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THE GENERAL PRODUCT SAFETY REGULATIONS

Government Response to the Consultation on proposals to implement Directive 2001/95/EC on general product safety (GPSD)

Consultation Response

JUNE 2005

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dti

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Transposing the Revised General Product Safety Directive

A summary of replies received to the DTI consultation paper of December 2004 on proposals to implement Directive 2001/95/EC on general product safety (GPSD) and the government's response.

The DTI's consultation paper on proposals to implement Directive 2001/95/EC was published in December 2004 and was the second consultation on the transposition of the Directive (the first having been conducted between Nov 2001 – March 2002). Over 700 organisations were sent either a hardcopy or a link to an electronic copy of the consultation document on the DTI website. The consultation closed on 31st March 2005.

Around sixty substantive responses were received, including from a number of trade associations who represented the views of their membership. We also had direct contact with some key stakeholders to discuss their responses. We are grateful to the respondents for their comments.

The following is a summary of those responses for each question, together with the Government's response. The responses received to the RIA questions are not included in this summary but have been taken into account when updating the final RIA – this will be laid in Parliament alongside the revised Regulations and published on the DTI website. Views are not attributed under each question to individuals or individual organisations but all the respondents are listed in the Annex except for those that requested confidentiality.

DTI Consumer & Competition Policy Directorate
June 2005

Introduction

This second consultation on the transposition of Directive 2001/95/EC focused on the draft implementing Regulations, and businesses, consumer groups and enforcement authorities were invited to offer views on how successful the Government had been in identifying the main issues for a successful UK transposition.

At the close of the consultation we had heard from over sixty organisations, including from the enforcement community, from trade associations, from individual businesses and also from a small number of legal firms. There were also a number of responses from other Government Departments.

The responses overall were of a high quality and touched on almost every area of the proposals, ranging from detailed analysis of individual words and terms to a more general overview of the proposals and their impact on consumer safety and the business community.

The general view from all groups was that we had correctly identified the main issues for transposition. However, some concerns were raised and there were requests for further clarification on particular issues.

Many provided helpful suggestions on which enforcement bodies should be identified and given powers within the Regulations, and also pointed out instances of duplication and inconsistency, particularly in respect of enforcement in Northern Ireland and Scotland.

The new recall provisions attracted a great deal of comment. Opinion was fairly evenly split across the board on the value of an advisory service.

The following summary provides more detail on responses to individual questions with the Government's responses.

Q1. We would appreciate your general views on whether or not we have correctly identified the main issues for transposition and on our proposals for implementation of the GPSD.

Many respondents commented on differences in the specific wording used in the draft Regulations compared to the Directive. Business in particular commented on the definition of a safe product in regulation 2 and the requirement to provide the name and address of the producer in regulation 7(4). One consumer body felt that the Regulations had the effect of making the list of measures in 7(4) appear exhaustive rather than illustrative. Comments were also received in respect of the language on the scope of the Regulations as regards their relationship to vertical legislation covering specific products (borderlines), the scope of regulation 6(4), and regulation 9(1) which did not carry over the extension of the obligation on producers and distributors to instances to where they "ought" to have knowledge about the safety of a product they placed on the market. It was also suggested that the duty to undertake market surveillance in regulation 36 exceeded the duty described in Article 9. The enforcement community commented on the definition of a product with emphasis on products used by consumers in the course of a service.

The possibility for the enforcement authorities to be able to take account of the precautionary principle when considering taking a measure attracted a lot of comment, with many suggesting it should be dropped from the Regulations or at the very least that the principle be clearly defined.

There were a number of calls for terms such as "consumer", "professional", "supply", "serious risk", "isolated circumstances" and "antique" to be specifically defined in the Regulations.

One law firm felt that regulation 9 would give rise to the prospect of a producer's notification being subject to an application against an enforcement authority under the Freedom of Information Act.

<u>The Government's response</u>

Most of the definitions provided in the Directive have been carried over into the implementing Regulations. Cabinet Office Guidance on transposing EC Directives states a general presumption that implementing laws should not elaborate except where there is clear justification to do so since there is a risk that we may give a less or more restrictive meaning than was intended. However, it is true that in some instances some specific wording in the Directive has not been directly transposed. Where this is the case it is generally to aid the UK courts judge cases brought in respect of breaches of the Regulations. We recognise that there is a lack of clarity in respect of the definition of a product used in the course of a service and we will address this.

In regulation 6(4) we will move towards the language in the Directive and while in regulation 9(4) we have not carried over the term "ought to have known" from the Directive we will take account of this in the final regulations.

We do not believe that there is any significant difference between "identity and details" in the Directive and "name and address" in the Regulations but that this was one instance where clarification was required. Nor do we believe that the drafting suggests that the list of measures in regulation 7(4) is exhaustive. The word "include" makes it clear the list is illustrative. We do not accept that the duty to undertake market surveillance in Regulation 36 exceeds the requirement

in Article 9 of the Directive. However, we are content to reintroduce the list of surveillance activities in Article 9(1) (a), (b) and (c) even though the list is merely illustrative.

The precautionary principle is an integral feature of the Directive that we cannot ignore. Our guidance notes will reflect upon the manner of its application.

We cannot shield any party from the effect of an application made under the Freedom of Information Act and the possibility that an application could be made in respect of notifications made under the terms of the Regulations does not justify not transposing that part of the Directive. In any event regulation 39 requires enforcement authorities to make information about the risks posed by products available subject to a limitation in respect of information subject to professional secrecy. The Freedom of Information Act also recognises an exemption for trade secrets unless outweighed by the public interest in disclosure.

