

Toy Safety The German way with regard to CMR Substances

Toys in focus: Toy safety affects the most vulnerable consumer group and is therefore a particularly important issue for families, legislators and politicians. The debate on the permitted use of certain chemicals stirred emotions to such an extent, that the "Arte" TV channel dedicated an entire evening to this issue in December 2012 ("Poison in Toys"). In addition to the necessary, serious debate, the topic also gives rise to populist (political) debate.

2012: Transition Year for the EU Toy Safety Directive

From a legal standpoint, 2012 was a transition year for the toy industry. The new Toy Safety Directive has been binding since mid-2011, with the exception of certain chemical requirements, which do not take effect until 20 July 2013. With the New Directive, the European legislature intends to harmonize the level of product safety in Europe and reduce trade barriers within the European Union.

The New Directive: General Part

The safety requirements related to the technical and design aspects of toys form the most important part of the New Directive. Specific mechanical, electrical and fireproofing requirements are stipulated in conjunction with the DIN EN 71 et seq. standards.

The Toy Safety Directive (or, to be more precise, the second provision of the Equipment and Product Safety Law, which is the German Implementation Act) imposes important obligations on all involved in the production and distribution chain. Both the manufacturer and the EU importer guarantee that only compliant toys are made available for sale in the first place. In this case, compliant means that the general and specific safety requirements are met. The manufacturer has to carry out the conformity assessment, conduct a safety assessment, issue a conformity statement and ensure the conforming production of each batch.

The safety assessment requires a risk analysis and an evaluation of the likelihood of exposure to the relevant risks.

Requirements for reducing noise emissions and suffocation risk have been tightened in the Toys Safety Directive; strangulation dangers are a newly-regulated area, as are toys which are connected to food, or intended for contact with food or oral contact, activity toys, electrically operated ride-on toys, and cosmetic toys.

The instructions and necessary safety information must be provided by the manufacturer. The system of warnings is explicitly regulated. Warnings that contradict the toy's intended use are prohibited. Warnings that may influence the purchase decision must be clearly recognizable prior to purchase. This last requirement is also to be explicitly implemented in eCommerce transactions.

It is now mandatory to label every toy with the "CE marking" as an external sign of compliance with these safety standards. In addition, there are numerous other test seals with varying levels of prevalence and significance ("GS" mark, "Blauer Engel", "VDE" mark, "spiel gut", "fair spielt").

Manufacturers also have particular obligations once the toy has been put into circulation. If the toy turns out to be hazardous, they are obliged to make spot checks and maintain a compliance log. Informing the appropriate supervisory authorities and taking corrective action are necessary in cases of non-conformity and danger, which is why the identification and traceability of toys is of high priority. Toys classed as hazardous, which have already been released into other markets, are listed in RAPEX, the EU rapid alert system, and, in Bavaria, in its consumer information system.



Chemical Requirements

The general legislation on chemical requirements, which will be mandatory starting mid-2013, should be considered first. Specific restrictions apply to CMR substances (carcinogenic, mutagenic or toxic to reproduction). Some are completely banned, as are certain allergenic fragrances. Other substances may not exceed certain (migration) limits. The limits to be observed are, however, disputed. In Germany, the Federal Institute for Risk Assessment is in charge of chemical safety issues. With regard to the Institute's findings, the Federal Ministry of Food, Agriculture and Consumer Protection does not consider the level of protection against CMR substances in the New Directive to be sufficient, since the respective limits were set with regard to the laws regulating chemicals and do not take into consideration the particular vulnerability of children. The limits for heavy metals such as lead, arsenic and mercury are therefore also unacceptable as are those for polycyclic aromatic hydrocarbons.

In order to safeguard the high level of protection currently in place in Germany, the Federal Government is working towards tightening the limits foreseen at the European level to match those already in place in Germany. The Federal Government also requested that the European Commission allow the German limits to remain applicable until further notice. In reaction to a largely negative decision by the Commission, the Federal Republic of Germany filed a complaint against the Commission in May 2012.

The German legislature continues to apply the current limits requirements, since the European limits on lead, arsenic, mercury, barium, antimony and nitrosamines introduced in the second provision on the Equipment and Product Safety Law have not yet been implemented.

If no agreement can be reached on uniform (lowered) European limits, then it will be up to the manufacturers to create a competitive advantage from the more stringent German requirements. Customers are becoming increasingly aware of the subject, as was underlined in an *Ökotest* article published in December, so the German toy industry could create a USP with their own distinct quality label or a self-regulatory initiative. This would not only serve to enhance product safety, and ideally also compliance with human rights and working conditions in the countries where the toys are manufactured, but would also further strengthen their already strong standing in the world market. This would apply in particular to the lucrative high-quality sector.

A uniform European legal framework on product safety not only offers advantages for manufacturers and consumers, but also makes it easier for specialized lawyers to launch coordinated attacks against manufacturers. Successful defense strategies on behalf of the manufacturers consequently presuppose the coordination of warranty law, product liability and regulatory affairs. We will focus in detail on the increasing significance of the role of "Coordination Counsel" in our next network briefing issue.

