



Press and Information

General Court of the European Union  
**PRESS RELEASE No 72/14**  
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Judgment in Case T-198/12  
Germany v Commission

## **The General Court confirms the Commission's decision according to which Germany may not maintain its current limit values for arsenic, antimony and mercury in toys, but annuls the decision in part as regards lead**

*Germany has not proved that those limit values, which correspond to the old EU standard, ensure a higher level of protection than the new European limit values*

In 2009, the EU adopted a new 'Toys' directive,<sup>1</sup> in which it laid down new limit values for certain chemical substances present in toys, such as, inter alia, heavy metals. Germany, which had voted against that directive in the Council, takes the view that the limit values applicable in Germany for lead, barium, antimony, arsenic and mercury offer a higher level of protection, on the basis that those values correspond to the old 'Toys' directive of 1988.<sup>2</sup> Germany therefore requested authorisation from the Commission to maintain those old values. By decision of 1 March 2012, the Commission rejected that request so far as concerns antimony, arsenic and mercury, and authorised the continued application of the German limit values for lead and barium only until 21 July 2013 at the latest.

Germany brought an action for annulment of that decision. It also applied for an interim measure in order to be able to continue to apply its current limit values pending the delivery of the judgment on the substance of the case. By order of 15 May 2013, the President of the General Court ordered the Commission to authorise that the five German limit values be maintained pending the General Court's decision in the main proceedings.<sup>3</sup>

**In today's judgment, the General Court, in the main proceedings, dismisses Germany's action so far as concerns arsenic, antimony and mercury.**

The General Court recalls, first of all, that a Member State may request that pre-existing national measures be maintained where the Member State takes a different view of the risk to public health than the assessment accepted by the EU legislature when it adopted the European harmonisation measure. To that end, it falls to the requesting Member State to prove that the national measures ensure, in terms of public health, a level of protection higher than that of the harmonisation measure of the Union and that they do not go beyond what is necessary to obtain that objective.

In the context of a comparison of the German limit values and the values laid down in the new directive for arsenic, antimony and mercury, the General Court observes that the directive establishes migration limits, the risk to health being regarded as linked to the quantity of a given harmful substance that may be released by a toy before being absorbed by a child.<sup>4</sup> In addition, that directive lays down three different migration limit values, defined by reference to the type of

<sup>1</sup> Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p. 1). That directive had to be transposed into national laws, regulations and administrative provisions at the latest by 20 January 2011, and those national measures were to be applied from 20 July 2011.

<sup>2</sup> Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ 1988 L 187, p. 1).

<sup>3</sup> Order of the President of the General Court in Case [T-198/12 R](#) *Germany v Commission*; see also Press Release No [59/13](#). By order in Case [C-426/13 P \(R\)](#) *Commission v Germany*, the Vice-President of the Court of Justice dismissed the appeal brought by the Commission against the aforementioned order.

<sup>4</sup> In the contested decision, the Commission explains that migration is defined as the amount which actually comes out of a toy and is actually absorbed by the human body.

material present in the toy (namely, dry, brittle, powder-like or pliable material, liquid or sticky material, and scraped-off material). The German limit values are, for their part, expressed in terms of bioavailability. They define the maximum permissible quantity of a chemical substance which may, as a result of the use of the toys, be absorbed and be available for biological processes in the human body.<sup>5</sup> In addition, those limit values are applicable to all types of toy, irrespective of the consistency of the material of the toy in question.

According to the General Court, it is clear from the data submitted by the Commission that, for liquid or sticky material and for dry, brittle, powder-like or pliable material, the German limit values, converted into migration limit values on the basis of the EN 71-3 standard, are significantly higher than those in the new directive, while the migration limit values laid down in that directive for scraped-off material are higher than those that result from the conversion of the bioavailability limit values laid down in the notified national provisions. Germany cannot claim, therefore, that the new directive authorises higher migration of harmful substances than that permitted in Germany, that children are accordingly more exposed to those substances and that this fact 'on its own' demonstrates that Germany has credibly established that its limit values ensure a higher level of protection than the new directive. The General Court observes, in addition, that scraped-off material is less readily accessible by a child than dry or liquid material.

In any event, since it is only in the case of the scraped-off material of which a toy is composed that the migration limit values in the new directive are higher than those resulting from the conversion of the German bioavailability limit values, the Commission cannot be criticised for having rejected the request that the German limit values be maintained, for the German limit values do not distinguish between the consistency of the materials of which a toy is composed.

As regards arsenic, antimony and mercury, the General Court concludes that Germany has not discharged the burden falling on it, namely, of proving that the German limit values ensure a higher level of protection than the new directive.

**With regard to lead, on the other hand, the General Court annuls the Commission's decision** in so far as it approved the German limit values for that heavy metal only until 21 July 2013. The General Court considers that **the Commission infringed its obligation to state the reasons**, since its decision, in respect of lead, contains an internal contradiction liable to hinder the reasons underlying that decision from being properly understood. In view of the fact that the limit values laid down by the previous directive were to continue to apply, under the new directive, until 20 July 2013 and the continued application of the German limit values for lead was approved only until 21 July 2013 at the latest (the difference between those two dates being purely symbolic), the contested decision amounts, in terms of its practical effect, to a negative decision, even though the Commission found that the conditions for approving the continued application of the national limit values for lead were satisfied.

**As regards barium**, the General Court declares, at Germany's request, **that there is no longer any need to adjudicate on the action**. The Commission has in the meantime amended the limit values for that heavy metal and so the action has become devoid of purpose with regard to barium.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to EU law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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<sup>5</sup> In the contested decision, the Commission explains that bioavailability is defined as the amount of chemicals which actually comes out of a toy and can but may not necessarily be absorbed by the human body.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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