Q2. Have we got the definitions of the enforcement authorities right in the draft Regulations, or should they be more specific?

A number of enforcement authorities pointed to some duplication in regulations 10(1) and 10(3) in the definition of an enforcement authority, and observed that the duty to enforce was unclear in respect of Scotland and Northern Ireland.

The extension of the Directive's scope introduces responsibilities for enforcement authorities that did not have a formal role under the 1994 Regulations. It was felt important that these authorities were identified in the Regulations and the scope of their powers adequately defined.

It was also asked whether all the named authorities had a duty to report to the Secretary of State as described in regulation 32(4).

The Government's response

We recognise the comments and have been working with LACORS to improve the definition in regulation 10(1) and 10(3), and with colleagues in Scotland and Northern Ireland with regard to the duty to enforce. Since regulation 2 defines "enforcement authority", the references elsewhere in the regulations to an enforcement authority such as "where an enforcement authority" in respect of the grounds for the serving of a safety notice is effective to cover all enforcement authorities not just those mentioned in regulation 10 which are under a specific duty to enforce the Regulations.

All authorities should have a duty to report under regulation 32(4) to the extent of their responsibilities under the regulations as directed to do so.

Q3. Should other authorities, beyond those mentioned, be listed for the purpose of enforcing the General Product Safety Regulations 2005?

Two names were suggested for addition to the enforcement authority list – the Vehicle and Operator Services Agency (VOSA) and the Environmental Agency (in England and Wales).

There was little business comment on this issue, although one contributor did suggest that greater consistency would be achieved if only one enforcement authority was given responsibility

for enforcing the Regulations. One law firm went further by suggesting that a central enforcement body, or at least regional coordination, would work better.

The Government's response

VOSA will have powers as an agency of the Secretary of State for Transport for the safety of vehicles under the terms of the Regulations. Trading Standards officers will however have a duty to act under the Regulations with respect to one-off safety problems with vehicles discovered on garage forecourts. We do not believe that the Environmental Agency has any locus in enforcing product safety or in the serving of safety notices or, therefore, that it needs specific powers under the Regulations.

The question of a national authority is a wide one not for answering in the context of product safety alone. The Hampton Report has recommended a greater role for coordination of enforcement activity. The Government is separately considering how to implement the recommendations in the Hampton Report

Q4. Do you agree (a) that we should we should include antiques and second-hand products supplied for repair or reconditioning in the scope of the Regulations and, if so, in the manner that we have, and (b) that section 10 of the Consumer Protection Act 1987 should be repealed?

Some enforcement authorities were concerned that the lack of a definition for antique would allow companies to exempt themselves from the effects of regulations 30(2) and 30(3) by describing a product as an antique when it was not. And the relationship to pre-1950 furniture excluded from the Furniture and Furnishings (Fire)(Safety) Regulations 1988 was questioned.

A small number of respondents were opposed to this proposal as they felt it went beyond the Directive and because any safety treatment needed for an antique to comply with the Regulations would lower its value. And that products fit only for repair or reconditioning could by their very nature only be unsafe.

Businesses and enforcement authorities generally welcomed the proposal to repeal section 10, although one consumer body did want to see the sense of section 10(2)(c) (producers to take account of any reasonable means to ensure goods are safer) retained in the definition of a safe product in the Regulations.

One response felt that repealing section 10 would leave no powers available against persons other than those placing the product on the market, which could be relevant in the case of some UK Regulations (eg Personal Protective Equipment (PPE)).

The Government's response

Although the GPSD does not apply to antiques or second-hand products supplied for reconditioning or repair these products are already covered in the UK by the safety provisions of the CPA. Bringing them within the scope of the Regulations would allow the repeal of section 10 of the CPA (which would then serve no further purpose), make for a more coherent safety regime and be in keeping with the Governments policy on regulatory simplification. Clearly however the notification requirements, especially under Rapex should not apply as the Community has no interest in such products as a consequence of their exclusion from the Directive. A provision

similar to section 10(2)(c) of the 1987 Act is not appropriate since the primary aim of the Regulations is to ensure that only safe products are available to consumers. We do not believe there are any concerns regarding the enforcement of the PPE (or other) Regulations consequential to the repeal of section 10 CPA.

Q5. Do you (a) agree that the DTI should adopt the central notification role, or (b) believe that the responsibility to notify is more appropriate to the producer or to another body?

Businesses welcomed the Department taking a central role, although one did suggest that notification to sector specific bodies would work better, and another felt that motor vehicle distributor notifications should be made up the supply line, rather than directly to VOSA.

There were some requests for additional information on how the process would work, with one respondent wanting to know how products placed on the market before the notification obligations came into force would be affected, and another wanting it made clearer which enforcement body was to be notified.

The Government's response

The 2005 Regulations will introduce for the first time an obligation on producers and distributors to notify the enforcement authorities when they become aware, or suspect, that a product they have placed on the market poses a serious risk to consumers, and also an obligation that the authorities in all the other member states in which they believe the product has been marketed must be notified. For small businesses in particular the latter could be a significant burden. In our view it is also better, where a problem associated with the safety of a product is identified, that a dialogue develops between the producer or distributor and the most appropriate enforcement authority at the earliest stage possible. The authority will work with the business and forward the notification to the DTI, which will inform the contact, points in other member states. Further advice will be provided in Guidance.

Q6. Do you think that anything other than the existing channels will be necessary to ensure that there is efficient and effective communication between the parties?

Although there was little indication that anyone thought there was currently a major problem with communication we did receive a number of suggestions on how things could be further improved. Consumer groups wanted more formal links with the enforcement authorities, and recommended that those authorities develop closer ties with the suppliers of innovative products which often give rise to safety concerns. There were also calls for enforcement authorities to conduct awareness-raising campaigns with local businesses, particularly small businesses.

