

dti

**The General Product Safety
Regulations**

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

CONSULTATION DOCUMENT

December 2004

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dti

The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

Introduction

This consultation seeks the views of consumers, business and the enforcement authorities on the draft regulations implementing the EC Directive (2001/95/EC) on general product safety (GPSD). **This consultation does not seek views on the Directive itself but on our proposed implementation of it.**

The Directive (at Annex B) and the draft Regulations (at Annex D) replace the 1992 Directive on General Product Safety (92/59/EEC), the General Product Safety Regulations 1994 and section 10 of the Consumer Protection Act 1987. The aim of the revised GPSD is to extend safety regulation (with some exceptions) to all consumer products, and to fill gaps left in sector-specific European safety legislation so that consumers can expect an even higher level of protection from dangerous products than already exists. In particular, implementation brings to the UK for the first time specific powers to enable the enforcement authorities to order the recall of dangerous products from consumers.

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Respond by	31 March 2005
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2 Executive Summary

- 2.1 The draft General Product Safety Regulations 2005 are intended to implement Directive 2001/95/EC on general product safety (GPSD). **This consultation does not seek views on the Directive itself but on our proposed implementation of it.** The new regulations will mostly impact where a product placed on the market is unsafe.
- 2.2 The draft Regulations include self-contained enforcement provisions and therefore do not apply the enforcement provisions contained in the Consumer Protection Act 1987.
- 2.3 The Directive and the draft Regulations apply to products that are intended for use by consumers or likely to be used by consumers. The only exception to this coverage in the Directive is products supplied as antiques and second-hand products that are supplied for reconditioning or repair prior to being used (provided the supplier clearly informs the person to whom he supplies the product to that effect). However, for the purposes of maintaining a consistent regime, we have taken these products within the scope of the draft implementing Regulations.
- 2.4 The scope also extends to products used by consumers in the course of a service, to products intended for professionals but which have “migrated” to the consumer market, and to the installation, commissioning and maintenance of a product where this is essential to the safety of the product. The GPSD does not extend to the safety of services per se.
- 2.5 The assessment of whether a product is safe will take into account a new class of European standards. Conformity with voluntary national standards giving effect to such European standards will mean the product will be presumed to be safe, so far as the risk is covered by the standards.
- 2.6 There will be a new requirement on producers and distributors to notify dangerous products to the enforcement authorities, to say what action they have taken to resolve those risks and to cooperate with the enforcement authorities in action to protect consumers.
- 2.7 Voluntary action is specifically encouraged as an alternative to enforcement. Enforcement authorities will however have access to a range of measures to require a product to be marked in a certain way, to require that consumers be warned as to the risks posed by a product and to order the temporary or permanent withdrawal of a product from the market. The key new element though is the ‘last resort’ power available to enforcement authorities to order a producer/distributor to recall a product from consumers where the action taken by the producer/distributor to resolve a safety risk is considered unsatisfactory or insufficient and where no other remedy will resolve the risk to consumers.
- 2.8 There will be a new requirement on distributors to keep and provide documentation to help trace the origin of products and on producers to keep a register of safety complaints.
- 2.9 The Regulations will apply to England, Scotland, Wales and Northern Ireland. However, while there is a reservation for product safety in the Scotland Act 1998, the exception to the reservation covers certain products (including fish products, seeds, animal feed stuffs, fertilisers and pesticides) that may be covered by the GPSD. Scottish Ministers are

considering whether for these few products they wish to implement the Directive separately in respect of Scotland.

How to respond

- 2.10 This consultation opened on 21 December 2004. The last date for responses is 31 March 2005.

Consultation responses should be sent by post, fax or e-mail to:

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- 2.11 When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
- 2.12 A copy of the Consultation Response form is enclosed at Annex F. An electronic version of the consultation document and the response form is also available at <http://www.dti.gov.uk/ccp/consultations.htm>
- 2.13 A list of those organisations and individuals consulted is at Annex E. We would welcome suggestions of others who you think may wish to be involved in this consultation process.

