Martin Cutts

Clarifying Eurolaw

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Original toy-safety directive: text and commentary

The paragraph numbers below correspond to the green boxes in the directive text on the left.

For the purposes of this exercise, the annexes have been excluded from the original and revised directives. Both directives are reproduced at 95% actual size to fit this booklet's page layout.

1 The directive lacks an obvious title; nor does it have a contents list or clearly stated purpose. This means the reader cannot quickly grasp what the directive is trying to do. The page layout is adequate but somewhat featureless and dull.

2 Readers expect the full stop to be the commonest punctuation on the page and are disconcerted when it isn't. The first sentence that begins here ends only when it has meandered to the bottom of the next page, some thousand words later, having traversed four legal-basis clauses ("citations") and 34 *whereas*-clauses ("recitals") that provide justification and a rationale for the Articles. This bizarre sentence structure immediately estranges the uninitiated. It is part of the performative or ritualistic style that remains common in the legal-drafting conventions of many countries. In England, similar structures occur as early as the tenth-century laws of King Athelstan, whose flowery prose contrasted with the terseness of his predecessor, Alfred the Great (whose civil service was leaner).

I notice that you use plain, simple language, short words and brief sentences. This is the way to write English – it is the modern way, and the best way. Stick to it; don't let fluff and flowers and verbosity creep in.

Mark Twain, writing to a schoolboy, c.1870

3 This is the first of the 34 *whereas*-clauses. In line with the interinstitutional agreement, recent directives use only one *whereas* before the recitals. There is no good reason for even this lonely, vestigial *whereas*, though of course *whereas* remains a useful word as part of normally constructed sentences. Despite the agreement's clear recommendation, the recitals in recent directives are sometimes left unnumbered, as they are here.

4 This and the next recital paragraph use somewhat unusual words when simpler ones would do: *without necessarily affording...protection, obstacles to the attainment* and *concerning the future orientation*. The language here is "nouny" rather than "verby" – a common feature of an artificially inflated style.

5 This paragraph is a 24-line block of type that is off-puttingly dense. It begins by referring to *the essential requirements* but does not explain what they are or where more information on them might be found. In all, the recitals refer to these requirements seven times before stating, in the seventh-last recital, that they are set out in Annex II. This is poor writing practice and inconsiderate to any reader, whether a private citizen or lawyer.

6 This paragraph uses *consist in*, which is not modern English.

Whereas, in view of the size and mobility of the toy market and the diversity of the products concerned, the scope of this Directive should be determined on the basis of a sufficiently broad definition of 'toys'; whereas, nevertheless, it should be made clear that some products are not to be regarded as toys for the purposes of this Directive either because they are not in fact intended for children or because they call for supervision or special conditions of use; 7

Whereas toys placed on the market should not jeopardize the safety and/or health either of users or of third parties; whereas the standard of safety of toys should be determined in relation to the criterion of the use of the product as intended, but allowance should also be made for any foreseeable use, bearing in mind the normal behaviour of children who do not generally show the same degree of care as the average adult user;

Whereas the standard of safety of the toy must be considered when it is marketed, bearing in mind the need to ensure that this standard is maintained throughout the foreseeable and normal period of use of the toy;

Whereas compliance with the essential requirements is likely to guarantee consumer health and safety; whereas all toys placed on the market must comply with these requirements and, if they do, no obstacle must be put in the way of their free movement;

Whereas toys may be presumed to comply with these essential requirements where they are in conformity with the harmonized standards, reference numbers of which have been published in the *Official Journal of the European Communities;*

Whereas toys that conform to a model approved by an approved body may also be regarded as complying with the essential requirements; whereas such conformity must be certified by the affixing of a European mark; 8

Whereas certification procedures must be established to define the way in which national approved bodies have to approve models of toys not in conformity with standards and issue type-examination certificates for them and for toys in conformity with standards, a model of which is submitted to them for approval;

Whereas adequate information for the Member States, the Commission and all the approved bodies must be provided for at the various stages of the certification and inspection procedures;

Whereas Member States must appoint bodies, called 'approved bodies', for the purposes of applying the system introduced for toys; whereas adequate information on these bodies must be provided and they must all comply with minimum criteria for their approval;

Whereas cases might arise where a toy does not satisfy the essential safety requirements; whereas, in such cases, the Member State which ascertains this fact must take all appropriate measures to withdraw the products from the market or to prohibit their being placed on the market; whereas a reason must be given for this decision and, where the reason is a shortcoming in the harmonized standards, these, or a part thereof, must be withdrawn from the list published by the Commission; 9

Whereas the Commission is to ensure that the harmonized European standards in all the areas covered by the essential requirements listed in Annex II are drawn up in sufficient time to enable Member States to adopt and publish the necessary provisions by 1 July 1989; whereas the national provisions adopted on the basis of this Directive should consequently become effective on 1 January 1990;

Whereas provision must be made for suitable action to be taken against anyone wrongfully affixing a mark of conformity;

Whereas checks on the safety of toys already on the market must be carried out by the competent authorities of the Member States;

Whereas, for some categories of toys that are particularly dangerous or intended for very young children, warnings or details of precautions to be taken must also be given; 10

Whereas the Commission must receive regular information on activities carried out under this Directive by the approved bodies; 11

Whereas those to whom any decision taken under this Directive is addressed must know the reason for that decision and the remedies open to them;

Whereas the opinion of the Scientific Advisory Committee for the evaluation of the toxicity and ecotoxicity of chemical compounds has been taken into account with respect to the health-based limits of bioavailability of metallic compounds in toys to children,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply to toys. A 'toy' shall mean any product or material designed or clearly intended for use in play by children of less than 14 years of age. 12

2. The products listed in Annex I shall not be regarded as toys for the purposes of this Directive. 13

Commentary

7 This paragraph uses tortured syntax: *Whereas, in view of the size and mobility of the toy market and the diversity of the products concerned, the scope of this Directive should be determined on the basis of a sufficiently broad definition of 'toys'....* The underlying idea is very simple: "A broad definition of 'toy' is needed because...". And it could say exactly that.