Businesses were particularly keen to see the Home Authority principle embraced when consulting prior to serving a safety notice. One business group felt that Internet mail-order sites should be required to advise consumers about any restrictions on their rights under the GPSD.

The Government's response

For cooperation to work between producers, distributors and enforcement authorities as envisaged in the Directive, and for timely and effective notifications to be made, it is important

that there is good communications between all parties. Guidance that the European Commission has produced, together with the UK guidance that will accompany the implementation of these Regulations, will help to facilitate this, as will the information systems being developed by the Commission. The government has for some time encouraged closer relations between the enforcement authorities and business to educate them on best practice as an alternative to formal prosecution through e.g. the National Performance Framework and the Enforcement Concordat. The Directive and these Regulations pick up on this theme. However, these and the Home Authority Principle are not arrangements that it would be appropriate to prescribe through the Regulations. Civil rights of redress are not a matter for the Regulations so the GPSR will have no restrictive impact.

Q7. Should authorities wishing to prosecute for breaches of the Regulations outside their own area have first to obtain consent to prosecute from the authorities of those areas in which the breaches occurred?

The majority of respondents felt that this would be achieved through normal adherence to the Home Authority principle, but it was felt that disagreement should not be allowed to prevent the initiating authority from taking action. There were some who felt that consent should be sought, with one enforcement body wishing to see an Enforcement Concordat style agreement between Trading Standards Departments.

Some businesses felt that confusion might result from having an alternative regime where the local/home authority did not have control, and it was suggested by one law firm that traders would often have proceeded on the basis of advice received from their local authority.

The Government's response

We were keen to have feedback on our proposals to improve the effectiveness of enforcement by providing authorities with the power to investigate and prosecute breaches of the regulations outside of their own area, which has been broadly positive. We accept that formal consent should not be required. As stated previously, Home Authority and other informal principles and agreements are not for Regulations.

Q8. Regulation 10(2) draws on section 16(1A) and (1B) of the Video Recordings Act 1984. This also provides specifically for enforcement authorities to have the power to conduct investigations outside their own area. We believe that similar powers may be required for the efficient prosecution of offences under these Regulations. Do you agree?

Most responses supported this proposal, even though a number stressed the need for the Home Authority to have a prominent role in any investigation or decision to seize and that the provision should not rely on the wording in the Video Recordings Act 1984 as this was outdated.

Enforcement authorities asked how this would apply to the growing market for Internet and mail order sales.

The Government's response

It is for the reason that products are increasingly sold by mail order or on-line that the government asked whether it was felt that enforcement authorities needed powers of

investigation outside their local areas and we believe the request that such powers be extended to seizure is a sensible one. We appreciate that the exact wording of the Video Recordings Act 1984 may not be appropriate in this instance. It is normal practice that any authority operating in another local authority area would, as a matter of course, advise the authority in whose area it was active.

Q9. Will the absence of a provision providing for the cross border prosecution of breaches of a safety notice be a significant obstacle to effective enforcement?

Most enforcement authorities felt that the absence of a provision to allow cross border prosecutions could be a significant obstacle to effective enforcement and would lead to applications becoming more resource intensive and to duplication in effort. Businesses were evenly split on this. One national retailer felt authorities acting independently of one another would prove a problem.

The Government's response

The question was specific to providing (for example) for the prosecution in England of a breach of a safety notice in Scotland, or the prosecution in Scotland of a breach in Northern Ireland. In practice the problems associated with the different legal systems proved too difficult to overcome in the context of these Regulations.

Q10. Do you consider (a) that the self-contained enforcement provisions as drafted are workable in practice or would you suggest a different approach? (b) Do stakeholders consider that we should include a power for an enforcement authority to vary or revoke a safety notices that it has served?

There was a range of opinion. Some business respondents took the view that the powers were too draconian and that it should be for the courts to decide on the issuing of notices while consumer bodies argued that consumer safety was paramount. The majority of responses, however, agreed that the enforcement provisions as drafted were workable. Some enforcement bodies wanted to see the powers mirror those of the Food Safety Act 1990 and to see an acknowledgment that the powers were not limited to enforcement officers' own local authority areas. One authority wanted to see suspension notices renamed holding notices to differentiate from the suspension notices in the CPA. One law firm considered that a suspension notice should be limited to 6 months.

All but one of the respondents agreed that enforcement authorities should be given the power to vary or revoke safety notices, which would allow greater flexibility in responding to new information.

The Government's response

The new powers are necessary for effective enforcement. The measures contained in the regulations take account of the measures listed in article 8.1(b) to (f) of the Directive which are more bespoke than those contained in the CPA. Safety notices, as now, will have national effect regardless of which local authority area they are served in. We are unconvinced that there is any need to differentiate between a suspension notice served under section 14 of the CPA and one served under the GPS Regulations. Suspension Notices will not be open ended. They will apply

for so long as the Authority specifies it is necessary to undertake safety checks. Once it has undertaken these checks, and has the results it will have to decide what if any further action is necessary. We agree the need to provide enforcement authorities the power to vary or revoke any measure taken. However, where a measure is made more onerous or stringent a new notice should be served so as to provide an opportunity for appeal against the new conditions.

Q11. Do stakeholders consider that the provisions for the serving of a withdrawal notice (in particular regulation 14(2)) are workable in practice?

