

UK Post-Brexit & Product Regulatory Compliance: Liability, Safety, Withdrawal & Conformity

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What's this all about?

A key highlighted feature of the deal between the UK and the EU in the Trade and Cooperation Agreement ("TCA") is that as of 1 January 2021 there will be zero tariffs or quotas applied to trade in goods between the UK and the EU (where those goods satisfy so-called "rules of origin", as detailed in the TCA). But what is the post-Brexit situation concerning the way products are regulated? This article looks in brief at this issue highlighting key changes that businesses need to be aware of – this is no way exhaustive of what are detailed and complex issues.

What about Product Liability?

EU rules on product liability (Council Directive 85/374/EEC) were implemented into UK law through the Consumer Protection Act 1987.

A central feature of these rules is that strict liability is imposed on producers of defective products for the damage caused by those defects. In terms of scope this applies to any goods, including products which are comprised in other products as component parts, raw materials or otherwise – liability extends to the constituent components and raw materials of products so if a finished product is defective due to a particular component the manufacturers of both the finished product and the component may be liable.

A defective product means a product whose safety is not such as persons generally are entitled to expect. Safety in this context includes safety with respect to products comprising the final product and safety in relation to the risks of damage to property or risks of death or personal injury.

A producer will be liable where any damage is caused either wholly or partly by a defect in its product. An individual can sue producers of defective products for compensation for either death or personal injury, or loss of or damage to any property, including land (provided that the property was for private use or consumption, and the value of the loss or damage claimed is over £275).

Liability for damage caused by defective products can apply to producers, own branders and importers. As regards importers, in the EU context, liability lies with the first importer of the product into the EU from a non-EU country – post-Brexit in the UK, liability will lie with the first importer of a product into the UK from any place outside of the UK.

Although liability is strict this is in fact not absolute. Liability can be avoided by producers in a number of circumstances under defences set out in the rules. These include where a defect is due to compliance with legal obligations imposed by UK or EU law – post-Brexit in the UK, this defence will apply only in relation to compliance with UK law and any so-called "retained" EU legal obligation.

What about Product Safety & Product Withdrawal?

EU rules on general product safety (Council Directive 2001/95/EC) were implemented into UK law through the General Product Safety Regulations 2005.

A central feature of these rules is that products placed on the market or supplied by producers and distributors must be safe.

These rules apply to the supply of all new and second-hand products to consumers for private use, with some exclusions e.g. the sale of antiques. These rules do not apply to certain products, including those used in the workplace by workers and to products which are not placed on the market or supplied in the UK.

“Product” means goods that are or could be placed on the market, or supplied or made available, including in the course of a service, to consumers for private use. Under these rules “supply” in relation to a product includes making it available in the context of providing a service, for use by consumers, and includes supply by producers and distributors.

A “safe product” means any product which under normal or reasonably foreseeable conditions of use presents no risk or only the minimum risk compatible with the product’s use, and which is consistent with a high level of protection for consumers. The safety of a product will be assessed having regard to a number of matters, including the product’s characteristics, packaging instructions for assembly and maintenance, and, use and disposal.

An important feature of these rules is that they require and empower enforcement authorities to take action necessary to protect consumers from unsafe products including to order a product recall/withdrawal.

In the EU context an enforcement authority must share information with the European Commission about (non-food) product safety risks. Notification is done through a rapid alert system known as “Safety Gate” (previously known as RAPEX) if products pose a serious risk and action has been taken to prevent or limit the marketing of those products. Under “Safety Gate” safety information is provided for EU Member State national enforcement authorities who can then check for notified dangerous products on their market and take appropriate measures to minimise the risk to consumers including requiring that a product be withdrawn (or recalled) from the market. “Safety Gate” therefore reduces the need for producers and distributors to notify product safety issues to numerous national authorities across the EU simultaneously.

Post-Brexit the UK is no longer part of this system, i.e. non-compliant products placed on the UK market will no longer be published on “Safety Gate”. Instead, UK enforcement authorities notify unsafe and noncompliant products to the UK’s “Office for Product Safety and Standards” using the “Product Safety Database”, where weekly reports of products placed on the UK market posing a risk to the health and safety of consumers are published. Unsafe products that pose a risk to the health and safety of consumers may be recalled – the list of withdrawn products can be found here: <https://productrecall.campaign.gov.uk/>. Note that the weekly reports do not cover food and drink, vehicles, or medicines and medical devices – the websites of the relevant government agencies contain further information on safety notices and recalls for these products.

What about Product Conformity?

The EU product conformity “CE” marking regime signifies compliance with EU safety, health, and environmental protection requirements. So, by affixing the CE marking to a product a manufacturer can sell the product throughout the EU. This also applies to products made in other countries that are sold in the EU. For (UK) guidance on the CE marking see here <https://www.gov.uk/guidance/ce-marking>.

