

Children's safety is the number one priority for Toy Industries of Europe (TIE), the voice of reputable toy makers in the EU. We are worried as our recent investigation¹ shows that an alarming amount of dangerous and illegal toys are available in the EU through online marketplaces.

The choice and convenience offered by online marketplaces makes them an important sales channel for the toy sector and a key part of our supply chain. But due to a lack of clarity in the legislation, online marketplaces are not required to do checks for toys from third-party sellers, like normal importers or distributors. All too often, they facilitate the sale of dangerous and illegal toys.

The burden to keep dangerous toys sold online away from children falls on the shoulders of customs officials, who cannot control the influx of billions of small packages. This puts children at risk, leads to unfair competition and undermines trust in e-commerce.

We call on the EU to seize the opportunity of the revision of its e-commerce- and product safety rules to better protect consumers from dangerous products. Voluntary actions do not work. Unless online marketplaces are legally required to take responsibility, the sale of illegal and dangerous goods will continue to grow.

We urgently need revised rules to make sure online marketplaces are required to:

- **prevent dangerous toys to be offered for sale on their platforms (proactive measures)**
- **react effectively when unsafe toys are discovered (reactive actions)**
- **screen toy sellers and collect verified contact information (traceability requirements)**

Rules for online marketplaces can only be truly effective if they go hand-in-hand with **effective enforcement**, including deterrent sanctions and **increased awareness** of toy safety rules among sellers. In the meantime, consumers should be aware that nobody is held accountable for the safety of toys sold by third-party sellers based outside the EU.

1. BACKGROUND

The European Union has some of the strictest toy safety rules in the world. They are complemented by an enforcement framework, with clear obligations for the different players in the supply chain. However, gaps in the legal framework allow dishonest traders to continue to sell non-compliant and dangerous toys via online marketplaces.

TIE's recent investigation into the availability of illegal and dangerous toys on online marketplaces revealed a shocking cause for concern. From a selection of 193 toys bought online in seven different EU countries (through four of the most popular marketplaces), 97% should not legally have been sold in the EU. Fifty-five percent of the toys had serious safety issues. The risks included exposure to harmful chemicals, choking, suffocation, strangulation, drowning and burns.

Online sales are becoming increasingly important for the toy sector. In some EU Member States, around 40% of toys are sold online. The COVID-19 pandemic will see this number grow exponentially. Preventing the sale of dangerous toys via online marketplaces has now become even more important to ensure children are safe when they play.

¹ TIE investigation on safety of toys sold by third-party sellers on online marketplaces

1.1 EVERYBODY SHOULD HAVE A ROLE TO PLAY, BUT ONLINE MARKETPLACES ESCAPE RESPONSIBILITIES

Normally, all relevant players (manufacturers, importers, distributors) in the toy supply chain have clear obligations to make sure only safe toys are sold on the EU market. More specifically, all operators have to put in place **proactive measures** to make sure toys are safe, ensure **traceability** and take a set of effective **corrective actions** in case unsafe toys are found.

These obligations are generally not applied to online marketplaces with third-party sellers based outside the EU. Existing EU guidance² does not recognise that online marketplaces usually act as importers. It only clarifies their obligations as ‘passive hosting service providers’. In reality, online marketplaces are usually the importer as they place the toy on the EU market by directly targeting consumers in the EU. They do this by directing their marketing activities, offering products in national languages and by enabling payment in local currencies, with EU payment methods. In some cases, they resemble the de facto seller of the toys – at least to the consumer.

1.2 THE CHALLENGES FOR MARKET SURVEILLANCE

When dealing with traditional supply chains, authorities can easily contact EU-based economic operators and hold them accountable. In the online world, this is impossible as the marketplace (often the only EU-based economic operator that can be contacted) is not held accountable.

Another challenge is the volume: small packages are entering the EU by the billions through customs, who do not have the resources to handle this. None of the dangerous toys TIE bought as part of its investigation had been intercepted by customs.

If unsafe toys are discovered, the relevant ‘listing’ of that toy may be taken down but the same toy is often still on sale in different listings (with same descriptions, same pictures). If marketplaces were to apply effective proactive measures and meet traceability requirements, the identification of dangerous toys would be much easier and this situation could be avoided.

1.3 E-COMMERCE DIRECTIVE 2000/31/EC HAS LIMITATIONS

The EU’s e-commerce rules stem from 2000, when online supply chains were very different from today. Several Articles of the e-Commerce Directive are particularly relevant for the (lack of) enforcement of product safety rules on online marketplaces.