Most respondents agreed that the provisions were workable, though many had suggestions for improvement. For example, one large retailer recommended that notices should only be served at registered offices and on senior people. A trade association felt that there should be a clear requirement to consult with the producer when considering issuing a safety notice, while another said that the home authority should be consulted. On a point of logic, one business group questioned regulation 14, asking how a product could be withdrawn before it was placed on the market.

Law firms' views included that producers should be consulted and allowed an opportunity to take appropriate action before a notice was served, that the safeguards for recall notices (particularly regulation 15(5)) should also be applied to withdrawal notices.

A number of enforcement authorities were concerned about the effect the information provisions applying Part 9 of the Enterprise Act would have on the requirement to alert consumers to the risks posed. Others felt that it would be more in keeping with the precautionary principle if the power to serve a withdrawal notice did not require "reasonable grounds" for suspecting or believing that a contravention had occurred, that it would be best if central government took responsibility for issuing safety notices that had a national effect, and that notices should include the actions required of the producer or distributor. There were also calls for the terms "unsatisfactory" and "insufficient" to be defined.

<u>The Government's response</u>

The Government does not think it needs to be too prescriptive on to whom and where safety notices should be served. Regulation 16(1) makes it clear that the enforcement authority will, in cases other than where there is a serious risk requiring urgent action, take the views of the producer or distributor concerned before serving a safety notice so a line of communication will have been opened. In cases where urgent action is needed the authority will provide for the views of the producer or distributor to be heard after the event. Generally it is assumed that where the producer or distributor is already taking the action necessary to remove the risk to consumers it will not be necessary for the enforcement authorities to serve a safety notice. However it is impossible to define in advance what "unsatisfactory" or "insufficient" mean, as it will likely be different in every case. The withdrawal notice is designed to reflect the provisions in articles 8.1(e) and (f)(i) of the Directive. One article envisages the product already being on the market while the other envisages a pre-marketing stage where the product is in a warehouse (or at the dock perhaps). The safeguard that has been provided in respect of a product recall recognises that recall is a power of last resort and the potential impact it can have. The Government is not convinced of the merit of extending the safeguard to apply where other safety notices are served. All safety notices have national effect. Finally, the nature of the Precautionary

Principle means that there has to be reasonable suspicion or belief that a risk exists before it may be invoked.

Q12. We are especially interested in respondents' views of our transposition of the recall powers. Do you consider (A) that the proposal is workable in practice, or would you suggest a different approach? (B) that the proposed advisory process strikes a balance between addressing the concerns expressed by business while remaining responsive to the need to protect consumers from dangerous products? And (C) do you think we ought to include a provision to ensure that there need only be one referral to the advisory process in relation to a particular product, so as to avoid the process being abused?

A

Most responses supported the view that the proposals were workable, though many chose to qualify this. Some business groups, for example, stressed the importance of enforcement authorities being properly trained and resourced and provided with clear guidance. They also wanted to ensure that producers were consulted about possible distributor recalls. One legal firm argued that the 'reasonable grounds' required for taking action (regulation 15(1)) should be based on belief rather than suspicion.

Two business organisations suggested that regulation 15(6) was superfluous as recalls would only be appropriate when there was a serious risk in need of urgent action. One legal firm took the view that regulation 15(3) was confusing in its relation to 15(6). The enforcement authorities felt that all timescales should be short and questioned whether the authority could determine the frequency of the publication of public notices. It was also suggested that the recall provisions should recognise both the 'repair' and 'destroy' options and that the Regulations should take account of other regulations that apply to recycling of waste products (e.g. WEEE). DEFRA suggested that specific collection points could be set up at Civic Amenity Sites for recalled products although charges to consumers could apply.

A small number of businesses viewed the recall provisions as unworkable. One suggested that enforcement authorities should be obliged to consult with businesses before ordering a recall and that business should be able to challenge expenditure incurred by enforcement authorities undertaking the recall themselves. Another argued that recall could not work in this way for long-life products (e.g. construction products). One business argued that the seven day notification requirement needed to be extended to fourteen as this would not allow time for obtaining documents from overseas suppliers and undertaking any necessary translation. It was also pointed out that recall notices were missing from Regulation 17(1).

B

Views on the proposed advisory service varied but were largely supportive, though many stressed the need for the process to be speedy. One law firm said that the evaluator should only be advising on action, not on whether the product was unsafe, and was concerned that the advice was not binding. It further recommended that the advisory service provision should also be extended to suspension and withdrawal notices.

Business was mainly concerned over the proposal that the producer should pay for the cost of the advisory process regardless of whom the advice most favoured. There was a strong call for the 'loser pays' approach to be adopted. A small number felt that the advisory service would

have no effect. One respondent from the enforcement community recommended that recall should instead be subject to a court order.

Many responses called for more guidance on the procedure.

C

Most respondents gave unqualified support for including a provision limiting referrals to the advisory service to just one for each product, though two legal firms questioned whether this was necessary given that as currently drafted the instigating party pays and is therefore unlikely to abuse the system.

The Government's response

The GPSD introduced for the first time a last resort power for enforcement authorities to order (or organise) a product recall from consumers. It was clear from the first consultation that the business community and enforcement authorities were concerned about how this power would work in practice and so the Government undertook to examine some safeguard options that might satisfy these concerns. Four of these options were discussed in detail in the Regulatory Impact Assessment.

It will we believe be a rare occurrence where the producer is based in the UK that recall action is aimed (solely) at a distributor. In any case the requirement in regulation 8(1)(b)(i) that distributors should pass on information on the risks posed should mean that the distributor and producer are in contact. Both are required under regulation 9(4) to cooperate with the enforcement authority whose main concern will be to remove the risk to the consumer by the most effective means.