Confidentiality

- 2.14 Your response may be published by the DTI. If you do not want all or part of your response or name made public, please state this clearly in your response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been specifically requested. We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

Complaints

- 2.15 If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

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Consultation Co-ordinator
Department of Trade and Industry
Room 723
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SW1H 0ET
E-mail Nick.vanbenschoten@dti.gsi.gov.uk
Tel: 00 44 207215 6206*

2.16 A copy of the Code of Practice on Consultation is at Annex A.

Additional copies

2.17 You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

*DTI Publications Orderline
ADMAIL Publications
London SW1W 8YT
Tel: 00 44 870 1502 500
Fax: 00 44 870 1502 333
Minicom: 00 44 870 1502 100
www.dti.gov.uk/publications*

2.18 Other versions of the document in Braille, other languages or audio cassette may be obtained on request.

2.19 In addition to the questions raised in the consultation document we would welcome your views on the partial Regulatory Impact Assessment of these proposals particularly in relation to the cost and other burdens that business might feel would result from the implementation of these Regulations (see Annex D). Generally it is our belief that the new regulations will only impact in any significant way where a product placed on the market, or intended to be placed on the market, is unsafe. This is as it should be since the intention of the Regulations is to protect public health and safety.

2.20 If you can suggest any alternatives to regulation please do so, although we would ask that you recognise that we are required by the terms of the Directive to transpose it into UK law. If you foresee any unintended consequences or other implications of the draft Regulations please let us know what you believe these may be.

Consultation questions

2.21 This consultation does not seek views on the Directive itself but on our implementation of it.

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.

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

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

Q4. Do you agree (A) that 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?

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?

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?

Q7. Should authorities who wish 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?

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?

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?

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?

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

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?

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?

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?

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?

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?

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 16(3)) should there be a right to challenge that decision?

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 given?

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

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

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?

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?

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

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

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

3 The proposals

Introduction

- 3.1 These draft Regulations, the General Product Safety Regulations 2005, are intended to transpose the General Product Safety Directive (2001/95/EC) of 3 December 2001 in the UK. **This consultation does not seek views on the Directive itself but on our proposed implementation of it.**
- 3.2 The Directive replaces an existing 1992 Directive on General Product Safety (92/59/EEC) that provides for an already high level of protection for consumers based on the general requirement that products placed on the market must be safe. It also sets out the range of obligations to be placed on producers and distributors and the powers to be given to competent authorities in the Member States to ensure compliance, including by the imposition of penalties.
- 3.3 The General Product Safety Regulations 1994 implement the 1992 Directive. These key into the enforcement provisions in the Consumer Protection Act 1987. The new draft Regulations, which are self contained, replace the 1994 Regulations.
- 3.4 The Department of Trade and Industry consulted on the main policy issues relating to implementation in November 2001 and published a summary of the responses received in July 2002.

The initial consultation document may be viewed at:

<http://www.dti.gov.uk/ccp/archive/pdf/gpsdcon.pdf>

And the summary of responses may be viewed at:

<http://www.dti.gov.uk/ccp/archive/pdf/gpsdsumm.pdf>

- 3.5 The basic provisions of the 1992 Directive are retained and built upon by the revised Directive to further ensure the safety of a consumer product once it is on the market. In particular the 2001 Directive:

(i) Extends coverage to include products used by consumers in the course of a service, products intended for professionals but which have “migrated” to the consumer market and, in respect of products for which there are specific safety requirements imposed by Community legislation, seeks to clarify the relationship between the GPSD and that legislation.

(ii) Creates a new class of European standards to help assess whether a product is safe. Conformity with voluntary national standards giving effect to such European standards will mean the product will be presumed to be safe, so far as the risk is covered by the standards.

(iii) Requires producers to keep a register of safety complaints.

(iv) Requires producers and distributors to notify dangerous products to the enforcement authorities, to say what action they have taken to resolve those risks and to cooperate

with the enforcement authorities in action to protect consumers. Voluntary action is specifically encouraged as an alternative to enforcement.

(v) Introduces a new 'last resort' power for enforcement authorities to order or coordinate or, if appropriate, to organise together with producers and distributors the recall of a product from consumers.

(vi) Requires distributors to keep and provide documentation to help trace the origin of products in the event of a safety problem.

3.6 In drafting the Regulations, account was taken of the views expressed in responses to the first consultation and in discussions with the main stakeholder groups that have taken place since.

3.7 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.

3.8 The draft Regulations are arranged in 4 Parts. These are discussed below generally and in more detail under separate headings where there are notable differences between the existing regime and the draft Regulations. It would be helpful if you were to focus your comments in the main on those new or revised elements.

