

Product Law Bulletin

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The spotlight's on product safety following the adoption of the General Product Safety Regulation (EU) and the UK Government's Round Table on online marketplaces

The General Product Safety Regulation

On 25 April 2023, the Council of the EU adopted the General Product Safety Regulation. The regulation aims to reinforce product safety and consumer protection laws for products sold both online and offline, in light of new technologies and online marketplaces.

The Regulation states that only "safe" products (whether new, used, repaired or reconditioned) should be made available on the market. To determine whether a product is "safe", manufacturers, importers and distributors must consider a range of factors including:

- The characteristics of the product, such as its design, technical features, packaging, instructions for assembly and, where applicable, its installation, use or maintenance;
- The presentation or appearance of the product, such as the labelling, age suitability or appeal to children, any instructions and warnings for safe use and disposal; and
- The likely consumer of the product, taking into account the potential risk to children, older people or people with disabilities.

There is a real focus on the responsibility of online marketplaces to engage with established market surveillance authorities to mitigate the risks of unsafe products on the market. Online marketplaces will need to appoint a single point of contact responsible for product safety and must identify and communicate any dangerous products detected on their platform to market surveillance authorities. These authorities will have the power to order marketplaces to remove unsafe products from their platforms or to disable their access.

Where a product is found to be dangerous, businesses must immediately apply corrective measures and communicate the issue to consumers and relevant authorities. In the event of a product recall, consumers are entitled to at least two options from the following: a repair, replacement or refund.

The Regulation acts as a broad legislative framework for product safety in the EU and seeks to bring existing, sector-specific legislation up to date. Businesses (with a particular emphasis on online businesses) operating on the EU market should begin to assess the safety of products already available on the market and any products due to be placed on the market in anticipation for when the Regulation officially enters into force in the coming weeks. EU Member States will then have 18 months to apply the Regulation in their own state.

Government Round Table on Online Marketplaces

During a recent Round Table led by Business Minister Kevin Hollinrake, online marketplaces such as Amazon, eBay, Etsy and Alibaba were warned that they must do more to prevent the supply of unsafe products on their platforms.

This follows a series of meetings in 2022 where the Office for Product Safety and Standards (OPSS) identified issues with the supply of unsafe products, concluding that consumers could repeatedly access unsafe products on the marketplaces. Potential solutions for preventing the supply of unsafe products included controlling the relationship between marketplaces and third party suppliers, ensuring the safety of products prior to placement on the market and providing consumers with better information about the products and/or third party suppliers.

The Round Table provided the platforms with an opportunity to discuss their progress to date in advance of publication of the government's upcoming Product Safety Review. We will continue to monitor developments in this space.

European Council adopts general approach for proposed EU Artificial Intelligence Act

In December 2022, the European Council adopted its position (or "general approach") on the European Commission's proposed Artificial Intelligence (AI) Act. This marks a significant procedural step towards creating a formal framework for the regulation of AI in the EU.

The Act aims to regulate AI systems placed onto the EU market, ensuring they are safe and respect the fundamental rights of EU citizens.

Key takeaways from the Council's general approach are as follows:

1. Definition of AI systems

The Council's definition of an "AI system" is one which is "*developed through machine learning approaches and logic- and knowledge-based approaches*". This clearly differentiates AI from standard software systems and narrows the definition used in the original proposal. The Council has also included wording to "future proof" the Act which aims to provide flexibility in the event of new machine-learning or logic-based approaches.

2. Scope

In relation to the potential harms posed by AI, the Council have broadened the scope of prohibited AI practices. The use of AI for "social scoring" – i.e. the evaluation or classification of a person based on their social behaviour or personal characteristics, for which the results could potentially lead to discriminatory outcomes, is now specifically prohibited. Similarly, the prohibition on using AI systems that exploit certain vulnerabilities now extends to include those who are vulnerable based on their social or economic situation.

The use of AI for national security, defence and military purposes is explicitly excluded from the scope of the Act. The Council also clarified that the prohibition on the use of "real time" remote biometric identification systems in public spaces by law enforcement authorities will not apply if there is a strict necessity to make use of such systems for law enforcement purposes.

The Act will not apply where AI systems and their outputs are used for the sole purpose of research and development or to people using AI for non-professional purposes (other than the requirement that they comply with transparency obligations).

3. Classification and requirements of "high-risk" AI systems

The Council clarified the classification and requirements of a "high-risk" AI system.

The text has been amended so that an AI system which is unlikely to cause a serious violation to fundamental rights or another significant risk is not classified as "high-risk". The requirements for a "high-risk" AI system in the proposal are now less onerous to comply with, for example, taking into consideration the quality of data or technical documentation. Finally, the text differentiates between different persons participating in an AI system's development or distribution chain and their relevant responsibilities.