The Government accepts that in all cases, other than where a suspension notice is under consideration, the enforcement authority should act on grounds of reasonable belief rather than suspicion. We do not think that regulation 15(6) is superfluous. It implements a specific requirement in the Directive that action can be taken with due despatch where a serious risk exists. The full extent of the requirement on the person on whom the recall notice is served will be set out in the notice. The Government has not included the possibility of repair by the producer in the scope of a recall notice since the notice is a measure of last resort and the producer would in most cases already have had ample opportunity to take such measures voluntarily. We understand though that where in particular there are numbers of small, low-value, un-safe products disposal by consumers could well serve the purpose of a recall as an alternative to return of the product.

We do not believe that recall under the GPS Regulations has any impact on regulations that apply to the recycling of waste products (e.g. WEEE). We welcome DEFRA's suggestion that specific collection points could be set up at Civic Amenity Sites. This would only likely be necessary where the enforcement authority was forced to carry out the recall itself so will be a matter for discussion between the authorities. Where the enforcement authority carries out the recall because of a failure to comply with a recall notice that has been served it may recover the cost of the activity as a civil debt. The court would judge whether the costs claimed were in fact reasonably incurred.

It is unclear why there is any doubt that the recall provision would not work in respect of long life products over others. Whatever the product it is unlikely that 100% recall will be achieved. Where the product is a construction product (assuming that it is also a product to which the Regulations

apply) and it becomes an integral part of a permanent structure (unlike removable fixtures and fittings etc) it can no longer be separately identified as a consumer product for the purposes of the GPS Regulations. However other products of the same type still on sale or still in the hands of consumers will be susceptible to the provisions of the Regulations. Building safety is regulated by means other than the GPSR.

Procedural rules for the advisory process will be made available as an annex to the Guidance note. The evaluator will provide a reasoned opinion based on the submissions presented by the parties. We do not believe it is right to limit the potential scope of the evaluation in advance. In some cases it may be accepted by the parties that the product is unsafe but the dispute will be over whether recall is the most proportionate response based on the analysis of the risk the product presents. In others the question as to whether the product is safe or unsafe may also be disputed. The decision to require the applicant to pay the costs of the process results from the fact that business is the demandeur for this safeguard. Moreover, the outcome is not binding on the parties so it is difficult to accept that the loser pays principle should apply.

Q13. Industry Codes of Good Practice are envisaged to potentially play an important role in regard to recall (and in relation to assessment of conformity against the general safety requirement). (A) What codes currently exist that might be considered appropriate to the terms of the Directive and by extension these Regulations? And (B) should it be an option for a recall notice to specifically require that recall be effected in accordance with such a code where it is relevant?

A

Respondents identified a number of industry guidelines and codes of good practice that might have a role to play in supporting the recall procedure. These varied from those that were perceived to be government codes (e.g. DTI, VOSA and OFT) to industry codes such as the British Toy and Hobby Manufacturers code and the Lighting Association Code. However, most enforcement authorities also identified the European Guide on Corrective Actions including Recall. Two respondents said there should be just one code to ensure consistency and compliance.

B

The enforcement authorities were mainly of the view that recall notices should be able to require that a relevant code be followed - as an option, though two felt that it was more appropriate to cover the use of Codes of Practice in guidance rather than legislation due to their voluntary nature. Businesses were unconvinced that such codes should be given any standing in the recall process, with one saying that recall was a judgement exercise and that codes would be too prescriptive.

The Government's response

The draft Regulations recognise the value that Codes of Practice could have in guiding a recall procedure. It is one of a range of options available to an enforcement authority serving a recall

notice; regulation 15(2) is illustrative in its scope not exhaustive. In practice no enforcement authority will require a particular code to be followed where it would be clearly inappropriate to do so since that would not achieve the desired outcome.

Q14. Do you (A) have any comments on the approach taken to the recovery of costs in the Regulations? And (B) agree that it is equitable that enforcement authorities should have the possibility to recover the costs of carrying out a product recall where it is necessary to protect consumers and the producer or distributor has failed to act?

The majority of responses were in favour of the approach taken, but it was stressed by various business bodies that costs should be reasonable and that there should be a right to challenge them.

There were some questions raised concerning the enforcement authority's liability to consumers. One enforcement authority wondered what liability would exist if local media did not give coverage to the press release when a withdrawal notice had been issued. A consumer body asked whether enforcement authorities would be expected to offer consumers some form of compensation or replacement product in the same way that it is customary for producers to do.

It was widely agreed that it was equitable for enforcement authorities to recover costs where it was necessary for them to undertake or organise a product recall. There was some worry though about the situation enforcement bodies would be left in where there was no-one to recover costs from and it was suggested that central funds should be used to reimburse authorities in such cases.

<u>The Government's response</u>

There are many means to ensure that a safety risk receives publicity. While a press release is one option others include paid media advertising and publicity through consumer organisations and web sites. The draft Regulations provide that an enforcement authority may bring a civil action to recover costs it incurs in undertaking a recall exercise where the person receiving the recall notice doesn't, or is unable to, comply. It will be for the Court hearing the case to judge what is reasonable. We do not believe that enforcement authorities should be required to compensate consumers for acting to protect their safety.

We are concerned that a central pot of money for recalls would offer encouragement to enforcement authorities to enter into recall action even though other measures were more appropriate because they would not have the financial responsibility that comes with having to meet the cost of action out of locally devolved funds for enforcement.

Q15. Do stakeholders consider that, in the case of a withdrawal notice, it is necessary to provide a right to apply for a variation of the notice, or in this case is it sufficient to provide for a right to apply to set aside the notice only? What variations might be sought?