8 This paragraph mentions *approved body* for the first time. Later recitals also refer to *approved bodies*. Yet the term is not explained until four recitals later. This is troublesome to most readers, who either need an explanation as soon as a technical term is used, or the comfort of knowing where they can find it.

9 This paragraph uses *thereof*, a term rare in conversational and written English for at least a century.

10 In this paragraph – as in most of the recitals – the verb is in the passive voice. Overuse of passives tends to make texts hard to read, especially when the passive is combined with long sentences and unusual vocabulary.

11 This paragraph refers again to *approved bodies*, which were last mentioned six paragraphs before. This shows the disorder of the recitals. If headings had been used, the authors would have had to group like with like. Chaotic organisation is a serious nuisance to readers.

12 Article 1: At last, full stops begin to appear, but again there is no obvious purpose statement. The Article includes a definition, but definitions are not grouped anywhere. This makes it hard for readers who are dipping into the directive to know which words are defined.

13 Article 2: Individual Articles lack headings, and they are not grouped under section headings. Articles in recent directives do tend to be grouped under headings, which helps the reader to navigate – a clear improvement.

[Tom Paine] supposed that in politics words count and that words are deeds. He further supposed that liberty is connected with prose and that people unfriendly to citizens' liberty normally wrap their power in pompous or meaningless phrases. 'Bastilles of the word' was Paine's phrase for needlessly haughty language.

John Keane, "Tom Paine, a political life", London, 1995

Article 2

1. Toys may be placed on the market only if they do not jeopardize the safety and/or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the normal behaviour of children.

2. In the condition in which it is placed on the market, taking account of the period of foreseeable and normal use, a toy must meet the safety and health conditions laid down in this Directive.

14 3. For the purposes of this Directive, the expression 'placed on the market' shall cover both sale and distribution free of charge.

Article 3

Member States shall take all steps necessary to ensure that toys cannot be placed on the market unless they meet the essential safety requirements set out in Annex II.

Article 4

Member States shall not impede the placing on the market on their territory of toys which satisfy the provisions of this Directive.

Article 5

15 1. Member States shall presume compliance with the essential requirements referred to in Article 3 in respect of toys bearing the EC mark provided for in Article 11, hereinafter referred to as 'EC mark', denoting conformity with the relevant national standards which transpose the harmonized standards the reference numbers of which have been published in the *Official Journal of the European Communities*. Member States shall publish the reference numbers of such national standards.

16 2. Member States shall presume that toys in respect of which the manufacturer has not applied the standards referred to in paragraph 1, or has applied them only in part, or for which no such standards exist, satisfy the essential requirements referred to in Article 3 where, after receipt of an EEC type-examination certificate, their conformity with the approved model has been certified by the affixation of the EC mark.

Article 6

17 1. Where a Member State or the Commission considers that the harmonized standards referred to in Article 5 (1) do not entirely satisfy the essential requirements referred to in Article 3, the Commission or the Member State shall refer the matter to the Standing Committee set up under Directive 83/189/EEC, hereinafter referred to as 'the committee', setting out its reasons. The committee shall issue an opinion as a matter of urgency.

After receiving the committee's opinion, the Commission shall notify the Member States whether or not the standards concerned or a part thereof have to be withdrawn from the publications referred to in Article 5 (1).

2. The Commission shall inform the European standardization body concerned and, if necessary, issue a new standardization brief.

Article 7

18 1. Where a Member State ascertains that toys bearing the EC mark which are used as intended or in accordance with Article 2 are likely to jeopardize the safety and/or health of consumers and/or third parties, it shall take all appropriate measures to withdraw the products from the market, or to prohibit or restrict their placing on the market. The Member State shall inform the Commission immediately of this measure and indicate the reasons for its decision, stating in particular whether the non-compliance results from:

(a) failure to meet the essential requirements referred to in Article 3, if the toy does not meet the standards referred to in Article 5 (1);

(b) incorrect application of the standards referred to in Article 5 (1);

(c) shortcomings in the standards referred to in Article 5 (1).

19 2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that any measure as referred to in paragraph 1 is justified, it shall forthwith so inform the Member State that took the action and the other Member States. Where the decision referred to in paragraph 1 is attributed to shortcomings in the standards, the Commission, after consulting the parties concerned, shall bring the matter before the Committee within two months if the Member State which has taken the measures intends to maintain them and shall initiate the procedures referred to in Article 6.

20 3. Where the toy which does not comply with the requirements bears the EC mark, the competent Member State shall take appropriate measures and inform the Commission, which shall inform the other Member States.

21 4. The Commission shall ensure that the Member States are kept informed of the progress and outcome of this procedure.

Article 8

1. (a) Before being placed on the market, toys manufactured in accordance with the harmonized

14 Article 3: Like the earlier Articles, this uses *shall* to impose an obligation. Article 2 also uses *must* for this purpose. In modern British conversational English (and even in most formal writing), *shall* has lost its association with obligation. *Shall* is becoming unusual even in the simple future tense, except in questions. Most speakers of British English use only *will* in the future tense. When imposing an obligation, *must* is now preferable. It is becoming more common in British law, where *shall* and *must* seem to be used interchangeably. The New Zealand Law Commission offers a convincing line of argument:

> *May* should be used where a power, permission, benefit or privilege given to some person may but need not be exercised: exercise is discretionary. *Must* should be used where a duty is imposed which must be performed. Although *shall* is used to impose a duty or a prohibition, it is also used to indicate the future tense. This can lead to confusion. *Shall* is less and less in common usage, partly because it is difficult to use correctly. Use *must* instead of *shall*: it is clear and definite, and commonly understood. *Shall* and *must* are often used unnecessarily in declarative expressions, in an attempt to capture a sense of authority and obligation. In this situation, the present tense is often more appropriate. (Law Commission of New Zealand, *Legislation manual: structure and style*, 1996)

There's not much to be said about the period [full stop] except that most writers don't reach it soon enough.

