

BIS | Department for Business
Innovation & Skills

**MARKET SURVEILLANCE IN THE
UNITED KINGDOM**

**UK policy on enforcement under
the EU New Legislative Framework**

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Legislative Background and Enforcement Authorities

1. UK enforcement policy in relation to our obligations under Community harmonisation legislation is based on the provisions of the Treaty establishing the European Union. Under Article 249 directives are binding, as to the result to be achieved, on the member States to which they are addressed, but the form and methods of implementation are left to the national authorities. However, Regulation (EC) No 765/2008 setting the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 creates a market surveillance framework with which the UK approach must comply. Article 10 of the Treaty obliges Member States to take all appropriate measures to ensure fulfilment of their obligations under the Treaty. The UK implements by legislation, usually secondary legislation, often as "Regulations" rather than primary legislation i.e. an Act of Parliament. After consultation with interested parties implementing regulations are made by Ministers and laid before Parliament.

2. Where possible, the UK has tried to use and adapt existing processes established in existing domestic legislation well known to manufacturers and consumers when preparing the enforcement regimes for EC directives. Thus, many enforcement powers for Community harmonisation legislation are drawn or derived from the Consumer Protection Act 1987 or the Health and Safety at Work etc. Act 1974 (or both). The day-to-day enforcement of the safety provisions of the Consumer Protection Act is the responsibility of the Trading Standards services of local government authorities in Great Britain (weights and measures authorities) and the Environmental Health Departments of District Councils in Northern Ireland. The Health and Safety at Work etc. Act 1974 applies only to Great Britain (but there are comparable provisions for Northern Ireland). The Health and Safety Executive (HSE) enforces it for most sectors of the economy (mainly industrial) and also for all work product safety. The Health and Safety Executive for Northern Ireland has similar responsibilities there. For those pieces of Community harmonisation legislation that are not safety specific, e.g., legislation to protect the environment or to ensure interoperability, then the enforcement powers are established in the implementing legislation (as described above).

UK Market Surveillance Policy

3. The fundamental UK policy on product safety regulation is that it should specify the goal, leaving those who are being regulated, wherever possible, some freedom to decide how to achieve this goal. The UK, therefore, supports this principle in the New Legislative Framework. Better Regulation, with a specific focus on regulatory enforcement, is a high priority for the Government

which has established the Better Regulation Executive to lead on these issues. In 1998, a voluntary Enforcement Concordat was developed which stressed flexibility and co-operation between business and enforcement authorities as a principle of good enforcement policy. Further emphasis on enforcement followed in the 'Hampton Report' in 2005 (entitled 'Reducing Administrative Burdens: Effective Inspection and Enforcement') with the result that the "Regulators' Compliance Code" has been introduced in order to give the principles established by the Hampton Report a statutory basis. This is intended to promote efficient and effective approaches to regulatory inspection and enforcement (based on risk assessment) which improve regulatory outcomes without imposing unnecessary burdens on business. The Code stresses the need for enforcement authorities to adopt a constructive and preventive approach towards compliance by:

- Helping and encouraging regulated entities to understand and meet regulatory requirements more easily; and
- Responding proportionately to regulatory breaches

4. This, therefore, emphasises strongly that prevention is better than cure. Enforcement authorities are encouraged to work actively with business, especially small and medium-sized businesses, to advise on compliance with regulations. Authorities should always ensure, as far as possible, that any action required of business is proportionate to the risks involved, so that the costs of compliance are balanced by a reduction in risk and hence the net cost is minimised. Opportunities should be provided to discuss the circumstances of the case and, if possible, resolve points of difference before formal enforcement action is taken, unless immediate action is required in the interests of health and safety. Where action is taken to prohibit or restrict a product from the market an appeal procedure exists and this must be explained to the manufacturer/ supplier concerned. Sanctions for non-compliance are required to be fair, proportionate, dissuasive and effective. The enforcement authorities do not hesitate to prosecute serious offences. This approach is consistent with the principles of proportionality, which is strongly recommended, in the European Commission's second edition of the "Guide to the Implementation of Directives Based on the New Approach and Global Approach" (the 'Blue Guide').