Most respondents supported the inclusion of a power for an authority to vary or withdraw a notice as it could be appropriate where the circumstances relating to the reasons for or scope of the notice that had been served changed. However, about half of the enforcement authorities that offered a view on this question did not see the need. One consumer organisation underlined the importance of such a right not being used to delay matters.

The Government's response

Generally we do not believe there is any intrinsic harm in providing enforcement authorities powers to vary or withdraw a notice (for example if it was found that the problem was in a certain batch or batches rather than all products of the type). We cannot see how this would be used as a delaying tactic as the measure would already be in force.

Q16. What are your views on (A) the temporary suspension of recall notices pending appeal? And (B) should the provision be extended to other measures where positive action is ordered e.g., Requirements to Mark and Requirements to Warn?

A

Opinion was split between business and the enforcement community. The former was generally in favour of temporary suspensions for recall notices, even though it was acknowledged that the process would need to work quickly and that it probably did not rest well next to the precautionary principle. The enforcement bodies were almost unanimously opposed, fearing that it could be used as a delaying tactic. Some felt that this option should not be open where the matter had already been referred to the advisory panel and the enforcement body had taken on board the advice given.

Consumer opinion was split on the issue with one body believing that temporary would be fairest for producers (though it would need to operate quickly) and another taking the view that there should be no suspension as appeals could progress independently of action.

It was the view of one trade association that the 21-day deadline for applying to have a notice permanently set aside was not long enough.

B

A similar split in opinion was evident between business and the enforcement authorities on the question of extending suspension provisions to other safety notices, with business generally supporting the proposal and enforcers mostly opposing it. One enforcement body observed that there were already adequate compensation provisions in the Regulations if a notice was wrongly issued, although another took the view that there was no adequate redress for the wrongful issuing of requirement to mark and requirement to warn notices under regulation 16.

The Government's response

We continue to think that the possibility to apply for a recall notice to be temporarily suspended pending appeal is appropriate given that a recall notice requires a positive action which carries a significant cost. We understand the concern expressed about the cumulative effect of a trader using the advisory scheme and then having a further opportunity to delay the recall by applying for a temporary suspension pending appeal. It is appropriate that any party should have the right of appeal. However, when hearing an application for the measure to be temporarily set aside, the court will want access to and to take account of all relevant information which we fully expect to include the outcome of the advisory process. On the balance of the consultation responses we do not intend to extend the temporary suspension provision to other notices.

Q17. Where an enforcement authority decides that it should undertake action with a view to organising or co-ordinating the return of a product from consumers (regulation 15(3)) should there be a right to challenge that decision?

There was a general split between business and legal firms who favoured the right to challenge and most enforcement authorities who thought the opposite. Though it should be noted that a small number of enforcement respondents sided with business. Many of the enforcement authorities opposing this provision took the view that there were already sufficient appeal provisions and rights of redress elsewhere in the Regulations.

One respondent argued that disputes should be settled by other means as the timing of action was often crucial. Others took the view that the process would need to work quickly if the right to challenge was introduced.

The Government's response

The authority can only organise a recall itself where either a recall notice has been served and not complied with (in which case the business concerned will have the same rights of appeal as any other recipient of a recall notice) or where the authority cannot find anyone on which to serve a notice. In the latter case no appeal will be possible.

Q18. Regulation 17(10) reflects the corresponding provision for appeals (against suspension notices) in section 15(5) of the 1987 Act. Do stakeholders think (A) that the provision should be drafted so as to allow the court to delay the effect of a safety notice pending an appeal against a decision of the court not to set aside or vary the notice? (B) In addition should regulation 17(10) be amended so as to allow an application seeking a delay of the coming into force of the court's order to be made after the order has been made?

The enforcement community strongly opposed giving the court the right to delay the effect of a safety notice and allowing an application seeking a delay. One consumer body was also against this fearing that exercising such rights would introduce delay.

Businesses generally favoured both the right to delay and the right to apply for delay, although it was felt that only the minimum delay possible should be allowed and that in any event this should not prevent urgent action.

The Government's response

The second part of regulation 17(10) gives a court hearing an appeal the possibility to suspend the effect of its order on the appeal pending a further appeal. A business appellant that lost its appeal would not benefit from suspending the order as the safety notice would remain in force. Only consumers would benefit from this provision as an enforcement authority could ask the court to suspend the order setting aside the safety notice until the appeal were heard. This being the case we consider the enforcement community's objections to be unfounded and propose to leave the provision as it is.

Q19. While the Directive does not provide for compensation we believe that there should be recompense in certain cases. Do you agree?

Business was strongly in favour of the proposal, and so were some enforcement authorities. Law firms were also supportive and further recommended that this should be considered by County Courts for greater consistency and the development of case law.

Many enforcement authorities, however, took a less supportive view, arguing in particular that compensation should only be allowed where enforcement had been negligent in discharging their duty. They also argued that the notion of compensation could be in conflict with the precautionary principle and would act as a disincentive to effective enforcement. Moreover there was concern that the compensation provisions relating to suspension notices and withdrawal notices (in respect of "any person having an interest") would leave enforcement authorities open to a wide range of claims (e.g. hauliers, storage firms etc). Two enforcement authorities suggested that extending the advisory service to suspension notices and withdrawal notices would reduce the number of compensation claims.

The Government's response

Overall, the balance of responses was quite even. In view of this we do not propose to change our provisions, which are based on the existing objective compensation arrangements in respect of a suspension notice in the CPA 1987. We understand the concerns expressed by some enforcers but were we to agree to change the provision the test would be too subjective and it is possible, at the extreme, that compensation could legitimately have to be paid on a technicality that the grounds on which action was based was flawed but the product was in fact a dangerous product.

