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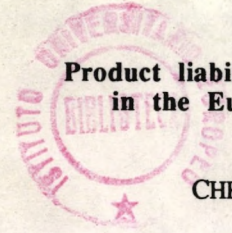

Product liability and product safety in the European Community

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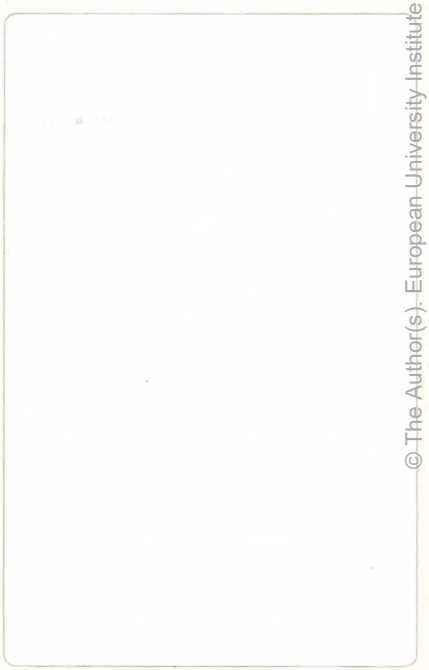

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FOREWORD

The workshop recorded in this working paper took place in Brussels on September 22-23, 1988, as the joint result of close co-operation between Mr. B.K.W. Risch, J.V. Monfort and Dr. Dieter Hoffmann of DG XI of the Commission of the European Communities, Professor G. Brüggemeier from the University of Bremen, Dr. J. Falke and Dr. H.-W. Micklitz of the Centre for European Legal Policy in Bremen, and the undersigned. The European Policy Unit of the European University Institute in Florence contributed to the organisational preparation, but the main workload - including the financial burden - fell to the Commission. I particularly want to express my indebtedness to Mrs. Lieven for her continual assistance.

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San Domenico di Fiesole (Firenze).

December 1988

Christian Joerges

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INTRODUCTION

THE AGENDA OF THE WORKSHOP

Christian Joerges

In its Directive on Product Liability (25 July 1985) and Council Resolution on a new approach to technical harmonization and standards (7 May 1985), the Community initiated the Europeanization of both product liability law and general safety legislation. The Community's initiatives are essentially motivated by its efforts to achieve completion of the internal market. Accordingly, the Directive on Product Liability provides for regular reports from the Commission to the Council on the implementation of this Directive which may include further suggestions on the part of the Commission. In the area of product safety policy the Commission intends to develop new legal provisions which should supplement the new approach to technical harmonization and standards by a general duty of safety and serve as a framework for the harmonization of general safety legislation.

Product liability law and product safety legislation are interrelated in many respects. Quite understandably, the compensation of the injured party and a fair distribution of the risks inherent in modern production technologies are commonly regarded as the primary objectives of product liability law. Moreover, it is a commonly held belief that such sanctions will at the same time provide incentives for producers to comply with safety prerequisites. Furthermore, there are areas of systematic convergence between liability and safety laws; liability for defective products rests on failure to comply with safety standards (Art. 6 of the Directive) whereas compliance with mandatory safety requirements excludes liability (Art. 7). Product safety legislation regulates the marketing of products and/or provides for means to respond to dangers which become apparent after products have been put into circulation. By enacting such legislation, the Community and the Member States undertake an obligation to carry out their duty to protect health and safety interests of citizens of the EC. However, the provisions pertaining to such safety legislation may be equally enforced by awarding damages under product liability laws. Judicial interpretation of the duty of safety provided for in

product liability law may be used as guidelines in the administration of safety legislation.

The workshop addressed these issues in the following way: the first group of contributions dealt with the regulatory functions of product liability and product safety law thereby including a discussion of the impact of product liability insurance. The second and the third group gave reports on the implementation of the Product Liability Directive and product safety legislation already in force or in preparation. The final session discussed institutional problems and perspectives of a Europeanization of product liability law and product safety legislation.

PART ONE: THE REGULATORY ISSUES

THE REGULATORY FUNCTIONS OF PRODUCT LIABILITY LAW[1]

Gert Brüggemeier

In its 1985 evaluation of a three-year model experiment on the cataloguing of accidents arising from consumer goods, the EC Commission estimated that every year in the EC such accidents caused over 30.000 fatalities and some 40 million cases of personal injury.[2] What contribution then can product liability law make towards the prevention of these incidents, the reduction of the resultant cost for individual national economies, as well as the prevention of physical and psychological burdens to those concerned and their families? What is the best framework for the substantive content of liability, and in this respect wherein lie the limits of effectiveness of civil product liability law? These questions will be examined in this contribution at the start of the conference on European product liability policy, and the complex problem will be discussed principally against the background of developments in West German product liability law. Comparative legal discourse is intended only to underline a certain homogeneity of development trends in modern product liability law in advanced industrial societies.

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1. A more extensive version of this paper has been published in German: Brüggemeier, Produkthaftung und Produktsicherheit, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR), vol. 152, No. 6 (1988) 511-536.
2. Commission Doc. COM (84) 725 p. 4.

I. Product liability law: Loss prevention through compensation

The rules governing product liability or producer's liability cannot be categorised definitively. The main reason for this is that in this field three traditionally strictly separate spheres of law overlap: contract law, tort law and strict liability law. A further complication arises from the fact that all three spheres of law are themselves disposed to dynamic development, so that nowadays their strict separation causes even more difficulties. The law of contract regulates the exchange of goods and services and safeguards the expectation of performance. Loss attributable to breach of contract is punished by the classical legal remedies and the obligation to compensate, which basically has as its object performance of the contract (legitimate expectation/Erfüllungsinteresse). The law of tort serves to protect life, limb and property. Traditionally its main field of application concerns accidental loss and negligence. Nevertheless, under tort law protection of integrity has long been applied - both within and without privity of contract - contractually and quasi-contractually, whereas vice versa, contractual performance is today increasingly assured under the law of tort - "ineffective" products, "chronic defects" (weiterfressender Mangel). Strict liability means the reintroduction of older common law remedies for the causation of damages (Kausalhaftung) under altered circumstances. Since the enforcement of the negligence doctrine in civil compensation cases in the 19th century, strict liability appears as an appropriate, although narrowly defined, exceptional regulation for a modified absolute liability, especially in relation to the new technical risks of industrial society. Today strict liability can be regarded as the keystone to liasbility in a "risk society".

The predominant function of contract, tort and strict liability law was traditionally to provide compensation for loss attributable to damage. The extent of compensation was determined in different ways, according to the specific field: legitimate expectations or detrimental reliance in contract law, integrity interest in the law of tort, and limited amounts concerning personal or property damage in strict liability law. But as early as 1888 the Austrian economist Mataja gave a superb critique of this compensatory reductionism of orthodox liability law, emphasizing the primacy of loss prevention:

"No legislation in the world can remove loss that has already occurred; law stands powerless before it as a 'fait accompli'. Concerning the risk of loss therefore, legislation can pursue only two aims: it can strive 1) to work as far as possible towards prevention, and 2) to direct actual loss towards those persons who appear, according to the demands of justice and the national economic interest, to be the most appropriate to bear the onus."[3]

For a long time this had no consequences for legal doctrine. It required the impetus of economic analysis of law in the USA in the 1960s, and increasingly in the FRG since the late 1970s, in order to bring about a preventive policy orientation in the liability discussion. Today, meanwhile, it is widely accepted that the function of liability law is the prevention of loss by the threat and enforcement of compensation, for those "responsible" for the individual case. In other words, liability is concerned with the control of conduct with the aim of preventing loss. The substantive content of liability - especially the prerequisites of compensation, the amount of damages to be awarded, the determination of those entitled to compensation - should be largely oriented towards this functional purpose. Accordingly, from the economic analysis of civil law it has emerged that this cannot mean that prevention of loss must be pursued at all costs. The focus should rather be on minimising loss. This should not be a question of avoiding certain losses and permitting others. The determination of avoidable loss is attempted through modifying and further developing the basic approach of the 'learned hand' formula.[4] According to this, avoidance of loss is expected to occur when the cost of loss avoidance multiplied by the probability of loss is less than the foreseeable loss.

This approach to loss control via the formulation of expectations concerning the conduct of those who potentially cause or determine danger has a clear relation

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3. V. Mataja, Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie, 1888, p. 19.
4. Cf. Posner, Economic Analysis of Law, 2nd ed., 1977, p. 122; Schäfer/Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, 1985, p. 97; on the Kaldor-Hicks Efficiency Criterion cf. ibid., p. 30 ff.

to the classical tortious liability in negligence cases. Incidentally, the American Justice Hand did not apply the above formula in 1940 for defining the notion of negligence within the liability law.[5]

This concept, of pursuing societal optimization of losses through the definition of expectations on conduct, can be directly transposed into contract and tort compensation. In contract law, the compensation obligations are intended to promote due fulfilment of the terms of the contract. The disputed concept of "effective breach of contract" can be integrated without much difficulty into the general principles of law concerning defective performance. First torts, then accidental loss have, since the economic analysis of civil law was first introduced, always been its central field of application.

In contrast, strict liability seems to be closed to such functional orientation towards loss prevention through conduct control. When strict liability includes absolute liability, this implies liability also for unforeseeable and therefore unavoidable loss even where the conditions of normal precautionary expenditure have been fulfilled. Economic analysis focusses on the qualitative difference of strict liability from tortious liability by emphasizing that here it is no longer a question of conduct control regarding the level of due care, but of determining the level of activity. A car driver who is subject to a strict liability can only control the additional liability risk by limiting his driving activity, even if he drives with due care.

This controversy between negligence liability (conduct control) and strict liability (activity control) is most pronounced in relation to the discussion on the optimal structuring of product liability. The familiar test case runs: liability for development risks. Development risks are design/construction defects in a product which, when first marketed, would not have been recognisable under the current state of technological knowledge (and science). The international discussion on product liability has a distorted view of a solution to this problem due to its unrelenting fixation on the concept of product defectiveness. Product defect is at the heart of the originally mentioned complex tangle of contract, tort and

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5. Conwy v. O'Brien, 111 F. 2d 611 (2d Cir. 1940).

strict liability law embracing this area of liability. French and US contract law have developed a wide-reaching indemnity for objectively defective products (and consequential loss) going beyond the narrower contractual relationship. German sales law, however, with its aedilic form of legal remedies (privity of contract), independent of fault, concentrates on a subjective concept of defectiveness; the replacement of the loss attributable to the defect and upon the narrow contractual relationship. The law of torts neither recognises an objective nor a subjective concept of product defect, but one related to conduct. Product defect here always means a source of danger arising from (human) failure in the production process or in the organisation of this process, for which the person held responsible for the defect is liable in damages if this misconduct is avoidable. The extension of strict liability for damages to cover development "defects" means, in fact, liability for the consequences of an activity, not for misconduct. Liability for the consequences of an activity in practice however, as has repeatedly been emphasized especially in the American discussion, makes the manufacturer an insurer of the victim of his product.

The contrast between product-related and conduct-related approaches - emerging above all in the relevant judgments of the highest courts of the American states - is however misleading in the context of the arguments about liability for development risks. In the US, until now, only the warranty liability - by definition tortious, but in reality of contractual origin - of the manufacturer for objective manufacturing defects ("flaws") is product-related. Liability for design and instruction defects is conduct-related (objective) negligence liability. Liability for development risks is in contrast neither product- nor (mis)conduct-related, but liability based on process or activity. Ten years ago Simitis[6] accurately pointed to the possible alternative ways of the developing of product liability law in the future: either a changeover to strict liability "sans phrase" for products and production processes (possibly with exoneration for the manufacturer in cases of product misuse by the injured party) and therefore in practice a changeover from

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6. Simitis, Produzentenhaftung: Von der strikten Haftung zur Schadensprävention, in: Festschrift K. Duden, 1977, p. 605 ff.

liability to a no-fault insurance; or alternatively, by adherence to product defect as the basis for liability, which in practice amounts to a comprehensive tortious liability of the manufacturer for objective negligence.

The second alternative has won through in the US concerning both the factual development of product liability law in the individual states and incipient legislative reform at federal level (as yet unsuccessful), and in Europe - both in the national legal systems of the Member States of the EC and on the EC level itself. The economic analysis of liability law based on conduct control and loss optimization also clearly tends in this direction.[7] It is true that the German protagonists of economic analysis of civil law speak of strict liability taking into consideration the negligence of the injured party as being the most efficient liability rule.[8] On closer inspection however, this strict liability is revealed as practically identical to, or at least no longer distinguishable from, an objective negligence liability.[9] The US development in product liability law is, as indicated above, characterized by incongruent concepts of defectiveness: for objective manufacturing defects (flaws) liability lies primarily under contract law and - since abandoning the privity of contract provision in 1960[10] - "strict" tort law or strict liability law respectively. As regards design and construction defects a conduct-related approach was taken. The decisive issue is whether, on the basis of a risk/utility test, greater safety measures could legitimately be expected of the manufacturer or not. In

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7. This applies especially to the main representative of the Chicago school, R.A. Posner; cf. Economic Analysis of Law, 2d ed. 1978, p. 122 ff.
8. Cf. Schäfer/Ott, Lehrbuch 1985, p. 107 ff.; M. Adams, Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung, 1985, p. 86.
9. Cf. for many Prosser/Keeton, On the Law of Torts, 5th ed. 1984, p. 677 ff.; Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law, 14 J. Legal Stud. 461 (1985); A. Pfeifer, Produktfehler oder Fehlverhalten des Produzenten, 1987, p. 116 ff.
10. Henningsen v. Bloomfield Motors Inc., 161 A.2d 69 (N.J. 1960).

the former case there is a product defect, and vice versa. Until now there has been no case of liability for development risks in the USA - with the sole exception of asbestos.[11] The state-of-the-art defence has been admitted here unchanged, i.e., the argument of proven orderly conduct means no strict liability.

This inventory shows that the function of liability law is unanimously seen - implicitly by court practice and explicitly in the modern doctrine of product liability law, especially in the economic analysis of civil law - as conduct control in the direction of loss prevention and loss optimization. In addition, the conduct-related tort law approach offers an appropriate liability law solution to the problem of development risks via the development of duties of post-sale control and post-sale reaction.

II. Efficiency prerequisites in product liability law

A functional concept of product liability aimed at loss optimization requires an additional framework of conditions in order to be effective. Liability can develop its indirect or preventive effect only if the attributable losses caused in the individual cases can also be claimed in full by the injured parties and be enforced effectively against the tortfeasors.
If we accept that, in substance, a liability rule between objective negligence (with or without easing the burden of proof) and strict liability is the most efficient form of product liability law, considerable gaps still remain. Causing the death of a person who has no maintenance obligations still remains practically unpunishable in civil law. To this end the liability law under the West German Civil Code regarding prevention of injury can only provide, de lege lata, what in practice is an insufficient impetus to the most important object of legal protection - the preservation of human life. In this regard M. Adams has proposed making ("for a logical second") the person killed into a legal entity with his own indemnification claim based on an allowance for the lost chances in life,

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11. Cf. the much-discussed decisions of the Supreme Court of New Jersey: Beshada v. Johns-Manville Products Corp., 237 A.2d 539 (1982); Feldman v. Lederle Lab., 479 A.2d 374 (1984).

and passing this claim on to heirs, who could then assert it.[12] Bavaria intends introducing a bill into the German Bundesrat according to which, in cases of homocide, the right to claim compensation for pain and suffering could be accorded to near relatives.[13] These certainly seem to be steps in the right direction, that of effecting indirect conduct control through liability law. Above and beyond this, the economic analysis of civil law with its broad concept of loss (any impairment of use) tends towards an immense expansion of indemnifiable loss, which will meet with (justified) reserve from civil lawyers and will also have few chances of success politically.

With regard to procedural success of claims for indemnification, the expansion of the burden of proof gains special significance. Here, as is well known, the decisions of the VI Civil Division of the Federal High Court of Justice (BGH) has done pioneer service. However, the fact that it was not the 'fowl-pest' decision of 1968,[14] but the 'apple-scab'[15] decision of 1981 which initiated the real "evidentiary revolution" in product liability, is still not given adequate support, which remains equally valid for the FRG. On the basis of the unfortunate separation of internal and external due care (cf. E. Deutsch, Juristenzeitung (JZ), 1988,pp. 993-996), the Federal High Court elucidated in 1981 that shifting the burden of proof applies also to the external duty to exercise due care, and certainly in cases of defects in manufacturing, design, (original) instructions and organisation. If, however, the manufacturer cannot prove observation of the required (external) care, the (redundant) moment of internal care is also indicated. The Federal High Court has made an explicit reservation solely in respect of the post-marketing duties of control and reaction. Here, the injured party continues to bear the burden of proof for evidence of breach of external due care by the producer.

In other words, in the framework of producer liability, according to para. 823 I of the Civil Code, the injured

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12. Adams, Gefährdungs- und Verschuldenshaftung, 1985, p. 178.
13. Cf. Vorndran, Zeitschrift für Rechtspolitik (ZRP) 1988, 293
14. BGH 26 Nov. 1968, BGHZ 51, 91.
15. BGH 17 March 1981, BGHZ 80, 186.

party needs only prove that he has been injured to his interest as he is protected under tort law by the product in the state in which it left the manufacturer. That means the burden of proof for the alleged product defect lies no longer on the injured party, but on the producer to prove that the defect did not exist. This shows that in practice, substantively and procedurally, the West German producer liability goes further concerning design and instruction defects than American law. This effect is to some extent compensated for by the fact that American civil procedure only requires as evidence what is described as 'preponderance of evidence', whereas German practice adheres unerringly to the so-called "full proof" (evidence of probability bordering on certainty) in the sense of para. 286 of the Code of Civil Procedure. It should be mentioned, if only for the sake of completeness, that bringing an action under product liability is still, with regard to preparation and in particular the gathering of information, despite easing the burden of proof, an enormously time-consuming and expensive process. In legal circles this circumstance has occasionally given rise to a call for the introduction of the American pre-trial discovery procedure into German civil law procedure.

In order that the producer cannot avoid paying compensation by limiting his liability, especially by such means as limited liability under company law, recently the possibility has often been considered of introducing compulsory liability insurance. Such mandatory insurance combines two advantages. On the one hand, this ensures to a considerable extent that the injured party is in fact compensated. The risk to him of limiting corporative liability and, within limits, the bankruptcy of the damaging party, is removed. On the other hand, the producer is aware of the possible social costs of his activity, ab initio, even if only indirectly through the liability insurance premiums. In this way, the preventive effect of liability law is taken into account. The objection is sometimes raised that compulsory insurance, in the sphere of product (and environmental) liability, means that the state's duty of safety regulation is transferred to insurance companies, by means of the plant inspection and control measures necessary for estimating risk, in a way comparable to that of the Berufsgenossenschaften in German mandatory accident insurance. Insofar as this is true, it could by the same token be asked whether this might not be a sensible way of effecting state functions through privatization. Austrian legislators have followed this innovative direction in transforming the EC product liability directive into a

national product liability law. The possibility could also be considered of making it a company law obligation for partners and management boards of limited liability companies to take out liability insurance for their company. If this duty were neglected, the partners or management board members would be personally liable. In this way, a claim for indemnity by the company could be dealt with separately by the creditors of the company.

Finally, a particularly relevant point remains to be mentioned when assuming the desirability of "strict" product liability and collateral easing of the burden of proof, the increased risks of which should be covered by insurance. The preventive effect of such liability ultimately depends on the current insurance market being competitive. Ideally, the rate of insurance should reflect exactly the degree of care and the extent of risk contained in the policy-holder's activity. The holder would be rewarded through a premium structure if he observed the socially desirable standards of safety and similarly penalised if he neglected those standards. The further insurance premium policy departs, in the existing insurance market situation, from these ideal conditions, the more it loses its loss-prevention effect under product liability law, and the more important the familiar moral-hazard effect becomes. In the extreme case of employing a uniform premium for all partners responsible for damage - common in West Germany, for instance in professional liability insurance for doctors - liability law is limited exclusively to the function of damage and indemnification settlements. It no longer offers incentives for observance of the socially desirable degree of care. Finsinger's analyses in particular have demonstrated serious lacks in the state-regulated insurance market in West Germany, which is accordingly characterized by considerably less price competition than for example in the United Kingdom.[16] State control of profits means that profits of the West German insurance companies are limited to 3% of turnover. Profit maximization under these circumstances means an increase in damage claims and administrative expense for the insurance companies - a strategy which conflicts directly with the loss-prevention policy. The

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16. J. Finsinger, Versicherungsmärkte, 1984; Finsinger/Kay/Tapp, A Comparison of Insurance Market Regulation in Great Britain and Germany, 1986.

realization of the EC internal market, freedom of services and deregulation of the insurance market could make decisive steps in the direction of rendering product liability law an effective incentive mechanism for bringing safer products onto the market.

Liability law is and remains nevertheless only one element in the structurally tripartite product safety law: preventive regulation of marketing prerequisites, responsive post-marketing control and liability under civil law (if necessary complemented by penal sanctions). Product liability law provides its own control mechanism but cannot replace the functions of the other two elements.

PRODUCT LIABILITY AND INSURANCE

Jörg Finsinger

1. Objectives of product liability

Product liability serves primarily two objectives:

-Prevention of accidents rather than punishment of producers

-Satisfaction of the demand for insurance rather than the provision of fair compensation

Where tort law deals with fault and negligence, punishment may be appropriate. Indeed under US common law, courts can make the tortfeasor pay punitive damages in addition to compensation. However, as legal debate is increasingly influenced by economic analysis emphasizing efficiency, the incentives applied by different legal frameworks become the focus of scholarly research. After all, meting justice without improving incentives for efficient behaviour, would hardly be more worthwhile than exacting revenge. In particular, where modern society creates unforeseen risks hidden in commodities, or integrally associated with their mode of transportation and prevailing wherever energy is produced, it seems appropriate to look for rules enhancing efficiency[17] by preventing accidents rather than punishing.

Traditionally, damage payments seek to provide fair compensation. Given that few accidents result from wilful intention to do harm, it is by no means obvious how the notion of fair compensation should be defined. However, it seems "fair" to require compensation awards to satisfy at least the demand for compensation by the victims. Clearly, the demand for compensation is nothing but the demand for insurance.

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17. Punitive damages therefore should be analysed as an instrument to induce prevention of accidents. Clearly, when accidents are caused by product defects and when it is not always possible to attribute the accidents to defects, it seems fair and efficient to punish producers who speculate on this possibility..

2. The demand for insurance

An individual is said to face a risk, when he is confronted by events which are not certain, but which occur within a "certain" range of probability. Some countries take a lenient approach to risk others do not. Suppose an individual is wealthy in one state but poor in another. Clearly, he faces the risk of be(com)ing poor. If the individual dislikes the risk confronting him, he is willing to pay something to increase his wealth in the low wealth state. He is willing to give up some wealth of the high wealth state, in order to increase wealth in the low wealth state i.e. he wants to make a more even distribution of wealth over `loss' ,and `no loss' states.

In the high wealth or `no loss' state the individual has a lot of money and hence the utility of an additional unit of money is small relative to its utility in the low wealth state. A rational, risk-averse individual will try to make arrangements, such as the transfer of money from the high wealth state to the low wealth state until the utility of an additional unit of money - this is the marginal utility of money - is equal in both states. The demand for such transfers of money is the demand for insurance.

If an object is damaged or lost there is a demand for repair or replacement. Speaking in terms of the marginal utility of money, damage or loss increases the marginal utility of money, i.e. money is needed more than in the `no loss' state, it is needed for repair or replacement.

Money obviously does not help when repair or replacement is not possible. An additional unit of money in the `loss' state therefore may buy just as much utility as in the `no loss' state. Hence, there is no demand for insurance.

Consider the extreme case of losing your child. Clearly, the loss cannot be undone; replacement is not available at any price. Now, consider your need of money. Children are quite expensive to bring up. When your child was alive you had to make money sacrifices in order to be able to pay for his clothing, his school or university etc. The marginal utility of money was high. After his death you can spend all this money on consumption. It is likely that the marginal utility of money is lower, you can buy most of what you want and whatever you could buy with more money would be worth less. Consider again, the `no loss' (or the happy) state in which your child lives healthily. There is one thing you do not want: insurance. You do not

want to pay a premium and thereby reduce the amount of money to spend on consumption in exchange for the promise of a "compensation" in case your child dies. On the contrary, you would want to buy the opposite arrangement to insurance, you want more money while your child is alive in exchange for the promise to pay a premium at the death of your child.

CONCLUSION: The loss of replaceable goods, or damage which can be repaired, requires compensation, when compensation is meant to satisfy the demand for insurance. The loss of irreplaceable commodities does not necessarily require compensation.

3. insurance through strict liability

Strict liability corresponds to compulsory and uniform insurance. If all consumers were equal, then there would be a uniform optimal insurance arrangement for product risks. In the absence of moral hazard, such a contract would provide full insurance for repairable or replaceable commodities. For other commodities, partial or no insurance would be provided.[18] If, however, consumers are not equal, then the optimal insurance arrangement depends on the characteristics of the consumer e.g. his "propensity" to take care, the ability to take preventive efforts, the distribution of losses etc. It follows that the uniform insurance arrangement applied by strict liability cannot be optimal. Nor can the payment of uniform insurance premiums by consumers who present different risks create an optimal situation. But under strict liability the insurance is inseparable from the purchase of an article and hence the insurance premium is contained in the purchase price.

In most cases the consumer has some control over product risks. He can make sure that the product is put only to its proper use. Also, he can avoid certain dangerous situations. Last but not least, he can use a product less frequently. If the consumer is fully insured, he may tend to be less careful as long as compensation is guaranteed. There are three, albeit far from perfect, ways of maintaining the incentives to act carefully: (1) contributory negligence (2) co-insurance (3) deductibles.

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18. In exceptional cases over-insurance is optimal. Cf. Cook and Graham (1977).

4. Two objectives - one instrument

Product liability serves two objectives: (1) it provides incentives to reduce product risks and (2) it provides compensation for victims. There are two objectives but there is one instrument for their application: the liability rule. Appropriate incentives for producing safe products may entail imposing strict liability on the producer.[19] Optimal compensation, however, is equivalent to the full loss only in exceptional cases. In general, the consumer should bear part of the loss to maintain the incentive to take care. Furthermore, in the case of irreplaceable or irreparable commodities, optimal compensation may not be possible. It is impossible to satisfy both objectives at the same time. There is a trade-off between the two. If the welfare of an economy depends primarily on appropriate incentives for accident prevention, then product liability rules should first of all create these incentives.

Generally speaking, liability rules with optimal incentives for the production of safe goods provide more insurance than is demanded. In this sense, optimal prevention means over-compensation. Over-compensation causes substantial misallocation only when moral hazard problems arise. But moral hazard can be reduced by co-insurance or deductibles. The optimal liability rule, therefore, should always shift part of the risk to the buyer of the product. It has been argued[20] that non-material damages and, in particular, compensation for pain and suffering should not be paid or paid in limited amounts and that this part of the loss should be shouldered by co-insurance. Although European legal systems provide relatively low awards for non-material losses and pain and suffering, and although the associated transaction cost savings are obvious, it may well be the case that the incentive to save lives has become insufficient. A solution to this problem might be sought in a separation of liablity into prevention incentive

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19. For a detailed analysis, see Finsinger and Simon, An economic assessment of the EC Product Liability Directive and the product liability law of the Federal Rupublic of Germany, 1988, Section 3 and 4.

20. cf. M. Adams (1987) and (1988).

(penalty) and compensation for non-material losses. non-material losses, pain and suffering and death, may only partially be compensated, but a penalty equal to the uncompensated damage should be imposed on the producer. For instance, a high penalty on death could be imposed. This penalty, however, would not be paid out to the relatives of the victim.

5. Insurance of product liability risks by the producer

This section enumerates some criteria for determining the insurability of a risk.

(1) Difficulty of estimating the probability of an accident.

(2) Adverse selection: If the insurer cannot distinguish high and low risk, he will find that at any premium predominantly bad risks will want to be insured. As Rothschild and Stiglitz (1976) have shown, a Cournot-Nash market equilibrium may not exist under these circumstances.

(3) Moral hazard: Insurance reduces the incentive to take care. The incentive to take care can only be maintained to the extent that the insurer monitors the care exercised and increases premiums whenever care is reduced. To some extent, incentives to take care can be maintained by loss-sharing arrangements. Co-insurance and deductibles are examples of such arrangements, leaving some of the risk with the insured. However, the incentive to take care will still be smaller than in the absence of insurance.

(4) The difficulty of estimating the probability of making a claim.

(5) No sudden changes in the legal system: The insurer must be able to clearly recognise what constitutes an accident and how liability for it is determined.

These criteria shed some light on the consequences of requiring producers to buy insurance. In fact, in Spain and Italy insurance will be compulsory for product risks. Clearly, compulsory insurance will guarantee the compensation of victims. But, it may interfere with proper incentives for prevention or with the dynamics of product markets:

(1) There is substantial information asymmetry in the area of design and development risks. The producer will always know substantially more than the insurer about such "idiosyncratic" risks. To the extent that insurers cannot monitor the safety of new designs or developments and therefore cannot calculate appropriate premiums, moral hazards and adverse selection problems will arise. As a consequence, new products might only be insured at high premiums. In some cases new products will not find insurance at all. Also, established firms in an industry will more easily obtain insurance. Small and young firms may be at a disadvantage. Clearly, in a perfect competition insurance market such barriers to entry would not be present. But the adverse selection and the moral hazard problems are severe enough to rule out that a market for product liability insurance would be perfect.

(2) Moreover, compulsory insurance requires that a basic insurance contract is specified by the government. This contract, amongst other things, specifies the basic types of risk insured as well as the minimum cover. The insurer can go beyond the contract, but he cannot offer less than the contract. This lack of flexibility does not cause misallocation when a standard risk is concerned as, for instance, when third party car insurance is compulsory. When a highly complex risk such as the product risk is concerned, the limitation on tailoring special contracts for special circumstances creates a potential for market failure. The insurance market will be less perfect than it otherwise would be in the presence of moral hazards and adverse selection. Thus, the problems of moral hazard and adverse selection are compounded.

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THE INSTRUMENTS OF PRODUCT SAFETY POLICY AND THE PROCESS OF EUROPEAN INTEGRATION

Christian Joerges

Deregulation

Product Safety Policy which first took on clearer form in Western industrial states during the sixties in the context of the various consumer movements, has since lost much of its former attractiveness. For several reasons the critique of market failures which once supported a dynamic search for regulatory cure has given way to a critique of regulatory failures and a movement towards deregulation. Admittedly this general shift in attitudes has created a favourable climate for the Community's attempt to bring about the completion of the internal market in the mystical year 1992. This is so for a very simple reason: Product safety legislation creates barriers to trade; any deregulation in this area tends to facilitate the free movement of goods within the Community; more precisely, the Community's internal market objective can best be achieved via deregulation.
A closer examination of the complex field of product safety policy reveals, however, that the coupling of market integration and deregulation suggests a far too superficial picture of the Community's tasks and its actual policies. The following overview will try to show that the process of European integration does in fact have a specific impact on the regulatory patterns of product safety policy which at first sight seems very much in line with the demands for (movement towards) deregulation. But the argument will also be made that, at the same time, the integration process leads to a revival of the issues of product safety policy and engages the Community in new regulatory activities.

I. Product safety through product liability

The controversies about product safety policy are to be attributed largely to the fact that, in practice, the guaranteeing of safety by governments tends to be reflected in regulatory measures, with the result that advocates of "juridification of the safety issues" tends to be countered by the general objections of governmental intervention and paternalism. Such debates, interesting and fundamental as they may be, are often highly academic. Their practical relevance depends on how one defines the limits of the paradigm referred to. On the one hand,

advocates of an interventionist safety policy have to take account of the numerous bottlenecks produced by safety regulation. The number and variety of potentially dangerous products, the speed of technical development, the unpredictability of behaviour by product users and the range of their interests in protection excludes, de facto, positive regulation in relation to all potential product hazards. On the other hand, objections to governmental measures do not necessarily mean that political responsibility for guaranteeing product safety is rejected out of hand. Instead, it is asserted that this task should primarily be approached using non-interventionist instruments, namely "market-oriented" regulatory techniques which work indirectly, particularly liability law and information policy measures; or at least, in so far as such techniques seem inadequate, self-regulatory mechanisms - more specifically, product standardisation through non-governmental standardisation organisations - are in principle preferable, since they seem able to exploit the professional competence of private individuals or undertakings and thus seem in general superior to "interventionist" solutions.