5. The Health and Safety Commission (which advises Ministers on health and safety at work issues) has published its own policy statement containing principles of enforcement. This deals with the approach to be taken by HSE inspectors in enforcing health and safety law in Great Britain. Emphasis is placed on proportionality and accountability for the regulator's actions in applying the law and securing compliance, consistency of approach, targeting of enforcement action and transparency about how the regulator operates and what the regulated might expect. The emphasis on proportionality in this approach helps enforcers to target inspection on those whose activities give rise to the most serious risks, where there is potential for a high hazard to be inadequately controlled or where there is emerging technology the hazards of which have not

yet been fully quantified and the level of risk accurately established. Where HSE has enforcement responsibility for regulations implementing Community harmonisation legislation the approach to enforcement is influenced by the approach described in the HSC's statement.

6. In 2002, the National Performance Framework for Trading Standards was introduced. This framework introduces performance standards and aims to help Trading Standards Departments throughout England, Scotland and Wales develop a modern high quality, consistent and responsive service. Performance measures for the Trading Standards service were introduced in 2003. Local authorities have a statutory duty to enforce consumer protection legislation and, within this, have some discretion in deciding their enforcement programme, in accordance with local and national priorities. When local authorities are given the duty to enforce legislation implementing Community harmonisation legislation such enforcement is part of this process. The Local Authorities Co-ordinators of Regulatory Services (LACORS) works to ensure co-ordination and consistency of approach among local authorities. This is very valuable because LACORS also works as a liaison between local and central government. Local Authority enforcement bodies share information and encourage co-operation between enforcement authorities and business by application of the "home authority principle". Under this principle, each local authority takes responsibility for surveillance of goods and services originating in its area. Businesses in each area can go to their home authority for preventative guidance and advice. Where an enforcement authority in another area has reason to believe that a product does not comply with the legislation, it can consult the home authority and make use of arrangements for monitoring and resolving disputes. Local Authority officers use this network to educate themselves and businesses in their area on the requirements of directives that apply to consumer products. Prosecution is the last resort, only used when advice and persuasion fail to secure compliance with the law.

7. HSE Regional Offices have a similar system to the "home authority" principle of the Local Authority enforcement bodies. Each Regional Office takes responsibility for manufacturers and suppliers of industrial products made or supplied locally. Product Safety Teams have been established to cover each of these Regional Offices so that when defective products are discovered in use elsewhere the appropriate regional team is alerted and initiate a record on ICSMS (Information and Communication System for Market Surveillance), whilst field inspectors (with advice from the safety team) will pursue the matter with the local supplier. Information on the results of defective product investigations and other information about manufacturers, suppliers and their products is held on ICSMS which is readily accessible to the regional teams. The regional teams also act as the link to the other enforcing authorities in the UK, particularly the local Trading Standards services. Advice and assistance with legal interpretation, contacts and information from other EU Member States surveillance authorities,

and with the drafting and presentation of any safeguard actions, is available to all field inspectors from a policy coordinating unit based in Manchester.

Independence, Impartiality and Confidentiality

8. Market surveillance in the UK is the responsibility of the public authorities, which are required to be strictly impartial and independent. The Regulators' Compliance Code commits central and local government to the maintenance of a fair and safe trading environment through open and helpful procedures. It sets out good enforcement policies and procedures which business and others being regulated can expect from enforcement officers. The aim is to ensure that enforcement action is proportionate to the risks, that it is carried out in a fair, equitable and consistent manner, and that there are well publicised, effective and timely complaints procedures.