Part I: General Provisions

Definitions

3.9 This part mainly concerns definitions, e.g. of a product (which extends to include products supplied in the course of a service and products which, while intended for professional use, migrate to the consumer market) and of a producer and a distributor, which are all largely drawn from the Directive itself. In transposing the Directive we have come to the view that the definition of a distributor includes those persons who act as an agent as well those who act as a principal.

Enforcement Authorities

3.10 Part I (and regulation 10 in Part III) also refers to the authorities responsible for enforcing the Regulations. The principal duty of enforcement will continue to be on local authority trading standards departments. However for the purposes of enforcing the safety of products made available in the course of a service in work premises such as hotels we are advised that they do not have any responsibility and could not act. In recognition of this the Chartered Institute of Environmental Health agrees that it would be sensible for Environmental Health Officers in England, Wales and Scotland (who look after the safety of such premises generally) to have enforcement powers – although the expectation is that their use would be very limited (mainly where there is no wider risk resulting from the same products being on general sale to consumers). In respect of any export ban on unsafe products where there has been a Commission Decision (see regulation 35), the Commissioners for Customs and Excise will enforce the ban using powers already available to them under s68 of the Customs and Excise Management Act 1979.

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

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

Scope

- 3.13 Regulation 4, which draws directly from Article 1.2 of the Directive, provides for the scope of the Regulations to take account of those aspects of safety that are not covered by vertical Community legislation (eg the Toys Directive). These are the so-called borderline issues on which the European Commission has published guidance on its web site:

http://europa.eu.int/comm/consumers/cons_safe/prod_safe/gpsd/guidance_gpsd_en.pdf

- 3.14 It should be noted that while the Directive excludes antiques and products supplied for reconditioning and repair (provided the supplier clearly informs the person to whom he supplies the product that they are antiques or products for repair or reconditioning) from its scope, we have decided to include these products within the scope of the Regulations. This will provide for a more coherent and consistent safety regime and will allow us to repeal Section 10 of the Consumer Protection Act 1987 (see Part IV below), which will then serve no further purpose. We do not however intend the Rapex or other reporting requirements established by the Directive to apply and we have reflected the exclusion of supplies to persons who carry on the business of repairing or reconditioning goods currently in section 46(7)(a) of the 1987 Act, in regulation 3. We have also repeated the effect of the defence currently in section 10(4)(c), in regulation 30.

- 3.15 Q4. Do you agree (A) that 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?**

Part II: Obligations on Producers and Distributors

- 3.16 This Part implements Articles 3 and 5 of the Directive. It establishes the general safety requirement and the criteria to be used to establish a presumption of conformity with that requirement. It also defines the obligations that are placed on producers and distributors. The provisions in the 2001 Directive are broadly similar to those in the 1992 Directive. They include a requirement on producers to take appropriate measures to be informed of the risks that their products might pose and to take appropriate action to avoid such risks. Such action may include withdrawing the product from sale either temporarily or permanently and warning consumers of the risks. Distributors are also required to ensure compliance with applicable safety requirements and to co-operate in the monitoring of the safety of products on the market and in action taken to avoid any risks. New elements include a reference to voluntary recall as a measure to avoid risks to consumers, a requirement on producers to keep a register of safety complaints, a requirement on distributors to keep documentation necessary to trace the origin of products, a requirement on producers and distributors to cooperate with the enforcement authorities on action to avoid the risks posed by the products they supply and the additional requirement on producers and distributors to notify the details of safety problems and the action taken voluntarily to prevent risk to the consumer.

Traceability

- 3.17 Regulation 7(4)(a)(ii) requires a product or its packaging to be marked with an indication of the batch of products to which it belongs or, where it does not belong to a batch, the product reference. This reflects the importance of batch markings in tracing the source of a safety problem involving a product that is already on the market. Regulation 7(4)(b)(ii) transposes the new obligation on producers to keep a register of safety complaints which can be an important tool in identifying safety problems.
- 3.18 Regulation 8(1)(b) requires that a distributor shall, within the limits of his activities participate in monitoring the safety of a product he has placed on the market. One particular measure is that records should be kept in order to be able to trace the origin of a product. The phrase “within the limits of his activities” comes directly from the Directive and was included to protect the position of e.g. the UK charity shop sector which could not be expected to have documentation that would help trace the origin of goods donated by members of the public or anonymously. It is not, however, unreasonable for charity shops to be expected to keep records in respect of any other products obtained through commercial channels that they may from time to time supply or make available. A specific exclusion from the requirement to keep records for the UK charity shop sector has not therefore been included.

