

# TRANSPOSING THE REVISED GENERAL PRODUCT SAFETY DIRECTIVE

**A summary of responses received to the DTI consultation paper of  
November 2001 on policy issues relating to the transposition of the  
revised Directive into UK law**

## INTRODUCTION

The DTI consultation paper on the transposition of the revised General Product Safety Directive (GPSD) into UK law was issued at the end of November 2001. The DTI published the paper on its website, and sent hard copies to some 500 organisations representing the interests of consumers, business and the enforcement authorities.

The consultation period ended in March 2002. We received substantive replies from some 35 organisations, including a large number of trade associations whose responses represented the views of many members. We also took the opportunity to meet with a number of the consultees who responded in order to discuss their comments. **We would like to thank the organisations and individuals who took the time to consider the consultation paper and to give us their views.** A list of the organisations that responded to the consultation is attached to this summary as an annex.

This summary takes each of the main policy questions raised in the consultation paper, briefly rehearses each issue as it was outlined in the paper, and then gives an overview of the nature of the responses received. These are largely presented in aggregate, under the headings 'business groups', 'consumer organisations' and 'enforcers'. In some cases we have cited particular comments from organisations or individuals, but have not identified them in the body of the summary.

Some of those who responded to the consultation also provided comments on the draft Regulatory Impact Assessment (RIA) that was included in the consultation paper. This summary does not reflect those comments, which will be taken into account when we produce the next draft of the RIA. That will be published as part of the next phase of the consultation on the transposition of the revised GPSD, which will be based on draft transposing legislation. We aim to issue the next consultation paper by the end of 2002.

DTI Consumer & Competition Policy Directorate  
July 2002

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## 1 Relationship between revised GPSD and sectoral Directives

The revised GPSD sets out a general safety requirement that consumer products placed on the market must be safe. Where a sectoral Directive sets out essential safety requirements for a particular group of products, then those requirements, rather than the revised GPSD's general safety requirement, will apply to the relevant products. However, the other provisions of revised GPSD (e.g. the requirements on producers and distributors to notify unsafe products, and on the authorities to be in a position to recall dangerous products) will apply to *all* consumer products, *including* those covered by sectoral Directives, unless a sectoral Directive contains provisions with the same objective as the GPSD.

**Business, consumers and enforcers** generally agree that the transposing UK regulations should adopt the wording of the Directive in this respect, and all stress the need for clear (and preferably legally binding) guidance on how the revised GPSD will interact with the sectoral Directives. The European Commission is committed to producing such guidance, and expects to produce a draft for public consultation by the end of 2002. Some consultees (particularly **business**) suggest that the UK should delay bringing forward draft transposing legislation until this guidance is available.

In parallel with the public consultation, we are discussing with **other Government Departments** the impact that the revised GPSD will have on legislation with which they deal. These discussions are ongoing and are not summarised in this paper.

## 2 Definition of 'product' – items used in the course of a service

The revised GPSD will explicitly cover products supplied to consumers in the course of a service (e.g. self-drive hire cars), but not products that remain under the control of a service provider (e.g. taxis).

Again, **business, consumers and enforcers** mostly agree that it would be appropriate to use the wording of the Directive when transposing, but emphasise the need for detailed guidance on the scope of the new legislation. Some consultees give examples of situations where clarification will be needed on whether GPSD applies or not (e.g. products used by children in schools).

## 3 Definition of 'product' – product migration

The revised GPSD will explicitly cover products that were originally designed for use by trained professionals, but that are "migrating" to use by untrained consumers (e.g. DIY power tools).

**Business** responses emphasise that in practice the consumer goods market does not divide neatly between consumers and professionals. Some responses suggest that a self-certification approach, where those buying items judged unsafe for consumers certify that they are aware of the risks and/or are able to use the item safely, could be a practical way forward, providing a defence for suppliers as well as some protection for consumers. Others suggest that it should be sufficient to warn consumers of risks.

