PRODUCT SAFETY ACT

The Product Safety Act is the central set of rules of German law regarding the safety of devices, products and systems. This act came into effect on December 1st, 2011 and replaced the previous Device and Product Safety Act. The following brief description addresses the most important issues which are of interest for manufacturers and suppliers of electrical and electronic devices in relation with the Product Safety Act – without any claim to comprehensiveness.

Field of application and relation to the Electrical and Electronic Equipment Act

According to § 1 para. 1 of the Product Safety Act the act regulates "the putting into circulation and exposing of products which is, of course, performed in the frame of an economic undertaking". Since the definition of the product in § 2 No 22 of the Product Safety Act includes all "products, goods, substances or preparations which were manufactured in a manufacturing process" this results in a very wide field of applications. Moreover, according to § 1 para 2 of the Product Safety Act it generally applies (subject to single exceptions) for "the building and operation of operating systems requiring inspection which serve for industrial or commercial purposes or by which the employees might get endangered".

Some product ranges are expressively excluded from the field of application of the Product Safety Act according to § 1 para. 3 of the Product Safety Act e.g. antiquities and medical products. Furthermore, the regulations of the Product Safety Act do not apply in favor of special standards in § 1 para. 4 of the Product Safety Act due to the reservation "as far as corresponding or proceeding regulations are provided in other legal provisions". It applies e.g. for the Radio and Telecommunications Terminal Equipment Act and the Law on the Electromagnetic Compatibility of Equipment (EMVG). As far as these laws include product safety requirements, they prevail the provisions of the Product Safety Act and replace them. However, the regulations of the Product Safety Act or special standards such as the Radio and Telecommunications Terminal Equipment Act or the law on Electromagnetic Compatibility of Equipment (EMVG) on the one hand and the regulations of the Electrical and Electronic Equipment Act on the other hand have to be taken into considerations in parallel since the standards are having different purposes. On the one hand it is concerning the product safety during the "lifetime" of the product and on the other hand it is concerning the waste-related product responsibility with regard to the obligations which are getting relevant at the "end of service life" of the products.

Product-specific regulations and regulation on collection

In the first place the product safety requirements are determined in the regulations which were issued for the individual product ranges on the basis of the Product Safety Act. According to § 3 para. 1 of the Product Safety Act a product must "only be made available on the market if it firstly complies with the requirements provided herein and secondly does not endanger the safety and health of persons or any other legal assets listed in the ordinances according to § 8 para. 1 in case of proper or foreseeable use" as far as it is subject to one or several ordinances according to § 8 para. 1 of the Product Safety Act. Examples for corresponding regulations are the "first ordinance to the Product Safety Act" (1st ProdSV) and the still applicable "ordinance on the safety of toys" (2nd GPSGV) which
had been issued on the basis of the former Device and Product Safety Act but which are still applicable as ordinance in the sense of § 8 para. 1 Product Safety Act which are applicable for devices to be used with a nominal voltage from 50 to 1,000 V alternate current or from 75 to 1,500 V direct current.

As far as no product-specific regulations are applicable, the general provision of § 3 para. 2 phrase 1 of the Product Safety Act applies. According to this regulation a product must "only be made available on the market if it does not endanger the safety and health of persons in case that it is used properly or foreseeable". The following needs to be taken into consideration for this assessment according to § 3 para. 2 phrase 2 of the Product Safety Act:

1. "the properties of this product including its composition, its packaging, the instructions for its assembly, the installation, the maintenance and the period of use,

2. the impact of the product on other products as well as they are being expected that it is used together with other products,

3. the design of the products, its marking, the warnings, the instructions of use and operation, the indications regarding its disposal as well as any product-related indications or information,

4. the groups of users who are more endangered than others while using the product."

Additional requirements in consumer products e.g. indication of the address of the manufacturer

In § 6 of the Product Safety Act there are additional requirements in placing consumer products on the market. The application of these regulations first requires the clarification of the term “consumer products”. They are defined in § 2 No 26 of the Product Safety Act as "new, used or re-manufactured products which are intended for consumers or under conditions which are foreseeable in its reasonable discretion can be used by consumers even if they are not intended for this purpose; consumer products are also products which are made available to the user in the frame of a service". In the Product Safety Act it is not particularly defined who is regarded as consumer. According to several regulations of the law of the European Union and national standards (refer to § 13 of the German Civil Law) a consumer is a natural person who is acting for a purpose which cannot be attributed to its industrial or professional activity, briefly a private person.

According to § 6 para. 1 phrase 1 of the Product Safety Act the manufacturer, his representative and the importer have to take care that

1. they make the information on the product which the consumer needs for the risk evaluation available to him,

2. they indicate the "name and address at which the manufacturer can be contacted if he is not based in the European Economic Area, the name and the address at which the representative or the importer can be contacted" as well as

3. a clear marking to identify the consumer product is being used.
The complete postal address means the address at which you may contact the manufacturer according to § 6 para. 1 phrase 1 No 2 of the Product Safety Act. It is not sufficient to indicate a P.O. box address or an Internet address. The name and address at which the manufacturer can be contacted must be mentioned on the consumer product or on its packaging if it is not possible to mention it on the product. Exceptions from this obligation are admissible according to § 6 para. 1 phrase 3 of the Product Safety Act if it "is acceptable to leave these indications out in particular since the user already knows them or if it would involve an disproportionate effort to apply them."