Notifying the Enforcement Authorities

- 3.19 Regulation 9 implements the new requirement on producers and distributors to notify the enforcement authorities where they have placed a product that is unsafe on the market, and of the action they have taken to prevent the risk to consumers. We believe it is unrealistic to require individual producers or distributors (especially SMEs) to notify the enforcement authorities in each member state in which the product could have been sold or otherwise made available to consumers. Instead we expect the producer or distributor to notify the local enforcement authority of the problem, indicate what has been done to resolve it and provide the names of those member states where the product could have been sold or otherwise made available so that the central contact point in the DTI can then advise those authorities of the risks posed.
- 3.20 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.**

Co-operation

- 3.21 Regulations 8(1)(b)(iv) and 9(4) set out the co-operation requirements for distributors and for producers and distributors respectively. We do not expect enforcement authorities to need to establish new or different procedures for dialogue beyond the channels of communication that already exist.
- 3.22 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?**

Part III : Enforcement

- 3.23 This Part implements the provisions of the Directive dealing with enforcement. In particular, it establishes the powers available to the enforcement authorities including the new 'last resort' recall power, and broadens the powers available (regulation 10(2)) to a local weights and measures authority to be able to prosecute for a breach of the Regulations that occurs outside of its local authority area. We had intended also to provide for cross border prosecutions as between England and Wales, Scotland and Northern Ireland, but this has proven difficult. As a result the draft Regulations do not address this possibility. While we will continue to pursue this during the consultation period there can be no certainty that it will prove possible.
- 3.24 Q7. Should authorities who wish 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?**
- 3.25 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?**
- 3.26 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?**

Part 8 Enterprise Act 2002

- 3.27 When the Department consulted on implementation of Part 8 of the Enterprise Act 2002 it undertook to consider as part of the transposition of the GPSD whether to apply the powers in Part 8 to product safety. Stakeholders are split on the matter with the enforcement community in favour and business against. In view of this clear split we have decided to retain the existing approach with safety notices linked to criminal prosecutions for breaches of the Regulations.

Precautionary Principle

- 3.28 Regulation 10(4) requires enforcement authorities to have regard to the precautionary principle. This broadly states that lack of scientific certainty or consensus must not be used as a reason to postpone preventative action where there is reasonable suspicion of harm. While the first consultation did not demonstrate stakeholder support for including reference to the precautionary principle in the Regulations, the Directive specifically requires enforcement authorities to have due regard to the principle when they take measures. Against this background we think that the Regulations should refer to the precautionary principle.

Enforcement Provisions

- 3.29 Unlike the 1994 Regulations that apply the enforcement provisions of the Consumer Protection Act 1987, these draft Regulations are self-contained. As a consequence, Section 13 of the 1987 Act (prohibition notices) is not required for the purposes of these Regulations and is disapplied by regulation 40 (4). However the Secretary of State

remains an enforcement authority and regulation 20 provides her with a power (mirroring Section 18 of the 1987 Act) to obtain information distinct from the general powers available to enforcement authorities to make test purchases (regulation 22) and to enter and search premises and take away samples and documents (regulations 23-27), which are reflective of Sections 28–34 of the 1987 Act. The possibility for an enforcement authority to apply to the court for an order for the forfeiture of a dangerous product (regulations 18 and 19) is also drawn directly from the 1987 Act (Sections 16 & 17).

3.30 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?

Requirement to Mark and Requirement to Warn

- 3.31 Regulations 11 and 12 introduce new powers for enforcement authorities called “requirements to mark” and “requirements to warn” which can be used by an enforcement authority to require that a product should be marked with suitable warnings where it could pose risks in certain conditions or that specific warnings be given to certain persons (or classes of persons) where they are potentially at risk. These powers correspond to the provisions in Article 8.1(b) and (c) of the Directive. These are not significantly different to the powers specified in the 1992 Directive but providing for the self-contained nature of the draft Regulations has allowed a more tailored response to be adopted. Currently, such risks are addressed by the serving of a suspension notice.