Post-Brexit, in the UK, this has been replaced with a new “UK Conformity Assessed” marking (“UKCA”) to be used for goods being placed on the market in Great Britain (England, Wales and Scotland). It covers most goods which previously required the CE marking. Note that goods placed on the Northern Ireland market require the CE marking or a “UKNI” marking.

The UK technical requirements (so-called “essential requirements”) that must be met – and the conformity assessment processes and standards that can be used to demonstrate conformity – are mostly the same as they were for the CE marking. The circumstances in which self-declaration of conformity for UKCA marking can be used are the same as for CE marking.

Although the UKCA marking came into effect as from 1 January 2021, in order to allow businesses time to adjust to the new UK requirements, in most cases businesses will still be able to use the CE marking until 1 January 2022. But, in some cases, businesses will need to apply the new UKCA marking to goods being sold in Great Britain *immediately* (i.e. from 1 January 2021). Note though that the CE marking is only valid in Great Britain for areas where GB and EU rules are the same. If the EU changes its rules and a business CE marks its product on the basis of those new rules the business will not be able to use the CE marking to sell in Great Britain, even before 31 December 2021. The UKCA marking only needs to be used before 1 January 2022 if a product:

1. Is for the market in Great Britain;
2. Falls under legislation requiring the UKCA marking;
3. Requires mandatory third-party conformity assessment; and,
4. Conformity assessment has been carried out by a UK conformity assessment body.

This does not apply to existing stock, e.g. if a product was fully manufactured, CE marked and ready to place on the market before 1 January 2021.

As regards the placing of the marking, in most cases the UKCA marking must be applied to the product itself or to the packaging; in some cases it may be placed on the manuals or on other supporting literature. Various general rules apply to the use of UKCA markings, e.g. no markings or signs must be placed that may misconstrue the meaning or form of the UKCA marking to third parties. Also, various rules govern the specific use of the UKCA image, e.g. the UKCA marking is at least 5mm in height for the whole logo, not individual letters (unless a different minimum dimension is specified in the relevant legislation).

A business must keep documentation to demonstrate that the product conforms with the relevant regulatory requirements, which must be kept for up to 10 years after the product is placed on the market; an enforcement authority can require to see this. The information that must be kept varies, depending on the specific legislation relevant to the product.

A so-called (UK) “Declaration of Conformity” (which an enforcement authority can also require to see) must be done for most products lawfully bearing a UKCA marking where the producer should:

1. Declare that the product is in conformity with the relevant legislative requirements applicable to the specific product; and,
2. Ensure that the document has the name and address of the producer together with information about the product and the conformity assessment body (where relevant).

The information required on the Declaration of Conformity is largely the same as what was required on an EU Declaration of Conformity; this can vary depending on the application legislation.

For many product types the following transitional measures apply:

1. Until 1 January 2023, for most goods (other than those subject to special rules) there is the option of affixing the UKCA marking on a label affixed to the product or on an accompanying document. The producer, importer or distributor (whichever is responsible) should take reasonable steps to ensure that the UKCA marking remains in place. Products that require the UKCA marking cannot be made available without it (other than where the CE marking is being used before 1 January 2022); and,
2. From 1 January 2023, the UKCA marking must, in most cases, be affixed directly to the product.

It must be emphasised that the above is just a summary of what are detailed rules and requirements. To check whether you will need to use the UKCA marking see the UK’s official guidance here: <https://www.gov.uk/guidance/placing-manufactured-goods-on-the-market-in-great-britain>

What practical steps can I take?

Consider taking the following practical steps:

1. As regards product liability, check your product documentation to determine if it complies with product liability rules in both the UK and the EU;
2. As regards product safety & withdrawal ensure that your procedures and processes cover both the UK and the EU;
3. As regards product conformity, ensure that your product markings comply with EU and UK regimes, and, specifically: check which rules (and guidance) apply to which product; check if you need to change your conformity assessment or marking and for which areas (EU, Great Britain & Northern Ireland); get all the

documentation in place; and, determine if transitional measures apply in the UK to your product.

Cordery's Brexit Impact Plan helps organisations prepare for the effects of Brexit for a fixed fee. There are details here <https://www.corderycompliance.com/solutions/brexit-impact-plan/>.

You can find out more about Cordery's expertise in product liability issues here <https://www.corderycompliance.com/product-liability-recall/>.

We report about compliance issues here <https://www.corderycompliance.com/news/>.

For more information please contact André Bywater or Jonathan Armstrong who are commercial lawyers with Cordery in London where their focus is on compliance issues.

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