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GUIDANCE DOCUMENT No. 4

ON THE APPLICATION OF THE DIRECTIVE ON THE SAFETY OF TOYS (88/378/EEC)

Grey zone problem: Is a specific product covered by Directive 88/378/EEC or not?

This document is a non binding document intended to provide guidelines in order to help Member States on the classification of toys. This document expresses the views of majority of experts in the Expert Group on Toys Safety.

1. Introduction

In the majority of cases the definition of toy provided by article 1.1 of Directive 88/378/EEC 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 these 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, according to Directive 88/378/EEC

The definition of article 1.1 provides the following criteria:

- Any product or material designed or clearly intended
- for use in play
- by children of less than 14 years of age.

The main difficulty of this definition is the concept of “use in play” or “playing value”. Virtually, everything has playing 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 playing value has to be introduced in an intended way by the manufacturer.

The declaration by the manufacturer of the intended use is a criterion to be considered. However, the **reasonable expected use** shall prevail over the declaration of intended used

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by the manufacturer. If the manufacturer labels the products as not being toys, he has to be able to support this claim.

In accordance with recital 5 of the Directive, there are some products that are not to be regarded as toys because they call for supervision or special conditions of use. These products may not be toys even if they are child appealing. On the contrary, the fact that they are child-appealing may make them dangerous, because they can be confused with toys by the consumer and their safety relies on adult supervision. A clear example of this category of products is the “floating seats”¹. This does not prejudice the existence of “functional toys” (Annex IV.3 of the Directive), that require the warning “to be used under the direct supervision of an adult”.

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 departments of department stores. 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 would 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;
- small-size: clothes for dolls, toy iron board are considered as toys;
- double use: when a product has an intended playing use as well as another intended use, it could be considered as a toy if it has a significant playing value;
- passive use:
 - products not intended to be touched or handled by children and which will be out of reach of children: products such as mobiles suspended from the ceiling which are permanently fixed and out of reach of children³ and do not presuppose active interaction by them are not considered as toys.
 - products not intended to be touched or handled by children but will be placed within the reach of the children: products which do not presuppose active interaction by children (passive use) but are within the reach of children can be regarded as toys if they have a play value (e.g. products intended to stimulate the sight, the hearing and movement of babies.)⁴

This 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.

¹ See Guidance document n° 2.

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

³ This information should be made clear to the consumers.

⁴ For example, mobiles which are hung over a cradle.

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

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 the Directive, and sensible arguments to consider them not covered. Discussions can be extended for years.

Nevertheless, manufacturers and consumers need to have legal security about the products that they place on the market or that they purchase.

The Commission Services propose to follow the following **approach** when a manufacturer has a doubt concerning the classification of a product as a toy or not:

1. The decision has to be taken at the lowest possible level;
2. The solution has to seek the highest level of consumer protection. Therefore, if two solutions are possible, the solution that provides a highest level of consumer protection should be preferred;
3. Even if the product is covered by other Directives, it has also to be examined within the scope of the Safety of Toys Directive.

The Commission Services propose the following **pragmatic procedure**:

1. The manufacturer or importer is responsible for the correct classification of their products as toys covered by Directive 88/378/EEC or not. They may seek the advice of a Notified Body (who may require remuneration for this service) to help them to take a decision. The manufacturer or importer's decisions can be challenged by the market surveillance authorities.
2. The **manufacturer or importer** that have serious doubts concerning the classification of a product as a toy or not may seek the advice of one of the national **Competent Authorities**. If the Competent Authority considers it necessary, it may consult a Notified Body.

Contact details are available in <http://ec.europa.eu/enterprise/toys/contacts.htm>.

3. If the question is presented to a **Notified Body**, it may accept the case and give a reply, to the best of its knowledge and on the basis of its experience. In case of doubt, the Notified Body should consult its Member State's **Competent Authority**.

4. The **Notified Bodies** may share their experiences concerning the classification of products as toys or not in the **Co-ordination group of Notified Bodies**. The Notified Bodies may also provide their advice on this matter to manufacturers and competent national authorities. Moreover, they may prepare **information documents** compiling these experiences. These documents should contain the description of the product in question, its classification as toy or not and the reasons that led to that decision.

5. When a Member State's **Competent Authority** has doubts about the classification of a certain product, it should **enter in consultation with Competent Authorities of other Member States**.

6. When the **Co-ordination group of Notified Bodies, a Competent Authority, a manufacturer or a consumer or trade association** finds that Member States classify in a different way the same type of product, they should raise the matter to the **Commission Services**, providing a maximum of information.

7. The **Commission Services** will evaluate the opportunity to deal with the matter. If the question is of general interest, it will present a **draft guidance document** on the classification of that particular product as toy or not toy to the **Expert Group on the Toys Safety** for discussion.

8. The **Commission Services** will publish **guidance documents** via its website **containing the view of the majority of the Expert Group on Toy Safety** on the classification of the product as toy or not. These guidance documents do **not have a legal value**.

4. Who has the ultimate responsibility to decide if a certain product falls or not within the scope of Directive 88/378/EEC?

The decision if a product is covered or not by the toys Directive 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 one Member State concerning the classification as a toy or not toy is not correct, it may take up the matter with the Member State. The Court of Justice is the only body that can give a definitive interpretation of the scope of the Directive.