4. General purpose AI systems

The Council have acknowledged the likely development of AI systems for different or multiple purposes post-enforcement of the Act by introducing new provisions for "general purpose AI". In circumstances where general purpose AI is integrated into other high-risk AI systems, certain requirements for high-risk systems would then also apply to general purpose AI systems. The implementation of such requirements would be directed by an implementing act, which would consider the specific characteristics, technical feasibility and relevant technological or market developments.

5. Innovation

To allow for continued development of AI, the Act calls for regulatory sandboxes – i.e. controlled experimentation and testing environments supervised by competent national authorities where AI can be tested prior to introduction onto the EU market. The Council stated that the sandboxes should allow for testing in real world conditions with supervision and, under specific conditions and safeguards, without supervision.

The AI Act proposal is now being considered by the European Parliament and it is expected that the Parliament will finalise its position in May 2023. The differences between the EU's AI Act and the UK Government's proposals on AI Regulation could create some challenges for businesses who operate in both the UK and Europe and have to ensure they comply with the different systems in place.

Ford launches history making "hands-off, eyes on" car

Ford has officially launched the first hands-free car to be approved for use on UK. The cars use BlueCruise technology to control steering and speed, monitor other vehicles and road markings, and keep the car in the centre of the lane. This allows drivers to entirely remove their hands from the wheel.

However, drivers will still need to stay alert – the technology includes a camera which monitors whether the driver is watching the road. If their attention is diverted away, an audio alert will sound and, if there is no response, the car will gradually brake to a halt. In addition, the cars are only permitted to be driven in specific blue zones and require the driver to take control in an emergency situation.

In our previous [bulletin](#), we reported that the first self-driving cars were set to hit the road in the coming months. In the case of fully autonomous cars, the Commission has recommended that human drivers should not be legally accountable for road safety. However, Ford's cars are not fully autonomous (the technology being classed as a 'Level 2' assistance system, which still requires human drivers to take control should something go wrong), and it is not expected that fully autonomous cars will be commonplace on UK motorways for a significant period.

Although Lisa Brankin, managing director of Ford in the UK and Ireland, has stated that the human driver will remain fully responsible in insurance claims in respect of Ford's hands-free cars, the legal framework remains unclear. Manufacturers, insurers and drivers should remain cautious as this area develops.

Allergen update: more calls for stronger reporting and guidance

In our [last bulletin](#), we updated you on the commencement of the 'Natasha Trial' which was aimed at treating people living with food allergies. The trial itself arose out of *Natasha's Law, (The Food Information (Amendment) (England) Regulations 2019)*, that were introduced after the death of Natasha Ednan-Laperouse following a severe allergic reaction. Those regulations implement stricter requirements with the 14 main allergens now having to be listed on Pre-packed Direct Sale Foods.

At the end of last year, there were further calls for stricter guidance on allergens following the death of Celia Marsh in 2017, who died from anaphylaxis after consuming milk protein. That milk protein was found in a product described as 'dairy free coconut yoghurt alternative'. The inquest concluded in September 2022 and the coroner issued a *Regulation 28 Report to Prevent Future Deaths* in November 2022, calling for further action. That [report](#) noted that the manufacturer of the product in Celia's case was aware there was a risk the product could have been cross contaminated by the allergen but did not pass this on to the customers.

The report itself highlights not only the need for the Regulations that came in force in 2021, but education for doctors, the public, and those with severe allergies. Part of this education involves the collection of data, which is where, the report states, the FSA, the UK Health Security Agency and the Department of Health and Social Care come in. The coroner states this collection of data should derive from a '*robust system*' which captures and records relevant data, with the aim of being able to provide '*early warning of the risk posed to allergic individuals by products with undeclared allergen content*'. This system is described by the coroner as being '*analogous to the current system used for notifiable diseases*' and proposes mandatory reporting under a statutory duty to notify 'the proper officer'.

In respect of specific advisories for the FSA – the coroner's clear message is that 'free-from' should mean just that: free from that specific allergen. To ensure it is absolutely 'free from' there should be robust systems in place confirming such fact. Until such time as this is in place, the coroner advises foods labelled as 'free-from' should be treated by individuals with severe allergies with the utmost caution.

These recommendations have been supported by the Chartered Trading Standards Institute. In its [press-release](#) in December last year, the CTSI, in referring to the robust system proposed by the coroner, stated: "*such a system would provide invaluable data to enable us to be better informed and targeted in this area, which is of significant importance for consumers and businesses. It would also be even more useful if the system could be used to report other allergen cases as well*".