1. The economic analysis of product liability

The argument that safety issues should primarily be dealt with by "indirect" mechanisms such as product liability law assigns a regulatory function to that law. This outcome has been developed above all through economic analysis of liability law. According to the general assumptions of this approach about rational action by manufacturers and consumers and about the function of legal rules, product liability law is (econonomically) rationally structured if it guides individual profit-maximising behaviour in such a way as to produce societally optimal welfare, i.e. if it tends to lead to expenditure on accident avoidance which corresponds to the general conceptions of social utility held by members of the society. It is undisputable that this control task cannot simply be left to individual (contractual) negotiation processees. Firstly, reliance on the rationality of contractual mechanisms, in which safety requirements are "negotiated", seems unwarranted. Admittedly, the manufacturer may clarify his safety expenditure to the consumer by corresponding price differentiation. But the purchaser's decision in favour of a more hazardous alternative ought to be considered "rational" only in so far as he can at all have an insight into the hazards of the product concerned. Secondly, relationships negotiated between manufacturers and users

dealing with safety issues by "indirect" mechanisms (e.g. product liability)

would have to cover all those concerned, who are endangered by product risks - including innocent bystanders. But if the transaction cost of individual agreements are prohibitively high, the law itself must determine the optimal welfare allocation of product hazards. Accordingly, it must lay down whether at all the manufacturer is to be held liable, whether his liability should depend upon his negligence or should be "unconditional". The term "unconditional" itself requires explanation which calls for a further decision about the regulatory functions of liability law. If all "social" costs arising as a consequence of the production of goods, are reflected in the price of goods, then "unconditional" liability must take the form of an "absolute" duty of accountability, extending equally to development risks which are "objectively" unforeseeable at the time of marketing the product.[21] If instead, the sanctions of liability law are to be used to guide the behaviour of manufacturers without punishing their willingness to innovate, then liability law must be orientated towards the possibility of manufacturers taking action, thus "unconditional" liability takes the form of a defect liability, starting at the moment a product is marketed and/or permitting a 'state-of-the-art' defence.

product liability as a substitute for a positive product safety policy

I refrain from a discussion of these alternatives and from an economic analysis of the European Product Liability Directive. Both issues are being extensively dealt with in the contributions of G. Büggemeier und J. Finsinger. Instead, I point to some of the reasons why product liability law cannot be conceived of as a substitute for a positive product safety policy.

First, as J. Finsinger emphasizes, there is a wide range of "irreplaceable" goods, for which compensation is not necessarily appropriate but rather preventive action. The exact delineation of such areas involves value judgements and requires political decisions. Likewise, the exclusion of liability for certain risks (as provided for in the case of development risks by Art. 7(e) of the Product Liability Directive) does not automatically relieve the

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21. See the exhaustive account in the LL.M-thesis of Reinhard Wiehe, Nachmarktkontrolle durch privatrechtlich-indirekte Steuerung. Eine ökonomisch orientierte Betrachtung, European University Institute 1988, ch. II.

Member States and the Community from regulatory burdens. General encouragement of innovative efforts does not mean that experiments in every field of technological development, however risky, have to be allowed.

2. Integration policy issues

Instead of going any further into the limits of product liability law, I would like to emphasise one dimension of the Europeanization of product liability law which is usually neglected in the legal analysis of the achievements and shortcomings of the European Directive, namely its interrelationship with the unification of product standards. It is true to say that different liability criteria of Member States do not constitute barriers to trade within the meaning of Art. 30 of the Treaty. The specification of product safety duties by the courts, however, is relevant over and above private liability law. The courts, in assessing the defectiveness of products, de facto control not only the production process of the individual manufactuer concerned but also the industry-wide standards taken by manufacturers as guidelines for their products. Additionally, one cannot rule out that national administrations adopt decisions of civil courts as guidelines to the level of product safety required by liability law for the purposes of their administrative practice. To be sure, such considerations are for the moment speculative. Nor are they meant to suggest that harmonization of liability is an indispensable condition for completing the internal market - a brief survey of divergencies within the product liability laws in the United States would alone be enough to discredit such a hypothesis. However, it does not seem too outspoken to assume that the Community, which has only harmonized, very imperfectly, mandatory product safety law and is no longer even aiming at perfect harmonization, will develop interests in the uniform interpretation of standards and liability law, and, therefore react sensitively to judicial criticism implicit in the results of European standardization. Community law even now has mechanisms for preventing wayward interpretation of directives (or disparate mechanisms to ensure uniformity in the interpretation of directives). Pursuant to Arts. 169 and 170 EEC Treaty, the Commission, and any Member State respectively, can impugn an interpretation of the product safety duty which is contrary to the objectives of the Community under Art. 6 of the Directive before the ECJ; national courts may, and are required to, bring questions of interpretation before the ECJ, pursuant to Art. 177 EEC. But these procedures are too cumbersome and

will only be used selectively. If interest is to be shown in uniform legal criteria for the level of product safety, then the available legal means are scarecely sufficient to enforce that interest.

II. Data collection

Once it has been recognized that product liability law and other "indirect" instruments of product safety policy such as information provisions cannot be exhaustive, the need to discuss and draft "positive" regulatory measures for product safety policy becomes irrefutable. One first step towards a rational product safety policy is the establishment of a data collection system providing public authorities with information as to the number and causes of product-related injuries. The United States has been a pioneer in developing such a systematic survey (the National Electronic Injury Surveyance System, NEISS)[22] and the American experience has been put to use by both, European states[23] and the Community.

The Community's activities have, however, always taken a course of extreme caution.[24] The Council Decision of 13 July 1981 was restricted to carrying out a pilot experiment, which left it Member States to decide the nature of their participation, and was really taken seriously by only three states. The Council's subsequent Decision of 23 April 1986 on the "European Home and Leisure Accidents Surveillance System ("EHLASS")[25] was

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22. On the development of the NEISS, see the documentation from the Consumer Product Safety Commission, The National Electronic Injury Surveillance System: A Description of its Role in the US Consumer Product Safety Commission, April 1986.
23. On the British HASS system, see the references in Ch. Joerges/J. Falke/H.-W. Micklitz/G. Brüggemeier, Die Sicherheit von Konsumgütern und die Entwicklung der Gemeinschaft, Baden-Baden 1988, 119-120; on the Dutch PORS cf. J.H.A. Bruggers/W.H.J. Rogmans, Registratie van ongevallen in de privésfeer- een inventarisatie van relevante registratie systeemen, Veiligheidsinstituut, Amsterdam 1982.
24. O.J. no. L 229, 13 August 1981, 1.
25. O.J. no. L 109, 26 March 1986, 23.

termed a "demonstration project". For a period of five years, data are to be collected throughout the Community - again with the Federal Republic of Germany playing a special role. The project's declared aim is an assessment of the data "aimed at preventing accidents". Whether the Community will ultimately be successful in establishing a European information system on a durable basis and making use of it to further its product safety policy is at present hard to predict.

It is certainly extremely difficult, to resolve all the complex technical and organisational problems of setting up a Community accident information system. This is not sufficient, however, to explain the Council's dilatory attitude. The difficulties of coming to a decision at Community level should instead be seen more in the context of the tension between product safety policy and internal market policy. The safety policy priorities resulting from an assessment of accident data stored in information systems, and the priorities that determine a European harmonization policy and standardization work in the interests of completing the internal market, stem from different contexts and converge only haphazardly. The conditions for consensus at European level are equally diverse. The controversies of its significance for national accident information systems involve different "safety philosophies" and regulatory traditions, which undoubtedly also embrace economic interests. They also bring forth the relationship between state and economy in general, in relation to public policy. Against this, when it comes to harmonizing national regulations which obstruct internal Community trade or working out European standards, those directly affected always present themselves to state their case. They may feel danger to their market shares at home, or hope that easier access may bring them new advantages on foreign markets. Safety policy decisions are unavoidable even in such bargaining situations. Yet a safety policy consensus cannot resolve economically-based conflicting interests, and a compromise formula to reconcile such conflicts may lead to concessions on safety policy questions. These considerations are not meant summarily, but more as initial pointers to the complexities of the integration process in the area under study here: product safety policy can become established as a European policy area only if it manages to demonstrate its contribution to the achievement of the European market. But this is precisely why product safety policy gets enmeshed in dependency on internal market policy, which is fully occupied with

balancing of the conflict of economic interests between economic and governmental actors.

III. Pre-market control

Accident information systems are concerned only with the possibilities of rendering product safety policy "rational". The most important legal instrument to date, which is also supposed to make up for the regulatory shortcomings of liability law, is preventive product safety regulation. Since such regulation acts by definition as a barrier to trade, the achievement of a common European market requires the harmonization of pertinent regulations or at least a mutual recognition national provisions.

Accordingly, the Community has, since the adoption of its programme on overcoming technical barriers to trade of 1969[26], engaged in the harmonization of pertinent legislation. This programme has, however, only been partly successful in a number of fields. By the seventies it had already become obvious that the objectives of a common European market necessitated a new harmonization policy - the now famous "new approach to technical harmonization and standardization" responded to that need.

1. National developments in product safety legislation

It is worth noting that this shift in the Community's integration policy has been accompanied and furthered by internal developments of product safety policy both within and without the Community. The development of the American Consumer Product Safety Act 1972 provides an outstanding example. When this legislation was enacted, it was assumed that safety requirements of consumer goods were to be brought under control primarily through mandatory standards for specific products. In 1981 the American legislator asked the Consumer Product Safety Commission to rely primarily upon voluntary safety

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26. O.J. no. C 76, 17 June 1969, 1.

standards [27] - not a single mandatory safety standard has been issued since then. This shift in regulatory philosophy is very much in line with the self-regulatory tradition dominating in Germany, in particular with the so-called 'reference technique' used in paragraph 3(1) of the law on technical appliances (Gesetz über technische Arbeitsmittel, GSG) of 1968. But the regulatory bottlenecks, which contributed to the emergence of self-regulatory schemes, can be observed even in those fields where public pre-market controls are firmly established and, in principle, regarded as indispensable. Thus, according to German pharmaceutical law, the licensing procedure belongs solely to the competence of the Federal Office of Health (Bundesgesundheitsamt) as the overall Federal authority (paragraph 77 AMG). But this agency is obliged to consult a licensing commission, which comprises representatives of the medical profession, including the pharmaceutical industry (paragraph 25(6) and (7) AMG); in fact, the "recommendations" of these committees determine official action[28]. Foodstuffs Law (paragraph 26 LMBG) refers to the guidelines of the foodstuffs register, which contains "substantive" criteria for the manufacturing, nature and other characteristics of foodstuffs; these criteria are worked out by a commission where once again government representatives sit alongside business people and scientific experts. These examples of corporatist arrangements underlying public regulation are certainly not a specific German invention.

It would, however, be erroneous to interpret these roughly described tendencies as indicating or confirming a general trend towards "deregulation". The emerging regulatory patterns are more complex. Thus, the German reference to standards technique starts from the assumption that "voluntary" standards will comply with the general safety duty imposed on manufacturers by the general clause of paragraph 3(1) GSG and uses indirect regulatory techniques by which such compliances are

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27. See E. Klayman, Standard Setting under the Consumer Product Safety Amendments of 1981 - A Shift in Regulatory Philosophy, George Washington Law Review 1982, 96 et seq.
28. See D. Hart/A. Hilken/H. Merkel/O. Woggan/G. Glaeske, Das Recht des Arneimittelmarktes in der Bundesrepublik Deutschland, Baden-Baden 1989, 30 et seq.

controlled. According to the standardization Agreement (Normenvertrag) between the Federal Republic and the German standardization Organisation (DIN) of 1975, DIN has promised to "take the public interest into account", to give "preferential treatment" to requests for standards coming from the Federal government, and to incorporate representatives of the Federal government, or of governmental agencies, in its standardization committees. In the new 1974 version of the basic standard, DIN 820, DIN undertook to observe procedural principles aimed at guaranteeing balanced involvement of "interested circles"; likewise in 1974, a consumer council was set up as an institution. Whether the norms thus produced meet the safety requirements of paragraph 3(1) GSG, is determined according to the general administrative provisions under the GSG, by the inclusion of standards in the annexes to those administrative regulations. Their inclusion is formally decided by the Federal Minister for Labour and Social Affairs, whose decisions are prepared, as regards substantive content, with the respective cooperation of the Federal Institute for Labour Protection and the DINs "Commission on Safety Technology". Clearer governmental post-sale control arises from the control power of the trade supervisory offices (Gewerbeaufsichtsämter), with jurisdiction in individual federal states (Länder) which in accordance with paragraphs 5-7 GSG verify observance of para. 3 GSG, call for submission of expert reports and may issue banning orders.

2. European harmonization policy

National debate and controversy concerning the advantages and drawbacks of national product regulation - on issues of "functional" delegation of lawmaking competence to private organisations and of indirect and/or ex post facto monitoring of these by government - have centered upon the suitability of legal regulatory strategies from a safety policy viewpoint. By contrast, relevant Community documents on Community legislative involvement in product safety have primarily been concerned with the internal market policy implications of a given regulatory approach. The "regulatory crises" which led to the shifts in regulatory philosophies had its counterpart on the European level in "harmonization crises" which the Community tries to cope with by its new harmonization policy. It can be easily observed as the common rationale of the attempts of the Cassis de Dijon doctrine to replace positive harmonization by mutual recognition, to restrict new directives to the harmonization of "essential safety requirements"; of the introduction of the (qualified)

majority principle by the new Article 100a(1); and at the attempts to strengthen the executory powers of the Commission.

The new harmonization policy has not totally replaced the "traditional" approaches. Especially in such highly sensitive areas as pharmaceutical law, the Community retains to the idea of "positive" harmonization - and struggles with the shortcomings of this approach. But new harmonization policy affects areas which were once undisputed candidates for "positive" harmonization, such as foodstuffs and it aims at establishing a new regime in the area of labour protection[29]. The primary "targets" of the new approach are, however, technical goods which lend themselves to cooperation with standardization organisations, and it is in this area where the Community has already been quite successful. The first directive giving effect to the new approach - namely the directive on Simple Pressure Vessels[30], and also the Toy Directive[31] were able to draw on preliminary work already completed. As regards the proposal for a General Directive on Machinery[32], the Commission has broken new ground: the range of application of this directive is similar to that of the German GSG, covering both work materials and consumer products (Art. 1).

3. Shortcomings

The starting-point of my observations was that the influence the Community exerts on product safety policy will primarily be guided by its dedication to the achievement of the internal market. This objective certainly requires the adoption of a harmonization policy which lifts the burden from the Community's legislative process. However, it remains doubtful, whether the new regulatory patterns the Community is trying to set up will

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29. Cf. the document COM (86) 87 final, 22 April 1986 on a proposal for a council directive on the harmonization of member states' legal provisions on permitted additives in foodstuffs and the proposal for a framework directive on organizational measures connected with the workplace, OJ C 141/1, 30 May 1988.
30. O.J. no. L 220, 8 August 1970, 48.
31. O.J. no. L 187, 16 July 1988, 1.
32. O.J. no. C 29, 3 February 1988, 1.

suffice to achieve its internal market objectives. Three deliberations seem to mitigate against such hopes: First, the strategy of (the nationalization) of product safety policy by majority decisions of the Council and by strenghtening the (executory) powers of the Commission clashes with Member States' interests in not letting responsibility for product safety out of their hands. The restriction of the majority principle of Art. 100a by virtue of paragraph 4 of this provision, and the outcome of the debate on the form of the new version of Art. 145 EEC, are general indications of resistance to this strategy; whereas the failure of the Commission's original proposal for a directive on additives in foodstuffs points to very specific resistance. Secondly, the increasing presence of bureaucracy in "de-governmentalization" (if this a possible term for "Entstaatlichung"/Deregulierung) in product safety law through the technique of reference to standards suffers from an inherent legal weakness. The relevant directives and draft directives lay the basis for community-wide rights for open markets in relation to goods complying with European standards or recognized national standards. They leave untouched the right of Member States to verify the safety of products themselves on the basis of "essential safety requirements" laid down in Community law and to take measures against products that in their view do not meet these requirements. Difficulties arise where the Commission regards action by one Member State against product hazards as justified. Should a safety defect be attributable to shortcomings in standards the Commission may refuse to recognise this standard. However, it is at present uncertain, whether the Community can take any further action, e.g. ask Member States to ban products not complying with its interpretation of the Community's safety requirements. The Toy Directive provides that Member States should "take all expedient measures to withdraw such (hazardous) products form the market or prohibite or restrict their being brought to market" (Art. 7 (1)), and the draft machine directive has a similar provision (Art. 7 (1)). But these provisions can hardly be interpreted as obligations to introduce new possibilities of action within Member States, and even if they were so interpreted, would be much too imprecise to guarantee, even approximately, uniform administrative practices in safety law. Last but not least, it seems doubtful whether the "functional" delegation of legislative competence to the European standardization organisations will in fact overcome the obstacles to arriving at a European consensus. Such obstacles do not simply arise from the idiosyncracies of national policy makers, but to a large degree, from

differences in the perception of economic interests. Such conflicts of interest do not fade away by the delegation of standardization activities to private organizations.

IV. Follow-up market control

Liability law only indirectly affects product safety - and these effects are limited and hard to predict. Preventive product safety law necessarily remains imperfect and provisional; imperfect since hazards can never be calculated exactly in advance; provisional, because the risk-benefit assessments reflected in technical safety measures must remain open to re-evaluation in changed circumstances or in the light of new knowledge. Still more so, governments must stay in a position to assert their responsibility for product safety if they delegate tasks of preventive safety regulation to non-governmental agencies. The device, which responds to these regulatory needs, is follow-up market control.

1. Functions

The regulatory functions of "follow-up market control" differ from one product area to another. In pharmaceuticals law, which in principle provides for preventive controls, their purpose is essentially to verify the justification of predictions incorporated in the licensing decisions, taking new knowledge into account. By contrast, in the law on technical work materials, they are rather intended to make up for the lacunae in protection by drawing up preventive standards, and where there are no standards, to lay down initial specifications of the general safety duty. But the practical conditions for effective response to hazards of marketed products also differ considerably. In the pharmaceutical sector, the number of producers is limited and channels of distribution easy to follow; the medical profession can be approached and through them also often those affected. In the foodstuffs sector on the other hand, those causing health risks are enormously harder to identify; distribution channels can hardly be controlled, and consumers involved can be reached, at most, by means of more or less speculative notices. The area of technical work materials and consumer products is extremely heterogeneous. Action on medical equipment, complicated plants, or high-value consumer goods which, as is the case with cars, are sold through closed distribution systems and in any case subject to regular official checking is relatively simple. This is not true

for the enormous range of technical consumer products as a whole. Even if manufacturers can be identified, it is hard to trace distribution channels, and determination of all product users involved is inconceivable.

2. Follow-up market controls and internal market policy

However unquestionable the demands for continued adoption of safety standards and for the possibility of government response to recognised hazards may seem, follow-up market control remains in Europe a poor relation of product safety law. But this does not mean that a need for action has not accrued at European level. There are two arguments in favour of European iniatives which take precedence over national developments: firstly, the Community must be aware that it will be regarded as having responsibility for hazards to the extent that it is successful in imposing its policy on opening national markets; secondly, it must expect that freedom of action, at present open to national authorities, will lead to new (subsequent) market segmentation because the competent authorities in Member States will interpret the general safety clauses in the new directives differently, and respond with different actions.

For specific medical requirements within the meaning of Directives 75/319EEC and 81/851/EEC: animal diseases and residues in foodstuffs and fresh meat within the meaning of Directive 64/432/EEC, for foodstuffs and - since the Council Decision of 2nd March 1984[33] - for consumer goods as a whole, there are Community information systems. The obligation on competent authorities in Member States to notify measures directed against "serious and immediate" health risks means only that information is passed on by the Commission, not that there will be a uniform Community-wide response. The need for action at European level seems most urgent in the area of application of the new approach to technical harmonization and standards. The safety objectives of the new directives all affect very broadly defined product categories, and have been correspondingly vague. The various "general" product safety duties differ in emphasis and are hardly sufficient for the formation of a consistent European safety philosophy. The new draft directive on machinery, with its comprehensive scope, thus represents considerable

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33. O.J. L 70/16, 13 March 1984.

progress. Admittedly, the wording of this draft presents interpretation difficulties that go beyond even those usual with general clauses.

Undoubtedly, the capacity of general safety clauses to provide orientation remains limited, however well the wording may have been thought out. But that makes their regulatory function all the more important. General clauses guarantee powers to act that have to compensate for absence of direct, detailed product regulations. Follow-up market control is the most obvious expression of this form of governmental guarantee of the safety and health of citizens. If the assumption that, as the new harmonization policy takes hold, follow-up market controls will acquire increasing importance, is true, then the Community must, by providing for anticipatory harmonization of law on follow-up market controls, guarantee Europeanization of decisions in this context.

PART TWO: PRODUCT LIABILITY LAW AFTER THE EUROPEAN DIRECTIVE

PROJET D'APPLICATION DE LA DIRECTIVE SUR LA RESPONSABILITE DU FAIT DES PRODUITS EN FRANCE[34]

Henri Temple

A l'heure où nous écrivons ces lignes, la France n'a toujours pas adopté la Loi qui la mettrait en conformité avec la directive n° 85/374/CEE du 25 juillet 1985 relative au rapprochement des dispositions législatives des Etats membres en matière de responsabilité du fait des produits défectueux. La France est donc, avec quelques autres Etats, en infraction avec les règles communautaires puisque elle aurait dû adopter, avant le 30 juillet 1988, les nouvelles dispositions législatives. A l'heure où nous écrivons, cependant, rien ne permet de penser que le texte pourrait être adopté avant la fin de l'année 1988, mais au contraire tout laisse craindre un nouveau report à la session parlementaire du printemps 1989. En effet, il semble que plusieurs tendances s'affrontent au sein même du gouvernement au sujet de la position que le Droit Français devrait adopter en ce qui concerne la question capitale des risques de développement.[35]

De plus de nombreuses voix s'élèvent tant du côté des secteurs industriels que dans le monde des assurances, pour souligner que la France ne devrait pas être un des rares pays d'Europe à retenir la responsabilité du fabricant ou du distributeur même lorsque ce dernier arrive à prouver que le défaut était imprévisible en l'état des connaissances scientifiques qui prévalaient au moment de la conception et de la première commercialisation du produit.

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34. Cette étude a été faite en fonction de l'état du projet de loi en Septembre 1988, à jour en Novembre 1988.
35. V. infra n° III B.

Force est de reconnaître que la proximité de l'échéance de 1993 et de la mise en place d'un marché européen unique conduit les principaux opérateurs économiques à provoquer de véritables courses de lenteur quand il ne s'agit pas de courses à reculons. Chaque Etat, en effet, hésite à pénaliser ses secteurs de production ou de services par rapport à ceux des pays concurrents en leur faisant subir le poids plus lourd d'une réglementation plus sévère.

Tout se passe donc comme si les pouvoirs publics français souhaitaient connaître la législation adoptée par les autres membres de la C.E.E. avant de proposer le projet de loi à l'Assemblée Nationale.

L'actuel projet de loi, qui emprunte une bonne partie de ses éléments aux travaux de la Commission dirigée par le Professeur Jacques GHESTIN, a subi de nombreuses modifications mais semble, à l'heure actuelle, à peu près stabilisé si l'on excepte la question des risques de développement. Pour décrire l'actuel projet nous exposerons :

I LA PHYSIONOMIE JURIDIQUE GENERALE DU PROJET.
II LE DOMAINE D'APPLICATION DU PROJET.
II LES CONDITIONS DE LA RESPONSABILITE.
IV AUTRES DISPOSITIONS DU PROJET.

I LA PHYSIONOMIE JURIDIQUE GENERALE DU PROJET.

A. Le non-cumul des nouvelles et anciennes dispositions.

Les nouvelles dispositions concernant la responsabilité du fait des produits défectueux prendront place dans le Code civil, dans des articles nouvellement créés : Articles 1387 et suivants jusqu'à 1387-17.

Pour éviter toute confusion et tout problème de délimitation, le texte du projet prévoit (article 1387-17) que lorsqu'il y aura lieu d'appliquer le système de responsabilité du fait des produits aucun autre système de responsabilité du Code Civil ne pourra être appliqué. Il s'agit donc d'une sorte de non-cumul du nouveau système avec les systèmes antérieurs qui sont maintenus mais qui, désormais, seront appelés à jouer un rôle beaucoup moins important, du moins en ce qui concerne la responsabilité du fait des produits.

Les nouvelles règles sont conçues comme le système de droit commun, les anciens systèmes ne venant compléter, en tant que de besoin, le nouveau système que lorsque celui-ci ne règle pas une question.

Il faut toutefois noter une exception au caractère primordial et non-cumulable des nouvelles dispositions : ainsi les articles 1792 et suivants du Code Civil qui concernent la responsabilité des constructeurs pourront recevoir une application conjointe à celle des nouvelles dispositions. En revanche, la mise en jeu d'une nouvelle disposition exclut formellement le recours conjugué aux articles 1641 et suivants qui concernent la garantie des vices cachés et la responsabilité pouvant résulter de ces mêmes vices; de même est formellement exclue la mise en oeuvre de la responsabilité du fait d'autrui ou de certains aspects de la responsabilité du fait des choses (article 1384 du Code Civil).

On a voulu couper court à toutes les questions d'exégèse et toutes les difficultés qui pourraient résulter à propos du choix du texte applicable.

B. La responsabilité sans faute étendue aux professionnels.

L'exposé des motifs qui accompagne le projet insiste sur l'idée d'instituer une responsabilité sans faute du fait des produits défectueux envers les victimes; bien entendu il s'agit de l'idée maîtresse de la directive qui est ainsi réaffirmée.

Une autre idée maîtresse du texte est celle qui conduit à faire disparaître la distinction entre responsabilité civile contractuelle et responsabilité civile délictuelle.

Un dernier choix fondamental a conduit les auteurs du projet à étendre son domaine d'application, sans distinguer selon que la victime est un consommateur ou un professionnel. Certes, le projet français s'écarte sur ce point de la lettre de la directive mais les auteurs du projet ont souhaité éviter d'instaurer des systèmes de responsabilité trop complexes. On a donc recherché la simplification.

Les auteurs du projet ont été amenés, dans cette ligne de conduite, à étendre le domaine d'intervention de la future loi, et à effectuer une légère modification des textes du

Code Civil concernant la garantie des vices cachés dans le contrat de vente.[36]

II LE DOMAINE D'APPLICATION DU PROJET.

Le projet français s'applique aux dommages provoqués par certains produits défectueux et détermine les personnes qui en supportent la responsabilité. On définira donc le dommage, le produit, le défaut et les personnes responsables.

A. Le dommage.

Le projet (article 1387-1) concerne les dommages qui résultent d'une atteinte à la personne ou qui sont causés à une chose autre que le produit défectueux lui même. On observera donc que le projet français va au delà de ce qui est prévu dans la directive.

D'une part, en effet, il ne se limite pas au seul dommage physique visé par l'article 9 de la directive. L'expression "atteinte à la personne" peut s'appliquer aussi bien au dommage moral (pretium doloris), préjudice esthétique ou fonctionnel subi par la victime directe, qu'aux dommages indirects (ou par ricochet) subis par les proches de la victime (conjoint, parents).

D'autre part, le projet concerne les dommages qui sont causés à une chose autre que le produit défectueux lui même. Comme dans la directive, le projet français ne distingue pas entre chose mobilière et chose immobilière mais à la différence de la directive (article 9), le projet ne se restreint pas aux seules choses qui sont normalement destinées et principalement utilisées pour la consommation privée de la victime. En d'autres termes, les biens professionnels sont compris dans le champ d'application du projet. Il s'agit d'une variante importante par rapport à la directive; elle est motivée par un souci de simplification.

B. Le produit à l'origine du dommage.

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36. V. infra IV.

Comme la directive, le projet (article 1387-2) ne vise que les produits mobiliers, même incorporés dans un autre meuble ou un immeuble, mais, comme la directive le permet (article 15 a), on englobe dans le projet français les matières premières agricoles, les produits de la chasse et de la pêche.

C. Les défauts du produit.

Le produit est défectueux lorsqu'il n'offre pas la sécurité à la quelle on peut légitimement s'attendre (article 1387-3). Le projet est donc un démarquage de l'article 6 de la directive et, comme cette dernière, il estime que la défectuosité ne saurait être retenue par comparaison avec la mise sur le marché postérieure d'un produit plus sûr. Pour apprécier la défectuosité, c'est à dire l'absence de sécurité à laquelle on peut légitimement s'attendre, il doit être tenu compte de toutes les circonstances notamment la présentation du produit, l'usage que l'on peut raisonnablement en faire.

D. Les personnes responsables.

Le projet désigne principalement le producteur comme personne responsable des dommages causés par les produits défectueux. Peu importe que le producteur ait été ou non lié par contrat avec la victime. Le producteur est défini par l'article 1387-5 du projet comme celui qui fabrique le produit fini, ou la matière première, ou les parties composantes de ce produit ainsi que toute personne qui se présente comme un producteur en apposant son nom ou sa marque sur le produit. En outre, sont assimilés au producteur les importateurs sur le territoire de la C.E.E.;sur ce point le projet français ajoute, par rapport aux dispositions de la directive, le vendeur, le loueur ou tout autre fournisseur agissant à titre professionnel (article 1387-6).

Il est à noter une trés légère différence dans la rédaction du projet français avec le texte de la directive. A propos des actes d'importation, le projet français vise "tout professionnel" qui importe alors que la directive mentionne "toute personne qui importe".

Enfin, reprenant le principe de l'article 5 de la directive, l'article 1387-7 du projet français institue une responsabilité solidaire de tous les producteurs des composants du produit.

III LES CONDITIONS LEGALES DE MISE EN OEUVRE DE LA RESPONSABILITE.

Le projet français s'aligne ici sur la directive en ce qu'il donne la même définition du défaut et du dommage, et en ce qu'il pose l'exigence de la preuve, pour engager la responsabilité du producteur, du dommage, du défaut et du lien de causalité entre le défaut et le dommage.

Quatre points particuliers méritent d'être soulignés:

A. Concept de la mise en circulation.

En effet, la responsabilité du producteur n'est engagée que si le produit est mis en circulation, c'est à dire, au terme de l'article 1387-4 du projet, lorsque le professionnel s'en est "dessaisi volontairement". Comme dans l'article 6.2 de la directive, le projet français (1387-3) interdit la référence à la mise en circulation de nouveaux produits plus sûrs pour apprécier la défectuosité du produit qui est à l'origine du dommage. L'absence de mise en circulation sera, nous le verrons, une cause d'exonération de la responsabilité du professionnel.

Quant au maintien sur le marché du produit après que s'est révélé un défaut ou un danger, il engage pleinement la responsabilité du professionnel, même si l'on se trouve dans l'un des cas d'exonération de la responsabilité initiale ou hors les délais d'action. Cette disposition pourrait convenir aussi bien dans l'hypothèse des risques de développement (voir infra B) que dans l'hypothèse où un produit plus sûr étant mis sur le marché, le produit concerné apparaît dés lors comme dangereux par comparaison.

B. Exonération de responsabilité.

1/ Sur ce terrain, la question capitale est le sort que le projet français réserve aux risques de développement. Un débat intense semble à l'heure actuelle diviser le gouvernement et opposer certains ministères aux représentants des professionnels. Quoiqu'il en soit, dans l'état actuel du projet, le professionnel peut s'exonérer de sa responsabilité en invoquant le risque de développement, c'est à dire en établissant que l'état "des connaissances scientifiques et techniques au moment où il a mis le produit en circulation n'a pas permis de déceler l'existence du défaut". Cette disposition est très critiquée par les organisations de consommateurs car elle n'est pas compensée par la mise en place de procédures de

réparation au profit des victimes; ces dernières semblent bien dans l'état actuel du projet ignorées.....

2/ Les autres causes d'exonération de responsabilité sont les suivantes:

- Lorsque le producteur établit que le défaut résulte d'une conformité du produit avec des règles impératives émanant des pouvoirs publics (1387-9, cf.article 7d de la directive). En revanche, la conformité du produit aux normes ou l'obtention d'une autorisation administrative laisse entière la responsabilité du producteur.

