

## Product safety: due diligence

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### **This guidance is for England, Scotland and Wales**

If you are a wholesaler or retailer the steady rise in counterfeit and illegal products available in the UK makes purchasing products increasingly complex.

The implications of purchasing or supplying products that are unsafe are far reaching and in some cases the results can be fatal. With this in mind how can you be sure that products are what they say they are and do what they say they can do?

Many consumer protection laws include 'strict liability' offences where it does not matter that the person accused did not intend to break the law. In order to create a balance of fairness, specific due diligence defences are normally included in strict liability consumer protection laws.

To use this defence a person must prove that they took all reasonable precautions and exercised all due diligence to avoid an offence being committed.

### **Due diligence principles**

These broad principles have been drawn from past views of the courts on what due diligence involves:

- sitting back and doing nothing is unlikely to enable a person to create a defence
- the nature of the necessary action will depend upon the individual circumstances
- taking reasonable steps or precautions involves setting up a system of control that has regard to the risks involved
- all reasonable steps or precautions should be taken; the defence fails where there was a reasonable step or precaution that could have been taken but was not
- what is reasonable depends on the particular circumstances; one factor will be the size of the business concerned
- the control system must cover all aspects of the business affected by the legislation
- due diligence means ensuring the proper operation of the system
- the operation of the system should be kept under review and be amended as necessary

Any due diligence system should be written down so that it can be followed and any issues raised should

be coordinated in one department or section, or by one person who has overall responsibility for the system.

A formal quality management system, though only mandatory where you manufacture products such as gas appliances, electrical appliances, cosmetics or personal protective equipment, may be of value in supporting a defence of due diligence. Further advice on quality management systems is available from the Association of British Certification Bodies.

To reduce the risk of purchasing unsafe products always buy from a reputable source and follow the golden rule: if it looks too good to be true, take extra care.

## UKCA, UKNI and CE marking

There is a legal requirement for certain products to be marked with this when placed on the internal UK market. UKCA marking is a key indicator of a product's compliance with UK legislation. By affixing the UKCA mark on a product a manufacturer is declaring conformity with all of the legal requirements to achieve UKCA marking. This may mean that there is more than one set of legal requirements that apply to a product.

UKCA marking may be achieved in two different ways:

- **examination by UK-approved bodies.** This means that the manufacturer must use an approved body (such as BSI - the British Standards Institution) to test or review the product to enable the application of the UKCA mark
- **self-declaration.** This does not require any independent testing or review and it is therefore the manufacturer's own statement that they believe the product meets the relevant regulations

It is the manufacturer's responsibility to carry out the conformity assessment in accordance with the relevant safety legislation, bearing in mind that some safety legislation is product specific - for example, the Electrical Equipment (Safety) Regulations 2016 and the Toys (Safety) Regulations 2011. It is also the manufacturer's responsibility to set up the technical file (including test reports and risk assessments), to issue the declaration of conformity and to affix the UKCA mark. There is no visual difference between a mandatory or self-declared UKCA mark and so a small business or consumer cannot tell whether the product has been tested or not. Therefore distributors must take care and must verify the presence of both the UKCA mark and the necessary supporting documentation.

If a product requires a UKCA mark but does not have one, it is illegal to place it on the UK market. However, do remember that not all products sold in the UK need to bear UKCA marking, so distributors must have a basic knowledge of the legal requirements. You should know what products must bear the UKCA mark and the accompanying documents required and should be able to identify products that are clearly not in compliance.

For guidance on the UKCA mark see the GOV.UK website.



Where Northern Ireland is involved, there is a further mark that is used: the UKNI mark. This is needed

because of the 'Northern Ireland Protocol', which came into force on 1 January 2021. For as long as the Protocol is in force, Northern Ireland will align with all relevant EU rules relating to placing manufactured goods on the market.

Guidance on the UKNI mark can also be found on the GOV.UK website.

The logo consists of the letters 'UK' stacked above 'NI' in a bold, black, sans-serif font.

There will be a crossover period for the UKCA and UKNI marks, and in most cases the CE mark can still be used until 31 December 2021. However, CE marking will only be valid in Great Britain if GB and EU legislation stays the same. If EU law changes and GB law doesn't, and you place the CE mark on your product on the basis of the new EU law, you will not be able to use the CE marking to sell in GB even before the end of 2021.

The logo consists of the letters 'CE' in a bold, black, sans-serif font.

## Test reports

So how do you, as a distributor, know that the UKCA mark has been affixed correctly or that the item is safe to be sold in the UK? A formal test report is the best way to verify compliance to a safety standard. There are three basic types of report available:

- an in-house report, which means the product was tested by the manufacturer
- a third party report, which means the product was tested by someone else
- a third party test report issued by an accredited laboratory

All three of these are valid methods of demonstrating safety. However, the accredited test report gives a far higher degree of confidence that the tests have been carried out correctly by competent laboratory staff.

Schemes such as the Kitemark certification can demonstrate that the product has met the applicable standard and that the manufacturer has effective quality control processes in place. In addition both the factory and the product are audited on an ongoing basis to ensure the products that have the mark are safe.

To meet your due diligence requirements:

- buy from a reputable supplier and always obtain an invoice
- make sure the product / packaging is marked with the name and address of the manufacturer or importer
- keep all invoices
- ask to see proof that the product is safe (a test certificate or declaration of conformity)

- inform your supplier about any safety complaints you receive about the product

## Key legislation

Consumer Protection Act 1987

General Product Safety Regulations 2005

Last reviewed / updated: February 2021

## In this update

No major changes

## Please note

This information is intended for guidance; only the courts can give an authoritative interpretation of the law.

The guide's 'Key legislation' links may only show the original version of the legislation, although some amending legislation is linked to separately where it is directly related to the content of a guide. Information on amendments to legislation can be found on each link's 'More Resources' tab.

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