William Zinsser, "On writing well", HarperCollins, 1990

15 Article 5(1): This begins with a long and complicated sentence that includes two internal cross-references and one external cross-reference, as well as a *hereinafter*. The latter word has rarely been used in conversational English for at least a century, except as a joke against legalese.

16 Article 5(2): The level of complication is gradually rising, after the first four relatively simple Articles. This 70-word sentence is hard to follow. It uses two internal cross-references – there are 44 in the Articles alone – and refers to a *certificate* and *model* which have not yet been mentioned or explained and for which no reference is given. The use of nouns like *receipt*, *conformity* and *affixation*, all derived from verbs, suggest that the writers are accustomed to smothering the verbs – "nouny" writing, not "verby".

17 Article 6(1): This uses four cross-references, a *hereinafter* and a *thereof*.

18 Article 7(1) refers in the tabulated list to the standards mentioned in Article 5(1). Since Article 5(1) refers to two kinds of standards, *relevant national* and *harmonized*, it is unclear which are meant. (It may even mean both.) Articles 6(1), 8(1)a and 10(3) refer specifically to *harmonized standards*, whereas Articles 8(1)b and 8(2)b return to *the standards referred to in Article 5(1)*. It is unclear whether this latter formula is careless drafting or deliberate inclusion of both national and harmonized standards.

19 Article 7(2) is unclear for the same reason.

20 Article 7(3) and many others use *where* as a synonym for *if*. This is a common trait of legal writing. *If* is often preferable because *where* suggests place.

21 Article 7(4): it is not immediately obvious what *this procedure* means.

standards referred to in Article 5 (1) must have affixed to them the EC mark by which the manufacturer or his authorized representative established within the Community confirms that the toys comply with those standards;

22 (b) The manufacturer or his authorized representative established within the Community shall keep the following information available for inspection:

— a description of the means (such as the use of a test report or technical file) whereby the manufacturer ensures conformity of production with the standards referred to in Article 5 (1) and, as appropriate: an EC type-certificate drawn up by an approved body; copies of the documents the manufacturer has submitted to the approved body; a description of the means whereby the manufacturer ensures conformity with the approved model,

— the addresses of the places of manufacture and storage,

— detailed information concerning the design and manufacture.

Where neither the manufacturer nor his authorized representative are established within the Community, the above obligation to keep a dossier available shall be the responsibility of the person who places the toy on the Community market.

23 2. (a) Toys which do not conform in whole or in part to the standards referred to in Article 5 (1) must have affixed to them, before being placed on the market, the EC mark by which the manufacturer or his authorized representative established within the Community confirms that the toy concerned conforms to the model examined in accordance with the procedures laid down in Article 10 which an approved body has stated complies with the essential requirements referred to in Article 3;

(b) the manufacturer or his authorized representive established within the Community shall keep the following information available for inspection:

— a detailed description of manufacture,

— a description of the means (such as the use of a test report or technical file) whereby the manufacturer ensures conformity with the approved model,

— the addresses of the places of manufacture and storage,

— copies of the documents the manufacturer has submitted to an approved body in accordance with Article 10 (2),

— the test certificate for the sample or a certified copy thereof.

Where neither the manufacturer nor his authorized representative is established within the Community, the above obligation to keep a dossier available shall be the responsibility of the person who places the toy on the market in the Community.

24 3. In the event of non-observance of the obligations laid down in paragraphs 1 (b) and 2 (b), the competent Member State shall take appropriate measures to ensure that those obligations are observed.

Where non-observance of the obligations is obvious, it may in particular require the manufacturer or his authorized representative established within the Community to have a test performed at his own expense within a specified period by an approved body in order to verify compliance with the harmonized standards and essential safety requirements.

Article 9

1. The minimum criteria which Member States must meet in order to appoint the approved bodies referred to in this Directive are contained in Annex III.

25 2. Each Member State shall notify the Commission of the approved bodies responsible for carrying out the EC type-examination referred to in Articles 8 (2) and 10. The Commission shall publish a list of these bodies, with the distinguishing numbers it has given them, in the *Official Journal of the European Communities* for information and shall be responsible for updating it.

26 3. A Member State which has approved a body shall withdraw approval if it finds that the body no longer meets the criteria listed in Annex III. It shall forthwith inform the Commission thereof.

Article 10

27 1. EC type-examination is the procedure by which an approved body ascertains and certifies that a model of a toy satisfies the essential requirements referred to in Article 3.

2. The application for EC type-examination shall be lodged with an approved body by the manufacturer or by his authorized representative established within the Community.

The application shall include:

— a description of the toy,

— the name and address of the manufacturer or of his authorized representative or representatives, and the place of manufacture of the toy,

— comprehensive manufacturing and design data; and shall be accompanied by a model of the toy to be manufactured.

22 Article 8 speaks of *an authorised representative established within the Community*, a lengthy phrase that is repeated several times. It might therefore be a candidate for substitution by a suitable defined term. In the rewrite, *EC-based representative* is used and defined.

23 Article 8(2)a is an 80-word sentence that includes three internal cross-references. It is hard to follow.

24 Article 8(3) begins with *In the event of non-observance of the obligations....* This is unusual style in written English and rare in spoken English except in highly formal settings. It merely means, "If x does not observe y".

25 Article 9(2) refers to *carrying out the EC type-examination referred to in Articles 8(2) and 10*. But Article 8(2) does not use the word *type-examination*. Readers have to work out that some part of Article 8(2) is speaking about type-examination. It is hard to know which part.