- Le professionnel est encore exonéré s'il prouve qu'il n'avait pas mis le produit en circulation ou encore que le défaut n'existait pas au moment où il a mis le produit en circulation.

3/ Sa responsabilité sera réduite ou supprimée si le dommage provient d'une utilisation anormale du produit tel que le professionnel n'était pas tenu de prévoir cette utilisation (article 1387-11).

En revanche, la responsabilité du professionnel n'est pas réduite à l'égard de la victime lorsque le dommage résulte pour partie de la défectuosité et pour partie du fait du tiers.

C. Seuil et plafond de responsabilité.

Le projet français exclut tout à la fois les seuils (dont on sait les divergences de traduction: la directive en français parlant de "franchise" et en anglais de "threshold" c'est à dire "seuil") et les plafonds de responsabilité. Le projet français ne se conforme donc pas à l'article 9 b de la directive C.E.E.

D. Délais.

Comme dans la directive, la responsabilité du professionnel est éteinte dix ans après la mise en circulation du produit qui a causé le dommage. Toutefois s'il s'avère que le professionnel a commis une faute lourde ou si le demandeur a engagé une action en justice au cours de cette période la responsabilité n'est pas éteinte.

Quant à l'action en réparation, elle se prescrit par un délai de trois ans à compter de la découverte du défaut et de l'identité du professionnel par la victime ou ses

héritiers (articles 1387-14 et 1387-15 du projet français).

IV AUTRES DISPOSITIONS DU PROJET.

Le projet français est un projet ambitieux qui s'efforce d'harmoniser l'introduction des règles provenant de la directive avec le corpus traditionnel du Droit Français (cf.I). Le projet, pour faciliter l'application du nouveau droit de la responsabilité, exclut les cumuls de textes; encore fallait-il harmoniser l'introduction des nouvelles dispositions avec celles qui, dans le Code Civil, concernent la garantie des vices cachés dans le cadre du contrat de vente. On sait que les articles 1641 et suivants du Code Civil resteront encore en application en ce qui concerne la réparation des dommages affectant le produit défectueux lui même. Mais, à l'occasion de la réforme, le gouvernement a estimé souhaitable de modifier légèrement les articles qui concernent la garantie des vices cachés; c'est ainsi que la future loi établit une présomption, au profit de l'acquéreur, de l'existence du défaut au moment de la vente du bien défectueux dés lors que le contrat de vente comporte une garantie conventionnelle (cf article 1641-1). La nouvelle disposition règle une difficulté traditionnelle de preuve qui pesait sur l'acquéreur, ce dernier devant, dans l'actuel système, établir que le vice était antérieur à la vente.

Une autre précision est donnée par l'article 1648 réformé par le projet: le "bref délai" au cours duquel l'acquéreur devait agir dès la découverte du défaut est fixé, impérativement, à un an à partir de la constatation du défaut. Enfin (but not least), il faut saluer l'article 1713-1 du projet qui étend les règles de la garantie des vices, au delà du contrat de vente, au contrat de louage de meubles et au prêt à usage.

PRODUCT LIABILITY LEGISLATION IN GERMANY

Rolf Sack

I. Procedural state for the implementation of the EC Directive

The EEC Product Liability Directive, adopted in 1985, provides for it to be implemented into national product liability law by Member States, by the end of July 1988 at the latest. This date, however, was not met by the German Federal Republic.

In March 1987, the Federal Ministry of Justice presented a draft of a new Product Liability Act, which was followed in February 1988 by a draft of the Federal Government.

In April 1988 the "Bundesrat" (Federal Council), which can be considered a second Parliament, representing the states (Länder) of the Federal Republic of Germany, gave its consent to all essential points of the draft. However, it criticized the inclusion of a ceiling clause, limiting the producer's total liability for damage resulting from death or personal injury to the amount of 160 million DM.

In July 1988, the Federal Government made a counter-statement. At the beginning of November 1988, the draft of a Product Liability Act received its first reading in the German Federal Parliament, and the German Product Liability Act is expected to enter into force at the end of 1989.

II. The problems of implementation

The legal discussion about the implementation of the EEC Directive into German law, focussed on certain problems:

1. Part or full regulation of product liability law?

A major problem was that the Directive governs only the most central aspects of product liability law. It was discussed whether the new German Product Liability Act should be restricted exclusively to implementing the Directive into German law or whether the new Product Liability Act should comprehend the entire field of product liability law.

The Federal Government preferred the former of the two alternatives. The rules laid down in The Draft Product Liability Act are nearly identical to those of the EEC

Directive, with the exception of the numbering of sections. For those areas of product liability which fall outside the purview of the EEC Directive and The Draft Product Liability Act, traditional German product liability law remains applicable.

2. Options

A second problem concerning the implementation of the EEC Directive in German law arose in relation to the so-called 'options', i.e. those regulations of the Directive which do not necessarily have to implemented into municipal law. The German draft does not implement any of these proposed options. More precisely this means:

a. The draft of the German Product Liability Act does not regulate liability for development risks.

b. The German draft does not apply to primary agricultural products and poultry.

c. In accordance with Section 16 of the Directive, the German draft restricts the total liability for damages resulting from death or personal injury to the limit of 160 million DM, i.e. approximately 70 million ECU.

This limitation of liability is supposed to apply equally where several persons are injured. Thus, if the entire damage exceeds the financial ceiling, all claims will be subject to proportional reduction. The Federal Council did not consider this regulation feasible, as successive damages may occur over a period of several years. The Federal Council therefore proposed to grant compensation according to the chronological order in which damages are reported, until the financial ceiling of 160 million DM is reached. All further claims for compensation, exceeding this financial ceiling, will not be compensated under the new Product Liability Act.

This limitation was considered to be acceptable because Section 10 of the draft, restricts liability only under the Product Liability Act; consequently any additional rights, which an injured person may have according to the existing regulations of product liability law, will not be affected by the prospective legislation.

The Federal Government, however, did not approve this proposal, arguing that several other German regulations

provided for a financial ceiling for liability without fault, for instance Section 88 of the German Drugs Act.

3. Damage to property with a threshold lower than 500 ECU

A further problem concerned the implementation of Article 9 of the Directive because of the term "Selbstbeteiligung von 500 ECU", "déduction du franchise de 500 ECU", which excludes an action in damages "with a threshold below 500 ECU".

The first question was: does Article 9 of the Directive impose a general exclusion on all claims for damages below the threshold of 500 ECU or do claims made in accordance with traditional liability remain outside the ambit of this article? The wording of Article 9 tends to point towards the first alternative; however, the purpose of the Directive - to improve consumer protection - results in the second alternative being chosen, thus allowing for the provision of compensation for damages below the threshold of 500 ECU under traditional product liability law.

The above outcome gives rise to another problem: how to negotiate damages exceeding the sum of 500 ECU. Does liability under Article 9 of the Directive in such cases comprehend the entire damage, or is it necessary to distinguish between a part of the damage above 500 ECU governed by the EC Directive, and a part of the damage below 500 ECU, governed by traditional product liability law?

There are various reasons in favour of the first alternative, in particular to render the law practicable and to allow for the rationalization of its application by the courts and the insurance companies.

Nevertheless, the Federal Government favoured the second alternative. This means the part of the damage which is below 500 ECU is ruled by the traditional product liability law, whereas the other part of damage exceeding 500 ECU is ruled by the harmonized product liability law. This alternative claims to be in accordance with the purpose of Article 9, which has been pursued uniformly by the Member States of the EC.

4. Damages to other parts of the product

A further problem presented by Article 9 of the Directive is that compensation should be awarded for damage to property other than the defective product itself.

This begs the question of compensation in the case of a defective component part where its defectiveness resulted in a damage to or the destruction of the entire product.

For example: a company bought a large production unit. A small safety element of this unit was defective. Since the safety elements did not work, the entire unit was destroyed.

The German Federal Court of Justice, which had to decide the case, argued that the defective element destroyed property other than the element itself. Article 9 of the Directive can also be interpreted to the same effect since Article 2 provides that for the purpose of the Directive "product" means all movables, even if incorporated into another movable or immovable.

The Federal Government was requested to provide a clear regulation of the liability for damages to a product caused by a defective component part of that particular product.

III. Questions outside the scope of the product liability law

1. Limits of liability in relation to death and physical injury

The EC Directive and the German Draft Product Liability Act leave a wide scope of application to traditional, non-harmonized product liability law.

a. The upper limit for liability
Traditional liability law will be applicable in the case of death or personal injury for that part of the claim which exceeds 160 million DM.

b. Damages for pain and suffering, and other non-material damages
Moreover, there is no provision in the German Draft for compensation for non-material damages resulting from death or personal injury and therefore compensation can only be granted under the provisions of the traditional product liability law.

2. Material damage
As is the case with liability for death and personal injuries, liability for damage to and destruction of

property is also only partially regulated by the Directive and the German Draft Product Liability Act.

a. Article 9 of the Directive and the draft only protect property, of a type ordinarily intended for private use or consumption, and used by the injured person mainly for his own private use or consumption.

Damages to property used for commercial or professional purposes, however, remain solely regulated by the traditional German product liability law.

b. Damage to property below a threshold of 500 ECU
In so far as the Directive and the German draft provide for compensation for damages only above a threshold of 500 ECU, below this threshold the injured person is protected against damages only by the traditional German product liability law.

c. Damage to other parts of the product
If a product is damaged or destroyed by a defective component part, the extent to which traditional German product liability law applies depends upon the scope of application of the harmonized product liability law. This has already been stated.
Alternatively, if damage to a product is not caused by a defective component part, but by a defective combination of component parts without defects, only traditional German product liability law can apply, for instance:
A high-speed sports car was equipped with tyres not suited to this type of car. When travelling at full speed an accident occurred due to the unsuitability of the tyres, destroying the car. In this case it is beyond doubt that the car-owner can be protected only by traditional German product liability law.

3. Development risks
The draft of the German Product Liability Act does not provide for compensation for damages caused by so-called development defects. It is only in the very important field of drug liability where strict liability is provided for development defects in special provisions of the German Drug Act.

For damages caused by development defects of products other than drugs the manufacturer in future can be held liable only under the regulations of traditional product liability law, where proof that the manufacturer is at fault is required.

With regard to development defects, however, the difference between the strict liability and the liability for fault under traditional German law is not very important, as courts have established far-reaching duties of care. Thus, even subsequent to sale the manufacturer has a so-called "Produktbeobachtungspflicht", the duty to keep his products under observation; he has a duty to collect carefully all information about risks and defects of his products which, because of the state of scientific and technical knowledge at the time the products were put into circulation, were not such as to enable the existence of the defect to be discovered. If risks and defects are discovered subsequent to their manufacture, the manufacturer not only has to improve the design, the manufacturing process or the instructions for use of new products, but he also has to warn consumers of the unsafe nature of products already marketed. Under certain circumstances he even may be obliged to recall unsafe products.

4. Defects appearing subsequent to sale

Development defects, inherent in a product at the time of sale, must be distinguished from product defects, which did not exist at the time the product was put into circulation. Such defects are characterized by the fact that they are caused after the sale by a third person changing a product. The Honda case, decided in 1986 by the Federal Court of Justice, provides an excellent example of these kinds of defect. Subsequent to motorbikes being put into circulation by the manufacturer, the handlebars of the motorbikes were equipped with encasements by a third person. This alteration caused a dangerous destabilization of the motorbikes when travelling at high speed.

The Court held that the manufacturer - in this case Honda
- was liable for damages resulting from the alteration by another person
- if the alteration was made in order to add necessary accessories or
- if the manufacturer equipped his product with devices for future accessories or
- if the manufacturer in exercising due care should reasonably be expected to be aware of the danger caused by alterations of his product.

In such cases, the liability of the manufacturer is disallowed by Article 7 of the Directive and by Article 1 of the draft of the German Product Liability Act. The injured person is only protected by the traditional German

product liability law under the provisions mentioned above.

5. Cut-off period

Traditional product liability law is also applicable beyond the expiry of a period of 10 years running from the date on which the manufacturer put into circulation the actual product which caused the damage, as provided in Article 11 of the Directive. Traditional product liability law provides a cut-off period of 30 years. For claims made subsequent to the expiry of the cut-off period, the European product liability law is no longer applicable, but the injured person has a further period of 20 years to bring an action for the same damage under traditional product liability law.

6. 'Purely economic damages'

Finally, I shall mention another problem of product liability, for which neither the EC Directive nor the German Draft Product Liability Act provides a satisfactory solution, as regards incurring liability for "purely economic damages". Such damage does not result in any injury to a person or any item of property whatsoever. An example of this is the well-known "Pr}fzeichen"-Fall, the "test marks" case, which was decided in 1974:
A producer of plastic water pipes labelled them with test marks of a testing institute, sold these pipes to a wholesaler, who himself sold them to an engineering company. This company had been commissioned to lay new water pipes for a water supply system. Shortly after the work had been done several water pipe bursts occurred. The underground engineering company had to lay new pipes and claimed damages from the producer of the pipes, because the pipes had not the quality which was warranted by the test marks. If the pipes had met the quality requirements for using the test marks, the water pipe bursts would not have happened.

The Federal Court of Justice dismissed the action, because the damage was a mere economic damage, not resulting from an injury to a person or to property.

This result of the decision was not considered satisfactory by most commentators in Germany.

The EC Directive and the draft of a German Product Liability Act do not lead to a result different from that of the traditional product liability law.

ITALIAN LEGISLATION IMPLEMENTING THE DIRECTIVE

Gustavo Ghidini

1. The EEC Directive on producer's liability was incorporated into Italian law, by Decree of the President of the Republic, 24/5/88, No. 224. The text of the Decree, in terms of its structure at any rate, adheres closely to the form of its Community counterpart, and as such is considered to be a faithful execution. For this reason, it is apposite to examine only those points in the Decree which derogate from the Directive, based on the powers given to national legislative bodies. Such powers were conferred essentially in relation to the following points:

a) The extension of the new regime to damages caused by unprocessed perishable agricultural goods.

b) The same extension applies to cases where the state of scientific and technical knowledge, at the time a product is marketed, does not reveal a latent defect in the product (ie. development risk - rischio di sviluppo).

c) It fixes a upper limit of not less than 7 million ECU for the producer's total liability for damages resulting from death or personal injury caused by the goods having the afore-mentioned defect.

2. With regard to the first point, the Italian legislator did not derogate from the terms of the Directive, which excludes natural agricultural produce from its ambit. The Legislative Committee formed by the Minister of Justice (on which I also had the privilege of sitting) had taken the view that the use of chemical products in agriculture could in some cases cause safety problems. It maintained, however, that the perishability of fresh agricultural goods and their mode of distribution normally make it impossible to identify the producer; therefore if the new regime were to be extended to these products, the legal problems could almost only be resolved in the unlikely event of the retailer's admission of liability. This could not form the basis of rational arguments on which to found liability. It would simultaneously bring undue and unjust and useless hardship to bear on the retailer concerned.

On the other hand, the term 'processing' (trasformazione), was defined, was used to subject many agricultural products to the rigorous regime of objective liability. The term includes not only processes which modify the nature of the product, but also its packaging and any other industrial treatment which make it difficult for the consumer to make checks, or create an undertaking in relation to its safety.

3. As regards the so-called 'development risk', no derogation was made as is permitted under the Directive, thereby excluding liability for technical development risks which are unforeseeable in the light of the state of the scientific and technical knowledge available at the time of manufacture.

4. The Italian legislator rejected the idea of fixing a financial ceiling for the producer's total liability for damages resulting from identical products sharing the same defects.

The reason lies, therefore, in the impracticability of the ceiling provided by the Directive itself. In fact, consider the case where available funds are not sufficient to make a global compensation: to be able to make a proportional reduction in compensation due to each party, one would have to notify the parties and administrate the victims' claims proportionally. This could take the following forms: a brief period could be fixed, at the expiry of which claims for the recognition of parties' rights must have been presented, the claims of those who incur damages beyond the date would be precluded, and the principle laid down in the Directive by which a ten year limit is imposed on making a claim for compensation would be violated; alternatively, the attribution of damages could be postponed beyond the ten year deadline, leading to an absurd and unacceptable result. If, on the other hand, claims could be settled on a continual basis, this would imply a contradictory situation, where successive claimants could be awarded payments, judicial decisions and out of court settlements between the tortfeasor and third parties, with no sufficient guarantee of protection of the interests of other injured parties.

5. Article 3 of the Decree is of paramount, importance particularly to multinational undertakings (and in this case perhaps even more specifically to non-Community

undertakings). This provision equates the liability of the producer to whoever imports, or acts as the importer of, a product into the Community for sale, hire, or for any other form of distribution whatsoever.

The introduction of importers' liability clearly has the aim of achieving effective parity in competition between internal EEC products and those emanating from non-Community States - in the latter case it is more difficult to enforce a claim for damages: this is also the case - but not exclusively so - in relation to possible specific problems of effective identification of the producer responsible (this is often the case with consumer goods imported from certain areas of South East Asia.

6. The definition of a defective product, under Article 5, therefore, is of particular significance for both producer and importer who market products, especially concerning the presentation, information, instruction and warning on the use of a product. I am convinced, that the legislator has recognised, that the ability to identify risks stemming from the use of the product, plays an important role not only in evaluating the possibility of the victim's contributory negligence, but this is more important in determining the degree of risk below which the product can be considered socially acceptable and non-defective. Of course, this consideration has to be integrated with others concerning the likelihood that the product could fall into the hands of inexperienced persons, or be used in a way which needs a lesser degree of care by the user, the likelihood of injuring third parties, and so on.

7. Here I must make a little digression. Unfortunately, the legislator did not accept the Commission's proposal in relation to an extremely important direction which I hope other national legislators may take. The Legislative Commission, then, had confirmed the position taken in the Directive, by which a product could not be held to be defective merely by the fact that a superior product appeared on the market. In addition, it had specified that the same rule applied even where the new product had the same price as its predecessor. This is how the important part of the provision was framed, since in the case of a product costing considerably more than the improved product, the rule in question is obvious, and can apply where products appear contemporaneously on the market. In fact, this is quite often the case for

products conforming to all the safety requirements which one reasonably expect, and they cannot be considered defective, despite the existence of more sophisticated products which offer an even higher level of safety, such that the product lasts longer, or is serviced less often or performs better.

8. I now return to the original arguments. Article 6, para. d merits closer scrutiny in consideration of the reasons for excluding liability. Here, pursuant to the position taken in the Directive, liability may be excluded in cases where it is due to a product conforming to a compulsory legal standard, or binding stipulation. The basis for this exception, presumably rarely applied, is to be found in the principle according to which the sanction of compulsory behaviour is forbidden. It follows that liability is excluded only if the legal standard or rule allows the producer no choice. This exclusion does not even apply, however, when the producer is limited to imposing a minimum level of safety, or leaves his choice to alternative means, some of which incur the defect. It need hardly be stated, since it is established law (jus receptum) that the existence of authorisations or administrative controls can in no way exempt a person's liability.

9. Still in connection with Article 6, paragraph f provides that the producer or supplier of component parts or primary materials is not liable for defects entirely due to the way in which the finished product is assembled, or where the latter is acting in conformity with instructions given by the producer.

It is obvious, and therefore does not need to be explained in great detail, that in the case of a defective component part one also has to regard the finished product as defective, consequently liability falls to the manufacturer. The reverse is the case for a component part if it is not defective, and the defective product threfore does not incur the liability of the producer.

10. The moment when a defect comes to light and proof of defect can also present considerable difficulties. The Decree, which follows the Directive in this respect, has burdened the producer with the onus of showing that the defect did not exist at the moment when he put the product into circulation. The presumption that the defect

existed, ab initio, is rather onerous, given that its scope of application can extend to events which can also be tested years later; but its rigour is attenuated by the rule, according to which it is stated that, to overcome the presumption it is not necessary to provide an irrebuttable proof ("piena prova") that the defect came to light subsequently. It is sufficient to demonstrate by referring to the circumstances of the case, that on the balance of probabilities, this is most probably the case. This reference to probability seems to constitute a new development concerning the onus of proof under Italian law. Nevertheless, the position chosen under the Directive, and welcomed by the legislator, seems adequate in substance.

11. For cases of joint liability under Article 9, the principle of joint liability applies (responabilit{ solidola), inspired by Article 2055 Civil Code. As regards indemnity actions against those held jointly liable, the question of who should compensate the damage is answered by the principle that the manufacturer is best placed to shoulder the objective liability, with express reference to the degree of risk attributable to each person. The aim of the principle attributing risk to each person held jointly liable was to indicate its relevance not only in relation to the material conditions determining risk, but also to the calculability of damage attributable to each party concerned.

12. FINAL REMARKS

I believe that the success of the law's protective aims can only be achieved by their existing connection with insurance schemes. I would like to point out that:
a) nothing has been amended or improved as far as time and costs of litigation are concerned;
b) the threshold of LIT 750,000 (ECU 500) below which the producer is not liable, will discourage a great number of requests for indemnification (even in cases where they are related to safety problems).

In this perspective, one doubts whether the law implementing the Directive will achieve the goal of increasing litigation while diminishing accidents.

This could only be achieved if national legislation encouraged (for example by fiscal means) compulsory product liability insurance schemes for producers. Apart

from facilitating and accelerating the award of damages (as is evidenced in practice) such insurance schemes could contribute, although indirectly, to the prevention of accidents. Indeed, the amount of the premium should be 'tailored' according to the level and quality of each industry's safety controls, thereby encouraging the producers to improve their standards.

THE CONSUMER PROTECTION STATUTE 1984 AND THE EUROPEAN DIRECTIVE 25 JULY 1985

Ignatio Quintana Carlo

I. The Situation prior to the Directive: The Consumer Protection Statute 19/7/84

Liability for damage caused by defective products is provided for by Spanish law in Chapter VIII of the Statute. This is undoubtedly the most unsatisfactory part of the Statute, since its incorporation into the body of existing law reveals a non-committal approach to the problems which the legislator intended it to resolve. Besides, and this is the central problem, one cannot determine the legislator's intentions with any degree of certainty. Moreover, if one makes use of interpretive techniques and parliamentary debates, one can still maintain that in the case of indemnity or compensation for damage or loss suffered by the consumer, the Statute creates a special system of liability which is characterised by the following elements:

1. The Statute contains a general principle in Article 25, by which it is stated that the consumer has the right to be compensated for any damage produced in the consumption of a good, product or service, except where such damage is due exclusively to the fault of the victim or the person(s) for whom he is answerable under civil law. It is a principle which, suffice to say, distorts the coherency of the system of liability, and which we are going to treat simply as a declaratory statement translated into legislative form. On the other hand, it is perfectly consistent with the consumer's fundamental right 'to indemnity or reparation for the damage incurred'. Since this right is guaranteed under Article 2, it is quite logical that Article 25, which opens Chapter VIII dedicated to 'guarantees and liability', reiterates the condition that damage or loss suffered must be 'proved' (a necessary prerequisite to all indemnity actions). Furthermore, its origin must not lie in the exclusive fault of the consumer or the person for whom he is answerable. This breaks the causal link between the damage claimed and the use of a product or service, in which case any possibility of incurring the producer's liability in connection with the said product or service disappears.

2. In general, the legal system under which liability is incurred, applies without distinction as to damage resulting from the use of a defective product or the use of defective services. The Statute is distinguishable from other national laws governing product liability and the Community Directive 25/7/85, in that it only applies to damage caused by defective products as is indicated by its title.

3. The Spanish Statute also sets up a special sub-system in Articles 26 and 27, as opposed to the general fault-based system laid down in the Civil Code, providing for the liability of the producer of goods or services, where the burden of proof falls on the producer; in this case the producer has to show not only that he has complied with the relevant standards established by law, but also that he has shown all due care in relation to the nature of the product or service marketed. The producer is therefore subject to a system of subjective fault-based liability, where the burden of proof is reversed; ie. the user does not have to show culpable or fraudulent conduct of the producer or manufacturer of goods or services, unless the latter can show not only that he has complied with all the standards and requirements established by law (such as the presription of technical health standards), but also that he has taken all due care in the marketing of a good or service. Moreover, both criteria have been adopted by recent case law in relation to the interpretation of Article 1902 Civil Code concerning delictual liability.

4. Additionally, under the terms of Article 28, the Statute establishes what can be termed a 'special sub-system', whose scope of application is paradoxically much wider and where the number of actions brought are greater than under the sub-system laid down in Articles 26 and 27. According to the terms of this special sub-system, the manufacturer or provider of services can be held liable for any damage or loss arising from the correct use or consumption of goods or sevices, which by their very nature are required to be fit for their purpose or are required to be so by law. This is the case when the said products and services must be of a pre-determined standard and quality as regards their level of purity, efficiency, and safety, or where there are technical, professional and qualitative controls to be met, before those products and services are marketed to the consumer.

Among the goods and services which come within the terms of this provision are the following: foodstuffs, health

and cleaning products, health services, gas and electricity, household and domestic appliances and lifts, transport services, motor vehicles, toys and products intended for the use of children. This list, which is by no means exhaustive, illustrates the fact that the ambit of this special sub-system has a much wider application in practice than the more general system.

To give full effect to the system of objective liability and allow producers to cover its economic consequences through the corresponding insurance contracts, the Statute completes the system of objective liability under Article 28; firstly, by fixing an upper limit for damages or compensatio of 500 million pesetas, and secondly, by setting up a compulsory insurance scheme and compensation fund, applying to certain specific sectors, covering the risk of poisoning, injury or death resulting from the use of defective products or services. For the moment then, the bringing into effect of compulsory insurance and compensation fund rests on the favourable development of the law.

II. Comparison between the Spanish Law and the Directive

The current provisions of the Spanish Statute on liability for damages caused by defective products which differ significantly from the Directive are the following:

a) the Spanish Statute covers damage suffered by the final consumer, whereas the Directive includes every person who suffers injury from a defective product, independent of whether he is the final consumer (including bystanders), producer, or worker if free from fault.

b) the Statute covers not only damage caused by movables (including natural agricultural products, fish or poultry products), but also immovables and services; whereas the Directive covers only damage arising from defective products excluding perishable agricultural goods, immovables and services.

c) the legislation does not cover damage resulting from the use of primary materials in the production process.

d) according to the Spanish legislation, there is no exemption similar to the one laid down in Article 9 of the Directive as regards material damage to goods.

e) the Statute contains no general definition of the term defective product, nor does it provide for all the so-called exemption criteria laid down in the Directive (amongst which is the concept of 'development risk').

f) the time limits within which an action may be brought incurring the producer's liability is one or five years, depending on whether liability is delictual or contractual respectively, unless is otherwise provided by law; whereas the Directive establishes a single time limit of three years.

g) the Statute fixes an upper limit for indemnity actions of 500 million pesetas, whilst the Directive sets a lower threshold of 70 million ECUs (more than 9000 million pesetas), and this is only applicable in the case of injury to health.

As one can see, there are considerable discrepancies which require immediate legal reform. This will be difficult given that Chapter VIII of the Statute establishes a lower limit which exceeds the ceiling fixed for liability based on defective products: the Statute does not make any distinction between damage caused by defective products and defective services.

III. Proposed Reform

The Directive, 25th July 1985, on liability for damage caused by the use of defective products was due to be incorporated into Spanish law by 30th July 1988, in order to comply with the terms of Spain's Act of Accession to the EEC; one therefore requires an interpretative statute to give effect to Articles 392 and 395 of the Act supplementing Spain and Portugal's Treaty of Accession to the European Community:

> "From the moment of accession, the new member States will be considered addressees having received notification of directives and decisions, such as defined by Article 189 EEC Treaty, all such directives... and decisions having been notified to all present member States." (Art. 392)

> "The new member States will take all the necessary measures from the moment of their accession to implement the provisions of the directives and decisions defined in Article 189 EEC Treaty, unless a different time scale is set forth in the list given in

Annexe XXXVI or other provisions of the present Act." (Art. 395)

Since there is no provision in the Annexe which relates to the Directive, 25th July, 1985, it is obvious that Spain has not complied with the time limits for its implementation within the transitory period.

Despite the fact that three years have elapsed since the signing of the Act of Accession, the incorporation of the Directive into Spanish law is still keenly debated, and it therefore seems unlikely that it will take effect in the immediate future.

This delay can be explained, but not justified, by the following factors:

1. the fact that Spain did not figure as a member of the EEC until the 1st January, 1986, and that since that day it has been concerned with the urgent task of modifying a large body of existing law in order to harmonise it with the objectives of the EEC legislation.

2. the fact that, from a purely legal standpoint, Spain already has legislation dealing with liability for damage caused by defective products, mentioned earlier, which took effect in 1984.

There are currently two drafts, however, proposing different approaches to the incorporation of the 1985 Directive into Spanish law:

a) The first draft has been advanced by Prof. Rojo (appointed by the Ministry of Justice) who has drawn up his draft on the basis that the 1985 Directive is not a minimalist legislative document, but rather a rigid document laying down the essential bases on which future legislation would have to be founded (for example, the proposed Directive on the safety of products). This explains why the draft departs from the Directive in so few instances. General Spanish law, as distinct from the 1984 Consumer Protection Statute, is converted into a specialised civil jurisdiction since it abrogates the provisions governing liability for the use of defective products or services.

The rare instances of the draft's departure from the Directive are the following:

1. the extension of the term 'agricultural good' to include in its ambit 'natural products such as the rearing or breeding of animals, fish and poultry'. (Art. 2.2)

2. the inclusion of electricity and gas within the meaning of 'product'. (Art. 2.3)

3. the extension of the general definition of manufacturer to persons who extract or harvest primary materials or agricultural products, respectively. (Art. 4.1. 3)

4. the creation of a system of strict liability for the manufacturers of pharmaceutical products (similar to the provisions of the German ProdHaftG). For the said manufacturers there is no possible exemption from liability for 'development risks'. (Art. 6.3)

b) The second draft is the work of Prof. R. Bercovitz. It remains closer to the existing legal framework in Spain, his view being that the Community Directive was minimalist in nature, and as a result it could be incorporated into the existing Spanish legislation, whilst at the same time preserving many of the norms which form Chapter VIII (Articles 25-28) of the Spanish Consumer Protection Statute, 1984.

In this draft, the principal areas of divergence from the Directive are the following:

1. the introduction of the legal term 'producer' in place of the word 'manufacturer', with the idea that this term is better suited to include those incurring liability (for both manufacturers and those who obtain or procure goods by any other means); and because it follows the official Spanish translation of Article 3 of the Directive.

2. the introduction of a new concept of 'consumer' (distinct from the one given in Article 1.2 of the 1984 Statute, whose scope is restricted to the 'final consumer') excluding whoever acquires, distributes uses or consumes goods or services from its ambit, provided that they are not final consumers. This has the aim of integrating them into the processes of production, preservation, commercialisation or hire to third parties; ie. for both commercial and industrial producers. The new draft extends the notion of consumer or user to whoever suffers damage. (Art. 26.1 a).

3. it extends the regime of liability for damages resulting from the use of defective products to damage

caused by the provision of defective services (Art. 25.6). In this respect, it claims to retain the current framework provided by Chapter VIII of the Statute. The author is aware that the draft's application of legal definitions, intended for defective products, to the provision of defective services will need to be flexible to accomodate the nature of the service provided on an individual basis and take account of the diversity of possible services. This adaptation would be best left open to interpretation through legal opinion and case-law.

On the one hand, this solution seems to run the risk of uncertainty concerning the regime applicable for damage allegedly due to the employment of defective services; additionally, it seems to be complicated by the fact that the norms set forth in the draft are going to be in conflict with the other already existing norms laid down by the Spanish Statute in relation to the provision of particular services (transport, insurance etc.); furthermore, it conflicts with the current system of liability for damage resulting from defective services, created by the Statute (see above, 1.). Moreover, this presents risks, since the application and concretisation of the relevant legal regime for services is going to depend mainly on less developed case-law, legal opinion and legal tradition than in other European countries (and non-European countries) concerning the general notion of consumption.