Suspension Notices

- 3.32 Suspension notices continue and the approach we have adopted is set out in regulation 13. Under the draft Regulations, suspension notices differ from suspension notices served under the 1987 Act (and the 1994 Regulations) in that they may only be served for the period of time deemed necessary by the enforcement authority for it to organise appropriate safety evaluations, checks and controls (and that period must be specified in the suspension notice). This reflects the terms of the Directive.

Withdrawal Notices

- 3.33 Regulation 14 introduces a “withdrawal notice” which provides enforcement authorities with the power to permanently prevent a person from supplying a product believed to be dangerous whether it is already on the market or not. Where an enforcement authority has issued a suspension notice on suspicion of a contravention of the Regulations and, following safety checks, the authority considers the product to be dangerous, it is expected that a withdrawal notice will subsequently be served. This will enable enforcement authorities to bring safety issues to a more satisfactory conclusion than at present. Regulation 14(2) provides that an enforcement authority may only serve a withdrawal notice in relation to a product that is already on the market where the action being undertaken by the producer or distributor in fulfilment of his obligations under the Regulations is unsatisfactory or insufficient to prevent the risks concerned to the health and safety of persons (a corresponding provision is included in relation to recall notices (regulation 15(5)(b)).

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

Recall from Consumers

- 3.35 Regulation 15 introduces the new ‘last resort’ power to order the recall of a product from consumers. However, our expectation is that UK business will largely continue to act responsibly and recall unsafe products from consumers voluntarily where it is necessary to do so. We doubt, therefore, that the power will have to be used very often. Ordinarily the need for action will be determined by whether or not alternative measures would adequately deal with the risk, and whether the steps taken voluntarily by producers and distributors are sufficient or satisfactory to prevent the risks concerned to the health and safety of persons. The Directive defines recall as any measure aimed at securing the return of a dangerous product that has already been supplied or made available to consumers. The possibilities are quite wide ranging and it would be impossible to specify in advance for every case what action or combination of actions might be most appropriate. Regulation 15(2) sets out a non-exhaustive list of measures that might be adopted. These include contacting purchasers of the product to inform them of the recall, publication of notices, and making arrangements for the collection or return of the product from consumers.

Advisory Process

- 3.36 At the initial consultation phase business applauded recognition of the role that voluntary industry codes of conduct could play in effecting a recall, but were concerned about the possible over or mis-use of the new power by enforcement authorities unfamiliar with recall. Business was also worried about a possible lack of consistency in the decision making process given that there are over 200 local enforcement authorities in the UK as opposed to one central authority. While it would have been disproportionately expensive to create a national authority for undertaking recall decisions we do recognise the concern that has been expressed. This is addressed by regulations 15(5)(c) and 15(7) which make provision for an advisory process operated by the Chartered Institute of Arbitrators. If the person on whom the recall notice is to be served so requires, the enforcement authority must first seek advice from a person appointed by the Chartered Institute. The advice will not be binding but will be taken into account by the enforcement authority. As the advice will have been sought on the request of the producer/distributor, we believe that it is appropriate that the producer/distributor should be responsible for the costs of the process.
- 3.37 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.**
- 3.38 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?

Serious Risks

- 3.39 The Directive provides for enforcement authorities to be able to take appropriate measures with due despatch where there is a serious risk to consumers. At regulation 10(4), we have provided that enforcement authorities may take any measure under the Regulations urgently and without first encouraging or promoting voluntary action where products pose such a risk.

Recovery of Costs

- 3.40 Where an enforcement authority has served a “recall notice” on any person, that person has failed to comply with the notice and the authority exercises its power to undertake any of the actions specified in the notice, regulation 15(10) provides that the Authority may bring an action to recover the costs it incurs.
- 3.41 **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?**

Appeals

- 3.42 Regulation 17 deals with applications to set aside or vary safety notices. In the case of a recall notice regulation 17(5) to (8) enables the person on whom the notice is served to also apply to the court (or sheriff) for a temporary suspension of the notice pending the determination of the application to set aside or vary the notice
- 3.43 **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 a right to apply to set aside the notice only? What variations might be sought?**
- 3.44 **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?**
- 3.45 **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?**
- 3.46 **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 or decision to be made after the order has been given?