26 Article 9(3): *forthwith* and *thereof* are outdated English.

27 Article 10(1) at last defines EC type-examination, which has already been mentioned several times. It does so partly by referring the reader to Article 3 instead of direct to Annex II, where the ultimate explanation of *essential requirements* is to be found.

Why do lawyers write so that no-one can understand them? They say it is because they need to be precise, and that their language has been honed by centuries of litigation. But this is baloney. The real reason is that, although they are paid for their skill with words, most lawyers are dull and clumsy writers who have not broken the bad habits they learnt as students.

Mark Adler (a lawyer), quoted in "The plain English guide", Martin Cutts, Oxford, 1995

3. The approved body shall carry out the EC type-examination in the manner described below:

— it shall examine the documents supplied by the applicant and establish whether they are in order,

— it shall check that the toy would not jeopardize safety and/or health, as provided for in Article 2,

— it shall carry out the appropriate examinations and tests — using as far as possible the harmonized standards referred to in Article 5 (1) — in order to check whether the model meets the essential requirements referred to in Article 3,

— it may ask for further examples of the model.

4. If the model complies with the essential requirements referred to in Article 3, the approved body shall draw up an EC type-examination certificate which shall be notified to the applicant. This certificate shall state the conclusions of the examination, indicate any conditions attaching to it and be accompanied by the descriptions and drawings of the approved toy.

The Commission, the other approved bodies and the other Member States may obtain on request a copy of the certificate and, on reasoned request, a copy of the design and manufacturing schedule and the reports on the examinations and tests carried out.

5. An approved body which refuses to issue an EC type-examination certificate shall so inform the Member State which approved it and the Commission, giving the reasons for refusal.

Article 11

28 1. The EC mark referred to in Articles 5, 7 and 8 and the name and/or trade name and/or mark and address of the manufacturer or his authorized representative or the importer into the Community shall as a rule be affixed either to the toy or on the packaging in a visible, easily legible and indelible form. In the case of small toys and toys consisting of small parts these particulars may be affixed in the same way to the packaging, to a label or to a leaflet. Where the said particulars are not affixed to the toy, the consumer's attention must be drawn to the advisability of keeping them.

2. The EC mark shall consist of the symbol 'CE'.

3. The affixing to toys of marks or inscriptions that are likely to be confused with the EC mark shall be prohibited.

4. The particulars referred to in paragraph 1 may be abbreviated provided that the abbreviation enables the manufacturer, his authorized representative or the importer into the Community to be identified.

5. Annex IV sets out the warnings and indications of precautions to be taken during use that have to be given for certain toys. Member States may require that these warnings and precautions, or some of them, together with the information specified in paragraph 4, be given in their own national language or languages when the toys are placed on the market.

Article 12

29 1. Member States shall take the necessary measures to ensure that sample checks are carried out on toys which are on their market, so as to verify their conformity with this Directive.

The authority responsible for inspection:

— shall obtain access, on request, to the place of manufacture or storage and to the information referred to in Article 8 (1) (b) and (2) (b),

— may ask the manufacturer, his authorized representative or the person responsible for marketing the toy established within the Community to supply the information as provided for in Article 8 (1) (b) and (2) (b) within a period specified by the Member State,

— may select a sample and take it away for examination and testing.

2. Every three years, Member States shall send the Commission a report on the application of this Directive.

3. The Member States and the Commission shall take the necessary measures to guarantee confidentiality with regard to the forwarding of the copies relating to the EC type-examination referred to in Article 10 (4).

Article 13

30 Member States shall regularly inform the Commission of the activities carried out in pursuance of this Directive by the bodies they have approved so that the Commission may ensure that the inspection procedures are implemented correctly and without discrimination.

Article 14

31 Any decision taken pursuant to this Directive and involving restrictions on the placing of the toy on the market shall state the exact grounds on which it is based. It shall be notified at the earliest opportunity to the party concerned, who shall at the same time be informed of the remedies available to him under the laws in force in the Member State in question and of the time limits applying to such remedies.

Article 15

1. Member States shall adopt and publish by 30 June 1989 the provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

They shall apply these provisions from 1 January 1990.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 16

This Directive is addressed to the Member States.

Done at Brussels, 3 May 1988.

For the Council
The President
M. BANGEMANN

32

28 Article 11 defines *EC mark*, though the directive has already referred to it in three previous Articles. It includes the phrase *said particulars*, a use of *said* as a demonstrative that has been rare in conversational and written English for at least a century.

Let every man take care how he...writes ...and not set down at random, higgle-de-piggledy, whatever comes into his noddle.
Cervantes, 1547-1616

29 Article 12 is a miscellany of points about sample checks, reporting to the Commission, and confidentiality. It is hard to see on what principle these things are grouped.

30 Article 13: *in pursuance of* is archaic English; *under* is normally a sound option.

31 Article 14: *pursuant to* is similarly archaic.

32 Article 15 uses *forthwith* and *thereof*, both archaic.

Possible effect of the interinstitutional agreement

How the toy-safety directive might be different, were it drawn up today

The interinstitutional agreement (referred to on page 4) postdates by a decade the drafting of the original toy-safety directive, so William Robinson, legal reviser at the European Commission, has kindly commented on how its structure might have differed had the agreement been in force when it was drafted in 1988. Here are his comments:

Some experience of popular lecturing had convinced me that the necessity of making things plain to uninstructed people was one of the very best means of clearing up the obscure corners of one's own mind.

TH Huxley, 1894

"The 1996 Council Resolution on the quality of drafting emphasized the need for legislation to be drafted in clear, simple, concise and unambiguous terms.

"The 1998 interinstitutional agreement reinforced that message and gave more detailed guidance. But it also stressed the need for practical measures to give effect to the guidelines. One step demanded was for better drafting to be built in from the start of the drafting process. If the toy-safety directive were adopted today, the whole approach might be different.