We appreciate the concerns in respect of the precautionary principle but where this is cited as a reason for taking a measure there has to remain doubt based on the state of science as to whether or not the risk that is perceived to exist does in fact exist. In these circumstances, using the provision as drafted, the enforcement authority would generally be isolated from the prospect of having to pay compensation unless the state of science was not as uncertain as the enforcement authority described and the product could be determined not to be dangerous.

We do not think that the concerns expressed about keeping the existing provisions which provide for compensation to "any person with an interest in the product" are justified. For example, we believe that a haulier's claim, assuming he had one, would be against the producer or distributor not the enforcement authority.

Q20. Do stakeholders agree that there should be an increase in the penalties in respect of the principal offences under the Regulations?

The enforcement authorities and many businesses welcomed the increases in penalties but some were concerned over anomalies between the penalties in these Regulations and those in the CPA. Some suggested that there should be some recognition of the severity of the infringement, possibly by introducing some kind of banding for penalties, and one law firm said there should be consistency with the approach adopted in other Member States.

A number of businesses were opposed to the increases, mainly because they felt that the penalties would already be significant through loss of business and reputation.

One law firm called for the offences to be more precisely defined. One respondent noted that not complying with the cooperation requirement in regulation 9(4) should also constitute an offence.

The Government's response

These Regulations introduce a number of new offences and the Government, in keeping with article 7 of the Directive has had to take a view on the level of penalty that would be appropriate for each of these having regard to the limits of what can be provided under the powers in the European Communities Act 1972. We believe that it is fully justified that the penalties for the principal offences should be set at a higher level than are currently established by the General Product Safety Regulations 1994 so as to continue to be sufficiently dissuasive.

Q21. Do stakeholders agree that regulations 23(4) and 5(3) read together are sufficient to provide enforcement officers with the necessary power to seize and detain samples of products and records in all circumstances, including where the product has not yet been placed on the market?

Business generally welcomed the Government's approach to seizure but enforcement authorities were fairly evenly split on this issue. Some authorities felt that the proposals would not match the powers given to them by section 29(4) of the CPA, under which they have broad powers to seize samples of goods for safety testing that have not yet been supplied in the UK (e.g. at ports and other points of entry to the UK). It was also suggested that there should be a reference to European Council Regulation 339/93 (product safety conformity checks on goods imported from third countries).

One business group felt that enforcers should differentiate between products intended for supply and others such as engineering samples, exhibition samples, imported quarantined goods etc. However, one consumer body felt that possession should be presumed to be for supply to consumers unless there was proof to the contrary.

Law firms (and at least one business organisation) generally wanted to see some protection for commercially sensitive material. It was also suggested that "professional secrecy" in regulation 39(2) be replaced by "commercial confidentiality".

Other comments included a call for clarification of what was meant by the terms "reasonable hour" and "credentials", and concern that entry does not require a warrant in every instance and that there was no general requirement to have 'reasonable grounds for suspicion' for entry.

The Government's response

Regulation 339/93 is directly applicable and does not need mentioning in the Regulations implementing the GPSD. We are however persuaded that there is a justifiable need for a clause in the Regulations mirroring S29(4) of the CPA for the reason stated. We will make clear through Guidance that it is only permissible to take action in respect of the possession of unsafe products that are intended for supply. Products that are unsafe that have been returned to a producer or distributor's possession by consumers whether under a recall or otherwise, or are in storage pending work aimed at making them safe, are not the target of the Regulations.

The information provisions in regulation 39 deal with the question of professional secrecy. This is a term that is already known in Community instruments and jurisprudence.

The requirements for the entry of premises are as they were in the CPA and for that reason are unremarkable.

Q22. Do stakeholders (A) agree the approach that written notices should be provided in respect of the seizure of products and records under regulation 24(1)? (B) that the notice be given to the person from whom they were seized and to any person appearing to be the owner or otherwise to have an interest in the seized products/records? And (C) do stakeholders have any comments on the corresponding right of appeal in regulation 26?

Business, enforcement and consumer organisations generally welcomed the requirement for written notices to be provided in respect of seized products and records. One law firm did express concern that the release periods mentioned in Regulation 26 were too long and that producers would want to test sooner rather than later, but this view was not echoed by anyone from the business community.

Most responses also agreed with the requirement for a notice to be given to the person from whom the goods were seized and to any person having an interest in the seized products or records, though a small number of enforcement authorities and one business felt that their should be a test of reasonableness and practicability placed on the requirement to serve the notice to anyone other than the person on whose premises the products and records were seized. Alternatively that the notice should only go to the owner or the person in charge at the time.

On the right to appeal, one law body felt that the issues involved resembled Anton Pillar orders and should therefore be considered by County Courts rather than Magistrates Courts. One consumer body felt that the right to appeal was unnecessary and could only frustrate an investigation.

The Government's response

On the basis of the responses received we are changing the provision so that notice only has to be provided to the person at the premises from whom the goods were seized at the time of seizure. Where no one is present the notice is to be left in a prominent position on the premises at the time of seizure. The Department for Constitutional Affairs is fully content that Magistrates' courts are the appropriate place for the appeals to be heard.

Q23. What, if any, further consequential amendments might be necessary?

The small number of responses received to this question (nearly all from the enforcement community) all chose to reflect on the changes other legislation might require of these Regulations, rather than the other way around as intended by the question.