**Consumer** groups and **enforcers** largely support the creation of measures to restrict the supply to consumers of products that could be dangerous in non-professional hands, and emphasise the supplier's responsibility to assess risk and to label and distribute products appropriately.

#### **4 Definition of 'safe product' – installation etc.**

In assessing the safety of products, the revised GPSD will take into account the "putting into service, installation and maintenance requirements" of a product where appropriate. Although GPSD is not intended to cover the safety of services generally, this provision means that where a product is designed in such a way that it *has* to be installed by, or under the control of, its producer, the installation requirements of that product will be taken into account when deciding whether the product itself is safe.

**Business** organisations stress that the distinction between products and services must be as clear as possible in the transposing legislation. **Consumer** bodies see the change as helpful. **Enforcers** express concern that the change does not address the wider problem of the unsafe installation of an otherwise safe product (which is being considered at European level as part of the Commission's current work on the safety of services provided to consumers).

#### **5 Assessing the safety of products**

Standards developed at European level that are judged as setting an appropriate level of safety will have a special status under the revised GPSD. Products that conform with such standards will be presumed to satisfy the GPSD's general safety requirement. Standards will remain voluntary, so producers can choose whether to use this route to demonstrate compliance with the GPSD requirement, or to use another method.

**Business** generally welcomes the new mechanism, with some consultees highlighting the need for clarity about the relationship between these standards and the British standards called up in existing UK legislation. **Consumer** groups emphasise the importance of consumer involvement in the standards-making process, and the need for this to be resourced. **Enforcers** flag up some technical concerns about the adequacy of new mandates; the Commission has work under way which is intended to address these issues.

#### **6.1 Obligations of producers: recall obligation } 10 Authorities' powers to order and organise recalls }**

The revised GPSD will require producers to be in a position to recall unsafe products from consumers if necessary, as a last resort, and will give the enforcement authorities powers to order and (if necessary) organise recalls.

Many **business** consultees strongly believe that the new powers of the authorities should be exercised by a central body, and suggest that this should be either the DTI

or a new organisation specifically established to manage product recalls. This is a matter that raises significant issues for the transposition of GPSD, and the DTI plans to invite business organisations, consumer groups and enforcers to meet together with us to discuss it further.

Business consultees also highlight the need for the new arrangements to dovetail with existing sectoral arrangements. One example given is the pharmaceutical sector, where existing processes focus on recall from pharmacies rather than end-users. Many consultees stress that new procedures must include reasonable deadlines and effective appeal mechanisms; one contends that there are human rights considerations here, while another suggests that the authorities should be able to set shorter deadlines for action in situations where a producer is clearly not willing to address a safety problem. The need for comprehensive guidance on the scope of the obligation to be in a position to recall is a common theme; business consultees strongly believe that the obligation should focus on the *actual* ability of producers to recall their products when necessary, rather than on a producer's ability to produce evidence of planning for a *potential* recall.

**Consumer** groups welcome the new obligation and powers, and argue that the authorities should be entitled to check that businesses will be able to recall quickly when necessary. One consultee suggests that there is much scope for improvement in the efficiency of recalls. Several consultees raise issues concerning liability insurance for product recalls. One observes that retailers often require producers to have such insurance, and suggests that it could be used to recover the costs of a recall carried out by the authorities where the producer is bankrupt. Another suggests that such insurance might be made compulsory. **Enforcers** point to the need for effective penalties, and vary as to whether local authorities or a central body should be responsible for recall decisions.

The consultation paper also raised the linked question of the appropriate penalty for any failure to comply with the new recall obligation. **Business** organisations have mixed views on whether the penalty for failing to comply with product recall obligations should be equivalent to, or harsher than, that applying to breaches of the general safety requirement. One **enforcement** body pointed out the link between this issue and the question of how the costs of a recall mounted by the authorities could be recovered from the producer concerned.

## 6.2 Obligations of producers: risk management

Under the revised GPSD, producers will remain obliged to take action in order to be aware of, and to manage, safety risks arising from their products, and to inform consumers about such risks, as they are under the original GPSD. The revised GPSD includes a list of illustrative risk management measures that producers may adopt. The consultation paper sought views on how these obligations should be framed in the revised GPSD.