"Other initiatives such as the *New approach to technical harmonisation and standardisation*, *Better lawmaking* and *Simplified legislation for the internal market* have also had a major impact.

"Those measures affect all stages of the lawmaking process from the first consultations within the Member States to the final adoption by the Parliament and Council.

"While it is hazardous to speculate precisely what difference those basic changes in approach might have made, the following specific consequences of the interinstitutional agreement may be mentioned:

- the possibility of giving a short title (guideline 8);
- *whereas* would appear once only before the recitals;
- each recital would be divided into shorter sentences beginning with a capital letter and ending in a full stop (guideline 4);
- Article 1 might be divided into three separate Articles, one on the subject matter (what is the purpose), a second on the scope (what is covered and what is not), and a third containing any definitions (guidelines 13 and 14);
- individual Articles might be split up (guideline 4, JPG 4.5.2);
- in lists, each item might be identified by a letter or number (guideline 15);
- some material given in the annexes might be moved to the Articles and vice versa (guideline 22)."

Commentary on the revised directive

Ideas behind the rewrite

The main ideas behind the rewrite (shown on pages 21-27) are to:

- give the directive a short and memorable title – point 1 on page 21;
- provide a contents list – point 2;
- provide a citizen's summary – point 3;
- state early in the directive what it is about and what it does – points 3 and 4;
- state early in the directive when it must be transposed into national law instead of stating this at the end, as in the original – point 5;
- group related points under headings, as in the definitions – point 6;
- write the Articles in reasonably clear English using, as far as possible, everyday words, short sentences and simple word order – see point 7 and Article 14, for example; and
- make the recitals (or "Reasons", as they are called here) more comprehensible by using straightforward English and splitting them up – point 8.

Lawyerisms are words like aforementioned, whereas, res gestae, and hereinafter. They give writing a legal smell, but they carry little or no substance.

Richard C Wydick, "Plain English for lawyers", Carolina Academic Press, 1985

Structural changes

The directive has a very different structure from the original, with 43 headings compared with 16. A coherent system of headings seems essential in this kind of document, for four main reasons:

1 It helps readers see how things are organized.
2 It helps readers find what they want.
3 It makes manifest the guiding hand that should be present in all writing whose purpose is primarily informative.
4 It forces drafters to organize themselves and show they have done so.

The original recitals have been transformed from (effectively) one sentence of a thousand words into 36 sentences averaging 23 words, with eight headings. The revised Articles have cut internal cross-references by over a half, from 44 to 21.

The Reasons appear at the end not because they are unimportant, but because they are less important to most readers than the summary and the Articles. There has been discussion about the naming of this section, but "reasons" seems appropriate in view of a specific reference in Article 253 of the EC treaty:

> Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, *shall state the reasons on which they are based* and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty. [My italics]

Citizen's summary

The citizen's summary is not part of the directive, so it is not listed in the table of contents. It aims to give a quick overview of the main points so that if people read nothing else, they will at least have got the headline news. Paragraph 8 states that the summary has no legal effect.

Difficulties in the redrafting

In the 1988 version, Articles 5–10 were the meat of the directive and the hardest

to understand. For the rewrite, I consulted EC translators, subject experts and a textbook on the directive. Even then I had to apply some guesswork. The revision is the most accurate I could achieve; but, as stated earlier, it is rarely possible to get exact equivalence in a rewrite exercise.

Readers' opinions

Some of the amendments to the original directive are minor – for example, in favouring *if* to *where* when starting conditional clauses – but their benefits accumulate throughout the directive.

I hate anything that occupies more space than it is worth. I hate to see a load of bandboxes go along the street, and I hate to see a parcel of big words without anything in them.

William Hazlitt, 1821

In the new Article 2, there are major changes: careful use of definitions has enabled the main text to be "unpacked" – for example, the definitions of *national standards* and *harmonized standards* have saved many words. This is perhaps why the revised directive seems easier to read, at least to most of the people consulted so far. Compare, for example, the original Article 5 with the revised Article 6. Here are two other examples of the different approach, both from the recitals. First:

> Whereas the standard of safety of the toy must be considered when it is marketed, bearing in mind the need to ensure that this standard is maintained throughout the foreseeable and normal period of use of the toy.

becomes

> Toys should not only be safe when marketed, but throughout their foreseeable and normal period of use.

Second:

> Whereas the opinion of the Scientific Advisory Committee for the evaluation of the toxicity and ecotoxicity of chemical compounds has been taken into account with respect to the health-based limits of bioavailability of metallic compounds in toys to children.

becomes

> Children can suffer ill-effects from ingesting metallic compounds from toys, for example by sucking them. So the opinion of the EC Scientific Advisory Committee has been considered when drawing up limits for the presence of these compounds in toys.

Whether the directive really is easier to follow is for every individual to decide. No doubt parts of it could be clarified still further, given better knowledge of the subject matter. In *The plain English guide* (Oxford, 1995), I argued that "no writing can truly be regarded as clearer or better...until users' performance proves it". There may be merit in a research project to determine readers' preference between the two versions of the directive, perhaps asking them (under test conditions) to locate answers to particular questions and give a clarity rating for each version. One research method is shown in *Lucid law* (cited earlier).

Typography

The typography of the revision is similar to that of the original, which works well enough. To help readers locate particular parts, the revision uses bold sans-serif small capitals for the major headings and bold type for the minor headings.

Request for comments

If you have comments on the revised version, please send them to Plain Language Commission. They will be taken into account in any future edition.

Safety of Toys Directive

Council Directive 88/378/EEC
30 February 1988
revised in March 2001 by Plain Language Commission
on the approximation of the laws of the Member States
concerning the safety and free trading of toys

Contents

CITIZEN'S SUMMARY

1 This Directive has two main purposes:

(a) to harmonize standards of toy safety throughout the European Community (EC), so that makers can freely trade their toys without being impeded by differences in national regulations;

(b) to ensure that every toy is safe and healthy for children and others to use during its normal period of use and during foreseeable play conditions, given that children generally take less care than adults.

