications of similar products and businesses can be easily identified and welcome proposed work to tackle this issue. We look forward to working together to help ensure that the existing OPSS database is accessible to, and delivers effectively for, consumers in Scotland.
40. Finally, we welcome proposals to consolidate and align the inspection and enforcement regime to ensure that OPSS has similar powers to those bodies operating other recall functions and to ensure that enforcement powers are aligned with other powers such as those proposed under the Digital Markets, Consumers and Competition Bill.

ⁱ [Consumer Scotland Act 2020 \(legislation.gov.uk\)](https://legislation.gov.uk)

ⁱⁱ [OPSS Product Safety and Consumers Wave 3: Main Report \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

ⁱⁱⁱ [Consumer protection study 2022: understanding the impacts and resolution of consumer problems \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

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- iv [Smarter Regulation to Grow the Economy \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)
- v [UK Government announces extension of CE mark recognition for businesses - GOV.UK \(www.gov.uk\)](https://www.gov.uk)
- vi [Internet sales as a percentage of total retail sales \(ratio\) \(%\) - Office for National Statistics \(ons.gov.uk\)](https://ons.gov.uk)
- vii [Big Small Business Survey | FSB, The Federation of Small Businesses](https://www.fsb.org.uk)
- viii [Small Business Index, Quarter 2, 2023 | FSB, The Federation of Small Businesses](https://www.fsb.org.uk)
- ix <https://consumer.scot/media/tiqattu5/literature-review-on-consumer-vulnerability.pdf>
- x Helberger, N., Sax, M., Strycharz, J. and Micklitz, H.W. (2021). 'Choice architectures in the digital economy: Towards a new understanding of digital vulnerability'. Journal of Consumer Policy, pp. 1-26.
- xi [PRISM: Guide for GB Market Surveillance Authorities and Enforcing Authorities \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)
- xii [OPSS Product Safety and Consumers Wave 2: Main Report \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)
- xiii [Commission Implementing Regulation \(EU\) 2021/2226](https://eur-lex.europa.eu/eli/reg/2021/2226/oj)
- xiv [Commission Implementing Regulation \(EU\) 2018/608](https://eur-lex.europa.eu/eli/reg/2018/608/oj)
- xv [Commission proposal: Digital labelling for EU fertilising products to better inform users and reduce costs](https://eur-lex.europa.eu/eli/reg/2023/1669/oj)
- xvi [Commission Delegated Regulation \(EU\) 2023/1669](https://eur-lex.europa.eu/eli/reg/2023/1669/oj)
- xvii [Digital Markets, Competition and Consumers Bill - Parliamentary Bills - UK Parliament](https://www.parliament.uk)
- xviii [Online choice architecture work - GOV.UK \(www.gov.uk\)](https://www.gov.uk)
- xix [UK Product Safety Review: Call for Evidence Response \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)
- xx [15 USC 45f: Collection, verification, and disclosure of information by online marketplaces to inform consumers \(house.gov\)](https://www.house.gov)