**Business** organisations generally feel that existing provisions in this area, including the general safety requirement, are sufficient to address this issue and hence that there

is no need for changes. Some consultees comment that guidance or codes of practice could help producers to understand and fulfil their obligations in this area.

One **consumer** group suggests that penalties should be imposed on producers who fail to meet the obligation to inform consumers about risks. Another points out the link between this issue and the need to manage the risks inherent in product migration (see section 3 above).

**Enforcers** offer a range of views; one consultee states that there is no need for change given the other provisions in the GPSD, while another believes that there is evidence that producers are not currently meeting their obligations in this area. Others suggest that new enforcement powers may be appropriate in this field.

### **6.3 Obligations of producers: register of complaints etc.**

Producers will remain obliged to investigate complaints made by producers about products, as they are under the original GPSD. The revised GPSD will expand this obligation to include “investigating and, if necessary, keeping a *register of complaints* and keeping distributors informed of such monitoring”.

Several **business** organisations state that the type of complaints that need to be registered should be clearly defined, and restricted to those about safety. They emphasise the need for guidance on when it will be ‘necessary’ to take such measures, and on which types of distributors must be informed about monitoring activities.

One **consumer** body argues that the whole market – including product designers as well as distributors – should be kept informed about monitoring. Another says that the transposing legislation should make it clear that complaints registers are obligatory and should be available for inspection by the enforcement authorities.

One **enforcement** organisation believes that a register will not always be necessary, since alternative approaches such as batch testing or the monitoring of returned products will sometimes be sufficient. Another suggests that a complaints register should be incorporated in every product’s technical file.

## **7 Obligations of distributors: tracing products**

Distributors will be required to keep adequate records to help trace the origin of products in the event of a safety problem, except in the case of charities supplying isolated used items donated by private individuals.

**Business** groups stress the need for comprehensive guidance on the scope of this obligation, and highlight its potentially disproportionate impact on small firms. One stresses the importance of proportionality. There are several views on how long records should be kept. One consultee points out that some consumer products have a lifespan of 20 years or more, and argues that it would be overly burdensome to have to keep records over such a period. Others suggest 6 years, in line with the Limitations Act provisions on certain consumer rights under sale of goods legislation.

Another believes that the length of the obligation should not be elaborated on in legislation, but should be clarified in guidance.

**Consumer** groups and **enforcers** also favour guidance, and want clarity about exemptions such as that for charities dealing with donated goods. One group suggests that the record-keeping obligation should extend for at least 10 years.

## **8 Obligations of both producers and distributors to notify unsafe products and co-operate in dealing with them**

The revised GPSD will require both producers and distributors to notify the authorities if they become aware that a product is unsafe, and to co-operate with the authorities in managing the resulting risks.

**Business** organisations again emphasise the need for clear guidance, this time on when the obligation to notify will apply (the European Commission is obliged to produce guidance on this). Consultees stress the potential costs that an overly wide obligation could impose on business, and are keen to work with DTI and the enforcement authorities to develop the procedures that will underpin the new obligations. One consultee suggests that the obligation may amount to self-incrimination and thus raise human rights issues.

**Consumer** groups welcome the new obligations. One suggests that enforcement authorities will need to strike a balance between encouraging businesses to notify and penalising them for not doing so. **Enforcers** highlight a number of administrative issues that will need to be resolved, and stress the need for proportionality in applying the obligation to notify.

## **9 Penalties**

The revised GPSD requires that penalties for infringements of the transposing legislation should be “effective, proportionate and dissuasive”. The consultation paper sought views on whether changes to the current penalties regime are justified, and also asked whether the transposing legislation should include scope for civil redress as well as criminal penalties.

