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GUIDANCE DOCUMENT No 4

ON THE APPLICATION OF DIRECTIVE 2009/48/EC ON THE SAFETY OF TOYS

Grey zone problem: Is a specific product covered by the Toy Safety Directive 2009/48/EC or not?

This Guidance document is a non-binding document intended to provide guidelines to help Member States and stakeholders to decide whether or not different kinds of products are covered by the Toy Safety Directive 2009/48/EC. It expresses the views of the majority of members in the Expert Group on Toy Safety. The images which may appear in the document constitute examples intended to facilitate the decision-making. They do not presuppose the conformity of the represented products¹.

This Guidance document does not relieve national authorities from their obligation to determine for any individual product, on a case-by-case basis, whether it falls within the scope of application of the Toy Safety Directive 2009/48/EC or within the scope of application of other sectoral legislation. The Court of Justice of the European Union has repeatedly held that the national authorities, acting under the supervision of the courts, must proceed on a case-by-case basis, taking account of all the characteristics of the product. Therefore, this document shall not “prescribe” which regulatory framework applies. Rather, it shall serve as one out of many elements supporting the national competent authorities in their case-by-case decision on individual products. In particular, this Guidance document does not prevent a national authority from consulting with colleagues from other regulated sectors concerned in order to reach a complete view on all aspects related to a given product.

¹ The views expressed in this document are not legally binding; only the Court of Justice of the European Union can give an authoritative interpretation of Union law.

1 Introduction

In the majority of cases the definition of toy provided by Article 2(1), first subparagraph of the Toy Safety Directive 2009/48/EC is clear enough to decide on the classification of a product as toy or not. However, there are some borderline products that are difficult to classify. For those cases, the definition does not seem to be specific enough, and it appears necessary to take into consideration additional criteria.

2 Criteria to classify a product as a toy or not

The definition of Article 2(1), first subparagraph of the Toy Safety Directive 2009/48/EC provides the following criteria:

- Any product designed or intended
- whether or not exclusively
- for use in play
- by children under 14 years of age.

The main difficulty of this definition is the concept of “use in play” or “play value”. Virtually everything has play value for a child, but this does not make every object fall into the definition of toy. To be considered as a toy for the purpose of the Directive, the play value has to be introduced in an intended way by the manufacturer. There are some categories of toys which the Directive shall not apply to which are to be found in Article 2(2).

Annex I to the Directive enumerates products that could be confused with toys, even if they do not fulfil the definition of a toy in Article 2(1), first subparagraph. The list is a list of examples and not an exhaustive list in any way. If a product does not figure in the list, it does not necessarily imply that it is a toy; in that case it needs to be assessed against the general definition in Article 2(1), first subparagraph.

The words “whether or not exclusively” in the definition indicate that the product does not have to be exclusively intended for playing purposes in order for it to be considered as a toy, but it can have other functions as well. This is also referred to as dual use. For example, a key-ring with a teddy bear attached to it is considered as a toy, as is a toy plastic figurine with a pencil sharpener in its foot.

The declaration by the manufacturer of the intended use is a criterion to be considered. However, the **reasonably foreseeable use** shall prevail over the declaration of intended use by the manufacturer. If the manufacturer labels the products as not being toys, he has to be able to support this claim.

Further guidance on when the Directive is applicable or not and further guidance for the classification of a product as a toy or not can be found in the Explanatory guidance document and in the other numbered Guidance documents.

In addition, the following indicative criteria² can help Member States to decide if a product has to be considered as a toy or not:

- place of selling: toys are usually sold in specialised toy stores or in the toy/children's product departments/shelf of stores, whether physical stores or online stores. Note that toys are nowadays also often sold in shops that are not traditionally toy shops (e. g. gas stations, souvenir shops, etc.). Products for adult collectors are more usually sold in specialised shops;
- target audience of the advertising and packaging: packaging and advertising designed to attract children could indicate that the product is to be considered as a toy;
- price: toys may be sold at a lower price than pieces for adult collection or use;
- size: toys might be smaller-size versions of non-toy products;
- within the reach of children or not: products such as mobiles suspended from the ceiling or otherwise which are permanently fixed and out of the reach of children, and are intended to stay out of reach of children at all times³, should normally not be considered as toys, but as decorative items instead. However, products such as toy figurines or plush toys hanging from a flexible spring fixed on the ceiling should normally be considered as toys if they can be accessible to children, including by being disconnected from the spring.

Products *hung over or mounted on* a cot or playpen (whether hanging from an arch or otherwise), which are out of reach of very young babies but could come within the reach of children as children become able to sit up or to stand on their hands and knees or stand on their feet, should normally be considered as toys. Mobiles that are *strung across* a cradle or a pram are always considered to be within the reach of children and should therefore always be classified as toys.

The above list of indicative criteria is not exhaustive. It is recommended to use the criteria in combination with each other because taken in isolation they do not provide an adequate basis for an informed decision to be taken.

Nevertheless, these factors are sometimes out of the control of the manufacturer. In any case, the authority should evaluate their applicability case-by-case.

² These are only indicative criteria, and may not apply in all circumstances.

³ This information should be made clear to consumers.

3 Pragmatic approach to deal with grey zone products

Often, the difficulty concerning grey zone products is that there are sensible arguments to consider them covered by the definition of Directive 2009/48/EC, and sensible arguments to consider them not covered. Nevertheless, economic operators and market surveillance authorities need to have legal certainty about the products placed on the market.

The following **pragmatic approach is proposed**:

1. Manufacturers are responsible for the correct classification of their products as toys covered by Directive 2009/48/EC or not. They may seek the advice of a third party to help them take a decision. Manufacturers' decisions can be challenged by the market surveillance authorities.
2. When a Member State **Competent Authority** has doubts about the classification of a certain product, it should **enter in consultation with Competent Authorities of other Member States**.
3. When the **Co-ordination group of Notified Bodies, a Competent Authority, an economic operator or any stakeholder** finds that Member States classify the same type of product in a different way, they should raise the matter with the **Commission services**, providing detailed information.

Contact details of the Commission services: GROW-TOYS@ec.europa.eu

4. The **Commission services** will evaluate the appropriate way of dealing with the matter. If the question is of general interest, they will present a **draft Guidance document** on the classification of that particular product as toy or not toy to the **Expert Group on Toy Safety (ADCO)** for discussion.
5. The **Commission services** will publish **Guidance documents** via the Commission website **reflecting the view of the majority of the Expert Group on Toy Safety** on the classification of the product as toy or not. Those Guidance documents are **not legally binding**.

4 Who has the ultimate responsibility to decide if a certain product falls within the scope of the Toy Safety Directive 2009/48/EC or not?

The decision whether a product is covered or not by the Toy Safety Directive 2009/48/EC is part of the implementation of the legislation. Therefore, this decision is primarily in the field of responsibility of Member States. If the Commission services consider that the decision of a Member State concerning the classification as a toy or not toy is not correct, they may take up the matter with the Member State. However, the Court of Justice of the European Union is the only body that can give a definitive interpretation of the scope of the Directive.