9. It is recognised that many enforcement authorities may not have the necessary in-house facilities to determine whether a piece of equipment complies with the requirements of the relevant directive as implemented. In these cases it is, therefore, usual practice to use the facilities and expertise of recognised test laboratories. In such cases the need for impartiality and a clear separation of these activities from those undertaken by a third party (if this was the case) before the product was placed on the market is always fully addressed. The facilities used are generally accredited to the relevant standard, or assessed to an equivalent level. The decision of whether the equipment is compliant with requirements remains the full responsibility of the enforcement authority.

10. The Health and Safety at Work etc. Act contains provisions to restrict the disclosure of information obtained by enforcement authorities. While enforcement authorities are still in discussion or dispute with a trader over whether a product is safe, the trader is entitled to be protected from the consequences of what may turn out to be an unjustified accusation. However, if there are strong health and safety reasons, action in the public interest may take place at an early stage to alert customers, distributors etc. of concerns. Authorities in the UK can and do issue public warnings in appropriate cases and when they do so, authorities in other jurisdictions are free to make whatever use they wish of that information.

Sanctions

11. Where the enforcement provisions in relevant Regulations are drawn or derived from the Consumer Protection Act any person committing an offence under those Regulations is liable, on summary conviction (that is to say, in a Magistrates' court - a local lower court) to a fine of up to £5,000, or a term of imprisonment of up to six months, or both. It is an offence to place on the market or put into service products that do not comply with the relevant requirements. Further, the Regulations usually provide that it is an offence to supply a product that is unsafe. Powers are usually provided in Regulations for enforcement

authorities to seize non-compliant products and related documentation and an application can be made to the court for the products to be forfeited or destroyed. A suspension or prohibition notice may be issued, prohibiting the placing on the market, supply or putting into service of non compliant products, and it is a very serious offence to contravene such a notice. Additional enforcement powers are also contained in the General Product Safety Regulations 2005. The GPS Regulations will also apply to existing vertical EU and national Regulations where they go further than the existing Regulations in terms of the specific aspects of safety covered, the extent of the obligations on producers and distributors, and the powers available to enforcement officers. In respect of enforcement these powers will typically include: requirement to mark products and requirement to warn and powers to order a supplier to organise a recall or to organise it themselves but this application of the GPSD applies only to consumer goods.

12. On conviction, the relevant Regulations drawn or derived from the Health and Safety at Work etc. Act permit a range of fines depending on the exact breach of law. If the case is brought in a Magistrates court the fine can be up to £20,000, but if the case is sufficiently serious it may be referred to the Crown Court, where the fine on conviction is unlimited. For certain breaches, including contravention of an Enforcement Notice a term of imprisonment of up to 2 years can be imposed as well as a fine. This is in addition to the powers of forfeiture, seizure, improvement, prohibition or suspension as appropriate. Although the GPSD does not apply to industrial products the Health and Safety at Work etc Act gives the enforcement authorities powers to require a manufacturer or supplier to inform its customers of defects and the remedial action that must be taken to ensure that products are made safe.

13. Implementing Regulations are usually founded on the principle of strict liability and provide that the mere fact of commission e.g. placing on the market a product which does not meet the essential safety requirements set out in the particular regulations is in principle enough to show that an offence has been committed. However, the Regulations also usually provide that in proceedings against any person for an offence it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence. This is because the accused should have the opportunity to show that he took all possible steps to avoid the situation occurring. It may be, for example, that a person committed an offence because of the default of another party.

Monitoring of Products

14. HSE has national responsibility to ensure compliance with a wide range of health and safety at work legislation, and deals with all industrial sectors, including the nuclear, off-shore oil and gas, mines and quarries, agriculture, chemical, and manufacturing industries. As a result of the powers that it has it is able to focus the attention of suppliers on the need to control risks through the

relevant transposed supply legislation or section 6 of the Health and Safety at Work etc. Act. The implementation of Community harmonisation legislation has led to a more targeted approach to inspecting suppliers and manufacturers, based on an assessment of the risks associated with the products and their use. This is because legislation requires the reduction of relevant health and safety risks through good design and manufacture. Standards development is integral to this, and HSE experts make a targeted and significant contribution to it so as to ensure that the standards used by designers and manufacturers include a high level of health and safety protection.

