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Germany's legal action against the European Toy Safety Directive's chemical restrictions: recent developments

INTRODUCTION

Germany imposes stricter limits on the presence in toys of certain chemicals than those that have been introduced by the new EU Toy Safety Directive 2009/48/EC ("TSD"¹). German consumers, as well as consumer protection authorities and organisations, believe that the new limit values in the TSD could negatively influence toy safety in Germany. In particular, they fear that toys will enter the German market from other Member States which do not comply with the stricter German chemical limits.

As previously reported in the *International Product Liability Review*,² on 14 May 2012, seeking to maintain the current German thresholds for certain chemicals in toys, the German government brought an action before the European General Court challenging the Commission Decision of 1 March 2012. The German government is challenging the Commission's rejection of the German national threshold for antimony, arsenic and mercury, and the imposition by the Commission of a time limit on the German national threshold for lead and barium. This article provides an update on recent developments in this action.³

BACKGROUND

Article 53 paragraph 2 of the TSD provided for a transitional period for compliance with the TSD's chemical requirements. This specified that toys which did not comply with the TSD's new chemical requirements could still be made available on the market provided that they complied with the chemical limit values of the earlier Directive 88/378/EEC, and provided that they had been placed on the market before 20 July 2013. After that date, all EU Member States must adhere to the new limit values for chemicals in toys.

UPDATE ON RECENT DEVELOPMENTS

Due to the German government's legal action against the TSD's new limit values for lead, barium, arsenic, antimony and mercury in toys, a special "transitional phase" applies in Germany in respect of these requirements. In addition to its legal action against the European Commission decision, Germany filed an application for interim relief, seeking permission to continue to apply its existing limit values for lead, barium, arsenic, antimony and mercury until a final decision has been handed down by the European General Court.

On 15 May 2013, the President of the General Court ordered the European Commission to approve the continued application of the limit values notified by Germany for these chemical substances in toys until the General Court's final decision.⁴

In his order, the President of the General Court pointed out that the legal dispute between Germany and the European Commission regarding the limit values for lead, barium, antimony, arsenic and mercury gives rise to certain highly technical and complex questions which cannot *prima facie* be dismissed as irrelevant. In its decision in the main case, the General Court will undertake an in-depth examination of these questions.⁵

The European Commission's appeal against the order of the President of the General Court of 15 May 2013 was dismissed on 19 December 2013 by order of the Vice-President of the European Court of Justice.⁶

¹ Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys.

² See Carolin Konzal, Christoph Weisser and Benita Zedelius, "Germany takes European Commission to court over European Toy Safety Directive's chemical restrictions" *International Product Liability Review* 48 (September 2012) p17.

³ Commission Decision of 1 March 2012 concerning the national provisions notified by the German Federal Government maintaining the limit values for lead, barium, arsenic, antimony, mercury and nitrosamines and nitrosatable substances in toys beyond the entry into application of Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys.

⁴ Order of the President of the General Court of 15 May 2013 in the case T-198/12 R; General Court of the European Union, press release No 59/13 of 16 May 2013.

⁵ In accordance with the order of the President of the General Court, the European Commission preliminarily approved the continued application of these limit values until the General Court's final decision of 7 October 2013 authorising Germany to maintain the limit values for antimony, arsenic, barium, lead and mercury beyond the entry into application of the limit values for chemical substances according to Article 55, second sentence of Directive 2009/48/C of the European Parliament and of the Council on the safety of toys in application of the Order of the President of the General Court of the 15 May 2013 (T-198/12R) (notified under document C(2013) 6387, text with EEA relevance (2013/492/EU).

⁶ Order of 19 December 2013, Commission v Germany, Case C-426/13 P(R), available at <http://curia.europa.eu>.

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COMMENT AND OUTLOOK

The outcome of these proceedings will strongly influence the future legal framework for limit values for chemicals in toys within the European Union. Toy manufacturers, importers and distributors should carefully monitor further developments in this case. As they adjust their products to the TSD's new limit values, companies should be aware that they might – at least provisionally – face issues in Germany as a result of the existing stricter requirements.

It is impossible to reliably predict either when these proceedings will be concluded, or what the outcome will be. But taking into account the average duration of procedures before the European Court, it is unlikely that a final judgment will be delivered before mid-2014. Further updates will be provided for readers when they are available.



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Meanwhile, the EU legislator has tightened limit values for cadmium⁷ and barium⁸ in toys. Both provisions have been in force since 20 July 2013. Germany believes that this new limit value for barium provides inadequate protection for children (current provisions in Germany impose stricter limit values). Both the Minister for Food, Agriculture and Consumer Protection and the Minister for Economic Affairs have stated that Germany will maintain its stricter limit values for barium in toys.⁹



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⁷ Commission Directive 2012/7/EU of 2 March 2012 amending, for the purpose of adaptation to technical progress, part III of Annex II to Directive 2009/48/EC of the European Parliament and of the Council relating to toy safety.

⁸ Commission Regulation (EU) No 681/2013 of 17 July 2013 amending part III of Annex II to Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys.

⁹ Press release no. 262 dated 19 September 2013.