Article 5 (‘Know Your Service Provider’) requires that service providers share info, such as name, address, email address and VAT number. Sellers on platforms should therefore be clearly identified. However, there is no clear obligation on the platforms to verify if sellers comply with this requirement.

Article 14 (‘Liability Exemption for Hosting’) limits the liability of online marketplaces when they host third-party information. This article does not apply when a marketplace is directly liable for the sale of goods, in case the online marketplace is aware of illegal activity and does not act expeditiously, or if it plays an active role. There is ECJ jurisprudence that explains that ‘optimizing or promoting the sale’, which all online marketplaces do, means that they play an active role.

Finally, Article 15 (‘Monitoring Exemption’) prohibits Member States to impose a general obligation to monitor information on platforms. Proactive measures which importers and distributors need to apply according to product safety rules should not fall under this exemption.

² COMMISSION NOTICES The ‘Blue Guide’ on the implementation of EU products rules 2016 (2016/C 272/01) and COMMISSION NOTICE on the market surveillance of products sold online (2017/C 250/01)

1.4 THE NEW MARKET SURVEILLANCE REGULATION (2019/1020/EC) WILL NOT SOLVE THE PROBLEM

The new Market Surveillance Regulation stipulates that toys are only allowed on the EU market when there is an economic operator in the EU that can cooperate with market surveillance authorities. The new rules do not specify that online marketplaces need to verify whether sellers adhere to these rules. It is unrealistic to expect market surveillance authorities to verify whether billions of EU-addresses are correct, nor will it be possible to prosecute against sellers if the EU-addresses are fake or absent.

Unless it is made clear that online marketplaces are often legally speaking importers, it will still be up to market surveillance authorities and consumers to find out if toys offered for sale were dangerous.

1.5 THE EU PRODUCT SAFETY PLEDGE DOES NOT WORK

In June 2018, several online marketplaces signed a Product Safety Pledge³ with the European Commission, making voluntary commitments to improve the detection of unsafe products marketed in the EU before they are sold to consumers or as soon thereafter as possible. Three of the online marketplaces we bought toys from in our assessments had signed the Pledge. In fact, we regularly find products that are notified on RAPEX on the marketplaces that signed up to the Pledge.

Whereas we support the intention behind the Pledge, we can only conclude that it does not work. We believe that a voluntary commitment is the wrong way to deal with this important issue. It should be replaced by effective legislation.

2. SOLUTIONS

The burden to avoid that unsafe toys are sold on online marketplaces should not primarily lie with market surveillance authorities. The rules need to be clear: online marketplaces should play their part. This should be complemented with effective enforcement and increased awareness among sellers. In the meantime, consumers should be aware that online marketplaces are not held accountable for the safety of products from third-party sellers.

2.1 UPDATED RULES FOR ONLINE MARKETPLACES ARE KEY

Proactive actions: Online marketplaces should be obliged to take proactive actions to avoid that dangerous toys are offered for sale to EU consumers. Market surveillance authorities should be able to sanction them in case they fail to adhere to the rules. If marketplaces cannot assure that a toy is safe for children to play with, they should not facilitate and profit from its sale to European consumers.

This does not mean that marketplaces should physically inspect every toy sold on their website, nor should they be fully liable in the same way as a manufacturer. It simply means that they should be subject to the same due care requirements that apply to toy importers and distributors. For example, they should make sure that the appropriate conformity assessment procedure has been carried out by the manufacturer and technical documentation has been drawn up. This will also make it easier to act when unsafe toys are detected, for example to identify identical listings.

Criticism that this is undoable for large marketplaces because of the vast number of listings on their sites is unfounded. That would mean that we place the burden fully on public authorities like customs officials. Customs officials are not equipped to deal with the influx of small packages.

³ Product Safety Pledge: Voluntary commitment of online marketplaces with respect to the safety of non-food consumer products sold online by third-party sellers

Traceability/‘know your service provider’ requirements: Opening a seller-account on online marketplaces often just requires an email address. Some marketplaces demand additional credentials, but these can be forged and are not verified. As a result, sellers are difficult to identify and tracing them is extremely burdensome and difficult. Furthermore, bad actors can have multiple accounts and simply switch accounts when one account is discovered to be offering unsafe products or is ultimately removed.