4. the absence of time-limits for calculating the producer's liability established in Article 11 of the Directive. The reasons to be adduced for this are, on the one hand, that the time-limits are introduced by the Directive without any consideration of 'development risks' as one of the reasons for exempting the producer from liability, and therefore attenuating the system of strict liability; one the other hand, the limits could prove insufficient, in many cases actually creating instances of a genuine 'lack of protection' (as is the case with construction materials and products first used a long time after their manufacture); finally, the total computable damage does not always come to light immediately, and in many cases, it is fair to allow a period of time to elapse before determining which damage must be compensated.

5. it includes the principle of damages for pain and suffering (Art. 27.1 a), in accordance with the final paragraph of Article 9 of the Directive, which envisages compensation for sentimental value in relation to damage caused to objects.

6. it adopts the upper limit of 70 million ECUs fixed in Article 16 of the Directive. In addition, it remains the case that the government may use the limit to complement the terms of Article 18 of the Directive.

7. it removes the lower threshold of 500 ECU set out in y the Directive.

8. it reinforces the position of the victim, by the creation of shared liability when the victim brings a joint action, as is currently the case in accordance with the general provisions of the law. (Art. 27.2).

9. it makes it easier for the victim to recover damages by requiring that a case be brought before a single jurisdiction: when one of the defendants is successfully brought before the civil jurisdiction, then the remaining defendants may be joined and be summoned before the said jurisdiction.

Linked to this point, and by way of conclusion, there remains the question concerning the current status of the drafts.

According to the information which I received in late September, 1988 from the National Consumer Institute - an autonomous body within the Ministry of Health and Consumer Affairs - attempts are being made to reach a consensus between this Ministry and the Ministry of Justice, in the hope that a unified text can be placed before the Council of Ministers, and thereafter before the Parliament, for approval.

This text will be based essentially on the draft prepared by Prof. Rojo and will be published in the form of a new statute, rather than a revision of existing law. There remain, however, two fundamental questions which require further consideration:

1. A total or partial abolition of Chapter VIII of the existing Statute by the proposed legislation, which is essentially the same - with slight changes - will mean that it only applies to defective services.

2. whether or not the concept of 'development risks' should be permissible as a defence. Here there is a conflict between the Ministry of Justice, which feels that there should be allowances for such derogation, and the Ministry of Health and Consumer Affairs, which feels that

there should be no derogation, bearing in mind the level of protection which the consumer currently enjoys pursuant to the 1984 Statute.

How agreement is to be achieved on the above points is dependent on the propitious harmonisation of Spanish law with the Community Directive.

CONSUMER PROTECTION ACT 1987

Prof. G. Woodroffe

I. PRODUCT LIABILITY

A. INTRODUCTION

1. Four reports in the 1970s (two United Kingdom, two European) recommended that producers should be strictly liable for personal injury or death caused by their defective products. The EC Directive on Liability for Defective Products adopted on 25 July 1985 provides that producers shall also be liable for damage to property.

2. Part I of the Consumer Protection Act 1987 implements the EC Directive and had to be brought into force by July 1988.

3. Although the Directive is intended to remove trade barriers between Member States and for this purpose to harmonise their law, it contains three options:
(a) agricultural products may be excluded; the Act excludes them;
(b) a 'development risks' defence may be included; the Act includes this defence;
(c) a ceiling of maximum liability may be included; the Act has no such ceiling.

B. THE PROVISIONS OF PART I

1. Strict Liability: s.2
Strict liability is imposed, so that it will no longer be necessary for the victim to prove negligence on the part of the producer who will be liable whether or not he knew or could have known of the defect. S.2 (1) states that 'where any damage is caused wholly or partly by a defect in a product, every person to whom sub-section (2) below applies shall be liable for the damage'.

2. Product: s.1 (2)
This means any goods, including components or raw materials, electricity (but not game or agricultural produce which has 'not undergone an industrial process' (s.2 (4)).

3. Producer: s.1 (2) and 2 (2)
Generally distributors and retailers will not be caught by this Part of the Act, but it is important to note that its scope covers not only producers in the sense of manufacturers of end products but other businesses too. The following businesses are caught:

(a) producers who have manufactured, won or abstracted the product; or carried out an industrial process affecting its essential characteristics, where not manufactured etc.

(b) importers of products from a place outside the Member States of the EEC;

(c) anyone who holds himself out to be the producer by putting his name, trademark or other distinguishing mark on the product ('own label' goods);

(d) suppliers, including wholesalers and retailers, if:-

i) the victim requests the supplier to identify the producer, importer or 'own labeller'; and

ii) the request is made within a reasonable period after the damage occurs, and it is not reasonably practicable for the victim to identify the others; and

iii) the supplier fails to comply with the request or to identify his supplier within a reasonable period.

4. Defective: (s.3)
This means that 'the safety of the product is not such as persons generally are entitled to expect'. There are three relevant factors:

(a) the manner and purposes for its marketing; its get-up, instructions for use and warnings;

(b) what might reasonably be expected to be done with it;

(c) the time when the product was supplied. (No inference is to be drawn from the fact that later products are safe).

5. Damages: (s.5)
(a) Death or personal injury.
(b) Loss or damage to property (including land).
But note that this is ignored unless:

i) the property is of a description ordinarily intended for private use, occupation or consumption, and was intended by the victim 'mainly for his own private use', etc.;

ii) and the loss exceeds 275.

N.B. Damage to the product itself is not covered.

6. Causation

Although Art. 4 of the Directive requires the victim 'to prove the damage, the defect and the causal relationship between defect and damage', the Act does not mention the point as it goes without saying: such proof is always required.

7. Defences (s.4)

(a) The defect is attributable to 'compliance with any requirement' (statutory or EC).

(b) The defendant never supplied the product to another.

(c) Supplied not in the course of business and not with a view to profit.

(d) The defect did not exist when he supplied it.

(e) Development risks: 'the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control'. Art. 7(e) reads '... was not such as to enable the existence of the defect to be discovered'. The current wording was initially in the Bill, amended in the House of Lords to follow Art. 4, but amended in the House of Commons to its initial form just before the Government called an election

(f) Component producers:

'the defect' -

i) constituted a defect in a product ('the subsequent product') in which the product in question had been comprised; and

ii) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with the instructions given by the producer of the subsequent product.

N.B. The onus of proof here is on the defendant.

8. Contributory Negligence (s.6 (4))

Although strict liability, contributory negligence may reduce the damages.
(Consider also 'defect' in s.3 - warnings, expected use.)

9. Limitation Period (Sch. 1, para. 1)

Three years, whether personal injuries or damage to property.

10. Cut-off Period (Sch. 1)
Ten years from the time when the defendant supplied the product to another.

11. Maximum Liability
None (though Art. 16 gives option of capping liability for a product line to 70 MECU).

12. Exemption Clauses (s.7)
Not permitted.

13. In Force (s.50 (2))
1 March 1988.

14. Not Retrospective (s.50 (7))
No liability for defective products supplied before Act in force by its producer.

II. CONSUMER SAFETY

A. INTRODUCTION

Part II of the Act implements the general safety requirement proposed in the White Paper on 'The Safety of Goods' published in 1984. This Part is enforced by criminal sanctions (of Part I which creates civil liability only).

Part II also consolidates and reenacts the safety provisions hitherto contained in the Consumer Safety Act 1978 and the Consumer Safety (Amendment) Act 1986.

B. GENERAL SAFETY REQUIREMENT

1. The Offence
It will be a criminal offence to supply (or to offer to or expose for supply) consumer goods which do not comply with the general safety requirement (section 10 (1)).

2. Consumer Goods
Goods ordinarily intended for private use or consumption, except
growing crops
water, food, feeding stuff or fertiliser
gas through pipes
aircraft or motor vehicles

drugs or licensed medicines
tobacco.

3. The General Safety Requirement

Goods fail to comply with this if they are 'not reasonably safe' having regard to

(a) any published standards of safety;
(b) the existence of means to make them safer (taking into account cost, likelihood and extent of improvement).

4. Defences

(a) Non-compliance with the general safety requirement will not result from compliance with any statutory requirement or failure to do more than is required by the safety regulations or approved standards of safety.
(b) Specific defences are -
    i) the goods would not to be used in the UK; or
    ii) supplied in the course of a retail business and the retailer had no reasonable grounds for believing that the goods failed to comply with the general safety requirement; or
    iii) second-hand (not new).

5. In Force

1 October 1987.

PART THREE: PRODUCT SAFETY LAW AND THE IMPACT OF THE NEW APPROACH TO TECHNICAL HARMONISATION AND STANDARDS

QUELLE SECURITE POUR LES CONSOMMATEURS EUROPEENS?

Régine Loosli-Surrans

Digne de grande répréhension est l'affaire qui, se proposant d'ôter un certain défaut, amène celui-ci par son effet même. (DANTE, Banquet I - III)

Il n'y a pas d'idées prématurées, il y a des moments opportuns qu'il faut attendre. (Jean MONNET, Mémoires - p.502)

Alors que les autorités françaises engagent une campagne nationale de prévention des accidents domestiques et tandis que le lancement d'une telle campagne au niveau européen est à nouveau reporté, dans une période où l'Europe de 1992 est sur toutes les lèvres et où les cendres de Jean MONNET sont transférées au Panthéon, pourquoi ne pas poser, parmi d'autres, la question "quelle sécurité pour les consommateurs européens ?

En effet, l'Europe des grands principes de 1992 - comme celle des pères fondateurs de 1950 - ne peut se construire qu'en résolvant des problèmes concrets et en satisfaisant les aspirations quotidiennes de nos concitoyens nationaux et européens.

Au premier rang de ces problèmes, figure le nombre considérable des accidents domestiques: 80 000 décès par an selon les estimations de la CEE et du Bureau Européen des Associations de consommateurs (BEUC). Comment agir sur les comportements, mais aussi sur les produits et services qui sont impliqués dans ces accidents, en respectant les habitudes de vie des différents pays, en visant un niveau de protection aussi élevé que possible et en poursuivant la construction d'un marché unique ?

La difficulté ne saurait être contournée. Si on la veut durable, l'édification de l'Europe ne peut se réduire à une simple fuite en avant.

La définition d'une politique de la sécurité des comsommateurs implique:

I - UN RAPPEL HISTORIQUE SUCCINT.
II - UN CONSTAT OBJECTIF.
III - UN CHOIX D'ACTIONS PRIORITAIRES.

I. RAPPEL HISTORIQUE

Depuis dix ans, la politique de la CEE en matière de consommation s'est traduite par une double évolution.

D'une part, la Commission de la CEE a profondément modifié ses techniques d'harmonisation ("nouvelle approche").

D'autre part, le premier et le second programme en faveur des consommateurs, eux-mêmes fondés sur l'article 2 du Traité de Rome, ont énoncé, parmi cinq droits fondamentaux, celui de la protection de la santé et de l'intégrité physique; ils ont été confirmés sur ce point en 1985 ("nouvelle impulsion").

A - Le transfert des responsabilités aux juges et aux normalisateurs: la "nouvelle approche".

Le premier virage a été amorcé avec la communication de la Commission sur l'arrêt dit du "Cassis de Dijon" (1979) qui laissait à la théorie de l'équivalence et de la reconnaissance mutuelle tout ce qui relevait de la "qualité" au sens étroit et ne conservait, à titre résiduel, dans le champ des travaux d'harmonisation que ce qui relevait de la protection des consommateurs et du domaine théoriquement "réservé" aux Etats par l'article 36 du Traité de Rome, celui de la santé et de la sécurité.

Le second virage, plus radical encore, consistait à transférer la responsabilité de cette harmonisation du Conseil des Ministres et de la Commission, institutions de droit public, au CEN et au CENELEC, organismes de normalisation de caractère privé. Ce fut la "nouvelle approche".

Tout se passe donc comme si l'élaboration du droit économique de la Communauté - hormis ce qui concerne la sécurité physique des consommateurs - était confiée aux juges tandis que les règles de sécurité seraient désormais en voie de privatisation.

B - Le contre-poids: la "nouvelle impulsion" de 1985.

Plusieurs objections peuvent être opposées à cette vision simplificatrice et donc nécessairement réductrice.

D'une part, on pourra remarquer que la Communauté était "au pied du mur", les techniques d'harmonisation horizontale et verticale classiques demandant des délais incompatibles avec l'évolution rapide des technologies et des marchés de produits et services.

D'autre part, on soulignera avec raison que tout texte communautaire, fût-il une directive ou même un réglement, appelle une interprétation dans douze états membres et que le rôle renforcé des institutions judiciaires et de la Cour de Justice de Luxembourg n'en est que la conséquence logique.

Enfin, on remarquera que la part de privatisation contenue dans la nouvelle approche est, au moins en théorie, tempérée par deux contrepoids indéniables.

D'une part, c'est le Conseil des Ministres qui, sur proposition de la Commission et sous le contrôle du Parlement Européen et du Comité Economique et Social, définit les exigences essentielles de sécurité dont le respect est présumé par la conformité aux normes.

D'autre part, la Commission (DG XI) a publié quelques mois aprés sa note sur la "nouvelle approche", le 23 juillet 1985, un document intitulé "Nouvelle Impulsion" pour la politique de protection des consommateurs qui faisait une large part à la prévention des risques de la consommation.

En effet, ce document affirmait que "les produits vendus dans la Communauté devraient répondre à des normes de santé et de sécurité acceptables" et définissait quatre moyens pour parvenir à cet objectif :

1/ Un programme de réglementation définissant clairement pour les professionnels (producteurs et fournisseurs) les exigences en matière de santé et de sécurité auxquelles doivent répondre les produits.

2/ Un programme de mesures de coopération entre les autorités nationales compétentes en matière de sécurité des consommateures.
3/ La création de mécanismes communautaires pour la surveillance et le contrôle des risques.

4/ Les actions d'information et d'éducation des consommateurs sur les comportements permettant d'utiliser les produits en toute sécurité.

Plus de trois ans aprés l'adoption de cette "nouvelle impulsion" qui ressemblait à s'y méprendre à un troisième programme de politique à l'égard des consommateurs, quel constat peut-on dresser ?

II. LE CONSTAT

L'objectivité du constat impose de reprendre successivement chacun des quatre points du programme "sécurité" de "la nouvelle impulsion".

A - La réglementation.

1/ Les directives "nouvelle approche".

Plusieurs directives définissant des règles de sécurité ont été élaborées ou sont en cours d'élaboration depuis 1985. On citera parmi les réalisations la directive relative aux jouets et la directive relative aux appareils à pression. Sont en cours d'élaboration: la directive sur les matériaux de construction, celle sur les machines, celle sur les appareils à gaz et on parle d'un éventuel projet sur les terrains de jeux.

Ces directives et projets de directive posent plusieurs problèmes sérieux pour la sécurité des consommateurs.

a/ Des exigences essentielles de sécurité souvent insuffisantes ou inadaptées.

Des deux directives "nouvelle approche" déjà adoptées, celle sur les appareils à pression est sans doute la plus précise, mais elle laisse en dehors de son champ d'application les appareils les plus couramment utilisés par les consommateurs comme les autocuiseurs.

Quant à la directive relative aux jouets, la définition de son champ d'application et la formulation de ses exigences essentielles de sécurité sont tellement imprécises que les praticiens font déjà l'expérience de ses lacunes (ex.jouets en mousse, vélos pour enfants et artifices de divertissement).

En ce qui concerne les projets de directives, la méthodologie adoptée ne semble pas toujours la meilleure. Par exemple dans la directive sur les matériaux de construction, les exigences concernant l'inflammabilité sont énoncées en quelques lignes.

La dernière version du projet de directive "machines" établit une "fusion" entre les exigences essentielles de sécurité dont peuvent bénéficier des utilisateurs professionnels et celles de nature à protéger les consommateurs. Comme si l'utilisateur d'un appareil électro-ménager ou d'un petit outillage de bricolage était dans la même situation psychologique et matérielle (gants, casques, lunettes de protection....) qu'un ouvrier devant sa machine-outil.

Cette inadaptation des exigences essentielles à la réalité des produits et des comportements peut trouver, sinon des excuses, du moins des explications.

En effet, plutôt que de partir du concret pour définir des exigences types, on travaille souvent dans l'abstrait ou on amalgame les normes existantes.

Or, on ne devrait pas définir les exigences essentielles de sécurité sans une analyse préalable et précise des produits et des comportements. Le système de recensement EHLASS (voir ci-aprés) et les enquêtes nationales et études de comportement devraient donc utilement éclairer les rédacteurs des exigences essentielles sur le déroulement précis des scénarios à risque.

b/ Le décalage croissant dans le temps entre la directive et les normes correspondantes.

Le risque est également grand de voir adopter un certain nombre de directives "exigences essentielles" assez rapidement, alors que, "derrière", la normalisation ne suit pas.

La diversité des normes nationales peut alors se perpétuer avec les inconvénients qui s'ensuivent pour la sécurité des consommateurs et pour l'édification du marché unique (cf. jouets, équipements de terrains de jeux, autocuiseurs....).

c/ L'absence dans ces directives d'une procédure d'urgence harmonisée et le recul qu'elles constituent donc par rapport à certaines législations nationales.

On remarque que, même dans la directive jouets (qui permet le retrait du marché des produits dangereux), les injonctions, le rappel et les communiqués de mise en garde du public prévus par la loi française de 1983 ne sont pas envisagés.

Les seules procédures prévues - et encore de manière diverse selon les sujets - consistent à provoquer la mise à jour pour le futur des normes et, éventuellement, des exigences essentielles de sécurité déjà définies.

En définitive, la "nouvelle approche" semble être une auberge espagnole dont les seuls éléments stables sont définis par les deux grands choix de la DG III - Marché intérieur : privatisation des règles de sécurité par renvoi à la normalisation et libre circulation des produits.

2/ Les directives "ancien style" de caractère horizontal ou vertical.

a/ Elles continuent à être élaborées (cf.directive sur les risques de confusion et directive sur les préparations dangereuses) ou à être régulièrement amendées (cf.directive sur les substances dangereuses). Mais, cette élaboration se fait encore souvent sans lien réel avec les comportements des consommateurs.

C'est ainsi que, à la suite du décès d'un enfant, la Commission de la Sécurité des Consommateurs française a dû récemment demander, dans un de ses avis, que l'étiquetage de certaines substances et préparations dangereuses puisse comporter la mention "ne pas faire vomir". Jusqu'à ce jour, cet étiquetage de conseil n'avait pas été proposé par les spécialistes qui siègent à Bruxelles....depuis 1967.

b/ Parmi les directives déjà adoptées, trop nombreuses sont celles qui constituent un recul par rapport au droit national et ne sont pas encore correctement transcrites en droit national.

On pense, en particulier, à la directive horizontale sur la responsabilité du fait des produits pour laquelle le projet de loi n'a pas été adopté dans les délais car il constitue un risque de recul par rapport au droit commun antérieur.

On pense surtout à la "saga" de la directive sur les substances dangereuses et de certaines directives sur les préparations (solvants, peintures, vernis) qui, en France, n'étaient transcrites que par des arrêtés de 1983 relevant du Code du Travail. Il a fallu attendre lus de cinq ans supplémentaires la sortie des textes applicables aux consommateurs, en vertu du Code de la Santé Publique et de la Loi du 21 Juillet 1983 sur la sécurité des consommateurs.

Les utilisateurs non professionnels sont donc souvent moins protégés que les utilisateurs professionnels contre certains produits alors qu'ils en connaissent moins bien les dangers.

3/ Une obligation générale de sécurité

Quand bien même les directives relevant de l'"ancienne et de la "nouvelle approche" seraient mieux adaptées et plus rapidemment appliquées en droit national, il demeurerait indispensable de préparer une directive générale sur la sécurité des produits. Pour quelles raisons ?

a/ D'une part, il est hors de question de réglementer tous les produits et services et un système de contrôle "a posteriori" s'impose particulièrement là où il n'y a pas de reglémentation sectorielle.

b/ D'autre part, si certains pays européens se sont dotés d'une loi et d'une obligation générale de sécurité à la charge des professionnels, le contenu et les conséquences de cette obligation varient sensiblement d'un état à un autre et beaucoup d'Etats membres sont encore dépourvus d'un tel texte.

Les distorsions de la concurrence et du niveau de protection des consommateurs qui s'ensuivent sont évidentes.

Après le colloque de Brême d'avril 1987, un projet assez proche de la loi française du 21 juillet 1983 avait été élaboré. Le texte a été considérablement modifié par les services de la Commission sur le fond et sur la forme et dans un sans qui n'est favorable, ni aux consommateurs ni à la clarté du droit.

En toute hypothèse, l'élaboration d'une telle directive ne saurait être poursuivie que si, à la différence de ce qui

s'est passé pour la responsabilité du fait du produit, elle ne provoque pas un nivellement par le bas.

B - La coopération.

1/ La coopération entre administrations nationales a été assurée, en 1984, par la tenue d'une conférence multilatérale à Montpellier suivie, en 1986 par une réunion qui s'est déroulée à la Haye. Ces réunions relatives aux techniques de contrôle concernant les produits ont été trés fructueuses et il est regrettable que la conférence qui était prévue fin 1987 en Angleterre n'ait pu s'y tenir en raison de problèmes internes à la Commission de Bruxelles.

2/ Cette coopération se double de contacts bilatéraux qui, pour être informels, n'en sont pas moins fructueux.

C'est ainsi que la Commission de la sécurité française travaille régulièrement en liaison avec ses homologues néerlandais, britanniques, belges, portugais, pour échanger des informations sur les statistiques d'accidents, la règlementation, la normalisation, les campagnes d'information, les produits nouveaux....

Cette coopération peut exister aussi au niveau de la méthodologie. C'est ainsi que les systèmes d'alerte néerlandais, anglais et français (MINITEL de la Commission de la sécurité) vont désormais utiliser le même index de classement, celui de l'OCDE.

C - La surveillance et le contrôle des risques.

1/ Les notifications en cas d'urgence.

La décision de mars 1984 a crée une procédure d'information rapide entre Etats membres en cas de danger grave et immédiat. Ce mécanisme présente plusieurs faiblesses.

D'une part, il ne couvre pas plus les produits alimentaires et les produits pharmaceutiques (qui font l'objet d'un système d'alerte distinct) que les produits relevant des directives sectorielles "ancienne approche" (ex.cosmétiques) ou des directives "nouvelle approche". En effet, celles-ci ne créent que des mécanismes de mise à jour non doublés de mécanismes d'alerte.

D'autre part, le système fonctionne de manière assez chaotique. Les Etats membres ont tendance à notifier les mesures visant des produits importés d'autres Etats membres ou d'Etats tiers, de préférence à des mesures concernant leur production nationale.

Comme aucun contrôle n'est exercé "au passage" par la Commission qui transmet les informations, l'exactitude et la précision des notifications peuvent souvent laisser à désirer (cf.le cas de cette caravane française déclarée "dangereuse" en Allemagne parce qu'elle ne comportait pas un étiquetage à l'emplacement prévu par la norme allemande pertinente...)

De plus, le système de notification ne prévoit aucune coordination ni, à fortiori, aucune harmonisation des mesures prises par les Etats membres récepteurs de l'information et par l'Etat émetteur.

2/ Le système EHLASS

Comme chacun sait, le réseau EHLASS (système européen de surveillance des accidents à la maison et dans les loisirs) consiste à recenser les accidents domestiques et de loisirs dans les salles d'urgence de 90 hôpitaux de la Communauté dont 11 hôpitaux français.

Dans notre pays, le système est co-géré par le Ministère des Affaires Sociales (Direction Générale de la Santé et SESI), par le Secrétariat d'Etat chargé de la Consommation.

La Commission de la Sécurité utilise depuis quelques mois le double des données nationales à l'appui de ses enquêtes tandis que le SESI en assure un traitement plus systématique.

Aussi, la France a-t-elle été trés surprise d'apprendre, il y a peu de temps, que la Commission envisageait de supprimer ce recensement au bout de 2 ans alors qu'il était initialement prévu pour une durée de 5 ans et qu'il commence à peine à porter ses fruits.

Plus récemment, la Commission a, semble-t-il, décidé de permettre la survie du système à condition qu'il soit décentralisé dans le cadre de chaque Etat membre, ce qui aurait nécessairement pour conséquence d'en atomiser les résultats, avec d'inévitables divergences d'interprétation et des actions nationales variables à la clé....

D - Les actions d'information et d'éducation.

1/ Les actions en faveur de l'éducation préventive

Elles sont encore embryonnaires et fractionnées.

Il est symptomatique que, alors que la CEE annonce depuis deux ans le lancement d'une campagne européenne en faveur dela sécurité des enfants à la maison, cette campagne ait encore été reportée.

Dans ces circonstances, on espère que la campagne française servira de "locomotive" à d'autres initiatives nationales (notamment avec les supports pédagogiques développés avec les associations).

Ces initiatives nationales sont déjà nombreuses comme l'attestent les colloques "comparatifs" régulièrement organisés par l'association européenne pour la sécurité des consommateurs qu'anime Win ROGMANS. Les plus récents (enfants, brûlures, terrains de jeux, personnes âgées) ainsi que le rapport général établi pour l'OCDE sont une mine d'exemples et de références concrètes.

Mais l'absence de mécanismes de coordination ne favorise pas les économies et la suppression des doubles emplois.

2/ Essais comparatifs et certification

De plus, le rôle des essais comparatifs et de la certification pour intensifier l'information des consommateurs en matière de sécurité n'a pas été suffisamment étudié et renforcé.

Le colloque organisé en mai 1988 à Bruxelles sur la certification, à l'initiative de la DG III, s'est limité à une énumération des solutions possibles (certification par les tiers, les acheteurs, autocertificationet assurance qualité) avec une préférence marquée des représentants de l'industrie pour l'autocertification, ce qui ne va pas dans le sens de la transparence souhaitée par les associations de consommateurs.

En France, le dossier d'une marque nationale de sécurité, ressucité il y a un an par le ministère de l'industrie, semble retombé dans l'oubli.

En attendant, il ne se passe pas de semaine sans que la Commission française de la sécurité reçoive un appel d'une future mère de famille qui se plaint de ne pouvoir

sélectionner des produits de puériculture (lit, pousette, couffin, chaise haute...) en fonction de leur conformité à la norme, du fait de l'absence de toute certification ou indication émanant des vendeurs et de leurs catalogues. Un récent avis de la Commission française précise que sur quatre trotteurs testés, trois étaient non conformes.....

III. LES ACTIONS PRIORITAIRES

Des priorités doivent être définies au plan communautaire et au plan national avec un objectif final: faire diminuer les accidents domestiques et, par là, leur coût humain et social (dix-sept milliards de francs par an pour les coûts médicaux directs en France, selon des chiffres de la CNAM).

A - Au plan réglementaire.

1/ La règlementation

La situation est claire: mieux vaudrait définir dans une directive cadre une obligation générale de sécurité avec les conséquences qui s'y attachent (retrait, mise en conformité, rappel, communiqué, ...) qu'énumérer dans chaque directive "nouvelle approche", quelques exigences essentielles floues et vite dépassées. On y gagnera en temps et en clarté et on pourra alors concentrer les efforts sur les mesures d'urgence et sur la normalisation.

2/ Les mécanismes d'urgence

Les mécanismes d'urgence doivent figurer dans la directive cadre afin d'être utilisés en cas de nécessité par chaque Etat membre. Mais il faut également que ces mesures soient relayées par celles des différents Etats membres.

Certains rêvent d'un règlement, ou d'une "Commission européenne de la sécurité" de caractère consultatif ou même d'une agence européenne de la sécurité dotée du pouvoir règlementaire.

Sans aller jusque là, trois "étapes" apparaissent d'ores et déjà comme concevables et indispensables:

a/ La première consisterait à créer un comité européen centralisant toutes les informations sur la sécurité et qui pourrait comporter, non seulement des experts

gouvernementaux, mais aussi des représentants des consommateurs et des professionnels.

Le Comité exploiterait les résultats du système EHLASS et recenserait, entre autres, les informations concernant les dangers graves et immédiats (le système minitel établi en France par la Commission de la Sécurité et équivalent en Grande Bretagne, aux Pays-Bas).

b/ La seconde consisterait à permettre la diffusion au niveau communautaire de communiqués d'information du public (cf.les retombées de Tchernobyl, le vin autrichien à l'antigel et le vin italien au méthanol) même si cette solution semble inquiéter la Commission de la CEE qui craint de faire l'objet de procédures judiciaires en réparation à la suite de ses communiqués.

c/ La troisième consisterait à pouvoir généraliser dans un bref délai au plan communautaire les mesures d'urgence déjà prises au plan national. On reprendrait alors le modèle de ce qui se passe déjà en France (et aussi en Espagne et en Allemagne) entre le plan départemental et le plan national (mesures de l'article 6 et de l'article 3 de la loi du 21 juillet 1983). L'Etat le plus actif pourrait ainsi déclencher l'action communautaire tout en gardant la liberté de manoeuvre que lui garantit l'article 36 du Traité de Rome.

3/ La normalisation

Pour éviter une "privatisation" totale de la normalisation européenne et une mainmise d'un Etat membre sur les mécanismes de normalisation, les mesures suivantes pourraient être prises:

a/ Contrôle approfondi du Conseil des ministres sur les mandats donnés par la Commission au CEN-CENELEC.

b/ Quota national pour les présidences des groupes de normalisation (45% des présidences sont déjà détenues par la RFA).

c/ Renforcement de la présence des consommateurs par financement de leur participation.

d/ Mise en place de bases concrètes pour la normalisation avec exploitation systématique des résultats du programme EHLASS lui-même complété par des études approfondies et des essais de comportement en situation réelle.

4/ La coordination des méthodes de contrôle

Elle devrait être considérablement renforcée à deux niveaux:

a/ Entre les administrations nationales compétentes avec une réunion multinationale annuelle et des liaisons bilatérales (cf. ce qui se passe déjà dans le domaine des produits alimentaires entre la France et les Pays-Bas ou la France et la Grande-Bretagne).

b/ Entre les laboratoires qui interprètent les normes en vérifiant la conformité des produits et peuvent créer (même involontairement), de nouvelles entraves aux échanges par des interprétations divergentes.

Dans ce domaine, un précédent existe en matière de sécurité électrique (directive basse tension) entre l'ensemble des laboratoires nationaux compétents.

5/ L'information et l'éducation

a/ l'exploitation opérationnelle et complète du système EHLASS devrait être confiée à un groupe d'experts nationaux afin de déterminer les travaux de normalisation indispensables, des "cibles" prioritaires et d'évaluer l'impact des actions de sensibilisation du public (cf. avis récent du CCC).

b/ Les médias supranationaux, notamment télévisuels, devraient être moblisés pour lancer des campagnes de prévention des accidents domestiques analogues à celles menées contre le SIDA, les accidents de la route ou le cancer.

c/ Une stratégie concernant la méthodologie et l'exploitation des essais comparatifs devrait être élaborée au plan communautaire avec un "pool" crée par les associations de consommateurs.

d/ Une politique de certification cohérente et honnête doublée de mesures de contrôle coordonnées (voir plus haut en 4) devrait être définie.

e/ Une réflexion globale sur l'intégration de la sécurité dans l'éducation parentale, scolaire et universitaire devrait être menée.

f/ Il conviendrait de mettre en place des banques de données sur l'application des directives en droit national

(législation et jurisprudence) qui permettrait de détecter et de limiter la résurgence des entraves aux échanges résultant de l'interprétation divergente des textes par les multiples juridictions nationales.

6/ L'accés à la justice

De même que les groupes défendant les interêts des consommateurs doivent pouvoir mieux agir dans les organismes de normalisation face à la sur-représentation des professionnels, ils doivent pouvoir accéder plus facilement au prétoire, là où s'interprète et se crée le droit communautaire. A cette fin, des procédures en représentation des interêts individuels ("class action") et en défense des interêts collectifs devraient être introduites dans chaque Etat membre et devant la Cour de Justice (où les associations ne peuvent plus se contenter de la procédure d'intervention).

7/ L'accés aux documents administratifs

En ce qui concerne la transparence administrative, les citoyens de la Communauté devraient pouvoir bénéficier à l'égard des institutions de la CEE des mêmes droits que ceux dont ils disposent, au moins en théorie, à l'égard de leurs institutions nationales. Un texte s'impose dans ce domaine. A défaut, seuls les cabinets-conseils ayant pignon sur rue à Bruxelles pourront se procurer les informations stratégiques et tactiques sur les projets de la Commission et du Conseil de la CEE.

B - Au plan national.