Compensation

3.47 While the Directive does not require that compensation be provided in the event of a safety notice having been served in relation to a "safe" product, the Department believes that there is a case for providing for compensation in the case of suspension, withdrawal and recall notices (see regulation 16(4) to (6)) if it transpires that there has been no contravention of the Regulations (in the case of a suspension notice) or that the product is not dangerous (in the case of withdrawal and recall notices). These are the measures that have the greatest impact on business and potentially the greatest detriment. In the 1994 Regulations (which apply the 1987 Act) compensation is limited to the case of suspension notices.

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

Penalties

3.49 In response to concerns expressed during the first consultation about the level of penalties, we are proposing that for the principal offences of placing dangerous products on the market and supplying dangerous products and of breaching a safety notice, the offence should be triable either way with a maximum fine, on indictment, of £20,000 and/or imprisonment of up to 12 months (see regulations 16(3) and 21). Offences tried summarily will carry a maximum fine of £5000 and/or imprisonment of up to 3 months, as is the case under the 1994 Regulations.

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

Powers of Entry and Search etc

3.51 Regulations 23 and 24 covering the powers of entry and search follow closely the equivalent provisions in S29 and S30 of the 1987 Act. However, we believe that regulation 23(4) provides the necessary power to act whether or not the product in question has already been placed on the market, in view of the requirement in Regulation 5(3) that no producer or distributor shall possess any product for supply unless the product is a safe product. As a consequence we have not provided for a direct equivalent to S29(4) of the 1987 Act. We have also extended regulation 24(1) from its corresponding provision in the 1987 Act so that it requires a written notice to be given about certain details, namely details of the products and records seized, the reasons for seizure and details of the right of appeal.

3.52 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?

3.53 Q22. Do stakeholders (A) agree the approach that written notice 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?

Part IV: Miscellaneous

3.54 As the name suggests, this Part largely deals with miscellaneous provisions consequential to the previous 3 Parts. In the main these reflect existing arrangements and should not, in practice, require any specific or additional action to be taken to comply. In particular the provisions include the duty on enforcement authorities to notify the Secretary of State of measures taken including for the purpose of informing the European Commission and other Member States of serious risks through the RAPEX (rapid exchange of information) system (regulation 33). This part also deals with surveillance of products already on the market for safety purposes (regulation 36) and cooperation arrangements between the enforcement authorities (regulation 38). We have also set out here the necessary amendments to the Consumer Protection Act 1987 and consequential amendments to other legislation (regulations 40 and 41).

Commission Decisions/Export Ban

3.55 Where the European Commission becomes aware of a serious risk to the health and safety of consumers in a number of Member States and the approach to dealing with the risk varies significantly between those Member States it may, after consulting the Member States, adopt a Decision (ordinarily valid for 1 year – extendable) to ensure a consistent and high level of protection for consumers and the proper functioning of the internal market. In particular, dangerous products subject to a Decision may not be exported from the Community unless the Decision provides otherwise. Regulation 35 implements these provisions.

Information

3.56 Regulation 39 deals with the publication of information relating to the risks posed by any product and implements Article 16 of the Directive. By means of the amendment specified in regulation 39(3) we key into the information provisions in Part 9 of the Enterprise Act 2002. This reflects the current position under the 1994 Regulations.

Extension of Period for Bringing Summary Proceedings

3.57 Regulation 43 extends the period for bringing summary proceedings from the normal 6 months to 12 months. This recognises the complexity of cases involving the safety of products and the time required to adequately prepare the case for prosecution. It also mirrors existing arrangements under the 1994 Regulations. There are no time limits for bringing proceedings on indictment.

Consequential Amendments

3.58 Regulations 40 and 41 deal with the consequential amendments required to the 1987 Act and to other legislation.

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

Transitional Provisions

- 3.60 Finally Regulation 47 is a transitional provision. It relates to safety notices served and in force prior to the coming into force of the 2005 Regulations.
- 3.61 Q24. What, if any, further transitional arrangements might be necessary? Do stakeholders have any comments on the particular transitional provision proposed in regulation 47?**

4. What happens next?

- 4.1 We will aim to publish a summary of the views expressed by consultees and the Department's response on the DTI web site within 1 month of the end of the consultation period. Thereafter the implementing Regulations will be laid before Parliament (negative resolution) and accompanying national guidance published with a view to the Regulations entering into force 12 weeks later.
- 4.2 Paper copies of the summary of responses will be available on request.