2 Makers (or their authorized representatives) must show that their toys comply with the safety requirements in the Directive, which include the harmonized standards. They must then affix or, for small toys, attach the CE symbol to the toy, its packaging or a leaflet.

3 In general, a maker (or representative) may affix the CE symbol if:

(a) the toy complies with the harmonized standards;

(b) the toy does not comply with the harmonized standards but the maker states that it conforms to a specimen certified by an 'approved body' appointed by the Member State. The certification process is called EC type-examination.

4 Member States can make sample checks on toys to verify that they conform to the safety requirements. Member States are to take action against the wrongful affixing of the CE symbol.

5 Makers (or representatives) must keep available for inspection a dossier about each toy. Member States may inspect it and, in certain circumstances, take away samples of the toy for inspection and testing. If a proper dossier is not kept, a Member State can require the maker to have a test done on the toy at the maker's own expense by an approved body. The purpose is to check that the toy conforms to the safety requirements.

6 By 1 January 1990, Member States must apply their own regulations or laws to give effect to this Directive. From that date, toys may not be sold if they do not comply with the safety requirements.

7 The substance of the Directive is its Articles and Annexes. The 'Legal basis and procedures' (page 3) and the 'Reasons' (page 6) explain why the Articles say what they do. If the Articles and Annexes are unclear, the Legal basis and procedures and the Reasons can be used to help interpret them.

8 This summary is for the interested general reader only. It is not intended to give guidance on the meaning of the Directive or to have any legal effect.

LEGAL BASIS AND PROCEDURE

1 The Council has adopted this Directive:

(a) after considering Article 100A of the Treaty establishing the European Economic Community;

(b) after considering a proposal from the Commission (1);

(c) in cooperation with the European Parliament (2); and

(d) after considering the opinion of the Economic and Social Committee (3).

ARTICLES

Article 1

Application and timing

4 1 This Directive is about the free trading and safety of toys. It is addressed to Member States.

5 2 By 30 June 1989, Member States must adopt and publish the provisions necessary to comply with this Directive, then apply them from 1 January 1990.

Article 2

Definitions

6 1 For the purposes of this Directive:

(a) *Committee* means the Standing Committee set up under Directive 83/189/EEC;

(b) *EC-based representative* means a toy maker's authorized representative based in the Community;

(c) *EC mark* means the CE symbol as described in Council Decision 93/465/EEC;

(d) *EC type-examination* means the procedure for ascertaining and certifying that a specimen of a toy satisfies the safety requirements;

(e) *harmonized standards* means the harmonized standards referred to in Article 6(2) whose reference numbers have been published in the *Official Journal;*

(f) *national standards* means the relevant national standards which transpose the harmonized standards;

(g) *Official Journal* means the *Official Journal of the European Communities;*

(h) *safety requirements* means the essential safety requirements in Annex II;

(i) *to market* is equivalent to 'to place on the market' and includes distributing free of charge as well as selling;

(j) *toy* means a product or material designed or clearly intended for use in play by children under 14 years old. The products listed in Annex I are not toys.

Article 3

Circumstances in which toys may be marketed

1 Toys may be marketed only if they do not jeopardize the safety or health of users or others when they are used as intended or in a foreseeable way by children, bearing in mind the normal behaviour of children.

2 In the condition in which a toy is marketed – taking account of the period of its normal and foreseeable use – it must comply with the safety requirements.

Article 4

Action to stop non-compliant toys being marketed

Member States must do all they can to ensure that toys are not marketed unless they comply with the safety requirements.

Article 5

Free access of compliant toys to markets

Member States must not impede the marketing on their territory of toys that comply with this Directive.

Article 6

Presumption of compliance if toys bear the EC mark

1 Member States must presume that toys comply with the safety requirements if they bear the EC mark.

2 Toys are eligible to bear the EC mark if they comply with national standards. Member States must publish the reference numbers of their national standards. If the maker has not applied the standards, or has applied them only in part, or if no such standards exist for the toy, then the toy is eligible to bear the EC mark if it has received an EC type-examination certificate under Article 11.

(1) OJ C 282, 8.11.1986, p.4.
(2) OJ C 246, 14.9.1987, p.91 and Decision of 9 March 1988 (not yet published in the Official Journal).
(3) OJ C 232, 31.8.1987, p.22.

7

Article 7

References to the Committee when harmonized standards do not satisfy requirements

1 If a Member State or the Commission considers that the harmonized standards do not satisfy the safety requirements, the Commission or the Member State must refer the matter to the Committee, giving its reasons. The Committee must then urgently issue an opinion. After receiving the opinion, the Commission must notify Member States whether or not the standards concerned or a part of them must be withdrawn from the *Official Journal* and other publications.

2 The Commission must inform the European standardization body concerned and, if necessary, issue a new standardization brief.

Article 8

Action if a toy bearing the EC mark could jeopardize safety or health

1 It may happen that a Member State ascertains that toys bearing the EC mark which are used as intended or in accordance with Article 3 are likely to jeopardize the safety or health of children or others. If so, the Member State must take all appropriate measures to get the toys withdrawn from the market, or to prohibit or restrict their marketing. The Member State must inform the Commission immediately and state the reasons for its decision, in particular whether the toy is non-compliant because:

(a) although the EC mark was affixed because the toy received an EC type-examination certificate, the toy breaches the safety requirements or does not meet the standards in Article 6 (or both);

(b) it breaches the standards in Article 6 though claimed to be compliant with them;

(c) the standards it complies with have shortcomings.

2 The Commission must consult the parties concerned as soon as possible. Then, if the Commission finds that any measure mentioned in paragraph 1 is justified, it must immediately so inform the Member State that took the action and the other Member States. If the Commission attributes the decision mentioned in paragraph 1 to shortcomings in standards, then, after consulting the parties concerned, it must:

— bring the matter before the Committee within two months if the Member State that has taken the measures intends to maintain them; and

— begin the procedures mentioned in Article 7.