For example, it was felt that the time limit for proceedings should be extended to three years from the commission of the offence or twelve months from the date of discovery by the prosecutor, whichever is sooner, which would be in line with the Cosmetics Regulations and the Trade Descriptions Act. It was also felt that Regulation 5 (General Safety Requirement) should include the simpler offence 'offering to supply a product which is not a safe product', otherwise this would be out of step with other trading standards legislation.

The Government's response

Extending the time limit for proceedings as suggested would bring the regulations into line with other recent consumer safety legislation (the Cosmetics Products (Safety) Regulations 2004) and the Trades Description Act 1968, and we believe this is sensible.

Q24. What, if any, further transitional arrangements might be necessary? Do stakeholders have any comments on the particular transitional provision proposed in regulation 47?

Again, only a few responses were received to this question, and mostly from the business community. It was generally felt that a transition period of 6-9 months after laying the Regulations before Parliament would be helpful. This would be particularly welcome with catalogue retailing where, in addition to the period of time the catalogue range is on sale there is also a lengthy product selection period.

There were no comments on the transitional arrangements referred to in regulation 47.

The Government's response

It is intended that the Regulations will enter into force on 1 October 2005.

Q25. Do you have any other comments that might aid the consultation process as a whole?

Enforcement comments relating to regulation 5 included a request for 5(3) to include "supply of product" in addition to "offer or agree", and another for 5(1) to include the act of "supplying" a dangerous product.

It was noted that "products made available for use by consumers in the course of a service" had not been included in the prohibitions in regulation 5, and that this should also be included within a definition of "supply".

Clarification was also sought on the effect distributor finishing to part-build products would have on the original manufacturer's liability.

There was also an enforcement authority request that the presumptions of conformity referred to in regulations 6(1) and (2) should carry an acknowledgement that they were rebuttable. It was also asked what bearing the Balding v Lew-Ways case would have on this Regulation in respect of its finding that compliance with a standard does not confer immunity from legal obligations, and that all steps had to be taken to avoid falling below the standard of a regulatory requirement.

One industry body suggested that regulation 7(4)(b)(iii) should be changed to impose a duty on producers to inform distributors only when it is known or believed that there is a risk as early warnings may not indicate true risk and cause unnecessary reputational harm.

One charity body felt that the requirement in regulation 8(1)(b)(ii) for charity shops to keep records enabling the origin of a product to be traced was unreasonable as donations from stores rarely compromised bulk quantities of one product, and often did not come with donator documentation.

There was also a request for regulation 9(2)(b) to allow reasonable belief that conditions concern isolated circumstances or products.

One enforcement authority noted that regulation 26(9) excluded any further appeal provision for anyone aggrieved by an order made in Scotland.

Another enforcement body sought clarification as to the bearing of the decision in R v Liverpool City Council, ex parte Baby Products Association and another ([1999] All ER (D) 1302) (the babywalker case) on the requirement to making information available to the public in regulation 39(1).

The Government's response

We appreciate the need to clarify regulation 5 to include supply. Completion of a part-built product by a distributor would render that distributor liable for any claim made in respect of the product as if he were the producer in respect of the work undertaken and or its impact on the product as a whole. However liability is not a matter for these Regulations. The presumptions of conformity listed in paragraphs (1), (2) and (3) of regulation 6 are rebuttable. See regulation 6(4). With regard to regulation 7(4)(b)(iii) we believe that the existing test of reasonableness is sufficient to cover the concern that has been expressed. The government fully understands that where individuals make donations to charity shops it would be futile to expect records tracing the producer to be available. However donations of products by business suppliers to charities will have paperwork that makes them traceable in the donor's own accounts and should therefore be recordable, to the extent that that paperwork allows. Incorporating a test of reasonableness in regulation 9(2)(b) moves the test from being an objective judgement to a subjective one. The Commission's guidance on notifications establishes a broad definition of an isolated circumstance or product. Where the Regulations require information to be made available, such disclosure will be in accordance with the proper legal procedure, which is what the decision in the Baby-walkers case required.

List of Respondents

Aberdeen Council
Anaphylaxis Campaign
Argos Ltd
Aromatherapy Trade Council
Association of Charity Shops
Association of Manufacturers of Domestic Appliances
Association of Personal Injury Lawyers
Baby Products Association
Boots Group Plc
British Retail Consortium
British Shops and Stores Association Ltd
British Toy & Hobby Association
CBI
Clifford Chance
Construction Products Association
Crossing the Boundaries Regional Safety Group
Cumbria County Council
Davies Arnold Cooper
Department for Environment, Food and Rural Affairs
Department of Transport
Dixons Group Plc
Durham County Council Trading Standards
Eversheds LLP
Frank Moore
Geraint Howells
Glasgow City Council
Hampshire County Council
Homebase Ltd
Index Limited
Intellect
International Powered Access Federation
Irwin Mitchell Solicitors
ITS RAM Ltd
Law Reform Society of the Bar Council
Littlewoods Home Shopping Limited
Local Authorities Co-ordinators of Regulatory Services
Local Government Association
London Trading Standards Authorities
Lovells
Mail Order Traders' Association
Marks & Spencer
Meat and Livestock Commission
Medicines & Healthcare Products Regulatory Agency
North Lanarkshire Council
North Yorkshire County Council
Penguin Group (UK)
Pharmaceutical Services Negotiating Committee
Product Liability Forum
Professor J K McLeod
Royal Society for the Prevention of Accidents
Satchwell Control Systems Ltd
Shop Direct Group Limited
SKC Ltd
Society of Chief Officers of Trading Standards in Scotland
South East Trading Standards Authorities
South West England Regional Co-ordination of Trading Standards
The Lighting Association
The Society of Motor Manufacturers & Traders Ltd
Trading Standards Institute
Vivid Imaginations Ltd
Which