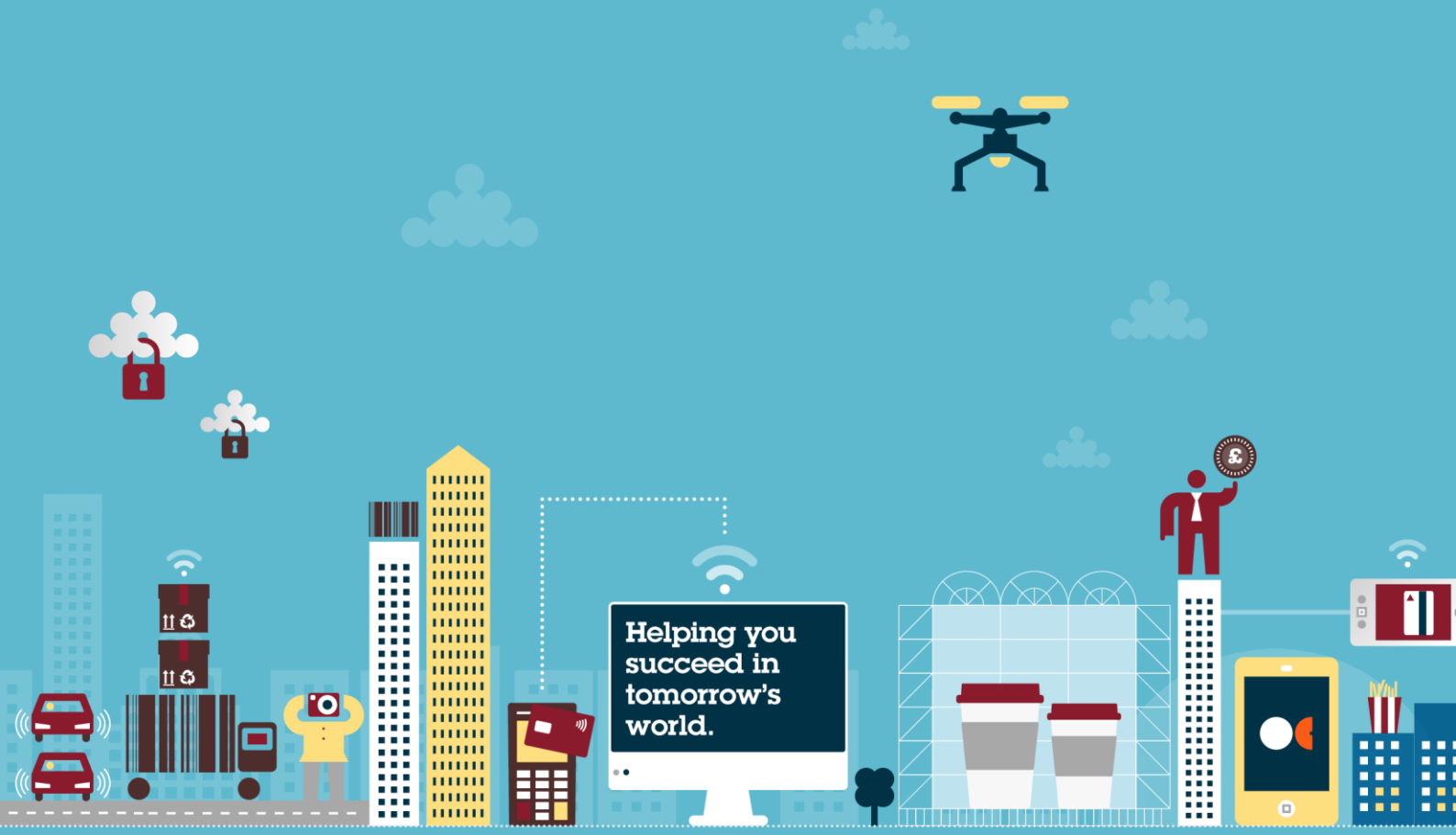
Osborne Clarke LLP

UK Product Safety Review: Call for Evidence

17 June 2021



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This document sets out Osborne Clarke LLP's response to the Call for Evidence, considering the long-term approach to product safety.

About Osborne Clarke

Osborne Clarke LLP is a full service law firm across 25 international locations.