3 If the toy that does not comply with the safety requirements bears the EC mark, the competent Member State must take appropriate measures and inform the Commission, which must inform the other Member States.

4 The Commission must ensure that Member States are kept informed of the progress and outcome of this procedure.

Article 9

Obligations of makers and representatives before toys are marketed

1 (a) Before a toy complying with the harmonized standards is marketed by the maker or his EC-based representative, it must have affixed to it the EC mark to show compliance.

(b) The maker or his authorized EC-based representative must keep available for inspection a dossier, giving:

— a description of how (such as the use of a test report or technical file) the maker ensures conformity of production with the harmonized standards and, if appropriate: an EC type-certificate drawn up by an approved body; copies of the documents the maker has submitted to the approved body; and a description of how the maker ensures conformity with the approved specimen;

— the addresses of the places of manufacture and storage;

— detailed information about the design and manufacture.

If both the maker and his authorized representative are based outside the EC, then the person who markets the toy here must keep the dossier available.

2 (a) Before being marketed, toys that in whole or in part do not comply with the harmonized standards must have affixed to them the EC mark by which the maker or his EC-based representative confirms that the toy conforms to the specimen examined in accordance with the procedures in Article 11, an approved body having already stated that the specimen complies with the requirements in Article 4.

(b) The maker or his EC-based representative must keep available for inspection a dossier giving:

— a detailed description of manufacture;

— a description of how (such as the use of a test report or technical file) the maker ensures conformity with the approved specimen;

— the address of the places of manufacture and storage;

— copies of the documents the maker has submitted to an approved body in accordance with Article 11(2);

— the test certificate (or a certified copy of it) for the sample.

If both the maker and his authorized representative are based outside the EC, then the person who markets the toy here must keep the dossier.

3 If the obligations in paragraphs 1(b) and 2(b) are not being fulfilled, the competent Member State must take appropriate measures to ensure that they are. In particular the Member State may require the maker or his EC-based representative to have a test performed on the toy at his own expense within a specified period by an approved body. The test is to verify that the toy complies with the harmonized standards and safety requirements.

Article 10

Approved bodies

1 Annex III states the minimum criteria to be met by Member States in order to appoint approved bodies responsible for carrying out EC type-examination.

2 Each Member State must notify the Commission of the approved body. The Commission must publish a list of them – with the distinguishing numbers it has given them – in the *Official Journal*, and is responsible for updating it.

3 A Member State that has approved a body must withdraw approval if it finds that the body no longer meets the criteria in Annex III. It must immediately inform the Commission of the withdrawal.

Article 11

EC type-examination

1 Application for EC type-examination must be lodged with an approved body by the maker or his authorized EC-based representative. The application must be accompanied by a specimen of the toy to be manufactured and must include:

— a description of the toy;

— the name and address of the maker or his authorized representative, and the places of manufacture of the toy;

— comprehensive manufacturing and design data.

2 The approved body must carry out the EC type-examination in the following way:

— it must examine the documents supplied by the applicant and establish whether they are in order;

— it must check that the toy would not jeopardize safety or health, as provided for in Article 3;

— it must perform the appropriate examinations and tests, using as far as possible the harmonized standards, in order to check whether the specimen meets the safety requirements;

— it may ask for further examples of the specimen.

3 If the specimen complies with the safety requirements, the approved body must draw up an EC type-examination certificate and notify the applicant of it. The certificate must state the conclusions of the examination and any conditions attaching to it, and be accompanied by the descriptions and drawings of the approved toy. On request the Commission, other approved bodies and other Member States may get a copy of the certificate. On reasoned request they must be given a copy of the design and manufacturing schedule and the reports on the examinations and tests. The Member States and the Commission must take the necessary measures to guarantee confidentiality when forwarding these copies.

4 An approved body that refuses to issue an EC type-examination certificate must so inform the Member State that approved it and the Commission, giving reasons.

Article 12

EC mark

1 The EC mark and the name and/or trade name and/or mark and address of the maker or his authorized EC-based representative or the importer into the Community must normally be affixed either to the toy or on the packaging in a visible, easily legible and indelible form. For small toys and toys consisting of small parts, these details may be affixed in the same way to the packaging, to a label or to a leaflet. If these details are not affixed to the toy, the consumer must be informed that it is advisable to keep them.

2 Marks or inscriptions that are likely to be confused with the EC mark must not be affixed to toys.

3 The details mentioned in paragraph 1 may be abbreviated but the maker, his authorized EC-based representative or the importer into the Community must remain easily identifiable from them.

4 Annex IV sets out the warnings and indications of precautions to be taken during use that have to be given for certain toys. Member States may require that these warnings and precautions, or some of them, and the information specified in paragraph 3, be stated in their own national language or languages when the toys are marketed.

Article 13

Sample checks by Member States

Member States must do what is necessary to ensure that sample checks are made on marketed toys, so as to verify that they conform to this Directive. The authority responsible for inspection:

— may ask for and must then be given access to the place of manufacture or storage and to the appropriate dossier mentioned in Article 9;

— may ask the maker, his authorized representative or the person responsible for marketing the toy based in the EC to give it the appropriate dossier mentioned in Article 9 within a period specified by the Member State;

— may select a sample and take it away for examination and testing.

Article 14

Information from Member States to the Commission

1 Member States must immediately inform the Commission when they have adopted and published the provisions necessary to comply with this Directive.

2 Member States must communicate to the Commission the texts of the provisions of national law that they adopt in the field covered by this Directive.

3 Every three years, Member States must send the Commission a report on how this Directive is working.

4 Member States must regularly inform the Commission of the activities carried out under this Directive by the bodies they have approved so that the Commission may ensure that the inspection procedures are implemented correctly and without discrimination.