15. Within HSE, there exist several industry-oriented sectors (e.g. agriculture and food, construction, manufacturing etc.) which set and agree health and safety priorities for their particular sectors. The sectors work closely with the industry trade associations to secure compliance with the requirements of the directives. They analyse accident data and history for products used in those industrial sectors, and target particular products and their suppliers. Examples include the manufacturing sector's work with suppliers of CNC lathes, the construction sector's work with telehandlers, and the agriculture and food sector's work with suppliers of forage harvesters and wood chipping machines where accident levels have been high. Information about such products and how the levels of protection can be improved, is passed on to HSE field inspectors who are then able to target their market surveillance work during the course of their workplace inspections and so enforce the law usually without recourse to legal sanctions.

16. Local specialist technical advice (e.g. mechanical or electrical engineering, noise or vibration) is available to every HSE regional office and provides technical support both to the industry-oriented sectors and to field inspectors. Where technical assistance is needed, therefore, inspectors can refer to their technical specialist colleagues, so that they can give manufacturers and suppliers the informed expert advice about minimising particular risks or eliminating hazards. In some instances, HSE's technical specialists work directly with UK manufacturers and suppliers

17. If an inspector finds matters of evident concern about defective new equipment in a user's premises, remedial action usually consists of passing the information to the local product safety team who will visit or contact the manufacturer or supplier concerned followed by written advice. If the contravention is a serious one, formal enforcement action may follow, e.g. prosecution or a notice to prohibit or restrict the supply and/or use of the product. In deciding on appropriate enforcement action, field inspectors take several factors into account, including the level of risk and advice given by the sectors and by specialist technical colleagues. If a Notice is issued there is an appeal system through the UK Employment Tribunals that are independent of the enforcing authorities. Information and appeal forms are issued at the same time as the Notice and the company has 21 days to lodge an appeal – for all Notices except where the risks demand an immediate prohibition, they cannot take effect

until at least the end of the this 21 day appeal period – often the company is given considerably longer to comply, for example if the work requires re-tooling of the manufacturing process.

18. The Trading Standards services of Local Authorities (the enforcement bodies in England and Wales and Scotland) have the responsibility to ensure compliance with a wide range of legislation on fair trading and the protection of consumers. A National Performance Framework sets out key national priorities and standards for the service.

19. A typical remit for such a department would cover the following areas:

- fair trading compliance - including trade descriptions, pricing, consumer credit,
- trade marks and copyright law;
- safety compliance - consumer products (both new and second-hand), some
- industrial products, licensing provisions for potentially harmful goods;
- underage sales – preventing harm to children and nuisance caused by young people from access to age restricted products;
- doorstep crime – Detect and prevent people being the victim of commercial crime in their own homes;
- food and agriculture compliance - labelling requirements, compositional standards, health and welfare of transported animals;
- metrology services - providing verification and calibration services, weights and measures compliance;
- business support and consumer advice - providing information to businesses and individuals on trading standards laws, receipt and referral of complaints.

20. There are 202 local authority enforcement bodies in the UK, and their responsibilities include enforcement responsibility primarily for consumer products under the horizontal General Product Safety Regulations and for vertical legislation such as that which implements the Toys, Low Voltage, Electromagnetic Compatibility, Machinery, Simple Pressure Vessels, Pressure Equipment, Gas Appliances, Recreational Craft and Personal Protective Equipment directives. They also have responsibility for the enforcement of the electromagnetic compatibility legislation and the personal protective equipment legislation for the supply of products to business. They also have certain enforcement responsibilities under the legislation transposing the Radio Equipment and Telecommunications Terminal Equipment Directive. Management of all these responsibilities demands a high degree of flexibility and co-operation, because local and national needs will require some local authorities to concentrate their activities on specific products. They also enforce a number of pieces of national safety legislation specifically in the child care and use areas and in relation to furniture flammability.