Unusually for a law firm, Osborne Clarke has a dedicated product compliance practice. This is a broad practice that covers product safety, labelling and liability. We act for a wide range of clients, both the leading players and the disruptors, at all stages of the supply chain and across different models of supply and distribution, including platforms, manufacturers, and retailers. We have experience across all major non-food product categories, including manufactured products requiring conformity marking (toys, machines, electrical products, etc.), with particular expertise in new technology.

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1. How easy is it to understand the current framework of product safety regulation? What areas, if any, could be simplified or made easier to follow?

Although all product safety regulation follows a similar structure, it is not always immediately apparent which product regime may apply to certain products or even how overlapping regimes apply. For example, the distinction between products that are aimed at consumers versus products that are designed for use at work or only supplied to businesses.

It is also often difficult for economic actors working across jurisdictions to understand which roles they are fulfilling in the supply chain, and what their responsibilities are. Particularly following the end of the Brexit transition period, many distributors and logistics providers have unwittingly taken on importer responsibilities from a product safety perspective, with international businesses being left uncertain about where liability and responsibility for compliance in the UK may lie. Further the concept of "producer" under the General Products Safety Regulations is a much broader catch all when compared to the specific roles of "manufacturer" or "importer" under the New Approach Directives.

We think it would be helpful to have consistent role titles and descriptions across all product safety regulations. We would also favour clearer guidance on which regulations apply to particular product categories; at the moment this is an area businesses are requiring support from external lawyers or consultants to understand this.

More practical, accessible guidance for businesses would also be helpful for economic actors to have certainty around requirements across different regulations. At the moment The Blue Guide is seen as the most definitive guidance but it only applies to the New Approach Directives and, as a result of Brexit, there should be UK specific guidance available which is as detailed as The Blue Guide.

2. In what areas, if any, should product safety regulation be strengthened or improved?

We have suggested three areas where product safety regulation could be strengthened or improved.

First, particularly for those involved in the e-commerce market for non-food products, current regulations are not fit for purpose in terms of enabling members of the supply chain to understand where responsibility and liability for product safety lies.

As is discussed in more detail in our response to Question 10, modern supply chains and distribution systems were not anticipated by the current framework, and existing legislation could be more flexible to satisfactorily account for drop-shipping of products, or for the role of online third-party marketplaces in the modern e-commerce market.

For example, the current regulations envisage a very simple supply chain where the manufacturer or importer is based in the UK and legal obligations are assigned to those roles, but in many modern supply chains those roles simply do not exist. When a product is placed on the market online and drop shipped to a consumer, there is no importer or notionally there is an argument that the consumer is the importer (as well as being the end-user). We have seen examples of some businesses outside of the UK believing that when they drop ship direct to consumers this means that the product does not need to comply with UK law, which is clearly concerning.

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Also, the Blue Guide states that only the manufacturer or the importer can place the product on the market but a product can be placed on the market online by neither the manufacturer or the importer. This presents an unacceptable level of uncertainty, not only for industry, but also for consumers seeking redress in the event of product safety issues. Everyone would benefit from understanding who is responsible for what in a modern supply chain. This would include greater clarity between the role of "importer" for the purposes of product safety legislation and the "importer" for the purposes of border control.

Second, we would favour improved wording around the requirements on importers and distributors to carry out due diligence on suppliers and checks on products before either placing on the market or making available. There is a lot of confusion about the extent of these checks and what is considered sufficient. As regulation is evolving more generally to ensure companies have greater scrutiny of their supply chain, for the purposes of modern slavery or to manage carbon emissions, it would be appropriate to also make it clearer how much transparency and diligence is required from those who supply products from a safety and compliance angle/

Third, the current regulatory framework presents barriers to entry which make it more difficult for small business owners and new manufacturers to understand if they are meeting industry standards. This is both due to the reliance on technical compliance standards (which are not free to access) to underpin product safety requirements, but also an overall lack of guidance around how manufacturers can ensure that their product designs meet the essential requirements of applicable regulations.

3. Should regulation be targeted more at the product itself, or the manufacturer's systems that produce it?

An effective regulatory regime will address both the safety of the product once it is placed on the market, and the systems and processes used to manufacture the product. Similarly, regulation should be clear on when responsibilities fall on the manufacturer, and in what circumstances other parties take on responsibilities for the safety of products that have been placed on the market.