Article 15

Clarity and speed of decisions

Any decision taken under this Directive and involving restrictions on the marketing of a toy must state its precise reasons. The parties concerned must:

— be notified at the earliest opportunity;

— be informed at the same time of their remedies under the laws of the Member State in question, and of the time limits for applying the remedies.

Not done at Brussels, 3 May 1988

Not for the Council

Not the President: F T Fogg

REASONS

Effect of differences in laws of the Member States

1 The laws, regulations and administrative provisions of the Member States about the safety of toys differ in scope and content. These differences may create barriers to trade and unequal competition in the internal market, without necessarily protecting consumers – especially children – against hazards.

2 Obstacles to an internal market of safe toys should be removed. The marketing and free movement of toys should therefore be subject to uniform rules based on the objectives on protection of consumer health and safety in the Council resolution of 23 June 1986 (4).

Harmonized standards

3 To help provide proof of compliance with requirements on safety and health, harmonized standards at European level are needed, particularly on the design and composition of toys. This will enable Member States to presume that products complying with the standards conform to the requirements. The harmonized standards are drawn up by private bodies and should remain non-mandatory texts. These private bodies – the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) – are recognized as the competent bodies for the adoption of harmonized standards in accordance with the general guidelines for cooperation which they and the Commission signed on 13 November 1984.

4 For the purposes of this Directive, a harmonized standard is a technical specification (European standard or harmonization document) adopted by one or both of those bodies upon a remit from the Commission in accordance with Council Directive 83/189/EEC (5) and on the basis of the general guidelines.

5 The Council resolution of 7 May 1985 set out a new approach to technical harmonization and standards (6). It

(4) OJ C 167, 5.7.1986, p.1.
(5) OJ L 109. 26.4.1983, p.8. Directive last amended by the Act of Accession of Spain and Portugal.
(6) OJ C 136, 4.6.1985, p.1.

stated that harmonization should consist of establishing the safety requirements that all toys must satisfy if they are to be marketed.

Considerations when assessing the safety of toys

6 The toy market is large, diverse and fast-moving, so this Directive's scope should be based on a broad definition of 'toy'. However, for the purposes of this Directive, some products are not to be regarded as toys because:

(a) they are not intended for children; or

(b) they call for supervision or special conditions of use.

7 Toys should not jeopardize the safety or health of users or others. The standard of safety of toys should be set in relation to the use intended by the maker. Yet allowance should be made for any foreseeable use by children, since they generally take less care than adults.

8 Children can suffer ill-effects from ingesting metallic compounds from toys, for example by sucking them. So the opinion of the EC Scientific Advisory Committee has been considered when drawing up limits for the presence of these compounds in toys.

9 Toys should not only be safe when marketed, but throughout their foreseeable and normal period of use.

Compliance with requirements — Toys already on the market — Warnings

10 Compliance with the safety requirements is likely to guarantee consumer health and safety, so toys should comply with them. If they do, nothing should impede their being marketed. A CE mark should be affixed to certify compliance.

11 Toys may be presumed to comply with these requirements if they conform to the harmonized standards whose reference numbers have been published in the *Official Journal*.

12 Member States should appoint 'approved bodies' to apply a system of inspection and certification for toys. Adequate information about these bodies should be provided and they should comply with minimum criteria for their approval.

13 Certification procedures should be established to define how approved bodies will:

(a) issue type-examination certificates for toys that comply with the standards, when a specimen has been submitted to them; and

(b) approve specimens of toys submitted to them that do not comply with the harmonized standards, and issue type-examination certificates for them.

14 Toys that receive a type-examination certificate from an approved body may be regarded as complying with the requirements.

15 There should be rules to ensure that adequate information for the Member States, the Commission and all the approved bodies is provided at the various stages of certification and examination.

16 Checks on the safety of toys already on the market should be made by the competent authorities of Member States.

17 For some categories of toys that are particularly dangerous or intended for very young children, warnings or details of precautions should also be given.

Non-compliance and wrongful acts

18 If a toy does not comply with the safety requirements, the Member State that ascertains this should get it withdrawn it from the market or prohibit its being marketed. The Member State should state why it has done so. If the reason is a shortcoming in the harmonized standards, then they or a part of them should be withdrawn from the Commission's published list.

19 There should be rules to ensure that suitable action is taken against anyone wrongfully affixing a mark of conformity.

Timetable for adoption by Member States

20 The Commission should ensure that the harmonized standards in all the areas covered by the requirements listed in Annex II are drawn up quickly enough to enable Member States to adopt and publish the necessary provisions by 30 June 1989. The national provisions adopted on the basis of this Directive should become effective on 1 January 1990.

Information about activities of approved bodies

21 The Commission should receive regular information on the work of approved bodies acting under this Directive.

Information about decisions

22 Those to whom any decision under this Directive is addressed should be told why it was taken and what they can do about it.

Afterword

Everyone in the European Union institutions seems to agree that EU law should be drafted clearly, simply and precisely. The question is: how? How clear, how simple, how precise? In his brave rewriting of the 1988 toy-safety directive, Martin Cutts has provided a concrete example. Following clear-drafting principles similar to those he applied to the UK's Timeshare Act 1992 in *Lucid law* (Plain Language Commission, 2000), he has taken the directive apart and reassembled it in a clearer and more usable form, blowing away its cobwebs and legal fog.

In the process, he has found that clarity depends not only on presentation and drafting – important as they are – but on clarity of intent. This is the key problem faced by all legal drafters, and in the EU institutions also by translators, who have to produce all the different language versions of every legal instrument. Legal drafters and translators in the EU institutions are the servants of the politicians who engineer the unique international compromise that is EU law. If the decision brokers can forgo fudge, we wordsmiths can forgo fog. The rewritten toy-safety directive shows us how.

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