21. There are two main mechanisms operating within local government to ensure that monitoring of products is directed to those that pose the highest risks. These include a network of regional co-ordinating groups and Regional Intelligence Officers. The Regional Groups come together to discuss managerial, policy and technical issues, and a comprehensive national IT network known as TS Interlink. The latter is a closed intranet system that enables local authorities to communicate with one another and to interrogate a database on enforcement issues. This is a very effective means of communication and co-operation between local authorities. It is frequently used to transmit information about the existence of non compliant products on the market, so that rapid enforcement action can be taken.

22. Aside from Trading Standards and the Health and Safety Executive, in the technical regulations field there are also a number of specialist enforcement authorities. The Vehicle Certification Agency of the Department for Transport for example, has the responsibility for the enforcement of the legislation transposing the Noise Emission in the Environment by Equipment for use Outdoors Directive as well as legislation covering vehicles, and WEEE. The Office of Communications (Ofcom), has enforcement responsibility insofar as the protection and management of the radio spectrum is concerned and certain enforcement responsibilities under the legislation transposing the Radio Equipment and Telecommunications Terminal Equipment Directive and the Electromagnetic Compatibility Directive. The Medicines and Healthcare products Regulatory Agency (MHRA) has responsibility for enforcing legislation transposing the Medical Devices legislation. The National Measurement Office has responsibility to enforce legislation implementing batteries, NAWI, MID, EUP and for Restrictions of Hazardous Substances,

Indicators of Success

23. An indicator of a successful market surveillance regime is evidence of a low incidence of accidents caused by unsafe products on the market. Rates of fatality among workers or employees in the UK are among the lowest in the European Union. According to national records aggregated by ESAW (European Statistics on Accidents at Work) and the WHO, workplace fatalities in the UK amount to 225 per annum which equates to the rate of 0.3 per 100,000 inhabitants. In comparison the EU average is 1.3 per 100,000. We see this performance as an outcome of the overall effectiveness of the UK's safety culture, its safety regime and its market surveillance system, including the way we seek to ensure that new work equipment is designed, manufactured and supplied safely.

24. In a European Commission (DG SANCO) sponsored report entitled 'Injuries in the European Union – 2003-2005': the UK comes out with the third lowest "Standardised Injury Death Rate" and the lowest "Injury deaths in % of all causes of death" (see Figure 1 on page 7). We believe that this is indicative of a strong safety culture including effective market surveillance in the field of product safety.

25. The UK embraces the principle of continuous improvement and it is the commitment to this principle that helps to account for these figures. The UK, therefore, is always keen to learn of best practices in other EU Member States and elsewhere as evidenced by the UK's membership and use of ICSMS.

Co-ordination at the National level

26. The UK has developed a strategic and co-ordinated approach to market surveillance at the horizontal level through the establishment of the Market Surveillance Co-ordination Committee (MSCC). This was established in September 2008 with Ministerial agreement by the then Department for Business, Enterprise and Regulatory Reform (BERR). The MSCC under BIS chairmanship consists of enforcement authorities and Government departments. It is designed to bring these organisations together to develop a more co-ordinated approach to the implementation and delivery of Regulation (EC) No 765/2008 and to foster co-operation between the market surveillance authorities. The work of the MSCC is based on the current priorities at the time, and will include sharing best practices and guidance on the Regulation e.g. the development of policy on how the border control provisions will operate. Meetings take place four times a year and it is planned that stakeholders will meet with the MSCC at every other meeting.

Environmental and Technical Regulation Directorate

<http://www.berr.gov.uk/whatwedo/sectors/sustainability/regulations/activity/page10936.html>

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