**Business** organisations generally believe that the current level of penalties remains appropriate. One body argues that penalties must be high enough to deter rogue traders, but should not be so high as to force the closure of legitimate businesses. Another believes that penalties should be proportionate to the size of the business being penalised. Business groups also suggest that new civil redress provisions are not required, given existing product liability laws.

One **consumer** group argues that the level of penalties should increase, and suggests that they should be brought into line with those applicable under health and safety at work legislation. Most **enforcers** argue that an increase in penalty levels is needed in order to reflect the gravity of offences. There are mixed views as to whether offences

should be triable either way, rather than solely on summary conviction as at present. Some enforcers support the idea of new civil redress provisions.

## **10 Authorities' powers to order and organise recalls**

See section 6.1 above (pages 4-5).

## **11 Enforcement mechanisms**

The consultation paper asked whether the enforcement powers used in transposing the original GPSD remain appropriate, or would benefit from revision. In particular, the paper invited comments on whether 'Stop Now Orders' (SNOs) might assist enforcement of the revised GPSD.

**Business** organisations generally feel that existing mechanisms are adequate, although several favour setting them out more clearly in the transposing legislation. All those that comment on the use of SNOs feel they are inappropriate in the GPSD context, not least because they do not fit well with the sort of voluntary safety management activity by producers (e.g. for product recall) that the GPSD seeks to encourage. One organisation argues that since prosecution under transposing legislation imposes the criminal burden of proof, injunctive remedies such as SNOs are not appropriate.

Some **consumer** bodies advocate a new set of enforcement mechanisms. One organisation suggests that this should be augmented with new official surveillance measures such as the statistical sampling of products.

**Enforcement** organisations generally favour new, self-contained enforcement provisions in the transposing legislation. A number of consultees suggest technical changes to the existing provisions. Enforcers generally support the extension of SNOs to the product safety field; one body describes them as being potentially "a useful additional tool".

## **12 Precautionary principle**

The revised GPSD requires that when the authorities take enforcement action, they should act "taking due account of the precautionary principle". The consultation paper noted the difficulty of giving this principle a practical definition for the purposes of the transposing legislation.

Most **business** consultees that comment on this issue feel that there is no need to refer to the principle in the transposing legislation. One suggests that businesses should be compensated if enforcement action based on the precautionary principle subsequently proves to have been unnecessary.

One **consumer** organisation points out that the precautionary principle will only be relevant when a producer is reluctant to take action, and suggests that the role of the principle in enforcement action must therefore be made clear in the transposing

legislation, so as to avoid unnecessary delay in acting to protect consumers. Another doubts that it will be possible to devise an agreed meaning of the precautionary principle, and expresses concern that the principle might be used to create barriers to trade under the guise of consumer protection.

Several **enforcement** bodies believe that the role of the precautionary principle should be spelt out in guidance accompanying the transposing legislation. One organisation suggests that there should be a requirement for all enforcement authorities to operate a nationally agreed risk assessment procedure.

### **13 Complaints to authorities**

The revised GPSD will require the authorities to ensure that consumers and other interested parties have the opportunity to submit complaints on product safety, surveillance and control, and to follow up such complaints.

**Business** organisations widely believe that existing arrangements, including the Home Authority principle, generally work well and do not need to be changed. Of the **consumer** groups that comment on this, one suggests that there should be more public information available on complaints made and on the authorities' subsequent actions, while another says that it is important to consumers that strong complaints systems are put in place across Europe. **Enforcers** note that systems are generally already in place in the UK at local authority level, but one consultee points out that this is not a statutory function of local authorities, and suggests that Citizens' Advice Bureaux may also have a role to play. Several enforcement bodies note the need for the 'Rapex' system (which is intended to exchange important product safety information rapidly between Member States) to be made more effective – something that the European Commission is currently working on.

### **14 Export bans**

Where the Commission takes Community-wide action under the revised GPSD to deal with an unsafe product (normally in circumstances where Member States are disagreeing on the right course of action), the export of that product outside the Community will be banned unless the Commission agrees otherwise.