Dans chaque Etat membre, des structures permanentes devraient permettre de mieux connaître et influencer le déroulement des négociations au Conseil, à la Commission, au Parlement et dans les organismes de normalisation.

En France, la création récente des "GEM" (Groupes d'Etudes et de Mobilisation) du Ministre des Affaires Européennes va dans le bon sens. Mais il faudrait leur donner un caractère permanent et coordonner en tant que telles les actions relevant de la sécurité des consommateurs.

Il serait également judicieux d'ajouter un groupe de "réflexion européenne" aux quelques groupes de travail (jouets/puériculture, équipement/logement, produits d'entretien et information/éducation et données statistiques) que le Secrétariat d'Etat à la Consommation

a créé dans le cadre de sa campagne de prévention des accidents domestiques.

CONCLUSION.

La France prendra la présidence du Conseil des Ministres de la CEE en juillet 1989. Dans le domaine de la sécurité des consommateurs comme dans d'autres, elle devrait profiter de cette occasion pour orienter dans un sens favorable la réalisation du marché unique - à condition d'avoir une vision offensive et non strictement défensive, des interêts positives et économiques et sociaux de la Communauté.

Par ailleurs, la CEE aurait tort de miser toutes ses chances sur le seul achèvement de ce marché unique , sans se soucier des aspirations culturelles et des préoccupations quotidiennes de l'ensemble des citoyens européens.

Sans une politique européenne de la sécurité, ou bien le marché "commun" pourra être morcelé à tout instant par de nouvelles formes d'entraves techniques se fondant sur l'article 36 du traité, ou bien des produits dangereux pourront être importés à tout moment en provenance d'Etats tiers ou d'Etats membres de la Communauté.

Sans une politique européenne de la sécurité, les citoyens européens n'auront pas le sentiment d'être reconnus en tant que tels.

On est alors tenté d'adapter aux circonstances la célèbre phrase que Jean MONNET a mise en exergue de ses mémoires et de lui faire dire:

"NOUS NE COALISONS PAS DES MARCHES NATIONAUX, NOUS UNISSONS DES HOMMES".

REACTIONS TO THE NEW APPROACH CONCERNING TECHNICAL HARMONIZATION AND STANDARDS IN THE FRG: THE CASE OF THE PROPOSED DIRECTIVE ON MACHINES

Josef Falke

Industrial associations, DIN - the German standardization organization-, the Federal Ministry of Economic Affairs, and the governmental parties have given a warm reception to the New Approach to technical harmonization and standards as laid down in the White Paper, in the Resolution of the EC Council from May 1985 and in several directives and proposed directives. In particular, they welcome the Commission's proposal of increasing mutual recognition of certificates through a policy which in principle favours self-certification by the manufacturer and disposes with compulsory independent third party certification. Trade unions, the Industrial Injuries Insurance Institutes, some testing institutes, and members of the opposing parties and the Federal Ministry for Labour and Social Affairs are rather sceptical, fearing that the present, relatively high level of worker and consumer protection in the Federal Republic could be watered down by implementing the New Approach.

The new harmonization policy has been interpreted by some interested parties as heralding a far-reaching deregulation strategy. Probably the most prominent adherent of such an interpretation in the Federal Republic is the Scientific Advisory Council of the German Federal Ministry of Economic Affairs. It argues, in principle, that it falls to the European consumer (not the Member State concerned) to decide on the standard of quality and safety of products. It concludes, therefore, that where governments cannot agree on the harmonization of product standards, competition between products manufactured to different standards is reasonable and, in the long term, the price-performance ratio that best meets consumer demand will prevail. However, this is not a valid interpretation of the Commission's White Paper or the judgement of the European Court of Justice. The statement quoted by the Scientific Advisory Council from the White Paper is based on the contestable assumption that the provisions governing safety in the Member States are generally equivalent. The demand that the Community should at all times enforce the principle of the free movement of goods and promote 'intra-Community competition between standards', even where harmonization of product regulations cannot be achieved, in fact means that firms

in 'safe countries' will be forced to accept the disadvantage of additional costs in the face of competition from firms operating in 'risk countries'. The disadvantaged businesses may respond to these distortions of competition by exerting political pressure to ease the burden of domestic safety regulations or relocate their production in 'risk countries'. Whatever happens, the 'safe countries' would come under pressure to adopt a deregulation policy. Such consequences pose a threat to regulatory measures which are in themselves justifiable, yet are unacceptable because they remove the decision for or against safety regulations from the political decision-making process and place it in the hands of the strategic calculations of individual countries or companies. Any lowering of product safety standards is not necessarily in the interests of European industry. On the contrary companies in Member States with high standards may even secure competitive advantages from a general raising of safety standards. Furthermore, in view of the political sensitivity of safety issues, the Member States cannot simply jeopardise their own product safety regulations in favour of European legislation. Nevertheless the history of the Single European Act and also discussion to date on the New Approach point in the same direction: it certainly was not 'risk countries' which insisted on the inclusion of Article 100 a (4), nor was agreement on the incorporation of the 'reference method' into the New Approach an indicator that 'safe countries' are prepared to accept a reduction in the level of safety provided by their standards.

The following remarks concentrate on the proposed directive on machines, until now the most important and far-reaching directive under the New Approach as regards its level of intervention into the established structure of worker and consumer safety regulations in several Member States, as well as intervention into traditional procedures of standardization and certification. In this sense each Member State tries to further certain special interests; France repeatedly tries to put very dangerous machines and prescribed homology on the market and evidently is successful with regard to woodworking machineries. The United Kingdom has laid more emphasis on the certification of processes of production and on securing quality than on the certification of certain products and is disappointed to find nothing in this respect in the proposed directive. The Federal Republic will hardly be successful in implementing the accident prevention regulations set by the Industrial Injuries Insurance Institutes (Unfallverhütungsvorschriften). I

will mainly concentrate on different positions in the Federal Republic of Germany.

According to the New Approach, the essential safety requirements shall be worded with sufficient precision to create legally binding obligations when transposed into national law which can be enforced effectively. They should be formulated in such a way as to enable the certification bodies to decide on examination whether a product conforms to EC requirements in the absence of national standards. This demand would seem however to conflict with two main elements of the New Approach on technical harmonization and standards, namely, the limiting of legislative harmonization to the adoption of essential safety requirements, and the entrusting of the drawing up of the required technical specifications to organizations competent in the standardization area. The delegation of technical discussions to standardization organizations has several advantages. The most important are:

- Technical experts can discuss until they arrive at a consensus, and draw up technical specifications which are supported by all concerned parties provided that they have been given a fair chance to participate in the standard-setting process.
- The EFTA countries also have an opportunity to take part in the standard-setting process.

Essential safety requirements are formulated in a very abstract way. They are not formulated with the object of enabling the certification bodies or the manufacturers to certify products as conforming with the essential safety requirements upon examination. All Equipment Safety Testing Laboratories, belonging to the Commission on Technical Equipment, felt that they were not in a position to certify products as being in conformity with the essential safety requirements in the absence of standards. Why then should a manufacturer be expected to do this in a responsible way, particularly since he is judge to his own cause? The conformity declaration of the manufacturer does not really mean approved safety, but affirmed safety. Members of testing institutes and of the Industrial Injuries Insurance Institutes criticize that the essential safety requirements are neither precise nor concrete enough.

On the other hand, representatives of the machine manufacturing industry and members of standard-setting organizations criticize the catalogue of the essential safety requirements, because they allegedly entail not

only basic safety aims and a framework for performance standards but also technical details, which strictly speaking belong to technical standards, and a framework for design standards. After an internal hearing within the EC Commission on the proposed adoption of a directive on machines at the beginning of November 1986, representatives of the machine manufacturing industry and the standardization organizations decided at the end of November 1986 to continue the efforts of the CEN/TC 114 Committee to draw up general and far-reaching European standards on the safety of machines for private and professional use, building a European counterpart to the German general safety standard DIN 31.000/VDE 1.000. Clearly it was decided not to wait for the announcement of the proposed directive nor to allude to its presumed content.

At the end of 1987 proposals for 1.000 tightly drawn CEN and CENELEC standards were already in existence. In the long term the completion of the Common Market will need standards equal in number to those currently in operation in the United Kingdom, France and the Federal Republic of Germany. Strict standards exist in several Community states: 12.000 AFNOR standards in France, 16.000 BSI standards in the United Kingdom and 20.000 DIN standards in the Federal Republic.

In the present situation the importance of national standardization is declining rapidly. As a result European standardization is rapidly gaining importance. It should not be isolated from world-wide standardization. If, as a result of market conditions or timing of available standards, the choice for European standardization seems to be preferable in a particular technical area, Europe should nevertheless be willing to integrate its standardization into the world-wide standardization process. Apart from original European standardization work, Europe should maintain its present effort to implement as many world-wide technical standards as is possible at European level. In particular in the area of new technologies the switch from national to

European/international standardization is very evident.[37]

Although it is generally recognized that a consensual process requires time, it has also become evident that the present time schedules for developing standards, which can last up to six years, are much too long to respond properly to a new demand for harmonized European standards.

The European obligation to exchange information about all new standardization projects will increasingly lead to plans, originally conceived at the national level, being discussed at the European level. Independent national work, therefore, will have to be confined to cases which bear the mark of national particularities.

Standardization work is led by two potentially contradictory principles: the precedence of international and European standards over national standards, and the aim to guard national standards against conflicting standards.

The question remains, what to do if there are not a sufficient number of harmonized standards. Denmark and the Federal Council have suggested that the directive should be implemented only to the extent that it can be harmonized with corresponding national standards. I suppose that this is not a realistic alternative, considering the massive political pressure to complete the Internal Market by the formal deadline of 1992.

For the present at any rate, at EEC level there are only a few harmonized standards in existence. The task of drawing up technical specifications, required for the production and placing of products on markets conforming to essential safety requirements established by the directive, cannot be accomplished in a sufficient volume by the time the directive is due to take effect. This being the case, the

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37. The proposed directive on machines and harmonized standards in this field is of enormous importance to the machine producing industry in the Federal Republic of Germany. The production volume amounts to more than 60 milliard ECUs, nearly one third of production is to be exported to other Member States, and one third to third countries all over the world.

Council Resolution on a new approach to technical harmonization and standards provides for certification by a third party. It is difficult to understand that the proposed directive relating to machines ignores certification by a third party in that case, and provides exclusively for certification by the producer himself. The Commission argued that only the producer is capable of estimating whether the product meets the required safety standards. This may be true for new and innovative products, but these are comparatively few in relation to technical appliances, commonly in use today.

The testing institutes emphasize that it is much easier to develop common testing criteria for the prevention of certain dangers, and look after their uniform application through cooperation between approved testing institutes, than to draw up corresponding standards for particular products. Standardized verification procedure leaves the producer broad freedom to determine his processes of construction.

The directive on machines strives to attain total harmonization. Member States are not only obliged to accept all machines which fulfill essential safety requirements of the directive, rather they have to change their regulations and rules in such a way that only essential safety requirements of Annex I are binding for all machines, and that the conformity with these requirements will be presumed if a machine is affixed with the EC mark and an EC conformity declaration is presented. The directive does not prevent any Member State from maintaining or introducing more stringent protective measures provided that these measures should guarantee the safety of the workers when using the machines in question, and this precludes the machines being modified in a way not specified in the directive.

To complement the proposed directive, which is founded on Article 100 (a) and seeks to guarantee the free movement of machines, there is a further proposed directive pursuant to Article 118 (a), which aims at the safe use of machines and worker protection. This proposal sets forth minimum requirements, and the directive does not prevent any Member State from maintaining or introducing more stringent measures for the improvement of working conditions, provided that this does not require modification in the construction of machines. Both directives supplement each other and should be treated collaterally. The Accident Prevention Regulations drafted by the Industrial Injuries Insurance Institutes are the

complementary measures which complete directives on worker protection, perhaps with more stringent measures in some respects.

Discussions about the extent of divergence of safety requirements in the particular Member States in practice, and whether this justifies such far-reaching incision into the established systems of consumer and worker safety, have to take into account the energy and pace with which the Commission works on the completion of the internal market up to 1993.

The draft directive on machines and the draft directive on the construction of personal appliances for safety at work are threatening the core of the Accident Prevention Regulations set by the Industrial Injuries Insurance Institutes. One should attempt to integrate the latter provisions with the European standardization work. DIN and the Industrial Injuries Insurance Institutes have to cooperate more closely than they did previously. One has to question whether the Accident Prevention Regulations could be preserved as an autonomous body of rules in respect of construction requirements for products in the long run. The Federal Council has claimed that Accident Prevention Regulations set by the Industrial Injuries Insurance Institutes could be regarded as standards in the sense of Article 5, No. 2 and 3 of the proposed directive.

According to Article 5, sections 3 and 4, national standards shall be given the presumption of conformity in the absence of harmonized standards. To this end Member States shall supply the Commission with the texts of their national standards, which they consider to be in accordance with one or more essential safety requirements. Thereafter the Commission will forward such texts to the other Member States, and - after consultation with the Standing Committee on Technical standardisation - inform the Member State concerned whether or not the standards in question shall continue to enjoy the presumption of conformity. Considering the wide range of application of the directives, one can expect Member States to present a wealth of national regulations and standards to the Commission. The Federal Ministry for Labour and Social Affairs has collected the principal state prescriptions and accident prevention regulations pertaining to certain kinds of machines, with a view to demonstrating the well-established structure and the high level of worker protection in the Federal Republic of Germany. This preliminary and partial collection is several hundred pages in length. The Commission will not be able to

investigate all prescriptions and standards of twelve Member States within the time limits set and attest their conformity with the essential safety requirements. The formal approval of national standards after a preliminary material examination according to Article 6 of the proposed directive on machines is an unrealistic procedure.

The United Kingdom and France have tried to compare British and French standards for pressure vessels. Their efforts did not lead to success after more than half a year and will be shelved. Under the Low Voltage Directive, which has now been in force for fifteen years, no one has tried to transpose this instrument into practice in a single case, because all parties concerned are convinced that it is not feasible. The sole practical solution is to draw up harmonized European standards for all important parts of the directive as fast as possible.

The Federal Council and the Parliament demanded additional safety requirements for some especially dangerous kinds of machines. The revised proposal of the directive on machines from June 1988 prescribes a more strict certification procedure for certain types of machines with a higher risk potential. Machines for the processing of wood and similar raw materials now come within the scope of the directive. They have to be submitted to a type-testing procedure by an independent and competent testing institute, if their construction is not in conformity with the safety standards applicable.

The Law on Equipment Safety (Gerätesicherheitsgesetz) does not determine concrete safety requirements, but defines only the protection aims in section 3:

> "The manufacturer or importer of technical equipment shall put it on the market or offer it for sale only if, in accordance with the generally accepted rules of technique and the provisions on safety at work and the prevention of accidents, the equipment is constructed in such a way that users and third parties who employ it for the purpose for which it is designed are protected against all risks to life or health to the extent compatible with the use of the product for the purpose for which it is designed."

Technical standards play an enormously important role in the technical safety law of the Federal Republic of Germany. This is primarily because, in all legislation on technical safety matters, including environment protection

legislation, the quality requirements governing technical installations and substances are defined in general terms. It is left to the technical standards used in the various fields to give substance to these requirements. Three Annexes of the General Administrative Regulation to the Law on Equipment Safety entail almost 1.700 technical rules and standards, whose application leads to the assumption that a product is in accordance with the generally accepted rules of the technique. If a product does not conform to the respective safety standard, the producer can attest that the same degree of safety is guaranteed in another way. The essential safety requirements of the EEC Directives correspond to the general safety duty clause of the Law on Equipment Safety; harmonized and equivalent approved national standards correspond to the three annexes of the General Administrative Regulation to the Law on Equipment Safety. The proposed directive does not amount to a general deviation clause, the observance of the essential safety requirements is obligatory. In the absence of harmonized standards and approved national standards the observance of these essential safety requirements is compulsory. The Member States are obliged to transpose the essential safety requirements, without any changes or additions, into binding national law. As regards the range of application of the proposed directive on machines the Federal Republic of Germany has to annul the general safety duty under section 3 of the Law on Equipment Safety in favour of the essential safety requirements of the annex and the divergent protection aims in Article 2 (1) of the directive.

Member States retain the responsibility, on their own territory, of ensuring safety for persons, domestic animals and goods with a general public interest such as health, and consumer, worker or environmental protection. To this end they are not allowed to introduce systematic pre-market controls, being restricted to making spot-checks only. Article 7 provides: "Where a Member State ascertains that machines bearing the EC mark accompanied by the EC declaration of conformity, and used in accordance with their intended purpose, are likely to compromise the safety of persons, domestic animals or property, it shall take all appropriate measures to withdraw those machines from the market, their putting into service, their use or to restrict their free movement". The existing competences of the labour inspectorates of the Länder have to be extended so that they can use this safeguard clause in an effective and comparable way. Presently, under section 5 of the Law on

Equipment Safety, the labour inspectorates have the power to prevent the manufacturer or importer from placing on the market or offering for sale any technical equipment which constitutes a threat to life or health. This measure is solely preventive and can only be applied - in a very limited way - to equipment already on the market. Equipment already in the hands of consumers is not covered by the provisions of section 5; the public authorities have no power to recall products.

The General Administrative Regulation on the Law on Equipment Safety obliges the competent authorities to take preventive action,

- if they hear from the user or from public authorities occupied with accident prevention tasks that a defect in the constitution of a product poses a risk to life or health of persons, or
- if there is good reason to assume that an accident is caused by a defect in the constitution of a product.

This prescription has not to be changed. Controls of factories by the labour inspectorates and by the Industrial Injuries Insurance Institutes are likewise admissible.
The safeguard clause of Article 7 can be best applied in particular suspicious cases, but not for routine and laborious detailed work on safety matters. The procedure is very expensive and can only be used if an immediate and certain danger threatens the safety of persons.

The proposed directive leaves a broad discretion to the manufacturer to assess whether he engages a third, independent and competent testing institution to prove and certify the safety of a product. In the Federal Republic of Germany a well-known special seal of approved safety exists, which can be awarded to a product only if an independent testing authority has confirmed that it complies with safety regulations. By means of the GS seal the consumer can discern what is a safe product without being a technical expert. At present there are 82 testing laboratories for special kinds of products, five thereof being French testing laboratories in virtue of a bilateral agreement between France and the Federal Republic of Germany. Each year they grant permission to use the approval mark in more than 20.000 cases. Only a quarter of products satisfy the applicable safety requirements at the first testing station; on average the testing laboratories find 11 deficiencies in safety matters in each object tested. This shows how important it is for products to be tested by third independent testing laboratories. The mark which proves testing and certification by a third

independent party should be distinguished very clearly from the EC mark and the declaration of conformity, which show the producer's announcement of the conformity of his products - without independent testing - with the essential safety requirements. Certification by third parties should be introduced into the proposed directive as a voluntary possibility; the implicit statement to this effect in the introduction to the directive does not suffice.
The EC mark of conformity shall be only a mark for administrative purposes to ensure the free movement of goods. As a consequence of related essential safety requirements, however, it is seen as a safety mark. Mertens criticizes the self-certification emphatically: "Self-certification by the manufacturer and the EC mark have no bearing on safety. They are a mere formality, which leads to considerable, but useless bureaucratic expenditure, but certainly not a contribution to accident prevention.

With regard to the vagueness of essential safety requirements in the annex of the proposed directive, and lack of reference to the retaining levels of safety, whether assured by producer self-certification or information issued collaterally with the EC mark, Mertens makes the following remarks. "At best they are a subterfuge, where one is supposed to believe that safety aspects have been considered in an appropriate measure when constructing the Common Market."

The Federal Association of German Industry and the Association of Machine Producing Industry support the principle of producer self-certification, arguing that the producer is liable for damages resulting from the defective nature of his products. The producer should take all necessary precautions to guarantee the safety of his products. Beyond that, he is free to engage a third independent testing institute in consideration of marketing requirements.

An analysis of the current testing and monitoring situation shows that the differentiated system of the Federal Republic of Germany has proved itself to be quite valuable, on the whole. It is based on a combined system of private and state testing bodies, and a set of sector and product systems and certainly does not operate less efficiently than the centralized systems of other European countries. It is of great value to consider the nascent efforts of Member States to exchange practical experiences regarding special groups of products between the

authorized testing institutes, and to develop common testing principles in the absence of standards or if standards are too vague in some respects. There should be stronger efforts deriving from the Ministry for Labour and Social Affairs to control the testing activities. The "Warentest" foundation, whose primary role is to conduct comparative tests, can exert certain indirect control on a small, but important sector of the activities of the testing institutes. Both the Federal Association of German Industry and the Industrial Injuries Insurance Institutes reject any policy aiming to move away from detailed and specific product certification towards a modern product monitoring system. They do not see production monitoring as an alternative or superior solution to product testing.

There is a large consensus of opinion believing that mutual recognition of testing laboratories and certifications is not a substitute for harmonized European standards. Quite the contrary, the mutual recognition of testing laboratories and certifications is a prerequisite for fast and far-reaching progress in the development of harmonized European standards. It will be difficult to make outsiders aware of the differentiated and essentially proven system of testing and monitoring bodies in the Federal Republic of Germany. It would be helpful to standardize the different testing rules in some way, to put together administratively different testing institutes which belong to a greater organization, and to adopt the control activities of the Federal Ministry of Labour and Social Affairs.

Conformity declarations in the form of declarations by the producer or a third independent testing body must be based on acknowledged testing principles, usually in the form of standards. Tests according to general principles without safeguarding the capacity to reproduce the test results cannot lay a foundation for a mutual recognition.

PATTERNS OF DUTCH PRODUCT SAFETY LEGISLATION: THE COMMODITY ACT 1988 AND ITS RELATION TO THE NEW APPROACH

Gerard M.F. Snijders

In September 1988 the Dutch Consumer Safety Institute published a report about consumer accidents in the Netherlands. The report concludes that every year one in ten persons in the Netherlands has to visit a doctor because of accidents in or around the home. This number does not include sport injuries, nor traffic accidents. Neither does the report specify how many of these accidents are caused by defective products. One can understand that it is very difficult to attempt to give such an estimation. However, the results mentioned in the report are reason enough to discuss the product safety policy of the European Community and the Member States during this workshop.

In the Netherlands, product safety is regulated in several acts and regulations. Accordingly there is a specific act to deal with the safety of cars, and others to deal with the safety of medicines, medical devices, pesticides and electrotechnical products.

The most interesting act for the participants in this workshop is without any doubt the new Commodity Act (or in Dutch the new Warenwet). This Act took effect from August 1988.

The old Commodity Act had been in force since 1935. As was the case with most other acts concerning product safety, the Commodity Act itself does not contain detailed safety requirements. It has to be seen as providing a framework for such requirements. These requirements can be laid down in regulations formulated by the cabinet and monarch. At the moment, about seventy such regulations are in force. They are usually divided into vertical regulations, which deal with the safety of a specific product or group of products, and horizontal regulations which relate to a particular aspect of products in general. In such horizontal regulations one can find for example requirements concerning the labelling of food and the addition of so-called 'additives'.

All regulations originally based on the preceding Commodity Act are still in force. The introduction of the

new Act, last August, simply gave them a new basis. Nothing has changed in the product safety requirements themselves; what changed however is the framework within which these requirements exist. This framework in itself merits discussion, because it lays down the basis for the delegation of powers and competences whereby new regulations are enacted.

The old Commodity Act was initially intended to provide a basis for requirements concerning the safety of food. This is clearly evident from the titles of the seventy regulations, mentioned above. One finds regulations dealing with bread, cheese, beverages, etc. Over the years it became clear that it was necessary to formulate requirements concerning non-food articles. If, at any time, there was no other act that could be used as the basis for such regulations, the government decided to derive its authority from the Commodity Act. The result is that among the Commodity Act regulations one also finds examples of requirements concerning cosmetics, crash helmets and toys. One of the important differences between the old Commodity Act and the new one is departure from emphasis on food regulation in the New Act. In other words, the new Commodity Act deals explicitly with the safety of movables more generally.

Discussion about the content of the new Commodity Act was advanced over many years. One of its particularly controversial aspects centred on whether the Act should contain a clause about product withdrawal and product recall. Some parties in parliament pressured its incorporation; the minister responsible (the Minister of Welfare, Health and Cultural Affairs) did not agree with them; the result is therefore a compromise, laid down in paragraph 21. This paragraph gives the Minister the competence to require the distributor of a dangerous consumer product to notify his purchasers of its dangerous quality. If the distributor refuses to, or does not do so in the way specified, then the Minister can decide to publish a warning himself. In comparison to the text of the old Act, the inclusion of this paragraph in the new Commodity Act can be seen as a significant development. In practice the distinction will be less important. In the course of recent years, the Minister has already published press reports to warn consumers about the risks of specific 'unsafe' products. The new Commodity Act merely formalizes existing practice, by explicitly giving the Minister a competence to issue such warnings.

During pre-legislative discussion two other questions had to be answered. The first question was whether the Commodity Act should be divided into two new acts, one concerning food regulation (like the old Commodity Act) and a second concerning the safety of non-food articles. As has already been observed, this was answered in the negative.

The second question asked whether the new Act should also provide a framework of requirements for products, the nature of use of which could risk having damaging effects on the environment. Similarly, the response to this question was also negative. It was concluded that existing environmental legislation provided a sufficient basis for such requirements, and therefore there was no reason to extend the scope of the new Commodity Act in this respect.

A new addition to the Commodity Act is paragraph 18, which prohibits the sale of unsafe products. This paragraph makes a distinction between food and other consumer products. Food has to be safe without exception, whereas non-food consumer articles may be distributed unless the distributor knows (or ought reasonably to know) that use of the product in the manner specified for its intended purpose(s) can be dangerous.

In the period from 1935 to August 1988, the sale of unsafe 'commodities' was prohibited in the Netherlands. A parallel prohibition was not to be found in the old Commodity Act itself, but in secondary legislation (municipal regulation). The word 'commodity' included food and drinks. It also included some non-food articles, indicated in Commodity Act regulations. Non-food articles for which requirements in such regulations did not exist were not regarded as 'commodities'. So the scope of the prohibition under the old act was limited.

The ambit of the previous Act was restricted to the safety of goods that were already in circulation, or at any rate, to those intended for circulation. This restriction no longer exists. So it now is possible to bring an action against the possessor of dangerous materials, without regard to his possible intentions.

The last difference I want to mention is that, whereas under the former Act it was possible to formulate regulations concerning the labelling of products, under the new Act the scope of the relevant paragraphs is extended to advertisement as well--with the effect that

advertising in defiance of a regulation based on the new legislation has become a criminal act.
Neither the Commodity Act, nor any other act or independent regulation, contains a clause about the possibility of referring to standards. Nevertheless in many of the regulations based on the Commodity Act, and in further regulations based on other acts, the legislator made use of this technique. Eight years ago the Interdepartmental Commission for Normalization ICN (a commission that coordinates the policy of the different ministers in this field) published a survey of the practice of reference to standards in Dutch legislation. In regulations based on the old Commodity Act, the commission found about fifty referred standards, most of which deal with testing methods. In other regulations the commission counted about five hundred referred standards.

One can therefore conclude that reference to standards is an important technique employed in Dutch legislation. In spite of this however, one has to conclude at the same time that a clear reference policy does not exist. In Dutch legislation all different types of references are used. Thus one can find examples of exact identification, undated identification and sometimes of general reference.

In a report published in 1984, the Interdepartmental Commission concluded that reference to standards in legislation had to be stimulated. The report states that it is preferable to refer to world-wide or European standards. The Commission did not say anything about the question of what method of reference should be preferred.

Later, in 1985, the New Approach to technical harmonization and standards came. The Dutch Minister of Economic Affairs asked the Social-Economic Council (the Sociaal-Economische Raad) to advise him on the question of the desirability of this approach. The advice published in April 1985 was very positive. However, the Council made one important reservation, which states that the influence of both employees and consumers on the activities of the European standardization institutes (CEN and CENELEC) has to be guaranteed. I am afraid that in this area still a lot of work has to be done.

What will be the impact of the New Approach on product safety and product safety legislation in the Netherlands? Before making some positive remarks I will first make a negative one.

In the New Approach I personally see some sort of a contradiction. The very contradiction lies in the technique of reference to standards in itself, especially where the legislator makes use of other methods than exact identification. On the one hand, the government considers the regulation of product safety as its own task and responsibility. The existence of the old Commodity Act, for example, demonstrates that some fifty years ago the Dutch legislator found it necessary to formulate mandatory safety requirements. The new Act shows that this idea has not changed. On the other hand, the New Approach forces that same legislator to restrict himself to laying down general rules (one can define them as fundamental rules), with the result that the standardization institutes have a very wide discretion to formulate technical detail. In fact, to some extent producers formulate the mandatory requirements themselves.

Now one might conclude that references in 'New Approach directives' are only meant as presumptions of standards, nothing more than presumptions. There will always be a possibility to prove the contrary. Of course, this is true in theory. But will it happen very often in practice? Will there be somebody willing to run the risk of burning his fingers, by stating that a certain product is manufactured in conformity with a referred standard, but is unsafe nevertheless? How much damage must be caused, before somebody has the courage to start the procedure?

Of course the reference to standards--and with this technique, the New Approach--has advantages. It has become possible to agree upon new product safety legislation relatively quickly. If one refers to European standards, one also contributes to the removal of technical barriers to trade within the European Community. However, this begs the question whether such safety requirements, especially when one considers the lack of representation of consumers, can be seen as requirements that are safe enough. Before the New Approach can be qualified as a reliable procedure to formulate safety requirements, the quality of the technical standards referred to has to be guaranteed.

The New Approach also has positive aspects for Dutch product safety legislation. Firstly, this policy may lead to more unity in the methods used in applying the technique of reference to standards. More importantly however, the Dutch legislator will be forced to implement requirements in areas where at present no regulations exist at all.

To illustrate the problem, I will describe in outline the Dutch Medical Device Act. This Act is a very modern example of legislation which creates a framework on the basis of which rules may be implemented. Within the framework, it is possible to stipulate requirements concerning the manufacturing and distribution of medical devices in a broad sense of the word. In recent years, the use of some medical devices has led to serious accidents in the Netherlands. Particular examples of this are the Dalkon shield and the breaking of Bj|rk-Shiley heart valves. How could these accidents happen in a country with such modern legislation? Whilst legislation, which provides a framework for more detailed legislation, opens the way to employing a strict regulatory mechanism, this will not prevent the importing of defective products into the medical practice where no use is made of regulatory mechanisms provided. Since 1974, the year in which the Medical Device Act became operative, it has almost remained a dead letter.

The main reason for this is that the Dutch parliament is not really interested in the safety of medical devices at all. A second reason is the Dutch policy of deregulation. For several years now, the government has tried to make legislation less complicated and thus decrease the number of regulations. One can understand that this is not conducive to the promotion of safety requirements for medical devices or for that matter any other products.

For the Dutch consumer it was very important that the European Community adopted a directive dealing with the safety of electromedical equipment, and that it is currently working on a draft directive concerning the safety of implants such as heart valves, pacemakers and insulin pumps.

Unfortunately I am not too optimistic; firstly, the aforementioned directive concerning electromedical equipment was published in September 1984. According to its provisions it ought to have been implemented two years later, in September 1986. Not until April 22nd, 1988, did the Dutch government publish a draft for a corresponding regulation. As yet, September 1988, the directive has still not been implemented in the Netherlands.

Secondly, the New Approach directives may also become dead letters. Such directives will refer to standards, which in itself is no problem at all, within the context of Dutch legislation. But, of course, there must already be standards in operation to which regulations can refer. As

long as these standards do not exist, the promulgation of the directives is superfluous. This tends to suggest a level of product safety within the European Community which, in reality, does not exist.

I should like to conclude with a final remark. Discussion about the New Approach tends to focus on product safety legislation. One has to remember that product safety is not only a question of legislation, but also one of certification.

In the Netherlands (as is perhaps the case in other European countries) the safety of certain products is not controlled by legislation, but guaranteed by private certification institutes. The best example of this is the safety of gas apparatus. Dutch consumers are only allowed to use gas installations certified by the VEG-Gasinstituut in Apeldoorn. This duty is not formulated in legislation, but in the individual contracts between consumers and gas distributors. Legislation in the field of the safety of consumer gas apparatus does not (yet) exist in the Netherlands.

