

**EVALUATION OF
DIRECTIVE 2009/48/EC ON THE SAFETY OF TOYS
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

10 DECEMBER 2018



EXECUTIVE SUMMARY

Independent Retail Europe considers Directive 2009/48/EC on the safety of toys (Toy Safety Directive / TSD) generally useful and welcomes the clear obligations for distributors. This enables retailers – and especially SMEs – to apply the regulation more efficiently and with legal certainty.

However, Independent Retail Europe is concerned about one particular aspect of the Toy Safety Directive: The lack of clarity as regards ‘isolated cases’ which we will explain in the following text.

COMMENTS OF INDEPENDENT RETAIL EUROPE ON ISOLATED CASES

Isolated Cases

There is a lack of consistency between the toy safety rules and the general product safety rules on what distributors should do in “isolated cases.” This is because the TSD is not clear on the subject of isolated cases.

An isolated case is where a problem with only one sample of a product has been shown as the cause of a problem. In such a situation, a distributor may be unable to determine with certainty whether the source of this isolated case comes from the product itself, from an inappropriate usage of this product by a consumer or if the whole production line of products is faulty.

Under the existing toy safety rules, it would seem that to treat an isolated case, distributors should notify their competent authorities (in accordance with Article 7 (4) and chapter V of the TSD). The Member State will then introduce a notification concerning the product in question under the RAPEX system, where an isolated case of a defective product has been found.

Under the guidelines to the General Product Safety Directive, distributors are allowed to simply contact the manufacturer. While the Technical Documentation to the Toy Safety Directive (2016) briefly mentions isolated cases (in sections 4.2.1. and 4.3.2.), it does not offer much explanation nor detail. In addition, it only gives indication on how the manufacturer should proceed but does not refer to importers or distributors.

- ➔ **So-called ‘isolated cases’ refer to particular situations where only one single product or a limited number of products is un-safe.**
- ➔ **Through its guidelines, the general product safety rules allow distributors to merely contact the manufacturer** rather than notifying the authorities for the situation of an isolated case.
- ➔ **The Toy Safety Directive and its Technical Documentation provide no clear and explicit rules for isolated cases.**

Downside of unclear rules on ‘isolated cases’

The downside of using the RAPEX system for an isolated case is significant. Where a product is publicly named as problematic/dangerous via RAPEX, for an isolated case only, it may harm a manufacturer financially. The manufacturer may then seek damages from the distributor, who made a notification to the relevant competent authority before being absolutely certain of the origin of the problem, thereby souring the business relationship.

This situation does not occur under the General Product Safety Directive/guidelines, which are clear on how to deal with isolated cases. Under the general product safety guidelines (Blue Guide), as

mentioned above, manufacturers, importers and distributors are exempted from the general obligation to notify a supposedly unsafe product for situations where only a limited number of products is concerned and the risk has been fully controlled. That means in practice that a distributor only needs to contact the manufacturer to warn that an isolated case has been found. The producer can then assess what follow up is necessary and proportionate. This is particularly useful where, for example, the manufacturer can clearly identify the origin of the problem due to his knowledge of the technical specifications of the product or due to his experience of prior notifications from distributors. This avoids potential huge losses for either the manufacturer or the distributor, which can arise from a public RAPEX alert (a disproportionate measure for such an isolated case).

Because legislators have recognised this problem it is covered *inter alia* in the Blue Guide accompanying the General Product Safety Directive and is briefly – however not sufficiently – mentioned in the Technical Documentation to the Toy Safety Directive. The European Commission and the European Parliament took it a step further in the context of the Draft Consumer Product Safety Regulation (published in 2013), in which a provision on ‘isolated cases’ was even included in the main text.

- ➔ **Unclear rules on isolated cases can cause conflicts in the supply chain:** A distributor risks being sued by the manufacturer for unnecessarily reporting a product to the market surveillance authorities.
- ➔ A high number of needless notifications create **avoidable burdens for these the competent authorities.**

Proposal

In this context, the evaluation should look at whether a paragraph on “isolated cases” that repeats the general product safety rules could be added to the TSD guidance document / Technical Documentation. The objective is to clarify that, in an isolated case, distributors should only contact a producer, who can decide upon the next steps, rather than immediately entering into the RAPEX procedure. This clarification on what to do in isolated cases would be particularly helpful for the large number of SME distributors in the EU. Through an explicit provision in the TSD guidance, SME toys distributors would have a straight-forward piece of legislation to follow rather than trying to interpret the rules from a scattered set of documents.

- ➔ Because of its relevance in the product safety regime, **the situation of isolated cases should also be explicitly covered in the toy safety legal regime.**
- ➔ There should be a **clear section on isolated cases in the Toy Safety Directive guidance.**

Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.

Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their 373,764 independent retailers, who manage more than 594.000 sales outlets, with a combined retail turnover of more than 977 billion euros and generating a combined wholesale turnover of 287 billion euros. This represents a total employment of more than 6.341.000 persons.

More information about Independent Retail Europe under www.independentretaileurope.eu