Whilst regulating the manufacturing process, and implementing an effective certification based regime based around agreed standards is accepted internationally as the best approach for ensuring the conformity of products, practically the majority of goods sold on the UK market are imported. Although the requirements still apply, often products are coming from jurisdictions where manufacturing is difficult to monitor. Combined with modern supply chain and distribution arrangements, along with barriers to access industry technical standards, those having products manufactured abroad or importing from abroad often don't know what requirements specific products must meet and how independent third-party certification processes should be applied. Consequently, non-compliant products are regularly placed on the market. We are not suggesting that manufacturing processes shouldn't be regulated but rather that greater clarity about the checks that should be undertaken on the manufacturing process combined with checks on the product itself when it enters the UK would be the most effective way of ensuring product safety.

Reforming the regulatory framework gives the government an opportunity to overhaul the market for technical standards. Providing these standards (particularly standards linked to legislation that provide a presumption of conformity) for free, and also providing practical, independent guidance around how they should be applied to products, would remove confusion and uncertainty, encountered by all businesses. This would allow manufacturers/importers to better understand whether their products meet essential requirements, and also assist third-party marketplaces to understand whether products being sold on their platforms are non-compliant and should be removed from sale.

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It is also important that the regulatory regime is properly equipped to identify and respond to the risks presented to end users by non-compliant products..

In the case of products sold into the UK by international manufacturers and businesses, it is important to continue to regulate the products themselves rather than relying solely on the manufacturing and certification process. The overriding principle that only safe products are placed on the market is important and this extends to ensuring that the labelling of the actual product is accurate and helpful to the end user.

There is also a risk that a system that only looks at manufacturing processes may unfairly disadvantage local UK manufacturers who may be more closely scrutinised than international manufacturers who cannot as easily be enforced against for non-compliance.

4. How could the current product safety framework do more to support innovation or the supply of new technologies to consumers? Using examples, how could it better anticipate upcoming changes in manufacture and production?

In order to future-proof the product safety regime, the regulatory framework needs to be kept flexible and broad. This is both to account for the rise in emerging technologies, such as AI and additive manufacturing (3D printing), but also to recognise that the legislation drafted today is not likely to anticipate or neatly fit with the future of both technology or e-commerce.

Realistically the next "big thing" in manufacturing or product safety is not going to be predicted or accounted for in this round of legislative reform. Although additive manufacturing may change the status quo for products over the next five to ten years, there will be new technologies and new supply chain innovations which will need to be reacted to, to prevent consumers from being exposed to new and hitherto non-existent risks. In our view building more flexibility into the wording of the legislation, while maintaining the core principles of safety and responsibility, is going to be key.

Where rapid change and development in products requires specific legislation, the ability to make targeted regulations can exist within the confines of an overarching and flexible Act – potentially in the same manner that the upcoming regulation for the security of IoT products will allow ministers to adjust the scope and requirements of the regulation.

The new legislation will also have to be broad enough to cover the future of logistics networks and supply chains, incorporating greater use of IoT and blockchain technology, and how products may make their way from manufacturer to consumer in the future, for example with the use of drones and robots.

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5. What areas of the current regulatory framework could be tailored to create more opportunities for UK innovation and manufacturing?

With the development of new technology there is the prospect that certain aspects of product safety can be assured. For example, a company that uses a reliable source of blockchain may be able to demonstrate better due diligence processes than a company that isn't using blockchain technology. It may be possible to use the regulatory framework to incentivise companies to adopt new technologies that will enhance product safety and supply chain security.

6. N/A

7. Reflecting on the response to the COVID-19 pandemic, what changes could be made to help bring safe products to market more quickly?

In a national or international crisis, there are times when traditional certification routes and compliance systems will present too much of a time-lag to allow manufacturers to meet public or government demand, as seen in 2020 with national and international PPE supply shortages which needed to be rapidly accounted for.

However, urgent demand and the corresponding speed of supply should not compromise safety or reliability, particularly when products must meet important conformity requirements or standards.