This means that, when talking about the impact of the New Approach, one also has to pay attention to the position of private certification bodies (and their private certification marks) in the future.

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PRODUCT SAFETY LAW AND THE IMPACT OF THE NEW APPROACH TO TECHNICAL HARMONISATION AND STANDARDS

Nuala O'Flynn

1. The removal of technical barriers to trade caused by different and sometimes conflicting national standards is an essential condition for the operation of a genuine Single Market. If manufacturers need to adapt their products several times in order to be able to sell in different Member States, this clearly increases costs and reduces efficiency and can deter manufacturers from seeking to sell outside their own Member State, or at least outside those which have the same standards. The New Approach (with its emphasis on compliance with agreed standards) should go a considerable way towards remedying this situation and facilitating the free movement of products throughout the Community.

2. At the same time we think it important that, in the adoption of standards, the objective should be to adopt those which reflect appropriate standards, rather than compromising between the highest and the lowest and adopting something in between. In this way we consider that the interests of consumers will be protected and those of industry will also be advanced.

3. This essential element in the New Approach is rightly emphasised in the second principle to be observed when drawing up a New Approach Directive, viz.:

> "the national provisions ensuring ... protection must be harmonised in order to ensure the free movement of goods, without lowering existing and justified levels of protection in the Member States".

4. Turning to the operation of the New Approach, more specifically to technical harmonisation and standards in practice, it is too soon to comment on its effect on product safety law at this stage. The Approach was adopted in May 1985 and only one directive has been adopted wholly under the New Approach - Toy Safety Directive, May 1988. However, our initial view is that the New Approach provides a satisfactory basis for Community legislation in the product safety field. In particular, the limitation of New Approach directives to the "essential requirements" is intended to result in decisions being reached more quickly than under the old approach where detailed requirements were set out in full in the directives.

5. The Single European Act is also likely to have a substantial bearing on the effectiveness of the New Approach, in particular in the following two respects:

(a) directives will be adopted under Article 100A of the Treaty by a qualified majority; and

(b) amendments proposed by the European Parliament are required to be considered by the Commission and the Council of Ministers.

POINTS TO WATCH

Precision in formulating essential requirements.

6. In a New Approach Directive, provision is to be made for Member States to ensure that the products covered by the relevant directive may be placed on the market only if they do not endanger the safety of persons, domestic animals or goods when properly installed and maintained and used for the purposes for which they are intended (B II of Annex II to the Resolution of 7 May 1985). These "essential safety requirements" must be worded sufficiently precisely to create legally binding obligations when transposed into national law and must be formulated in such a way as to enable the certification bodies to certify straightaway that products conform with the requirements even when there are no standards (III of Annex II to the Resolution).

7. The requirement of a degree of precision is clearly a highly desirable objective because lack of sufficient precision in the formulation of the essential requirements in the safety area is likely to lead to the requirement being transposed into the national law of Member States in different ways (and thus to give rise to obstacles to the free movement of goods), although once harmonised standards are adopted, the position is likely to be ameliorated. We hope that it will be possible to achieve the objective of drafting the essential safety requirements with sufficient precision notwithstanding the temptation to draft in general terms, leaving the detail to be set out in the relevant standards.

8. The requirement for a degree of precision is also important in the light of the presumption which must be provided for in a New Approach directive that a product which has been properly attested as conforming to the essential requirements and has been EC-marked is to be entitled to free circulation throughout the Community. In order therefore that -

(a) industry may be reasonably sure when such free movement will be forthcoming and
(b) that consumers will be given adequate protection against unsafe products

it is necessary that the essential safety requirement be formulated with some precision.

Method of complying with the "essential safety requirements".

9. The usual way of complying with the essential safety requirement will be by complying with a specified European standard. Compliance with the relevant standard will be voluntary and it will be possible to show direct compliance with the requirement itself by some other means although in practice that may be more difficult to do because certification by a third party is required in order to raise the presumption of conformity with the essential safety requirement if the relevant standard is not complied with (or if there is no relevant standard).

10. It is therefore clear that the success of the New Approach will depend to a considerable extent on the speed with which the European standard-working bodies can draw up the necessary standards. In addition, they will have to react quickly to changing situations and new dangers to consumers as they become apparent by amending or adding to the relevant standards.

11. In some cases, also, it will be necessary to amend the essential safety requirement in the directives themselves in order to take account of new dangers or risks which have come to light or been created since the directives were adopted. This is a matter which the Commission will no doubt bear in mind because it is as important that the directive under which standards are made reflects and takes account of the current position with regard to safety as that the standards should do so.

The New Approach directives only cover particular products and this will necessarily result in many products not being regulated.

12. Apart from the Toy Safety Directive mentioned earlier, nine draft New Approach directives are under discussion and many of these are concerned with product safety. However many products are covered by the New Approach, a substantial area will remain uncovered. We therefore think that consideration should be given to the question of work on a general directive on consumer safety in the Community

discussed in the Communication from the Commission on the safety of consumers in relation to consumer products dated 18 May 1987. The United Kingdom, like some of the other Member States, has recently (October 1987 - when Part II of the Consumer Protection Act 1987 came into force) introduced into its law a general safety requirement which suppliers of consumer goods are required to meet, breach of the requirement being a criminal offence. We do not suggest that a Community-wide requirement that consumer goods be safe should (or could) be imposed without careful consideration and discussion, taking account of the interests of all who may be affected, but we think that it would be useful to start giving such consideration at an early stage in order to ensure that there is a basic Community-wide level of protection for consumers in relation to unsafe products.

Procedure for withdrawing unsafe products from sale in the Community.

13. One matter which is not provided for in the New Approach directives, or elsewhere, is a Community-wide procedure for withdrawing products which are found to be unsafe in one Member State. Such directives must contain a safeguard provision (VII 1 of Annex II of the Resolution of May 1985) whereby Member States, finding that a product might compromise the safety of individuals, domestic animals or property, are required to take steps to withdraw it from the market or prohibit its sale even it has been properly attested. We are of course in favour of this provision, since each Member State is responsible for securing, as far as possible, that persons on its territory do not suffer injury from unsafe products, even if they are or appear to have been attested in other Member States. But we are concerned about the possibility that a product which has been withdrawn from sale in one Member State for safety reasons may continue to be sold in other Member States. Under the New Approach where the Commission considers that the withdrawal was justified it must inform all other Member States that "all else being equal, they are also obliged to prevent the product in question from being placed on the market" (B VII 2 of Annex II to the May 1985 Resolution). This has been provided for in Article 7.2 of the Toy Safety Directive, where it is a requirement that the Commission inform Member States that the action taken by the Member State in question to prohibit or restrict the sale of the product was justified.

14. The rapid exchange of information on products which have been found to be dangerous is essential for protecting consumers throughout the Community from the possibility that such products might be "dumped" in Member States other than the one in which action was originally taken. Whilst such an exchange (whether under the procedure in the New Approach directives or under the system for the rapid exchange of information on dangers arising from the use of consumer products set out in Council Decision of 2 March 1984) does not automatically result in the products being removed from the Community, it goes a considerable way towards securing this by ensuring that Member States are quickly alerted to the danger from a particular product.

PRODUCT SAFETY LAW AND THE IMPACT OF THE NEW APPROACH TO TECHNICAL HARMONISATION AND STANDARDS: A SWEDISH PERSPECTIVE

Nils Ringstedt

Abstract

This paper presents a brief summary of the background to Swedish consumer policy and the 'New Approach' of the EC, Swedish standardization as well as consumer influence on standardization, also taking into account decisions within the Nordic Council of Ministers. Present and future consumer safety legislation is also summarized as are the 'guidelines system' and the ongoing work on product liability legislation in Sweden. By way of conclusion the close connections between present and future Swedish product safety policy with the European standardization work are underlined, together with planned product safety legislation within the Community.

1. Swedish consumer policy and the EC

In Sweden consumer policy deals with problems related to the acquisition of goods and services on an open market for the consumer's private use. This omits problems related to the use of public services supplied by government or local authorities, such as health care and education. Important features in Swedish consumer policy concern the support given to households by strengthening their resources through different measures, thereby influencing businesses to adapt their activities in accordance with consumer interests; to conduct investigations of goods and services, to ensure that dangerous and unserviceable products disappear from the market, likewise that the marketing activities and the sales conditions of businesses are acceptable, that consumers get adequate information about the market, and to promote education and research in the consumer field.

In a 1988 Bill entitled "Sweden and the West European integration" the Government has underlined two issues of importance on an international level:
- the protection of consumers from dangerous products/services;
- the protection of consumers' economic interests.

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As regards product safety, the Bill states that developments in the EC will be of utmost importance to Swedish consumers, not least because of the already existing co-operation between EC and EFTA countries through the standardization bodies CEN and CENELEC. According to the Bill it is natural for Sweden to seek to attain the highest possible levels of safety, even if it cannot be said in all certainty that Sweden has the best safety rules in all areas of consumer products. However, the Government thinks it is necessary that Sweden, preferably in co-operation with other Nordic States, is engaged actively in European standardization work, and equally that consumer interests are considered.

The Swedish Government is of the opinion that the harmonization work in the EC in relation to product safety may imply that, in some respects, lower safety requirements will be applied in the Community than those in operation at present in Sweden. Because of this the Government wishes to actively engage itself in the West European co-operation in this field (Government Bill 1987/88:66, pp. 91 ff.).

When considering the Bill in the Swedish parliament the Standing Committee on Foreign Affairs stated that it is important, in connection with the increased co-operation with the EC, that Sweden tries to remove technical barriers to trade as far as possible by harmonizing laws and other regulations. It is urgent that Swedish authorities scrutinize the EC rules in diverse areas to research existing possibilities for harmonization. When drafting proposed legislation, existing rules in other countries, inclusive of those in the EC, should be taken into consideration. With this background the Swedish Government has instructed all Government Committees/ Commissions in special guidelines to follow the activities in the EC and consider possible ways of harmonization (Government Guidelines to Committees/ Commissions 1988:43).

The above may be seen as background information to the impact of the New Approach to technical harmonization and standards with regard to product safety in Sweden.

2. The New Approach and Swedish standardization

It has traditionally been the policy of Swedish Government to adhere to the concomitant principles that rules and regulations shall contain only essential safety

requirements regarding health and safety and so forth, and that all detailed requirements are to be found by reference to standards. The National Swedish Board for Consumer Policies applies this method when drafting guidelines on product safety, for example.

It is important for Sweden that the EC has chosen the approach of referring to standards in order to eliminate technical barriers to trade and to entrust the task of drafting standards to the European standardization bodies CEN and CENELEC. The Swedish standardization bodies are full members of these bodies and participate actively in the European standardization work. Furthermore it is very important that the Governments of the EFTA countries adhere to the same principle and programme. In fact, at present EFTA concurs completely with the principles in the EC New Approach and has entrusted the CEN and CENELEC to draft and issue EN standards. As a rule both the EC and EFTA authorize the CEN and CENELEC to develop standards in a specific field, for example toys. According to the rules of CEN/CENELEC national standardization bodies are obliged to accept an approved EN standard as a national standard, normally within six months - even where the national body voted against the implementation of such a standard (Wallin 1988).

Whereas EN standards are binding for national bodies in the EC, this is not the case in EFTA countries. In these countries however it is expected that national bodies shall approve and refer to EN standards which have been developed by mandate and financed by EFTA. The standardization bodies are not obliged to accept standards which conflict with national laws and regulations.

3. Consumer influence on standardization

As Sweden is a member of the European standardization bodies, Swedish delegations participate in the European standardization work on an equal footing, for example, with delegations from EC countries. By sending well-informed experts/delegates to European meetings, Swedish points of view may be presented and will - if well-founded - be taken into consideration when drafting EN standards.

However, as regards consumer influence on standardization the picture is not very positive. Although the Swedish Board for Consumer Policies may participate actively in all European standardization bodies, it is not possible to do so at committee level in more than a few selected

committees. It is a matter of having adequate resources and competent staff. There are also other problems of a more general nature - common to other consumer bodies participating in standardization work. Consumer interest has to compete with other interests - mainly those of trade and industry. When conflict arises and the interests do not coincide, the consumers are only represented by one voice, which means that all other parties in a committee can vote against a proposal, which, arguably, from a consumer safety point of view should have been accepted.

The EC has taken a positive step in this regard and has issued a recommendation on the involvement and improvement of consumer participation in standardization. EFTA has also recommended that a similar initiative be taken by the Governments of the EFTA countries in order to achieve balanced consumer representation from both EC and EFTA countries in the CEN/CENELEC work. The EFTA Sub-Commitee on Consumer Policy Affairs has recently proposed (May 1989) the establishment of a Consumer Policy Committee on a par with CEN/CENELEC.

At a meeting in Stockholm in March 1988 between the Nordic consumer ministers in the Nordic Council of Ministers it was decided that Nordic harmonization work should be undertaken in a way that corresponds with related work in the EC. In the field of product safety and new technology it is especially important that the Nordic work is related to what is going on in the Community. With the purpose of achieving - as far as possible - a common Nordic attitude towards the international standardization organizations, the Council decided to work towards an increased consumer influence in standardization. Furthermore, in May 1988 the Nordic co-ordination ministers in the Council stated - on the basis of a Nordic investigation (NCM, Norden i Europa, 1988) - that the Nordic countries should co-operate regarding technical barriers to trade in order to reach solutions achieving harmonization with those of the EC. At the same time however, the present high level of consumer protection in the Nordic countries must not be lowered.

Against this background Swedish product safety work and the impact of the EC New Approach have to be considered.

4. Present and future consumer product safety legislation in Sweden

4.1. The Marketing Act and Guidelines

The Swedish Marketing Act relates to marketing actions by a firm or some other trader when marketing goods, services, etc.

Article 4 concerns product safety inclusive of services. It states that a tradesman who offers to sell to a consumer, for personal use, a product whose properties are such as to entail a particular risk or personal injury or damage to property, may be ordered by the Market Court to desist from doing so. The same applies in the event of a product being manifestly unfit for its main purpose. Also a tradesman who, as a manufacturer, importer or in any other capacity, offers a product of the kind referred to in the foregoing for sale to another tradesman may be ordered by the Market Court to desist from so doing, insofar as this is necessary in order to prevent a product of the said kind from being offered for sale to consumers for personal use. The Article is not to be applied in cases where special provisions already exist concerning the goods or services.

By virtue of this Article it is possible to prohibit the sale of a hazardous toy, for instance, which could harm the user, e.g. because of certain mechanical risks. Goods which clearly prove to be unserviceable (not fit for their main purpose) may also be prohibited. In one case the Market Court prohibited the sale of a washing machine whose washing effect was practically nil.

Of interest in this respect is that this clause does not clearly say what makes a product dangerous. Instead it is the task of the Consumer Ombudsman and the Market Court to intervene and by negotiations or by a final court decision change the trade practice. Initially the Ombudsman and his officials negotiate with business enterprises. If the negotiations fail, that is if they do not lead to a voluntary settlement, the Consumer Ombudsman may bring the case before the Market Court and ask the Court by virtue of the Marketing Act, for example, to prohibit the sale of a dangerous product. Almost all cases have been solved by voluntary agreements, but of some 20-25 cases each year brought before the Market Court by the Consumer Ombudsman, only a few concern hazardous products.

The Ombudsman may request the Court to prohibit the business from continuing the practices under criticism or from hiring or selling to anyone a harmful or useless commodity or service. Where a case requires the inclusion of certain information (of a safety character for instance) in an advertisement, the Consumer Ombudsman requests the Court to enjoin the party concerned to provide such information. If the Market Court decides to uphold the Ombudsman's request, it issues a prohibition or an injunction against the business concerned and normally lays down a conditional penalty. There is no appeal against decisions by the Market Court.

In matters of minor importance the Consumer Ombudsman may issue a prohibition order or an order to disclose information (according to Article 3 firms and other persons involved in advertising or in any other form of marketing may be enjoined to provide information of special interest to consumers). If the business against whom the Ombudsman's order is directed signs an approval of the order, this has the same legal effect as a Market Court order. By using his authority to issue prohibition injunctions the Ombudsman may prevent, without great effort, products from being sold which are similar to those the Court has found harzardous and thus prohibited.

It may also be mentioned that the Market Court may issue an interlocutory injunction upon the request of the Consumer Ombudsman.

As to the distribution of competences between different bodies, local consumer counsellors are independent from the Board. They help the local consumers in many respects and hand over complaints to the Board which ought to be dealt with centrally. The Board (whose Director General is at the same time the Consumer Ombudsman) collects complaints, regarding for instance product safety, from consumers, local consumer counsellors, businesses, media, the medical profession, police, etc.), investigates problems, undertakes surveys and issues information and educational material - amongst others - in safety matters. The Board negotiates, as has been said above, with trade and industry and tries to achieve voluntary solutions. Should such a course of action not succeed, the matter is taken over by the Secretariat of the Consumer Ombudsman to be handled judicially pursuant to the Marketing Act. In this respect the Ombudsman has the function of a prosecutor before the Market Court. The Court is the highest jurisdiction and therefore has the ultimate authority to sanction.

The Board has for many years given priority to product safety. This has taken place through direct intervention against hazardous products, by working out guidelines and by recording injury rates within various product areas. The safety work of the Board takes in a wide variety of products. This presumes not only co-operation with various organizations and authorities within Sweden but also a broad international network of co-operation. Therefore the Board participates within the organizations of international and European standardization (the ISO, the IEC, the CEN/CENELEC) as well as with the OECD, EFTA, the Economic Commission for Europe, the European Law Group, the European Testing Group (ETG) and with the IOCU, to which the Board is affiliated as a supporting member. Through participation in these organizations the Board can contribute to the process of international harmonization of methods, standards and regulations in regard to product safety.

As regards the New Approach the Board's work on guidelines is of special interest. They are of great importance to achieving product safety improvements and may be seen as both pre-market measures and post-market measures.

The guidelines strive to contain only the main requirements regarding, for example, safety in a product field. Details as to the specific demands on a product or the methods to be used to test the safety characteristics are as a rule to be found elsewhere in standards, reference to which is made in the guidelines. In this respect the guidelines are not dissimilar to the method used in the EC New Approach. The difference is that guidelines are not legally binding unless the Market Court bases its consideration on guidelines in a decision.

If a guideline is not adhered to, the Board intervenes by contacting the company which is not complying with the guideline. As the guidelines are drafted in the course of negotiations with trade and industry the resulting rules may be seen as agreed upon by the different parties. If a company, after negotiation with the Board, persists in not adhering to a guideline, the Consumer Ombudsman, by virtue of the Marketing Act, can bring an action against the company in the Market Court or issue a prohibition or information order. The Court, however, normally bases its decision on considerations relating to whether or not the marketing practices are contrary to the intention of the Act. The guidelines are in this respect not crucial.

The fact that the guidelines are not legally binding does not mean that they are not effective - quite the contrary, according to the Board's experience.

Guidelines are the Board's foremost instrument for applying pressure on manufacturers and traders. Their purpose is to give guidance as to marketing, construction and design of products and services. By issuing guidelines the Board decides the requirements for safety, function and information to be taken into account by trade and industry when developing products and services and marketing them. As has been stated above, they also serve as a basis for the assessment of particular cases under the Marketing Act. They are published in a series by the Board as a code of regulations (NSBCP, Board Management Report 1988:1).

The Board often refers to standards in its guidelines. Preferably the Board uses international standards, if such exist, otherwise national standards are applied. Where international standards can be used, this is to be preferred in order to decrease barriers to trade and to use their persuasive force to induce trade and industry to accept the guidelines. In cases where standards do not exist, the Board develops, on its own or through Nordic co-operation, suitable methods to be used when measuring a product's characteristics, and states the specifications to be used when developing the product in question. These methods may later be standardized. Developments in Europe require the Board as far as possible to participate in the CEN/CENELEC work as a representative of Swedish delegations to consumer standardization committees.

The guidelines which the Board has issued hitherto in the area of product safety reflect products which many other countries also have found necessary to observe from a safety point of view. From this standpoint at any rate it is of utmost importance to follow developments abroad.

As an example of the attention the Board pays at present to the New Approach, mention can be made of the work on safety of toys. As early as the seventies it was underlined by the trade and industry lobby in Sweden that guidelines on toys as to requirements on safety had to take European developments into consideration, since more than 90% of toys in Sweden are imported. In addition to work regarding guidelines, at the same time a technical committee on toys within the Standardization Commission in Sweden drafted standards (first mechanical and physical properties, then flammable properties). The Swedish

standards take as their point of departure the EN 71:1 and 71:2 with a few additions from US toy standards. Further, the guidelines contain some requirements regarding information from other sources. In the guidelines only the main requirements are stated, and for detail reference must be made to the Swedish standards.

At present the Board actively participates in the CEN work on toys and has contributed its experiences especially to the drafting process for requirements on mechanical and physical properties. The Board is prepared to consider participation in other important safety standardization committees within the CEN, especially those concerning products affecting child safety. That means that New Approach projects concerning product safety will be considered carefully by the Board with a view to participation if resources are available.

It may also be mentioned in connection with the adoption of the New Approach in Sweden that in the field of electrical products the Swedish controls on such products have been surveyed with the purpose of adapting the controls to the European Low Voltage Directive. Control according to the terms of the new order will take place in Sweden from July 1, 1989.

4.2. The future of product safety in Sweden

A new Product Safety Act has been approved by the Parliament and will come into force on July 1st 1989. During the preparation of the Act, consideration was given to work in the EC on the product safety directive.

The new Act will allow for the possibility of product recall, and this in different forms; for example, for repair, replacement or refund. The new statute contains regulations on certain product safety issues which are today governed by the Marketing Act, notably sales prohibitions pertaining to hazardous products. The Product Safety Act purports to prevent products from causing personal injury or damage to property. Regarding the dissemination of information, the Act distinguishes between cautionary information and safety information. Warnings aim to protect those who have already acquired a hazardous product, and as such differ from safety information, which is to be provided at the time of supply of products.

It is of interest that the existing statutes governing product safety today in various goods and services sectors

will continue to be applied on a parallel footing with the more general provisions of the Product Safety Act, and will take precedence over the latter insofar as the more specific provisions have the same effect as the Product Safety Act. The Act covers all types of safety deficiencies. The scope of its application is restricted to such goods and services as are supplied in commercial activity and which consumers use or may use to a considerable extent for private purposes. Thus, it will apply mainly to goods and services offered by entrepreneurs as part of their commercial activity to consumers, for example consumer goods.

The Market Court will settle disputes under the new Act. The authority supervising its jurisdiction will be the National Swedish Board for Consumer Policies; with authority limited however to products which are not subject to special regulations. In such a case the pertinent special authority will be the supervisory authority. If negotiations with companies do not lead to solutions, the matter can be referred to the Consumer Ombudsman, requesting the latter to apply for an injunction or a prohibition before the Market Court. The Ombudsman will be authorized to issue information, prohibitions and recall injunctions.

A government commission has also presented a proposal to the Government regarding export prohibitions for dangerous products, which is currently subject to its scrutiny.

An important feature of future product safety policy will be a system for reporting injury. At present such a system is being constructed by the National Board for Social Health and Welfare. This system is, to begin with, expected to be launched in three counties from July 1, 1989. It will form a necessary part of the Board for Consumer Policies' future market control.

4.3. The future of product liability in Sweden

A proposal for product liability legislation is at present being prepared at the Ministry of Justice. The proposal is expected to be presented for examination later this year, whence it will be submitted to various interested bodies for comments prior to any bill being presented to Parliament.

It is not possible at this stage to give any indication of the substance of the forthcoming proposal which will - as far as we know - be adapted to the EC directive with

certain exceptions. In relation to consumer interests we have, however, expressed our views on what should be the content of product liability rules. Sweden strongly supports the developments along the lines of the 1985 EC directive towards strict liability instead of liability based on the old negligence concept of fault which is so difficult for the victim to prove.

We are not happy with all the rules of the directive. For instance, we see no reason to exclude primary agricultural products from the ordinary strict liability. Furthermore, it is vital, we think, that the strict liability should also include development risks. Also, the period of termination of liability should be sufficient so as to reasonably cover long-term damage that may result from the use of chemicals, medicine, etc.

5. Concluding remarks

The emphasis of work in the field of product safety at the National Swedish Board for Consumer Policies is laid on post-market control, although the drafting of guidelines also requires considerable work. The existence of guidelines in different product fields enables the Ombudsman and the Board to supervise the market in collaboration with the local consumer counsellors and thus ensure adherence to the guidelines. These then, together with other measures, are important in post-sale control of the safety of products. The drafting of guidelines, testing of products and risk-assessing involve considerable technical problems, not least the development of adequate methods, often in collaboration with the national and international/European standardization bodies.

The new Product Safety Act will sharpen the instruments of the Board in future and make it possible to have unsafe products withdrawn by using the recall possibility. As the new Act in many respects seems to be adapted to a future general Product Safety Directive in the EEC, the new Act thus forms a foundation for a future common European collaboration in the planned European Economic Space in 1992.

At present the Board gives much more attention to the international aspects of the product safety work and especially in relation to the European standardization in order to avoid creating barriers to trade. It will be extremely important in coming years to co-ordinate the

Swedish product safety work not only with the other Scandinavian countries but also with the work in the remaining EFTA countries and with the work in the EEC in order to be prepared for a West European market in 1992.

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AN ECONOMIC ASSESSMENT OF THE EC PRODUCT LIABILITY DIRECTIVE AND PRODUCT LIABILITY LAW OF THE FEDERAL REPUBLIC OF GERMANY

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I. Introduction

The authors of the German Civil Code of 1900 did not make manufacturers liable for damages caused by their products[38]. This is in keeping with the international legal developments at the turn of the century as can be seen from "leading cases" in other countries. Court decisions laying down the basic principles of product liability law were given in the USA, UK, Switzerland, Austria and Italy at approximately the same time as in Germany[39] early in the 20th century. Initially, there were few cases to be decided, although their number has since increased. There have been around 100 cases in

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38. Cf. Münch/Komm/Mertens, Bürgerliches Gesetzbuch, 1986, Schuldrecht, Besonderer Teil, 2. Halbband, 823 Rn. 297.
39. Cf. Frh. Marshall v. Bieberstein, Die Produkthaftung der USA, 1975, p. 11. The fundamental court rulings in France related to producer liability fall into the period before 1900, cf. Ferid, Französisches Zivilrecht, Vol. 1, 1971, p. 635; Lorenz, Länderbericht und rechtsvergleichende Betrachtung. Zur Haftung des Warenherstellers, in: Die Haftung des Warenherstellers, Arbeiten zur Rechtsvergleichung, Bd. 28, 1966, p. 19; Lukes, Reform der Produkthaftung, 1976, p. 6.

Germany in the last ten years[40]. The recent marked increase in court cases does not, however, present sufficient evidence to judge the development and importance of compensation for defective products. Statements by insurers are made in order to publicise exceptional cases, rather than to present a comprehensive statistical view of product damages.[41]

The EC commission has instituted a thirty-month model study[42] with a view to building a common information system on accidents occuring while using specific products outside professional activities and traffic related activities. The authors of this report (7/1/1988)[43] conclude that consumer goods cause substantial economic losses and reductions in GDP. It has been estimated that accidents caused by consumer goods alone lead to more than 30,000 dead and 40 million injured, causing annual hospital and treatment costs on the part of the health insurance system of more than 30 billion ECU, notwithstanding losses in production.[44] The majority of cases registered by insurers, however, are related to damages caused by defective products used in a production process (75%).[45] This is an indication of the scale of losses incurred by member countries as a result of defective industrial products. 40% of injuries caused by consumer products are the result of design defects, 30%

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40. Cf. the synopsis by Schmidt-Salzer, Entscheidungssammlung Produkthaftung, Vol. 1 and 2, 1976 and 1979. Until 1941 the Reichsgericht decided only 21 cases. Between 1950 and 1970 the Bundesgerichtshof ruled in more than twice the number of cases.
41. Cf. Brendel, Qualitätsrecht. Die technisch-ökonomischen Implikationen der Produzentenhaftung, 1979, p. 22 also cf. Schürpf, Produkthaftpflicht in multinationalen Unternehmungen, VersWirtsch 1973, p. 25
42. O.J. L 229/I and II of August 13, 1981
43. EG-Kommission, Dokumente, KOM (84) 725 endg., Be 4.
44. Op. cit.
45. Brüggemeier/Reich, WM 1986, pp. 149; Schmidt-Salzer/Hollmann, Die EG-Produkthaftungsrichtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach Art. 823 Abs. 1 BGB, Kommentar EG-Richtlinie Produkthaftung, Vol. I: Deutschland, 1986, Einl. Rn. 76.

the result of manufacturing defects and only 20% occur as a result of incorrect usage.[46]

The questions addressed here are the following: what are the incentives associated with different liability rules to reduce damage or personal injury, and who should carry the risk for such damages? The options are internalisation of damages by shifting liability to the manufacturer - Caveat Fabricator (CF) - , externalisation of damages by shifting the risk to the consumer or the industrial user - Caveat Emptor (CE) - , and finally, shifting the risk to the insurers.

II. Strict liability and liability based on fault or negligence

According to the German Civil Code of 1896 the risk of suffering damages through a defective product falls on the buyer. The manufacturer was liable for damages according to Art. 831 BGB if he did not exercise sufficient care in selecting his employees or supervising them.[47] However, in 1911 the Reichsgericht ruled, that the manufacturer was not liable if he exercised due care in the choice of managerial supervision of a product.[48]

This allocation of risk was based on the principle "no liability without fault" (i.e. you are not liable unless you are at fault in some way) and "the damage is not the reason for liability, but the fault".[49] The general philosophy was that growth in the economy and the accompanying general increase in popular welfare and

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46. Cf. Schürpf, Probleme und Tendenzen in der Produktpflicht und ihrer Versicherung I, VersWirtsch 1971, p. 341.

47. The criterion was the care of a respectable father, Die Beratung des Bürgerlichen Gesetzbuches in systematischer Zusammenstellung der unveröffentlichen Quellen (edts. Jacobs and Schubert), Recht der Schuldverhältnisse I, paras. 291 - 432, 1978, p. 238.

48. RGZ 78, 107.

49. H. Ihering, Das Schuldmoment im Römischen Privatrecht, 1867, p. 8.; Alternativkommentar/Kohl, before Art. 823., I, 1, Rn. 1

industrialization would invariably shoulder the burden of compensating its victims. The result is the development of the general principles of fault-baseed liability, as well as a general principle of non-interference on the part of the legislator. However, a few special laws calling for strict liability have since been developed to take account of the risks of industrialization.[50]

One can identify three stages in the development of liability for product defects since the turn of the century:

- -During an experimental phase the courts explored the implications of a hypothetical contract between buyer and manufacturer and of general duties of care on the part of the manufacturer. However, they proceeded to develop negligence duties which became the decisive criteria for product liability. Fault was associated and later identified with the violation standards of due care[51].
- -During the second phase in the 1950s the courts tended to withdraw from the previous position which, relative to the Civil Code tended, to emphasise the rights of consumers.
- -The last phase is characterised by successively more stringent duties of care on the part of the manufacturer and stricter requirements on evidence submitted in court. The burden of proof, however, tends to fall on the manufacturer.

The present legal framework is based on the principle of liability as a consequence of negligence on the part of the manufacturer. There are, however, a number of rules relating to the burden of proof and general duties of care which put the position closer to one of strict liability.[52]

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50. Cf. §1 HPflG; § 7 StVG; § 33 Luftg; §§25, 7, 26 AtomG; §§ 1, 22 WHG and before §833 BGB. The pet-owners' liability under § 833 BGB and the liability for water pollution under § 22 WHG are not limited. The law which controls the right of the general terms of business only came into effect on 1 April 1977.
51. Cf. Kötz (1988), pp. 156.
52. Cf. v. Hippel, NJW 1969, § 681 and Brüggemeier, Deliktsrecht, 1986, p. 328.

1. Fault in the conduct of the manufacturer rather than in the nature of the product

In order for the manufacturer to be liable according to BGB § 823,1 the dangerous product must have been created in the production process of the manufacturer. The injured party needs to prove, that he/she has incurred injury while properly using the product. This precludes the requirement of defining what actually constitutes a defective product[53]. It is not a product's 'fault' which will cause a liability to be incurred, but faulty behaviour on the part of the manufacturer. The judiciary has since defined the general duties of the manufacturer as:

- design duties,
- manufacturing duties,
- instruction duties,
- product observation duties,
- and duties of organisation.