The Regulation 28 report allows 56 days for certain parties to respond but does confirm that the coroner may extend that period if necessary. However, the report also places a duty on those who receive it, to respond. That deadline was 16 January 2023. We await to see the outcome of the responses received to that report but it is clear that there will be further developments in this area in the very near future.

General Product Safety Regulations breaches

Trading Standards have imposed a hefty fine on Romford-based furniture shop Rattan Garden Furniture Ltd for breaching fire safety rules. Following anonymous tips about two of their products, Trading Standards officers conducted test purchases at the retailer. The products were sent to a laboratory for fire testing, and it was found that two chair lines were made from fabric and foam which were non-compliant with Fire Safety Standards for upholstered furniture, and therefore deemed unsafe.

The non-compliant product lines were seized from the company's warehouse in Essex and a suspension notice was issued to halt any further sale. The company's owners pleaded guilty to possessing goods that did not meet safety regulations in Barkingside Magistrates' Court on 6 September 2022. They also pleaded guilty to contravening a suspension notice for continuing to advertise the non-compliant products for sale after the suspension notice had been issued. Mr Brightman and Ms Rayment, the company's Manager and Director respectively, also both received an administrative caution.

Rattan Garden Furniture Ltd received a £15,000 fine and was ordered to pay costs exceeding £13,000. Similarly, Islington Council has recently issued a warning about unsafe food blenders 'Boxo Blend' after it was alerted by London Fire Brigade that a faulty one could be the cause of a flat fire in Tottenham in December 2021 which resulted in one man dying in the blaze and another being hospitalised.

The blenders, which had been imported from China, were sold for £36.99 or given away between 2020-2022 by Boxo Blend Ltd, a company registered in Islington. The Council promptly investigated the company and issued a suspension notice to ensure no more blenders could be sold whilst they were safety tested. Findings revealed that they did not comply with electrical safety regulations due to voltage issues and a lack of thermal protection, thereby posing a fire risk.

Shortly after, Boxo Blend announced they were withdrawing the blenders and that they would no longer be trading. After testing batteries installed in the blenders, they were deemed to be unsafe. It appears there is an ongoing dispute with the manufacturer; Boxo Blend Ltd had not carried out any safety checks on the products on the assumption that this had been done by the manufacturer.

One of the company's directors, Mr Bashiru Anthony Blenman, pleaded guilty to two offences under the General Product Safety Regulations 2005; one for supplying an unsafe product and the other for failing to properly cooperate with the Council when required to do so. At Highbury Corner Magistrates' Court on 1 February 2023, Mr Blenman was sentenced to 12 weeks' imprisonment suspended for 12 months, 150 hours of unpaid work and asked to contribute £700 to costs plus a £128 victim's surcharge. A forfeiture order for all seized blenders (approximately 1,000 of them) was also made.

John Herriman, Chief Executive of the Chartered Trading Standards Institute (CTSI) stated: *"This case highlights the importance of product safety and is a stark reminder that dangerous products can kill. Businesses that import and sell goods in the UK have a responsibility to ensure products comply with the law, and they should be aware of the tragic consequences of cutting corners, as well as the severe penalties they face if they fail to take these responsibilities seriously."*

OPSS publish Product Regulation Strategy for 2022 – 2025

The Office for Product Safety and Standards ("OPSS") has published its regulation strategy for 2022 to 2025, "Delivery protection and confidence in a strong, green economy."

The new strategy sets out how the OPSS are taking a focused, risk-based approach to regulating the products that are an everyday part of lives.

The strategy also seeks to address the balance between product safety and the need for responsible businesses to operate with confidence. Whilst safety is at the forefront of the strategy the OPSS has attempted to ensure businesses are not burdened by excessive or unclear regulation.

One area of importance identified by the OPSS as part of their strategy is the regulation of products in a "strong, green economy." The strategy proposed by the OPSS would seek to enforce product regulations whilst providing protection for the environment by:

- Providing frameworks for the safe use, recovery, disposal and recycling of potentially harmful products and materials.
- Supporting an infrastructure for low-carbon and carbon-free transport.
- Communicating the energy efficiency of electrical appliances.

The strategy also identifies the need for product regulation to move with the times. This will be achieved by ensuring that any regulation considered changing technologies, evolving markets and the shifts in the needs of society.

New products and technologies present challenges especially when they do not neatly fit into the boundaries of the existing regulations. The OPSS are alert to the fact responding to these changes in the right way can help ensure that regulation remains fit for purpose.

The OPSS are at the forefront of the government's consultation on changes to the EU-derived framework for product safety regulation and they will continue to review the current frameworks as part of their ongoing strategy.