A potential solution to this would be to enable fast tracking of specific categories of goods ahead of queues for third party tests or certifications where Ministers believe there is an urgent market need or justification to bring those products to market as quickly as possible.

Similarly, in such circumstances OPSS or Trading Standards could have the power to liaise with industry and identify where and why products may need to be granted exemptions. This transparency, particularly if matters could be discussed between individual businesses and Trading Standards through Primary Authority relationships, could help both government and industry respond to urgent market demand more effectively.

8. What role should voluntary standards play in product safety? What are the benefits and drawbacks of linking regulation to voluntary standards?

Voluntary, as opposed to harmonised standards that are linked to regulation, are useful in providing a commonly accepted market practice. Legally it is perhaps slightly misleading to consider them as voluntary because there is an expectation that they will be followed and if not, the business is able to justify why an alternative approach is just as effective.

Voluntary standards are a good way of establishing common product safety standards via industry experts and private sector groups. They provide a capacity for the market, and for manufacturers themselves, to adapt to changing expectations and practices, since they are typically developed and agreed by members of the industry.

However, there is a general lack of clarity around what voluntary standards are expected to be complied with or applied to products when placing them on the market. There are also a plethora of voluntary standards which can make it confusing. Better guidance around which standards are expected to be applied for certain products or product categories, and how manufacturers or businesses should identify which standards are applicable or appropriate for their products, would be useful.

Additionally, the fact that voluntary standards are also commercialised and must be purchased for often prohibitively high prices presents a barrier to entry into product markets, and may prevent new manufacturers and small business owners from being confident that they are providing the safest possible product to their users.

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9. What are the key challenges for regulating product safety in online sales? What has worked well in terms of regulation, and where are the opportunities?

Modern online sales channels and marketplace platforms are not anticipated by existing legislation. Regulatory reforms should specifically address how product should be sold by both means and where the burden of regulatory liability should fall.

One of the key challenges with online sales is providing sufficient and accurate information about the product. While in theory more information can be provided to an end user than the information available on a product label, we regularly see businesses who do not have the technological capability within their website to be able to deliver all of the information. While this may be an issue that will resolve over time, we think it is important that the legal regime encourages entrepreneurs and start-up companies so we would not favour mandatory information requirements that in practice may be difficult for every business to achieve. That said we think there is an opportunity here to clarify what information can appear online and does not need to be replicated on packaging or in-box material.

Marketplaces are more complex. On the one hand they are no different to a shopping centre owner in a physical retail environment. However as platforms have become more common place and consumers have started to trust market place "brands", there is a risk that end users do not always appreciate who they are actually purchasing from or have an expectation that certain checks have been undertaken which have not. Most market places want to sell products that are reputable and meet legal requirements, however, when a market place business model is delivering at scale (particularly globally) the ability of the market place to regulate every product listing is extremely challenging. While the current legal requirements on market places is being discussed, we would encourage regulation that recognises the value that the flexibility of the market place sales channel brings to consumers, while at the same time ensuring that those third parties who sell through a market place have clear product compliance obligations and are easily and readily identifiable.

Legislation and guidance could make it clear what a platform's role as an economic actor should be, depending on the structure of the supply chain used, method of distribution and the types of merchants using the platform. We think it is achievable for market places to conduct certain vetting checks on third parties before they are permitted to sell on the platform but the requirement could be limited to certain categories of high risk products and certain categories of evidence. Further, it could be made much clearer to consumers who they are purchasing from, who is responsible for product safety and a requirement that merchants must provide certain information about themselves. We think this may help to deal with both counterfeit goods and to deal with the problem of the same product being sold on multiple marketplaces under different product names and by different (or the same) traders, which makes take down of product very challenging.

Regulation should also provide consumers with a more effective redress option, with better powers in place to pursue third party sellers for placing dangerous or non-compliant goods on the market via a platform.

It is important that reforms to legislation target those who are not currently compliant, and make it "easier" to comply, both in terms of what responsibilities different economic actors have, and also more practical guidance on how sellers ensure their products are compliant. Similarly, sellers who are currently compliant, and marketplaces themselves, should not be disadvantaged by new regulations, as these platforms and online sales channels provide good value and opportunities for both consumers and businesses.

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10. Thinking particularly about new models of distribution and supply (including online sales and the sharing economy), is it always clear where responsibility / liability for product safety lies?