Duties of design and production

Products need to be designed in an appropriate and suitably safe way. What this means in practice is determined by the "generally accepted technical standard", or, more stringently, by the "state of technology", or, most stringently by "the state of science and technology". It is not clear which of these requirements holds for design duties in the context of a manufacturer's liability.

Proper manufacture

In order to ensure that individual products are properly manufactured, the manufacturer needs to take care that production processes and the materials used are monitored. If the manufacturer can show that this has been done, the occasional defective product does not constitute a liability. Otherwise strict liability holds.[54]

Faults in instruction and consumer advice

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53. Cf. Diederichsen, Wohin treibt die Produzentenhaftung? NJW 1978, p. 1284.

54. Diederichsen (1978), p. 1285.

If it is possible that damage occurs in the normal use of products, the manufacturer has a duty to give adequate instructions to the user, the extent of which depends on how dangerous this product can potentially be.[55]

Product observation

Particularly in the case of mass production, the manufacturer needs to have an idea of how a product works in practice. He must to take action if he becomes aware of any dangers[56] and must be sure that the product is being used properly.[57]

There are difficulties in the case of products which lead to damages in the long term. If, objectively speaking, potential long-term damages could not be recognised at the outset a manufacturer is not liable.[58] This is the case for development risks. If risks are recognised, but there are no technical means of averting these at present, some sort of a social cost/benefit analysis has to take place.[59] Risks which cannot be prevented at reasonable cost, given the state of technology, do not lead to liability.

Duties of organisation

The manufacturer is required to run his business in such a way that faults in construction and planning will not occur[60].

2. Caveat Emptor versus Caveat Fabricator

A damage claim against a manufacturer has to be based on fault; current rulings have specified that violating one

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55. BGH, NJW 1975, 1827
56. Cf. Kullmann, BB 1987, p. 1957; BGH, BB 1981, 1041; BGH, BB 1987, 717 (Steering wheel cover).
57. Cf. BGH, BB 1970, 1414 (brakes); Schmidt-Salzer, Der Fehlerbegriff der EG-Richtlinie Produkthaftung, BB 1988, p. 346 (355).
58. Diederichsen (1987), 1275.
59. KG VersR 1975, p. 427 (Thorooplast); Brüggemeier, (1986), p. 353
60. Lukes (1979), Brüggemeier, Produzentenhaftung nach 823 Abs. 1 BGB, WM 1982, p. 1294.

of the duties of care will suffice for this. Hence, courts have interpreted the fault standard of the Civil Code as a negligence standard. The required standards of the manufacturer's duties of care are stringent. The burden of proof has been shifted to the manufacturer. This suggests that current German law has moved towards the principle of Caveat Fabricator and away from that of Caveat Emptor.

III. Controlling behaviour by way of damage internalisation or by way of duties of care

The economic analysis of liability law is concerned with controlling individual behaviour. The hypothesis is simple, if there is one actor controlling the risk and one party injured as a result of the actor's conduct, then the actor is responsible for the damage caused, the injured party receives compensation. Since the actor must pay for the losses he inflicts on others, the risk externality is fully internalized and the rational actor's prevention efforts will be optimal. Things get more complicated if both parties may be considered as actors, i.e. if both parties control the risk. From an economic point of view, one would want to induce behaviour in every respect which represents optimal levels of care. There is a simple rule inducing two parties to behave optimally: the first party is held liable for the damage if the other party observed the duties of care. The other party would then only be liable for damage if he has breached at least one of the behavioural rules which represent the duties of care. The basic result of economic analysis on the subject of liability is that the first party will consider the trade-off between reduction in liability payments and costs and inconvenience of additional care. The threat of liability for damages when duties of care are not upheld will cause the other party to observe these duties of care.[61]

If the duties of care completely specify optimal levels of prevention, optimal behaviour in the presence of risk can be achieved, irrespective of who is the cause of the

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61. Cf. the standard work by Shavell, Strict Liability versus Negligence, Journal of Legal Studies, 1980, p. 1, and Adams, Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung, 1985.

damage or who is the victim. Strict liability and fault-based liability may, therefore, serve to control the behaviour of the actor and the victim, respectively. The combination of incentives breaks down where duties of care cannot be specified for all aspects of behaviour which will affect risk.

There is no general theory laying down the conditions under which the concept of care used by the courts differs from the economically optimal concept of care. The starting point for such theory has to be the definition of negligence. In many cases the "Learned Hand Test" will suffice; this involves comparing the effort required to achieve greater safety with the reduction in potential damages thereby made possible. The degree of caution or care has to be increased as long as the marginal effort required to prevent damage is less than the damage which can be prevented. This test cannot be applied if different levels of care are associated with not only with different costs but also with different utility levels on the part of the actors. If one is comparing the costs of prevention and the consequent reduction in damages, one may assume that cost and damage functions will be similar for homogeneous population groups, and that therefore there is an optimal level of care. However, the levels of utility associated with different levels of care may vary widely, so that an optimal level of care cannot even be defined for small subgroups of the population. Evidence of this problem is given by the fact that courts have developed elaborate standards for non-negligent driving, i.e. safe, speeds on roads but they did not develop a standard for miles driven per year although with respect to prevention of accidents, driving fewer miles per year may be more beneficial than reducing the average speed .[62]

Analogous problems arise in the context of product liability based on negligence. The courts tend to characterise the manufacturers' duties in the sphere of the production process by a general duty of care. The manufacturer of a product is liable if he has not paid attention to the necessary duties of care, in all other

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62. Cf. Finsinger/Pauly (1988), section 2. Cf. also Faure/Van den Bergh (1987), pp. 97/98. When entry into on activity matters negligence standards may lead to excessive entry. Cf. Polinsky (1980).

cases the buyer is liable. The difficulties in characterising a situation which constitutes negligence is apparent in the case of design defects.

Given that there are n different ways of designing a product where these ways are ranked according to the increasing safety of the resultant product, the expected damages associated with the product designs $S_1,...,S_n$ constitute a declining series. Safer designs are more costly. Therefore, the respective production costs $K_1,...,K_n$ represent an increasing series. The Learned Hand Test for negligence[63] requires that the optimal construction process i minimizes the sum of production costs K_i and expected damages S_i. Construction processes resulting in goods which are less safe would then be considered negligent according to this test. This test is only adequate if the utility associated with the use of the product is independent of how it is designed; this will only rarely be the case. This means that this test for optimality should take into account the different levels of utility $U_1,..., U_n$ associated with the n designs. A design would, however, be truly optimal if the difference between the user's utility from a given product, and production and expected damage costs, $U_i - K_i - S_i$ is maximised.

In practice, the courts find it difficult to conduct such a test of optimality and determine the ideal level of care. A kind of partial analysis is therefore used. On the one hand, courts will orientate themselves according to the current state of science and technology. On the other hand, the cost of safety precautions and the varying levels of utility will also be considered. The comparison of utility and costs can only be an incomplete one and will not lead to a definition of optimal duties of care. Furthermore, the availability of information is crucial. What then is the second-best alternative that can be achieved? This is the topic of the following analyses.

The principle of strict liability has gained importance in a number of areas: traffic, drugs, and atomic energy. The legal reason for this is that whoever benefits from creating a source of risk should be liable for the damage it may cause. The economic reasoning employs a different

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63. Cf. Schäfer/Ott (1986), p. 97.

rationale, based on the realisation that the control of these risks, by way of standards of care, tended to be inadequate. This is particularly obvious in the case of traffic. In this area risks have increased in direct proportion to increased driving and disparity in incentives has arisen in its relation to the increasing volume of traffic. The incentive disparity is due to the impossibility of defining standards of due care for the frequency of driving.[64] In an economy without strict liability, the risks of driving would have become too great.

There is not clear cause for the change in court decisions in the area of product liability. Possible causes could be attributed to the following:

-the courts need technical knowledge to adequately define standards of care. In civil proceeding, both parties will have an incentive to provide the courts with this type of information, and experts may be used. This way of proceeding has generally been successful. However, the trend towards stricter liability represents evidence of the difficulty to define standards of due care. Indeed, where complex products and production processes are involved, the courts may not be in a position to draw the line between non-negligent and negligent manufacturer behaviour such that optimal product safety is provided.

-The victims of product construction faults, however, have generally not been in a position to prove negligence etc., since they have not had access to the companies.[65] This has led to a change in the burden of proof.

IV. Caveat Emptor versus Caveat Fabricator

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64. Cf. Finsinger/Pauly, 1988.

65. This argument was given by the court, Cf. BGHZ 51, 91 (Hühnerpest). Checking of defective parts by the supplier excluding the producer, Cf. BGH, VersR 1972, 560; BGHZ 67, 359 (SCHWIMMERSCHALTER): The responsibility was located in the area of the producer, who alone could control design and installation of the switch. The consumer did not have this possibility.

The 19th century Civil Code tended to emphasize the freedom of choice and action on the part of each individual. Corresponding to this, there was also the principle "Let the loss lie where it falls" in the UK, in France, and in Germany. This principle implies that a seller is only liable for product attributes which he has contractually guaranteed. It is the principle of Caveat Emptor. The duty of the courts is to enforce freely negotiated contracts.

Under the principle of strict liability, the burden of liability is transferred from the buyer to the producer. Only if the buyer himself caused the damage is he liable for it, otherwise the manufacturer will be liable. This is the principle of Caveat Fabricator.

The two types of liability are compared in the following paragraphs. Initially, we assume that all actors are risk neutral and, for the time being disregard problems of moral hazard and adverse selection. Later on we introduce risk aversion and the demand for insurance, as well as moral hazard problems. The starting point is the assumption that product risks do not affect bystanders. From there we suggest rules for internalisation of this externality.

1. Well-informed consumers and the pronciple of Caveat Emptor (CE)

Well-informed consumers are aware of the characteristics of products and their inherent hazards. They can avoid these hazards by not purchasing a product or they can choose an optimal price versus safety ratio and buy a level of safety where the costs of additional safety and the benefit from this safety are exactly equal. Free contracts in a market economy will therefore lead to an optimal allocation [66].

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66. The reader, interested in a formal argument, should consider purchase decisions under perfect competition. Let the average cost of a product with safety q be denoted by C (q). In equilibrium the price of the product p will be equal to average

(Footnote continues on next page)

2. Caveat Fabricator (CF)

In the case of strict liability the manufacturer has to pay for all damages caused by his product. Under the term damage we also include immaterial damages, so that if a buyer is reimbursed fully he is indifferent as to whether or not the damage occurs. This means that when a product is being purchased the buyer need only take into account the price of the product and its characteristics other than safety characteristics.

If damage payments are made by the manufacturer, it is he who will compare expected liability claims and the added cost of improving product safety. This internalisation of damages can lead to the same choice of product safety as will occur under the liability principle of CE.

The differences between the considerations made by the buyer and the manufacturer under the principles of CE and CF respectively are the following :[67] under CE the buyer optimises the ratio of price and safety taking into account his expected damages which are contingent on his individual risk situation. Under CF the seller optimises the ratio of costs and safety taking into account the average damage to consumers. Any additional costs caused by more stringent safety requirements will be passed on to the consumer. The resulting allocation will only be the same one if all buyers are identical. Generally, using an average level of damage will lead to different decisions

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(Footnote continued from previous page)

cost, therefore we have p (q) = C (q). The basis for the purchase decision is not the price p (q) but the sum of this price and the expected damage denoted by S (q). Clearly, if products are identical in all respect except for the safety level q then a rational consumer will choose the product with safety level q* for which p (q) + S (q) is minimal.

67. Cf. Oi, The Economics of Product Safety, Bell Journal of Economics, 1973, p. 3.

on the level of product safety [68] than that which would have been made by the individual buyer. The result is a tendency towards products with a medium level of safety; very safe or very unsafe products will disappear from the market. [69]

This tendency to an in some sense average level of safety produces a misallocation. Whereas, under CE, consumers would buy products which correspond to their own personal potential for damage, under CF, a large number of consumers are forced to buy products with either too low or too high a level of safety. Since manufacturers will pass the costs of safety on to consumers, consumers with a low risk potential are forced to subsidise those with a high risk potential. The principle of CF thus leads to redistribution and an undifferentiated supply of products. Indeed it is possible that the total of damage caused increases.

Conclusion: CF leads to an efficient resource allocation only if consumers are homogeneous.

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68. To See this, denote the expected damages of consumer i by S. With the annotation of footnote 26, the decision problem of the producer can be represented as the minimization of the expected average cost for all safety levels q:

$$\underset{q}{\text{Min}}\ C(q) + 1/n \sum_{i=1}^{n} S_i(q)$$

where n denotes the number of buyers. If the expected damages of all consumers are equal, i.e. if $S_i = S$, then the decision problem of the producer reduces to

$$\underset{q}{\text{Min}}\ C(q) + S(q)$$, which is equivalent to the choice of consumers under CE

69. Cf. Adams (1987), p. 6

The tendency by manufactures to find new market segments will tend to work against the trend to products of average safety. This is particularly important in another context. Traditional opinion believes that the principle of CF leads to the development of safer products. However, all that can be said theoretically is that the incentive to be innovative will be reduced. CF does not permit the manufacturer to introduce new products whose safety characteristics are difficult to assess to that part of the market where consumers have a low damage potential, since he cannot rely on the self-selection mechanism operating among consumers under CE. Recall that under CE consumers with large expected losses buy safe products. Rather, the manufacturer has to select his buyers himself and is only partially able to do this through the process of market segmentation. It becomes more difficult to test inventions and their number will consequently decline.

In the case of development risks one would prima facie expect that a manufacturer who will have to pay damages for development faults has a greater incentive to avoid errors than a manufacturer who is not liable. This conception is however based on the assumption that the demand for product safety under CE does not create the same incentive as the liability of the manufacturer under CF. This would be the case if consumers were less well informed about development risks than manufacturers.

3. Consumer liability - contributory negligence

Under the principle of CE the buyer carries the product risk. He will take the level of care necessary for the marginal utility of the damage he has avoided to equal the marginal cost of care.

Under the principle of CF the buyer no longer has an incentive to reduce his risk; external controls need to be put in place. This is done by taking into account negligence on the part of the consumer when the division of liability is established in court. A simple rule would then provide that the liability of the manufacturer is removed completely if the buyer was negligent.[70] Negligence on the part of the consumer is present if the

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70. The German Law, however, provides a reduction of liability which is proportional.

consumer has not exercised the "commonly recognised necessary degree of care". Ideally, this level of care should be defined for each aspect of the consumer's behaviour and should be equal to the optimal level of care. This is not possible for three reasons:

a. The courts will not be able to obtain sufficient knowledge about a number of aspects of the consumer's behaviour;
b. 'Optimal' behaviour is very much linked to an individual person; courts, however, can define due care levels only for groups of individuals.
c. Both the level of care in the use of products as well as the frequency of use will have an effect on expected damage. However, the courts cannot set due care levels with respect to frequency of use.

Conclusion: It is more efficient to control behaviour of rational and well-informed consumers via damage internalisation under the principle of CE, than via the definition of due care levels.

4. Superiority of strict liability in cases where consumers incorrectly assess risk

The assertion that consumers systematically over- or underestimate the risk they subject themselves to, changes the conclusions substantially. An underestimation of risk will lead to a higher than optimal exposure to risk and vice versa.

This effect will not be present if there is a strict liability on the part of the manufacturer (CF). If damages are fully compensated, consumers will behave as if they were purchasing a safe good. It is the producer who chooses product safety by considering the trade-off between more safety i.e. less liability payments and the accompanying higher production costs. However, there is a potential for misallocation if consumers are heterogeneous.

Conclusion: Strict liability tends to be superior to liability based on fault or negligence if consumers are systematically misinformed. However, misallocation may result if consumers are relatively heterogeneous.

5. Incorrect assessment of risk on the part of manufactuteres

If risk is perceived incorrectly on the part of manufacturers only, the principle of CE is superior to strict liability (CF). There is, however, a tendency for some correction in the perceptions of the manufacturers since they will by necessity[71] be gathering information about damage claims.

6. Product risks affecting bystanders

Product risks affecting bystanders can be regarded as an externality. As such all that is required in principle is internalization. Under the rule of CE the owner of the product would have to be held liable for all accidents affecting third parties. Clearly, CE calls for strict liability of the product owner. A legal system based on negligence such as the delictual liability in the FRG does not provide adequate internalization of products risks under CE. A negligence standard would have to define what kind of behaviour and corresponding product risks would lead to liability with respect to third party losses. Other risks would be acceptable and corresponding losses of third parties would not be compensated. However, such a negligence standard would only be efficient if it was specified for all dimensions of product risks including the frequency of use and if the corresponding duties of care were clear to owners and to third parties. Clearly, this would require the courts to act like some sort of product safety agency. The third party risk control would be incomplete because monitoring of behaviour would necessarily be incomplete, but it would also be inflexible - much like product safety regulation. Furthermore, complete control via negligence standards would require to specify duties with respect to frequences of use, otherwise, CE under the tortious liability law of the FRG would be inefficient.

In the case of CF, it is consistent to shift liability for third party losses to the producer. Duties of care for third parties or more precisely criteria for contributory negligence would have to be developed. It seems that this would be a relatively easy task for courts.

V. Liability and Insurance

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71. The German courts have been aware of this fact for almost two decades. Cf. BGH, BB 1970, 1414.

The principle of CF is similar to a system of forced insurance against damages occuring as a result of product faults. The potential misallocation described in section IV.2. is generally the result of a compulsory system of insurance with uniform premiums. Every customer, irrespective of this person+s risk characteristics, receives exactly the same insurance cover at the same price. This is a moral hazard situation, since the insured party has no incentive to modify his behaviour when this does not affect the price he pays for insurance [72].

At any rate some form of insurance is demanded by risk averse buyers. But there are problems associated with this line of reasoning.

(1) Risk aversion can only lead to a demand for compensation of damages which are not already insured through the health and social security system. Risk aversion alone is not enough to create a general demand for the compensation of immaterial damages.

(2) The manufacturer is not the only source of insurance. A better solution may be if the buyer insures product risks.

Ad (1)
Two types of losses need to be distinguished; those which generally lead to a demand for compensation in risk averse individuals, and those which do not, even for individuals who are risk averse. The demand for insurance is a result of the aim to maximise expected utility under conditions of uncertainty. An insurance contract generally transfers money from a situation where there is a lot of wealth to situation where there is low wealth. Perfect insurance

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72. This situation can typically be found in regulated insurance markets, when insurance contracts and premiums are insufficiently related to individual risks. In Germany contracts for non-commercial customers are usually completely standardized.

compensates exactly this wealth differential.[73] However, the loss of irreplaceable commodities or the loss of people may not affect the wealth at all. Hence, insurance may not be required.[74] In these cases, the optimal level of insurance depends on the types of product risks, and the user concerned. A standardized level of insurance will not do justice to the complexity of the problem. It is however not clear whether under CE buyers would be able to purchase their preferred type of cover in the market.

Ad (2)
It is appropriate to differentiate between the private and the industrial use of products. The private user can buy protection against some consequences of product risks (car, health, and unemployment insurance, for instance), but a number of other risks cannot be insured against. The situation is different for an industrial user of a product. In the case of CE, the source of risk (e.g. a boiler in a laundry) can be pinpointed exactly and insurance taken out against a specific incident with specific consequences occurring. In a situation of CF, the manufacturer has to take account of a multitude of risks resulting from the many uses of his product. Furthermore, there is no means of monitoring the behaviour of the user (adequate maintenance etc), and thus no means of avoiding the problems of moral hazards. The manufacturer is faced with risks which are difficult to assess and which are larger than the risk insured by the user of the product under CE.

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73. Strictly speaking, it is the marginal utility of money which matters. Insurance transfers money so as to equalize the marginal utilities in different states of the world. If an irreplaceable loss does not affect the marginal utility of money, then there is no demand for insurance. However, irreplaceable losses may affect the marginal utility in ways such that there is demand for overinsuring, for full insurance, for less than full insurance or even for the opposite of insurance i.e. claims when no loss occurs and the payment of "premiums" when a "loss" occurs.
74. Cf. Cook and Graham, The Demand for insurance and Protection: The Case of Irreplaceable Commodities, Quarterly Journal of Economics, 1977, pp. 143-156.

There is another problem. A manufacturer is not in the same position as a specialised insurance company which can group together a number of similar risks which will average out in some way. Rather, one would suspect that product faults are related, so that individual risks are positively correlated. The manufacturer therefore requires double insurance to cover this risk. The crisis in the product liability system in the US demonstrates that the total risk in the case of CF may turn out to be uninsurable.

VI. Economic analysis of the EC Product Liability Directive (PLD) and its incorporation into German Law

The EC PLD postulates strict liability[75] for the manufacturer. The principle of CF is, however, encountered in major areas. Furthermore, the definition of what consitutes a faulty product is open to interpretation. A number of distinguished commentators[76] therefore do not foresee any major changes to the German legal position. This is because duties of care on the part of the manufacturer are reintroduced by means of the term 'product defect'; these duties had previously constituted negligence according to Art. 823,1 BGB. In the following paragraphs we will show that economic analysis suggests a different interpretation of the term 'product defect', one which corresponds better to the intention of the PLD. Furthermore, we show that not all of the depatures from the principle of CF contained in the PLD in the Product Liability Law (PLL) have a sound economic basis, but that on the other hand, other approaches do not go far enough.

1. Freedom of contract and the PLD

Article 1 of the EC Directive states that:

> The producer shall be liable for damage caused by a defect in his product.

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75. Cf. Taschner, Die künftige Produzentenhaftung in Deutschland, NJW, 1986, p. 611.
76. Schmidt.Salzer, Der Fehlerbegriff der EG-Richtlinie, Produkthaftung, Betriebsberater, 6, 1988, pp. 349-356 also Schlechtriem, Angleichung der Produkthaftung in der EG, Versicherungsrecht, Vol. 41, 1986, pp. 1033-1043.

Article 12 states:

> The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

Arts. 1,1 and 14 of the PLL translate these regulations into German law without modifications.

In future, the buyer will not prima facie be able to subject himself to certain risks, even if he were prepared to do so in full knowledge of all circumstances. This limitation on the freedom of contract would seem to imply that certain dangerous products will no longer be offered in the future. Whether or not this will be the case depends on how the term 'defective' interpreted.

2. The term 'defective'

Article 6 of the EC directive states:

(1) A product is defective, when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

  (a) the presentation of the product;
  (b) the use to which it could reasonably be expected that the product would be put;
  (c) the time when the product was put into circulation.

(2) A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

The German statute implementing the Directive differs from this formulation without constituting a major change in content.[77] In the PLL, Art. 3 Defect, it is stated:

(1) A product is defective, if it does not offer that level of safety which can be expected, taking into account all circumstances, in particular
  a) its presentation,
  b) the use to which it can be expected to be put,

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77. Cf. Schmidt-Salzer, (1988), p. 351.

c) the time at which it was introduced into the market.

(2) A product is not faulty simply because an improved produce was later introduced into the market.

The definition of product defect in 1a) and 1b) gives the manufacturer the opportunity to exclude liability by presenting the product in a suitable way and by including warnings regarding any product risks. However, this is only true to the extent that the legal position depends on the conscious perception of the user. If the courts oblige the manufacturer to take into account duties of care which require a higher standard of product safety, irrespective of presentation and notices, this defence to liability is no longer open to the manufacturers. This issue also constitutes the main interpretational problem in the context of what is a faulty or defective product. Is the product defect term exclusively related to the safety expectations of the user in relation to the actual safety and the intended use of the product, or alternatively, could duties of care on the part of the manufacturers influence the interpretation of the term 'defective'. This latter interpretation would imply that a manufacturer+s care would have to be measured against a concept of negligence. This being the case, the EC Directive will not have brought about strict liability.

3. Interpretation of term 'defective'

Neither the EC Directive nor the German PLL give any indication, whether liability should be determined by the reasonable expectations of the user or the reasonable expectations of the manufacturer. If both are relevant, there is no indication of their relative importance.

Schmidt-Salzer[78] (like other commentators) claims that the expectation of both interested parties are relevant, and suggests using the defect term employed in the context of US product liability law in order to assess their relative importance. In the US, a product is considered defective if it is unreasonably dangerous. It is therefore not the fact that a product is dangerous per se, but that it is unnecessarily so. This 'unreasonableness' will primarily have its cause in the sphere of control of manufacturers. This provides a link to the established

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78. Cf. Schmidt-Salzer, (1988), p. 350.

German view in the context of liability for negligence, which is based on the duty of the manufacturer to exercise due care. Thus, product hazards can only be regarded as unnecessary or unreasonable in the general context of the design and the production of a product, in particular its cost and price, and the situation in which it will forseeably be used. According to Schmitd-Salzer, courts will have to assess the trade-off between technically possible standards of safety on the one hand and costs on the other hand. They will also have to assess the validity of manufacturers' expectations in relation to the intended use, misuse, or incorrect use of the product.[79]

Where the question of who is responsible for how a product is used is concerned, manufacturers' and users' interests are no longer equally important, according to Schmitd-Salzer. Users need ask themselves, what use they can "reasonably" make of a product. The basis for a conclusion would be the justified expectations of the manufacturer. Only if the manufacturer has to expect a certain use, does he have to ensure the necessary safety of the product in such circumstances. It is only this extent of safety which the user can rely on. The safety standards of a product which can reasonably be expected on the part of the user will be limited by manufacturers' expectations of the uses to which this product will reasonably be put.[80] If the courts were to follow this interpretation of what constitutes a defective product, considerations would have to be extremely complex. Moreover, although we have an indication of which factors should be considered, their relative importance remain unclear.

Schlechtriem[81] takes a slightly different position. According to him, what is important in the context of product safety is what is generally expected and what can generally be expected. This formulation - he claims - could be interpreted as duties of care on the part of the manufacturer as under present law.

4. The 'information defect concept' as suggested by economic analysis

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79. Cf. Schmidt-Salzer, (1988), p. 355.
80. Schmidt-Salzer, (1988), p. 353.
81. Schlechtriem, Angleichung der Produkthaftung in der EG, Versicherungsrecht, Vol. 41, 1986, pp. 1033-1043, esp. p. 1035.

There are three situations in which the principle of Caveat Fabricator is superior to the principle of Caveat Emptor:

(1) If buyers incorrectly assess the dangers associated with a product, they can be protected by the liability of the manufacturers.
(2) If buyers cannot insure product risks in the insurance market, there is a need for insurance through the manufacturers.
(3) Given the delictual law of the FRG basing claims of bystanders on negligence, their risks[82] are not appropriately taken into account.

If it is not the case that at least one of these conditions is present, then strict liability on the part of the manufacturers cannot bring buyers any advantages.

The lack of insurance protection, condition (2) does not require the introduction of the principle of Caveat Fabricator, i.e. compulsory insurance on the part of the manufacturer. Rather, it would make sense to provide general insurance against product risk. Thus illness and social security insurance could be augmented by a product insurance policy. The fact that such a policy is generally not for sale might indicate that either demand for such a policy is not high, or that because of moral hazard and adverse selection effects the premium cannot be calculated or would be too high. It is also possible that such a policy is not for sale, because manufacturers at present tend to carry the liability burden themselves anyway.

Consequently, the most important reason why the principle of Caveat Fabricator would be superior will be the perception of risk on the part of the buyer.[83] From the point of view of economic analysis a system of liability would be ideal which only in this case removes autonomy from the contract parties and lets the manufacturer be strictly liable for damages and accidents in the use of

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82. Cf. Epstein, Modern Products Liability Law, Westport, 1980, pp. 59-60.
83. More generally there is a trade-off between welfare losses due to incomplete information and the welfare looses due to heterogeneous consumers discussed in section IV.2. In this paper it will be argued that consumers are relatively homogeneous while industrial user are relatively heterogeneous. Cf. the following section.

products. The term +product defect' according to the PLD and the PLL would then be interpreted as follows: A product is defective if the actual safety of a product does not correspond to that level of safety which is expected by a sufficiently well-informed buyer who is concerned with the proper use of the product.[84]

The 'informational product fault' concept has the following characteristics:

(1) The manufacturer can exclude liability for product risks by concisely pointing these out, provided the sufficiently well-informed consumer can digest this information. Misleading advertising on the other hand will automatically lead to liability.
(2) Buyers can still buy unreasonably dangerous products. If product risks have been pointed out to them, and they still persist in buying the products, they carry the consequences of their actions.
(3) Faults in production and usage instructions lead to the liability of the manufacturer, because of the divergence between expectations of users and the actual safety of products.
(4) Dangerous design will lead to liability on the part of the manufacturer only if the reasonable user underestimates the risks inherent in a product.
(5) The buyer or user of products is required to inform him/herself about product risks, since liability will not depend on his/her particular level of information, but on the information available to a sensible consumer whose aim is to use the product in a careful manner.

What then are the advantages of such an 'informational product defect' concept? This concept results in a change in the system of liability exactly at the moment where the application of Caveat Emptor no longer leads to an optimal allocation, and the principle of Caveat Fabricator lead to a better allocation. For non-defective products we have Caveat Emptor, for defective products we have Caveat Fabricator. In view of condition (3), a consistent interpretation of the informational product defect concept requires that the buyer/owner of a non-defective product is strictly liable for product risks affecting bystanders. For a non-defective product is one whose risks can be

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84. Cf. Hollmann, (1985), p. 2392.

expected to be known to the product user. Hence, the user should be held liable for resulting losses.

The informational 'defect term' also sheds light on the issue of liability for products in industrial use and liability for development risks.

5. Industrial use

The industrial use of products is characterised by the fact that the use to which products are put is heterogeneous. Thus an electric switch can be used to switch on an office lamp or to switch on an emergency power generator. The consequences of a product defect substantialy vary. In particular, in the context of material damages it seems than in the case of industrial use of products is more differentiated that their private use. In section IV.2 it was explained that in the presence of heterogeneous buyers the principle of Caveat Fabricator leads to misallocations. Also, one can expect that industrial users will be able to come to a better assessment of the risks of certain products than private buyers.[85] The informational product defect term would therefore imply that when products are used for industrial purposes, the buyer or user would generally have to carry the risk of damages. The informational product defect term thus corresponds to the definition of damages in the PLD, Art 9). This states:

For the purpose of Article 1, 'damage' means:

(a) damage caused by death or by personal injuries;
(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:
    (i) is of a type ordinarily intended for private use or consumption, and
    (ii) was used by the injured person mainly for his own private use or consumption.

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85. The European Court in Brussels ruled in 1986 that commercial buyers of insurance can be expected to make well-informed choices and that they do not need the same protection ordinary consumers may need.

This ArticLe shall relate to non-material damages without prejudice to national provisions.

Article 9 was included in para. 1,1 of the PLL:

> If a person is killed, or harmed in body or in health, due to the defective nature of a product, or similarly, if an object is damaged, then the manufacturer is obliged to remedy the resulting damage. In the case of material damages, compensation must only be paid if another object other than the defective product has been damaged, and this other object is normally used for private purposes and has been used in such a way by the injured party.

Even if the Directive and PLL remove in part industrial sphere from the liability of the manufacturer, the industrial user still has the opportunity to claim damages by way of para. 823,1, which deals with delictual liability. One should therefore consider whether this option should be limited or ruled out in the case of industrial use of products in order to achieve a more efficient allocation.

6. Development risks

Article 7e) of the PLD states:

> The producer shall not be liable as a result of this Directive if he proves that the state of scientific and technical knowledge at the time he marketed the product was not such as to enable the defect in the product to be discovered.

The EC does give Member States the option, however, to make manufacturers liable for development risks. The German PLL does not take up this option. In para. 2,2(5) it is stipulated:

> Liability for damages is ruled out, if the fault could not be recognized, given the state of science and technology at the time the product was put into circulation.

Development risks can thus be characterised by the condition that neither the user, nor the manufacturer recognizes the risk of a product. A product is faulty, if it does not display that level of safety which the intelligent and interested user would expect.

Consequently, the EC directive recognises a cause for liability which is removed by the inclusion of Art 7e).[86] The economic reasoning for this exclusion could be as follows. Imposing liability on the manufacturer can only prevent damages occurring if the manufacturers' assessment of the advantages of increased safety and the disadvantages of greater costs takes place under a situation where the buyer is given improved information. Where this asymmetry is not present, the principle of Caveat Fabricator will not lead to a more advantageous allocation.