At a minimum, online marketplaces should collect and verify contact information for sellers prior to allowing an account. Data on illegal products and illicit traders should be shared with authorities. Otherwise, there is no possibility to enforce safety rules on sellers. Verified information will also allow online marketplace to avoid that the same seller reappears under a new account.

Reactive actions: Even when the best proactive measures are in place, some products may still be found to be unsafe. Effective reactive actions are therefore crucial. Online marketplaces with third-party sellers should:

- **Operate a ‘notice, take down & stay down’ policy.** There should be a short timeframe (for example two days) specified by law for the removal of any unsafe toys notified by public authorities. This should also apply to identical listings;
- **Recall unsafe products and inform consumers.** Marketplaces know which consumers have already bought which product. Platforms should have an obligation to inform consumers in case they bought a product that is unsafe or illegal. None of the marketplaces we made aware of dangerous toys on their platform immediately informed consumers who had already bought these toys. Often, they indicated that this was the responsibility of the seller or they could only do this if the toy was notified on RAPEX;
- **Cooperate with Market Surveillance Authorities.** Online marketplaces should be required to collaborate with market surveillance authorities and inform them as soon as they are aware of dangerous products being sold on their platform. Only one of the marketplaces we contacted informed the relevant market surveillance authorities.

Opportunities for policy change at EU level:

- **Update of ‘Blue Guide on EU Product Rules’ and ‘Guidelines for Article 4 of Regulation (EU) 2019/1020 on market surveillance and compliance of products’:** Both documents are currently being assessed by the European Commission. They should specify that an online marketplace should be considered an ‘importer’ or a ‘distributor’ and should adhere to all relevant obligations.
- **Revision of the General Product Safety Directive (2001/95/EC):** The new legislative proposal planned for 2021 must establish clear obligations for online marketplaces, including traceability requirements and proactive- and reactive measures.
- **Digital Services Act/Revision of the e-Commerce Directive (2000/31/EC):** The legislative proposals planned for 2021 should look at:
 - due-diligence requirements and enforcement of ‘know your service provider requirements’ on online marketplaces;
 - the liability rules for online platforms. The review offers an opportunity to provide clear rules for online marketplaces, for example through specific liability rules for online marketplaces or to make it clear that online marketplaces are not exempt from obligations under EU-product safety rules;
 - The exemption from general monitoring obligations for intermediary service providers. This should not shield online marketplaces from obligations in the field of product safety.

2.2 STRENGTHEN ENFORCEMENT

Clear and effective rules for online marketplaces need to go hand-in hand with effective enforcement. **Sellers and online marketplaces must also face deterrent penalties** when they are caught. At the moment, consequences are usually limited to removal of specific listings and, in some cases, reimbursement of consumers.

We welcome current actions from enforcement authorities that target online sales. These actions can be further strengthened through sufficient funding for market surveillance activities, targeting online sales in annual market surveillance strategies and in EU Joint Actions. Intergovernmental cooperation to act against sellers outside the EU can also be helpful. Finally, authorities should make sure that all identified dangerous toys are placed on RAPEX, while providing the relevant economic operator with the opportunity to demonstrate the safety of the toy.

2.3 INCREASED AWARENESS AMONG SELLERS AND CONSUMERS

We believe that most traders who offer non-compliant toys for sale in the EU know they are breaking the law. However, there will also be sellers who are not sufficiently aware of EU rules and requirements. Authorities and online marketplaces should do more to educate and increase sellers' awareness of the rules and requirements.

We also support further national and EU initiatives to help consumers buy safe toys from trustworthy sources. TIE and its members contribute regularly to such campaigns, most recently on buying safe toys online⁴. TIE stands ready to work with partners and lend support to EU initiatives.

Most consumers believe that online marketplaces have some accountability for the products they sell. As long as that is not the case, the platforms should clearly specify that they cannot be held liable for the safety of products sold by third-parties on their platform.

About TIE

Toy Industries of Europe (TIE) is the voice of the reputable EU toy manufactures. Our mission is to promote the right of every child to play safely and securely and to promote fair practices and fair legislation, allowing responsible toy companies to continue to grow.

TIE's membership includes 17 direct members, eight European national toy associations who represent their local manufacturers, and seven affiliate members who also have an interest in toy manufacturing.

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⁴ <https://www.toyindustries.eu/tips-for-buying-safe-toys-online/>