Since the Product Safety Act and the Electrical and Electronic Equipment Act are complementing one another (refer to the field of application above) the requirements of § 6 para. 1 phrase 1 No 2 of the Product Safety Act are applicable in addition to the obligation of marking of § 7 of the Electrical and Electronic Equipment Act. Electrical and electronic devices which can be used in private households and which fall below the fields of applications of both laws – as usual – therefore regularly must be marked with a clear identification of the manufacturer, the icon of the crossed out waste bin according to Annex II to the Electrical and Electronic Equipment Act and the bar beneath as a sign of placing the product on the market according to the regulations after August 13th, 2005 and furthermore the name and address must be mentioned at which the manufacturer or a representative located in the European Economic Area or the importer can be contacted.

Further obligations of the manufacturer mentioned in § 6 of the Product Safety Act related to consumer products for instance refer to provisions in case of a necessary call-back action, the performing of spot checks and the information of the competent authorities if safety risks are identified.

CE marking

§ 7 of the Product Safety Act refers to the CE marking (CE = "Conformité Européenne"). This is the marking intended for the market surveillance authorities indicating that the manufacturer declares the conformity of his product with the Europe-wide harmonized safety requirements in devices of this type. This is no test mark (such as e.g. the GS sign) and no quality mark, but only the external identification for the self-assessment of the manufacturer. The marking acts in the same way as a "passport" for the devices within the European Union and beyond (in the 27 member states of the EU as well as in Turkey and Switzerland) since the marked devices are not subject to any limitations in the free movement of goods.

The Product Safety Act does not specify if products have to be provided with a CE mark at all. This is regulated in the ordinances on the basis of § 8 of the Product Safety Act (e.g. 1st ProdSV) or other legal provisions (e.g. Medical Devices Act). However, according to § 7 para. 2 of the Product Safety Act, it is forbidden to omit a prescribed CE mark as well as to use a not provided CE mark. Details of the marking are resulting of Article 30 of the ordinance (EC) No 765/2008 to which § 7 para. 1 of the Product Safety Act refers as well as details of § 7 para. 3 to 5 of the Product Safety Act.

As far as CE marking obligations apply, the manufacturers have to perform a safety and conformity evaluation and have to take care that technical documents are issued and the traceability is being guaranteed. Importers have to check if the manufacturers have correctly performed the conformity evaluation of the products. In addition, the obligation of the manufacturer to make available
declarations of conformity for the user may result from special regulations (e.g. § 10 para. 3 of the FtEG).

**GS mark**

Optionally, the § 20 para. 1 of Product Safety Act provides the option to let the products adjudicate with the GS sign for “tested safety” by a competent authority upon demand of the manufacturer or his representative and to provide these products graphically with the pictured GS sign in the annex of the Product Safety Act. According to § 20 para. 2 of the Product Safety Act it “does not apply” if the product which is ready to use is provided with a CE mark and the requirements are at least equal to the requirements according to § 21 para. 1”. For products to which the CE obligation of marking applies, the GS mark can also be adjudicated and applied only – in addition – if its granting prerequisites are stricter than the conformity requirements of the CE mark.

**Sanctions**

As sanctions of infringements of provisions of law, the Product Safety Act allows investigative measures and measures of advertising a danger at the cost of the causer, the tracing of administrative offences in the penalty procedures as well as in severe cases even the punishment of offences.

For instance, the authorities are authorized according to § 26 para. 2 of the Product Safety Act to

- arrange that a product is tested by a notified authority, by a GS authority or by an authority which is equally suitable
- prohibit that a product is made available on the market or to
- order the take-back or call-back of a product which had been made available on the market.

Single offences such as the use of a sign which might be confused with the GS mark are punished with a fine of up to 100,000 EUR. Other offences can be punished with a fine of up to 10,000 EUR; this applies for e.g. offences at which

- a name or an address at which the manufacturer can be contacted is intentionally or negligently not, not correctly, not completely or not in time added contrary to § 6 para. 1 phrase 1 No 2 or
- the competent market surveillance authority is not, not correctly, not completely or not in time informed contrary to § 6 para. 4 phrase 1.

According to § 40 of the Product Safety Act persons who persistently repeat the mentioned infringement or who endanger the life and health of other persons or foreign assets of important value by intentional actions are punished with imprisonment of up to one year or with a fine. This applies for instance for

- persistently intentionally making available of electrical equipment contrary to § 3 para. 1 phrase 1, 4 No 1 of the 1st Product Safety Act
or persistent intentional refusal to make available the declaration of conformity contrary to § 3 para. 4, 4 No 2 of the 1st ProdSV.

Implementation of directives of the European Union

Finally, it must be observed that the Product Safety Act and the associated ordinances implement several directives of the European Union. In Germany, not the directives need to be directly applied, but in fact the necessary provisions of implementation. In particular the

- directive 2001/95/EC regarding the general product safety is implemented by the Product Safety Act,
- directive 2006/95/EC (low voltage directive) is implemented by the "first ordinance of the Product Safety Act" (1st ProdSV) and the
- directive 2009/48/EC on the safety of toys is implemented by the "ordinance on the safety of toys" (2nd GPSGV).

Author:

Attorney and specialist solicitor for administrative law Dr. Holger Jacobj,
Solicitors office Prof. Versteyl (Burgwedel)

Contact:

Phone: +49 / 5139 / 98 95-0, Website: www.versteyl.de, E-Mail: holger.jacobj@versteyl.de