No. According to existing product safety regulations, and The Blue Guide, the only economic actors which can place a product on the market are importers and manufacturers. The definition of these economic actors is very specific. For instance, an importer must be the person established in the UK (in the EU under The Blue Guide) who places a product from a third country on the local market.

"Placing on the market" means when the product is first made available on the market in the UK, and "making available on the market" means when a product is supplied, for distribution, consumption or use on the UK market, in the course of a commercial activity, whether in return for payment or free of charge.

The definition of an importer therefore requires the "importer" to be an entity which transfers title of the product to a third party, generally the end-user. Therefore under new models of distribution, such as drop shipping, or direct to consumer imports, it is often the case that there is not an entity which meets the definition of an importer.

In these instances, both legally and from a practical consumer perspective, it is not clear where the responsibility for product safety lies.

This uncertainty could be resolved in new product safety legislation, both by reconsidering the definitions for economic actors, and accounting for modern distribution and supply models, but also by making it more clear to consumers and other actors in the market and supply chains when liability may be taken on, and in which circumstances this might change.

11.-12. N/A

13. What role should voluntary commitments, such as the Product Safety Pledge, play in consumer protection from unsafe products? Can you share any evidence or experiences of the benefits and drawbacks?

We do not believe that voluntary commitments and pledges are the solution to unsafe or non-compliant products making their way onto the market. They are currently reactive, ie. they ask for commitments to deal with a product safety issue when it arises; only a limited number of platforms sign up to them and there is a slight obsession with monitoring metrics and KPIs rather than actually addressing the issues. There is a concern within industry about how "voluntary" initiatives will be used by regulators and we think it would be more effective to improve and clarify legislation and have better private discussions with industry to drive improvements and to encourage greater industry cooperation , particularly across marketplaces.

By way of comparison, the voluntary initiative around reducing campylobacter in chicken has been a success because the league tables published by the FSA have driven the grocery market to make improvements. However, the grocery industry has been around significantly longer, they have historically cooperated in areas that are relevant to all and there are established food industry bodies and research associations. This backdrop does not exist for online marketplaces, but while the industry is nascent there is an opportunity for regulators to work with these businesses to establish standards and ways of working. However, this needs to be within a clear legal framework rather than through voluntary commitments.

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Furthermore from the perspective of an online marketplace, notices of recalls or non-compliant products are often insufficient for platforms and marketplaces to identify which specific products are non-compliant and subject to corrective action. There is also now duplication in the UK with the EU's RAPEX system. We would favour a move towards a central database (it would be extremely helpful if this could be achieved globally) to list all product recall notices with adequate information to ensure that product, manufacturer and sellers are very clearly identified.

14.-18. N/A

19. When it comes to product enforcement, how well does the system deliver transparency and confidence while maintaining confidentiality?

Due to the decrease in test purchases, border control and other methods of proactive investigation and enforcement action by regulators, the likely risk of enforcement against non-compliant manufacturers is limited, unless a product safety issue is reported by a third party. This has been exacerbated by the significant lack of funding provided to local authority Trading Standards services over recent years.

Compliant businesses value having a strong regulator who will ensure that rules are followed and a level playing field achieved. This promotes transparency and confidence. Businesses that are actively trying to comply become frustrated when they see others blatantly breaking the rules. The UK has a reputation for strong enforcement across a wide-range of regulatory areas, it is therefore disappointing to see that an area as important as product safety is not as well-resourced as some other compliance areas. While we appreciate that budgets need to be controlled, our view is that Trading Standards funding and their ability to pursue prosecutions needs to increase. The relationship and balance of enforcement and regulatory responsibilities between Trading Standards and OPSS could also be clarified.

Confidentiality is always a concern for a business and, as explained in our answer to question 18, the uncertainty over whether discussions will remain confidential is one of the issues that delays notification.

20.-25. N/A

About Osborne Clarke

Our global connections and 'best friends'

Through a network of 'best friends' we extend our reach across the globe, particularly in North America, EMEA & Asia Pacific. We have worked closely with like-minded firms in over 100 countries. We'll find the right local partner for you and wherever that may be, we will make sure that you receive the Osborne Clarke level of service.

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