Those **business** groups that comment on this provision generally support the DTI suggestion that a new legal mechanism will be required to give this measure effect. One emphasises that it will be important to explain to businesses what their role in this mechanism will be. One **consumer** group notes that concepts of 'safety' vary in different parts of the world. One **enforcement** body suggests that an export ban should apply to all dangerous products, not just those subject to Commission action.

### **15 Availability of information**

The revised GPSD will give the public the right of access to information that is available to Member States and the European Commission regarding safety risks,

particularly “on product identification, the nature of the risk and the measures taken”. However, information shall not be disclosed if it is covered by professional secrecy, unless the nature of the information is such that it must be made public in order to protect consumer health and safety.

Some **business** consultees point out that this provision is very wide, and suggest that safeguards will be required in order to avoid inadvertent harm to businesses. One argues that it will be important to avoid the premature disclosure of ‘undigested information’, which could give rise to unnecessary concern on the part of consumers or could cause unjustifiable damage to a manufacturer. Another suggests that no information should be disclosed before formal enforcement action is begun. On the **consumer** side, one organisation welcomes the new provision and says that professional secrecy should not be a factor where issues of serious risk are involved. Some **enforcers** suggest that the new provision should prompt a review of the wider legal picture on the disclosure of information, mentioning in particular a recent judicial review (the Liverpool Council ‘Babywalker’ judgment) which ruled that enforcers must proceed with enforcement action before releasing information on product safety to the public. One enforcement consultee states that the implications of the Freedom of Information Act must also be considered. Another suggests that other Government Departments may be able to provide a model for the disclosure of information about unsafe products to consumers.

## 16 Definitions

The revised GPSD will define the terms “serious risk”, “recall” and “withdrawal” for the first time. The consultation paper noted that the definition of “serious risk” will be augmented by guidelines to be produced by the European Commission, and asked for views on the significance of the new definitions.

**Business** consultees stress the need for meaningful guidance on the definition of “serious risk”, some expressing concern about the risk of inconsistent interpretation between different authorities within the UK and in the various Member States. One organisation suggests that the definition should link to the concepts of serious injury and death. **Consumer** groups also suggest that the definition of “serious risk” needs to be elaborated. Several **enforcement** bodies point out the distinction between ‘risk’ and ‘hazard’ in this context.

## 17 Administrative issues

A number of **consumer** groups suggest that the cumulative effect of the new powers and obligations in the revised GPSD will require a significant increase in the resources devoted to enforcement. One believes that Trading Standards Departments will need significantly more resources to deal with the new notification obligation (section 8 above) in particular. Another states that the implementation of the revised GPSD can only be as effective as the resources that are provided for its monitoring and enforcement.

## **ORGANISATIONS THAT RESPONDED TO THE CONSULTATION**

NB This list does not include those organisations that acknowledged receipt of the consultation paper but indicated that they had no comments.

### **Business**

Agilent Technologies  
Association of the British Pharmaceutical Industry  
Association of Charity Shops  
Association of Master Upholsterers  
Baby Products Association  
British Retail Consortium  
British Shops and Stores Association  
British Toy Importers' Association  
CBI  
Co-Operative Group  
Construction Products Association  
Eurisol (UK mineral wool association)  
Food and Drink Federation  
GA (gift & home industry)  
Lighting Association  
Music Industries Association  
National Pharmaceutical Association  
Royal Pharmaceutical Society  
Sea Fish Industry Authority  
Society of British Gas Industries

### **Consumers and others**

Association of Personal Injury Lawyers  
BSI Consumer Policy Committee  
Consumers' Association  
Institute of Food Science and Technology  
Royal Society for the Prevention of Accidents  
University of Liverpool Law School

### **Enforcement bodies**

Crossing the Boundaries Safety Group  
Enfield Trading Standards  
Essex Trading Standards  
Glasgow Trading Standards  
Hampshire Trading Standards  
LACORS (local authority co-ordinating body for regulatory services)  
North West Safety Panel (Trading Standards)  
South Eastern Trading Standards Authorities  
Trading Standards Institute