Two other issues need to be taken into account, however. In general, buyer and manufacturer expectations with respect to development risks are not symmetrical. The manufacturer who is concerned with the design of a product generally has more information as to where risks may be present. Furthermore, under the principle of CF the manufacturer collects information on incidents of damage or injury involving his products and can assess development risks at an early stage. This is the principle of self-correction following fault perceptions on the part of the manufacturer. This self-correction will not take place as long as dangers are only latently present and do not lead to claims by injured parties.

Secondly, the incentive to develop new safety techniques is not necessarily optimal. This incentive is a result of the advantages over competing producers which can be gained by developing new safety precautions. Such an advantage can only be gained if the new safety precautions are correctly assessed by buyers. Incorrect perceptions on the part of the buyer with respect to the risks and their possible reduction will not lead to a efficient[87] incentive to develop safer products. Also, this incentive may disappear if competitors can copy new developments.

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86. Indeed, this suggests that a product can be defective and the producer can be held liable even if he excercises proper care. Thus, the interpretation of the notion of the product defect by Schmidt-Salzer (1988) or by Schlechtriem (1986) is not consistent with the logic of the EC-Directive.
87. When risks are over-estimated, the incentive to produce safe products is excessive.

Patent law and its effectiveness is clearly important here.

VII. Limitations of product liability

From the point of view of economic analysis we have shown in the previous section that the optimal product liability laws should be neither of the strict liability type, nor should they be based purely on liability for negligence. Only a hybrid system can satisfy the requirements of a law which will influence the economy in a range of ways. Wherever rules must be combined in complex ways, however, there is the danger that the influence of special interest groups will lead to discrepancies between the best possible formulation of a law and its formulation in practice. The result will be laws which will uphold particular interests to the detriment of the rest of the economy.

1. The limitation of damages

Article 16 of the EC PLD states:

(1) Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECUs.

(2) Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect on consumer protection and the functioning of the common market of the implementation of the financial limit on liability by those Member States which have used the option provided for in paragraph 1. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal paragraph 1.

Article 16 (1) was included following the wishes of the Germans against the majority of member countries. Liability for serial damages can thus be limited. The argument used by the Germans was that the possibility of insuring against product risks would only be possible if there was some sort of a limitation to damages. Other countries, such as France, argued that it is possible to ensure against unlimited liability in countries with far

reaching product risk liability.[88] The argument put forward by the German side is wrong in principle, however. If liability is unlimited, insurance with limited cover will be more easily available and most likely cheaper, because the producer bears the upper tail of the risk and thus has an incentive to avoid large losses. Why should liability principles be limited by the extent to which the associated risk of being held liable can be insured? Companies are also liable for profits and losses although these risks cannot be insured.[89]
The PLL limits liability to 160 million DM in para. 10:

§10 Limitations to damages
(1) If death or bodily harm are caused by a product or by products with the same fault, the responsible party is only liable up to a maximum sum of DM 160 million.
(2) If damages to injured parties exceed the amount stipulated in (1), individual damage payments will be reduced pro rata.

The maximum sum of damages generally puts a ceiling on the potential liability of a company, not only in the case a serial product defect case.[90] This risk, however, is already limited by the capital base of a company (in the case of a property liability company). This means that larger companies with a large capital base will profit from this regulation. Firms with smaller capital base than the limit do not have an advantage. This implies that a maximum sum discriminates against medium-sized and smaller companies.

The general criticism voiced against maximum damages is that it remains unclear how this maximum sum should be divided among claimants if there are a series of claims which only become apparent after a long time. It could be the case, for example, that the total sum of damages cannot be established for half a century or more.

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88. Cf. Finsinger, Verbraucherschutz auf Versicherungsmärkten, München, 1988, Chapter 2, pp. 20-23. The German Office for Insurance Regulation holds that insurers should not be allowed to provide unlimited cover.
89. The same argument is at present being used to limit liability for environmental damages.
90. It will have to be seen whether this is consistent with the directive. Cf. Taschner, (1986), p. 164.

From the point of view of economic analysis, the following aspect seems to be more important. The manufacturer should be liable in those areas where he is in a better position to assess risks than a buyer. The assessment of the manufacturer should then replace the assessment on the part of the buyer. The manufacturer's assessment, however, can only then lead to the correct decision relating to product safety, if he compares the total expected costs of damages with the cost of reducing these by implementing safety precautions.

This argument only holds true if there is an information asymmetry between producer and buyer. If the buyer is fully informed about the risks he is taking and, if furthermore the buyer can foresee the pro-rata division of the maximum damages between different claimants, he/she can accomodate the insufficient expectation (because it neglects the tail end of the distribution) on the part of the manufacturer by adding this risk to the purchase price. As long as buyers take into account the effects of limitations in liability in their purchases, there is no loss in allocation. A type of Coase Theorem of Liability is borne out.

2. Non-material damages and the bagatelle clause

According to Art 9 of the EC directive [91], the administration of non-material damages is left to national law. In a number of EC countries, such as Germany, non-material damages can only be claimed in part. In other EC member countries the conditions for claiming damages are more favourable. The remaining national differences conflict with the aim of the directive to unify liability law.

As has been shown in section V, there are a number of reasons why compulsory insurance of non-material damages on the part of the manufacturers may not be warranted from a theoretical point of view. The same arguments apply, however, as far as the manufacturer's incentive to compare safety and costs is concerned, which have been made in the context of maximum damages. If buyers are well-informed, they can arithmetically divide expected damages into non-material and other damages and calculate any expected damages. This would enable them to choose the optimal

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91. Cf. Section VI.5.

level of protection via their product purchase in spite of the fact that maximum damages are limited. The irrelevance of liability ceilings does not stand up if buyers incorrectly perceive risk, i.e. if there is asymmetric information. These same theoretical arguments can be applied to the case of the bagatelle clause which postulates that the first 500 ECU of damages are carried by the injured party. The PLL states in §11:

> In the case of damage to property, liability is limited to claims in excess of 1125 DM.

We only need to add, that buyers should easily be in a position to take into account this personal contribution in their purchasing decision. Buyers' 'calculations' are in this case simpler than in the case of a maximum sum of liability. The full personal contribution is, however, DM 1125 plus the non-material damages which are not compensated.

3. The exception of agricultural products

According to Article 2 of the Directive:

> For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural products' mean the produce of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. 'Product' includes electricity.

Since no common consensus could be found within the EC whether it is consumers or these sectors who are more in need of protection, the following option was included in the Directive:

Article 15, 1. (a):

1. Each Member State may:
(a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive 'product' also means primary agricultural products and game.

The Germans have not used this option. This may mean that from the German goverment's perspective consumers of foodstuffs are less in need of protection than any other consumers, or that German consumers are cosidered to be

well-informed about the dangers inherent in certain foods. Indeed, the government proposing the PLL seems to believe that the contamination of food with dangerous substances is as well known to consumers as it is to the producers who are responsible. If consumers still insist on purchasing sprayed, hormone enriched, conserved, dyed, and radiated foodstuffs, this must be their own free decision in the market? Some weight was given to arguments[92] such as the idea that agricultural products are perishable and deteriorate easily, that there are risks in agriculture over which the producer has no control. Furthermore, it was recognized that the distribution system makes identification of the producer difficult and it may be costly to inform buyers of produce about its contents or contamination and the resulting health effects. The exclusion of agriculture is in line with the general policy of taking away risks from agriculture and with the tendency to regulate this "industry" rather than relying on decentralized market mechanisms.

@ 2 of the PLL states:

> A product in the sense of this law is any moveable object, even if it is a part of another moveable object or an unmoveable object, as well as electricity. Exceptions to this definition are fruits of the earth, animals, fishery and hunting produce, as long as they have not been subjected to an initial production process.

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92. Similar arguments were presented by the Scottish Law Commission before the Consumer Protection Act was passed in England 1987. Cf. Montgomery Blight (1988).

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PART FOUR: THE EUROPEAN ISSUES

SETTING UP A COMMUNITY PRODUCT SAFETY POLICY: INSTITUTIONAL ASPECTS

Marc Fallon

There are several ways of analysing the setting up of a Community product safety policy. On the one hand, rules have to be adopted, whose aim to ensure the marketing of sufficiently safe products; on the other hand, the respect of these rules by the producer ought to be controlled, in order to ensure their efficiency.

In strictly institutional terms, the first aspect does not present any new problem today. The Community's power to adopt harmonization measures, in the broadest sense - since the adoption of the Single Act -, is unquestionable, not only in relation to the directive of 25 july 1985 on products liability, but also the general statement on product safety, proclaimed in Council Resolution of 25 june 1987.[93]

The setting up of a common safety control process is more complicated, however, because it is a new conception. One wonders whether an authority could be created at international or Community level to control individual observance of Community safety legislation.

It is well known at present that most legislative instruments, at both Community and national levels, concern prevention in a global sense and compensation. Prevention policy takes into account the protection of users in the definition of marketing norms for products, and imposes as well certain safety duties on the State or the producer. These duties are diverse. As regards the producer, he can be asked to ensure that the products are safe for a normal use, and to inform public authorities of the arrangements made for this. The State has to ensure application of Community law, and to cooperate with the

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93. O.J.E.C., 1987, C 176/3.

Commission by transmitting informations[94] to him about dangerous products and accidents occurred.

But not one of these enactments really concerns a decision process implying that measures be taken in order to prevent or limit injurious effects of an accident that is foreseen or actually occurs. In such cases, the State has in accordance to certain Community acts, only to transmit all relevant information to the Commission. Thus, the "Seveso" directive, relating to major industrial accidents1, and the directive relating to the control of transfrontier shipment of hazardous waste, only provide that Member States take "all necessary measures"[95] in the case of an accident.

More generally, actual secondary Community law leaves the task of intervention to Member States, limiting the establishment of "Community control processes"[96] to a duty to "cooperate" and inform the Commission. At first sight, it seems clear that there is no political intention to go further; this can been read in the preamble of the Council Resolution[97] of 25 june 1987 relating to civil protection. In some areas however, Community institutions directly control the application of Community law by individuals. The case of competition policy is an often cited example, but one can consider also the powers conferred in the field of fisheries, of anti-dumping control and, in the particular context of the Euratom Treaty, of nuclear energy. None of these cases concerns a field covered by a common policy in the sense intended by the treaties.

This study supports the view that the implementation of a general common control process of product safety in Europe, giving intervention powers to a common organ, is

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94. See Council Decision 84/133 of 2 March 1984, O.J.E.C., 1984, L 70/16; Council Decision 86/138 of 22 April 1986, O.J.E.C., 1986, L 109/23. 1 82/501, 24.06.1982, O.J.E.C., 1982, L 230. 2 84/631, 6.12.1984, O.J.E.C., 1984, L 326/31.
95. See also in this sense, Council Decision 86/85 of 6 March 1986, O.J.E.C., 1986, L 77/33, in the field of sea polution.
96. Term used by the Court of Justice in case 42/82, 22.03.1983, "Italian wine".
97. Resolution 87/C176/01, O.J.E.C., 1987, C 176.

possible and appropriate from a legal perspective. It does not analyse the opportunity or effectiveness of such a process.

This statement needs to be answered by considering the following two questions : what could one envisage as the basis for such intervention powers in Community law? What would be the institutional constraints in this context?

§ 1. - Basis for Community powers

Without considering here the American experience in the field of multistate safety policy, one can foresee in the long term at least that the existence of a common control process in Europe is unavoidable for two reasons. First of all, the increase in multistate operations, due to the completion of an internal market, will require a multistate control of those aspects involving health and safety in so far as such operations can endanger people or properties across the frontiers, while national sovereignty, with the power of coercion, is limited to the frontier of the State (A). Secondly, the implementation of a common postmarket control authority, technically, is in accordance with the establishment of a Community safety policy (B).

A. - Limits of national jurisdiction in international cases

There are general principles of private, administrative or penal international law wich lead to the conclusion that, even in Europe, the State is not able to take all necessary measures in order to prevent an act wich occurred in its own territory having injurious effects abroad. Enactment of common provisions only, be it by way of treaty or of binding Community provisions, can ensure a multistate enforcement of such measures.

To support this statement one must respond to two objections, relating, respectively, to the effectiveness of State intervention and recent developments in the field of recognition of foreign safety standards.

1) The principle of territoriality

From a legal point of view, national authorities have the power to intervene with efficiency in order to control the legality of individual behaviour.

According to international law, no foreign State has any authority to use force on another State's territory without its consent. It falls to national authorities alone to decide whether a foreign act or decision may have an effect on its territory. Accordingly, only national decisions can benefit from enforcement in a given case. One must add that obviously, only local authorities are in a position to take measures requiring a nexus between the administration and the individual, such as is the case for inquiries.

On the other hand, by virtue of the E.E.C. Treaty, Member States have assumed certain duties, expressed in the general terms of article 5, on the basis of wich the Court of Justice has developed the duty to cooperate as a general principle of Community law. It means that the State has a duty to ensure execution of Community law, but also application thereof by individuals. Considering current institutional law, it is clear that national autorities appear as executive authorities of the Communities. Most Community instruments dealing with harmonisation of safety provisions, especially in relation to provisions implying certain duties in this field for undertakings, express the duty of the State to take all measures, be it by way of criminal sanctions[98] in order to ensure the respect of harmonized provisions.

These statements do not prevent national decisions having effect abroad, nor Community institutions being also the executive organs of Community law. Executive powers of the State are only subsidiary and prevail in so far as they are not superseded by a corresponding power attributed to such institution, be it the Council or the Commission. This statement is well established in areas covered by a common policy, for instance agriculture, where States act only on Community's behalf[99] and have to seek harmony between divergent national executive decision-making processes.[100] Even in other areas subject to the general

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98. See for example Directive 75/319 of 20 May 1975 concerning medicinal products, O.J.E.C., 1975, L 147/13; Regulation 2785/80 of 30 October 1980, O.J.E.C., 1980, L 288/13, relating to the water content of poultry.
99. Case 804/79, 5.05.1981, United Kingdom.
100. Case 39/70, 11.02.1971, Fleischkontor; case 205/82, 21.09.1983, France.

provisions relating to free movement of goods, State intervention remains under Community law control, as will be seen below.

The absence of effects abroad requires two types of explanations.

(a) No international effects of a criminal or administrative decision

Municipal administrative or criminal decisions cannot lead to an order abroad, for example on admissibility of evidence, concerning a product recall or to obtain payment of a fine.[101] It is only possible to take into consideration such a foreign decision : in this particular instance, a case brought before a national autority tends to receive a criminal sentence for example, but the criminal law applied by this autority must take into consideration, as a mitigating factor against the penalty, the existence of a foreign condemnation.

Recognition of foreign decisions is possible on the other hand in commercial and civil matters, even without a treaty, under the conditions edicted by the State where enforcement must take place. Most countries admit this possibility, subject to two types of conditions, substantive - as the control of public policy -, and procedural - the exequatur procedure. The Brussels Convention of 27 September 1968 illustrates general rules in force in several European countries in these matters. Thus, an injunction or a daily fine decided by a civil jurisdiction on behalf of an individual plaintiff, must be enforced in other Member States according to the conditions, such as the conformity to public policy, provided by this Convention.

An international instrument, such as a treaty, can facilitate the enforcement of foreign decisions. At the present time however, coercive measures cannot be based on

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101. See recently, in the United Kingdom, United States of America v. Inkley, C.A., 25 March 1988, 3 W.L.R. (1988) 304; D. FLORE, "Le jugement r pressif au-del des fronti res nationales", Annales de droit de Louvain, 1988, 105-146; F.A. MANN, "L'ex cution internationale des droits publics", Rev. crit. dr. int. pr., 1988, 1-28.

the foreign decision itself, but rather on the coercive effect of a national decision giving the exequatur to the foreign measure, after control of some substantive conditions. This is the case even for the Brussels Convention of 27 September 1968 concerning civil and commercial matters. In the field of administrative or criminal decisions, some treaties introduce a cooperation mechanism between national authorities but, conforming to the above mentioned principle, do not permit direct international enforcement.

By way of contrast, one can find some unilateral Community statutes providing for such direct international effect. Thus, the Directive 73/239 of 24 July 1973 in the field of direct insurance[102] provides that withdrawal of an agreement to furnish insurance services by the State of control of the company, obliges the State where services are furnished to withdraw its own agreement (art. 22,1).

(b) Extraterritorial application of national law

It is true that a State can decide to apply national provisions, even in administrative or criminal matters, to acts or facts occurring partially abroad. Such a provision would not violate a so called extraterritoriality principle , since - as far as such a principle could exist in international law -, applicability of the rule is based on a territorial factor, whether or not part only of the relevant conduct.[103] For example, Belgian law can impose a fine in cases where a producer established in Belgium proceeds to export and/or commercialise unsafe products in a foreign country. A conviction in this sense would have executive effect in Belgium, vis- -vis the Belgian producer and his properties located in Belgium.

As a matter of fact, most market rules of industrial countries, including Community rules, do not provide as yet for their application to exportations. This extension remains exceptional, and is rather the result of pressures of public opinion or international organisations, as the

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102. O.J.E.C., 1973, L 228/3.
103. About this widely discussed question on extraterritorial application of law, see recently the answer given by the Court of Justice, case 89/85, 27.0931988, "Wood pulp".

World Health Organisation.[104]

Nevertheless, even if the law provides for its application to facts abroad, nothing can be done to prevent foreign marketing from taking place. In such a case, the imposition of a fine in the State of origin does not imply by itself a parallel conviction in the exporting State. Indeed, neither the administrative or criminal law of the first State, nor administrative or criminal decisions based on it in this State, are enforceable as such in a second State.

To this extent, a mere recommendation of the Commission of the European Communities to Member States to consider or to respect measures taken by a State, seems to be unsufficient, because such an atypical act, without binding effect, could not by itself give any effect abroad to national measures. It seems doubtful whether, given the present state of Community law, the general duty to cooperate, in the sense of article 5 of the E.E.C. Treaty, implies by itself such enforcement without any control of national authorities concerned.

By comparison, a Community individual act could be enforceable ipso facto, conforming to Art. 189 of the E.E.C. Treaty, not by virtue of the binding effect of a national act or decision. But a distinction has to be made.

If said decision is addressed to the State and not to individuals, it has no direct effect on individuals. If the State does not comply with the Community decision, a consumer could not invoke, by virtue of Community law, this decision to obtain a measure be taken concerning the product. He can only use legal mechanisms provided for by national law, in particular a State liability regime in so far as it is organized by this law.[105]

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104. See recently Regulation 1734/88 of 16 June 1988, O.J.E.C. 1988, L 155/2, in the field of environment protection.
105. By way of contrast, such decision has effect vis- - vis each authority of the State, be it jurisdictional or administrative, whose function is to ensure the application of law. See Court of Justice, case 249/85, 21 May 1985, ALBAKO, Beurre de No 1.

If a Community decision is addressed directly to individuals, i.e. to undertakings involved in the production or marketing process of a product, and this decision contains a pecuniary obligation, such as a fine, in the sense of Art. 192 of the E.E.C. Treaty, it is directly enforceable in any Member State, under the purely administrative conditions of the executory procedure provided by this Article. However, the standing - in a procedural sense - of users about this decision is not obvious. They could hardly ask for an annulment by the Court of Justice, following present case law of the Court. Furthermore, it is doubtful whether they could request enforcement, in the sense of article 192 of the E.E.C. Treaty, by national authorities.

2) Limits of the new approach relating to standards

The new perspectives offered by, respectively, recent developments of the European Court case law, the new approach relating to standardisation and the Single Act, do not suffice to affect the present state of international enforcement of national measures.

The Court of Justice's interpretation of Art. 36 of the E.E.C. Treaty, more precisely the proportionality principle, indicates that an importing State can proceed to make controls in individual cases based on legitimate interests, such as the protection of health, by way of sampling, even when regulation in the exporting State can be considered equivalent to its own regulation.[106] If an undertaking has obtained a conformity certification from the exporting State, i. e. an individual administrative decision of national character, the importing State still has jurisdiction to control the conformity of this product to its own standards on safety grounds, in order to uphold prosecution of infringements of national or Community

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106. See for example Court of Justice, case 42/82, 22.03.1983, "Italian wine", and the position of the Commission as described by S. LECRENIER, "Vers l'achèvement du marché intérieur : l'évolution des procédures de contrôle prévues par la directive 83/189 depuis 4 ans", Revue M. C., 1988, 121-139, 129.

regulations.[107]

The Council Resolution of 7 may 1985[108] confirms the latest case law of the Court of Justice, stressing State intervention by affirming its general power to control by way of sampling, in accordance with its new responsibility concerning putting into circulation of products. It only excludes a systematic control, prior to marketing.

According to the said Resolution, safeguard clauses enable States to take all measures, such as recall orders, with a view to ensuring safety of persons, animals or goods. Such measures have to be transmitted to the Commission, wich, if it considers the measure to be well-founded, extends to other States a so called duty also to forbid the marketing of such product. But the text of the Resolution does not explain the nature or the origin of this duty. In any case, it could not be based on any principle of international law. Nor could a mere recommendation or notification from the Commission suffice to raise such a duty to cooperate in the sense of art. 5 of the E.E.C. Treaty, unless a liberal interpretation is given to mutual assistance between States in this context. If non-binding, such recommendation cannot even lead to an annulment procedure before the Court of Justice. A decision merely containing information cannot have the same mandatory effect as an order to enforce a foreign national decision without allowing for control.

In Art. 100A, the Single Act confirms the right of the State to adopt general measures (§ 4) or individual decisions (§ 5), subject to the control of Community law, in order to ensure safety of consumer products.

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107. E. Regulation 359/79 of 5 February 1979, O.J.E.C., 1979, L 54/136, concerning cooperation between national autorities to verify compliance with Community and national provisions in the wine sector; Directive 84/631 of 6 December 1984 relating to the control of transfrontier shipment of hazardous waste, O.J.E.C., 1984, L 326/31, admitting that exportation can only occur if the producer obtained an autorisation from the State of destination : this implies that the authorization of the exportating State does not suffice.
108. O.J.E.C., 1985, C 136/1.

For all these reasons, there seems to be a need for some Community system ensuring uniformity of decisions for unsafe products. Such a system could be based on a common rule of recognition and enforcement of foreign administrative or criminal decisions, similar to the Brussels Convention of 27 September 1968 relating to commercial or civil matters. Instead of limiting the intervention process to national measures only, this system could also adopt a proper Community process, centered on real Community decisions directly enforceable in all Member States, addressed either to States, either to individuals concerned. On an efficiency point of view, it could lead to intervention on an earlier date in the whole Community in emergency cases.

B. - Completion of a Community safety policy

The establishment of a proper Community intervention process in order to take preventive measures concerning a particular unsafe product, seems coherent with the completion of a Community safety policy, and even with the Community's free movement of goods regime.

In so far as several Council resolutions have formulated a consumer policy of the European Communities, namely in the field of the protection of the safety of persons and of goods, such implementation normally supposes that decisions could be taken at this Community level by an organ whose responsibility is to conduct such policy, i.e. to organize a safety system and to control its efficiency.

Furthermore, a full regime of free movement of goods necessarily includes considerations relating to the social effects of production and marketing. Article 36 of the E.E.C. Treaty illustrates this statement largely about the protection of health and safety, and in the 1980's the Court of Justice added to such legitimate aims the environment protection.[109] The Single Act also confirms this general statement about environment, and imposes on the institutions a duty to ensure a high level of protection concerning safety of products (Art. 100A, § 3).

Considering the control of the application of Community safety regulations by individuals, the State, it is true, is entitled - and even obliged, as seen above - to enact

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109. Case 92/79, 18.03.1980.

sanctions, for its own territory. This does not imply, however, that such powers belong to the State by virtue of national law, and that Community institutions cannot claim such powers as their own. This concern relates to execution of Community law, and it can be stated that States powers in this area are not exclusive, but rather subsidiary to a corresponding intervention of Community institutions.[110]

§ 2. - Institutional requirements

If the implementation of a special multistate organ in Europe is deemed to be feasible from a legal point of view, taking into consideration present state of Community law and international administrative or criminal law, this perspective leads to three types of questions, namely, which organ could be designated, what types of powers and acts could be attributed and enacted, and to what extent might such an organ be controlled?

These questions require answers from a Community law perspective. Other questions may arise considering the general structure of European economic - i.e. substantive - law. Thus, one wonders about the extent to wich it is convenient to consider some control processes adopted in other areas of Community law, e.g. safety of machines or toys, sanitary aspects of social policy, environment protection.

A. - Determination of a competent organ

A common control process must take into account the requirements of the institutional structure created by the Treaty, especially the balance of powers given to the different institutions.

This is especially true for the principles governing application and execution of Community law. The two concepts are not distinct in Community practice, despite the theoretical distinction established by Article 155 concerning the attribution of powers to the Commission.

The attribution of executive powers and the implementation of a supervisory system for the application of Community

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110. Case 5/77, 5.10.1977, Denkavit, can been read in this sense.

law by individuals, must follow precise conditions, and new Article 145 makes them even stronger.

Since the Community powers are limited, there is no question of derogation or of adding on.

One can imagine several types of control organs, either a multistate agency without any Community interference, either a special comittee distinct from the Council and the Commission, or the Commission itself. It is also possible to modify national procedural laws in order to give the Commission prosecution powers before national courts. This formula seems politically unfeasible and does not reach an international efficiency objective, leaving the responsibility of coercive measures to the State.

Before surveying these different proposals, it is useful to point out the general rules governing execution and/or application of Community law.

1) Principles governing the execution of Community law

In current Community law as updated by the Single Act, executive powers belong to the Council (Art. 145, E.E.C. Treaty). The latter can retain such powers in exceptional cases, but normally it must give an habilitation to the Commission, pursuant to the conditions set up by Council decision 87/373 of 13 July 1987, laying down the procedures for the exercise of implementing powers conferred on the Commission.[111]

There can be no delegation to another organ, except under a series of strict conditions, as is stressed by the Court of Justice in the Meroni case[112], and confirmed in opinion 1/76 of 26 April 1977[113] relating to the "Fonds europ en d'immobilisation de la navigation int rieure". Such delegation may concern only strictly defined executive powers giving no discretion to the organ, so that no decision of substantial effect taken by such organ can supplant decisions to be taken normally by the institution designated by the Treaties, under the responsibility of the latter.

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111. O.J.E.C., 1987, L 197/33.
112. 9/56, 13.06.1958.
113. O.J.E.C., 1977, C 107.

Delegation may not imply any transfer of liability, so that powers transferred are strictly delineated and under control of the delegating institution. As a result, the creation of an autonomous organ cannot affect the jurisdictional control of the Court of Justice for said interventions.

2) Multistate agency

At first sight, Member States could decide to create by way of an international treaty an autonomous agency, being an international organization. This agency would receive the power to take measures in order to prevent or to limit damageable effects of an accident.

Such a perspective seems to be unrealistic, however, for several reasons.

From a practical point of view, this agency should be common to all Member States, and not only to some of them. Furthermore, to be able to intervene, it should have all useful informations relating to dangerous products at its disposal. It would lead to an administrative process parallel to the Community one. If such a process implies disruptions in the cooperation between Member States and the Commission in this respect, there could be an infringement to Article 5 of the E.E.C. Treaty. One should then consider the involvement of the Commission in the multistate process, and the treaty should describe the Community as a contracting party.

From a strictly legal point of view, the creation of such an agency does not itself seem incompatible with the E.E.C. Treaty, as long as the Council does not retain executive powers for itself or does not give any delegation to the Commission.[114] In so far as national measures do not imply a market organisation in a field covered by a common policy in the sense of the Treaties, e.g in the case of agriculture, Member States have power

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114. Contra : I. SCHWARTZ, "Le pouvoir normatif de la Communauté, notamment en vertu de l'article 235 - une compétence exclusive ou parallèle", Rev. M. C., 1976, 280-290, but recognizing the possibility of a treaty between States when the Community institutions do not deem their action as "necessary", but only "useful".

to take measures under the general requirements of the regime of free movement of goods. As has been seen before, this regime allows interventions in order to ensure safety of persons, if they are not discriminatory and respect the principle of proportionality.

The mere implementation of a multistate agency, however, could hardly reach the legally expected results. Indeed, the Treaty should provide for international efficiency of enforceable decisions taken by the agency. According to the present state of international law, this condition seems difficult to fulfil. As has been said above, even in treaties relating to commercial and civil matters, a foreign decision must be controlled by a national authority, whose decision confers enforceability to it, and such enforcement can still be refused if it is contrary to the public policy of the State. Multistate cooperation does not lead to the direct international enforcement of foreign decisions.

3) Community agency

Implementation of a Community agency has to take into account two principles of Community law, namely the principle of institutional balance between the Council and the Commission, and the restrictive conditions of the delegation of powers regime set up by the Court of Justice.

Under present Community law these conditions imply that, besides the Council, only the Commission has power to manage a safety policy implying enforceable interventions based on an appreciation power in the individual case.

Such habilitation could occur by way of a decision or of a regulation, instead of a directive. Considering the general nature of the provisions to be taken, namely when defining the substantial powers of the Commission, a regulation seems more convenient. As far as this basic regulation should go beyond a mere approximation of laws, Article 100A of the E.E.C. Treaty does not seem to serve as an appropriate legal basis. Therefore, Article 235 should be invoked.

B. - Determination of the powers of the organ

Giving intervention powers to the Commission, with measures having a direct and mandatory effect in

individual cases of accidents due to an unsafe product, necessitates answers to the following questions : what types of powers could be given to the Commission? What types of act, in a formal sense, could the Commission issue? What sort of cases could such intervention take place?

To answer these questions one must consider the functional objectives of the implementation of a Community intervention process in the field of product safety, i.e. setting up a rapid system leading to immediate uniformity of results. This implies a relatively simple procedure, opened in international cases only, where an immediate uniformity is required.

Community law gives some illustrations of the Commission's intervention, namely in the field of the competition policy or anti- dumping policy. For practical reasons and the coherence of the global process of application of Community law as well, it seems convenient to consider these experiences when implementing an intervention process in the field of products safety.

1) Types of acts

Without considering here the real content of intervention measures which could be taken or the way these powers should exactly be described in the basic delegation instrument, one can distinguish several types of measures and the form of acts to be adopted.

If the purpose is to give to the Commission the power to control the application of Community law through the producer, and more precisely to take measures in order to prevent damages or to limit the effects of an accident which has occurred or is likely to occur, the final decision could tend to forbid the marketing of a product, or to require its recall.

These measures would be surrounded by much collateral intervention, in the context of opening a procedure warranting a proper examination of the case and the effectiveness of orders taken, and considering the possibility of a parallel intervention in another State. Thus, as is the case in the field of competition or anti-dumping policy, a decision to initiate a procedure would be taken. In the course of this procedure, a broad investigative power should permit a due examination of all the facts of the case. Furthermore, temporary safety measure should be taken in case of emergency. After a

final measure is taken, the Commission should have the power - under the conditions set up by the basic habilitation regulation itself - to ensure its effectiveness by imposing a fine on undertakings that did not follow the enactments.

In relation to the form of the acts to be taken, the anti-dumping policy shows that the Commission could use both the regulation and the decision.

A regulation seems to be the relevant instrument necessary to lay down general terms relating to the measures to be taken about a product or a category of products. Indeed, such measures can concern a wide range of undertakings, i.e. the whole chain of production and of distribution of the product, or all producers of a finished product containing an unsafe substance. Therefore, a general instrument is to be preferred. Furthermore, such an act would by immediately applicable by any national authority.

A decision would be the appropriate instrument for investigative measures in the premises of an individual undertaking, or for the possible imposition of a fine to ensure proper execution of the regulation.

2) Types of intervention

It does not seem necessary to distinguish between an a priori intervention of the Commission, and an a posteriori intervention, i.e. after a State decided to take measures on its own territory. Indeed, for other States, the Community measures to be taken afterwards would have an a priori aspect. Furthermore, a proper safety policy at Community level implies that the common organ can initiate proceedings without any prior initiative from a Member State. The right for users and/or for users associations - if such right is recognized - to take action before the competent organ should be pointed out in the basic regulation. Of course, interrelation of existing national procedures and the initiation of a Community one, should be preferably delineated.

The cases for and method of intervention should be properly determined by the basic regulation. Indeed, the purpose could not be to substitute the power of the Commission for the action of national authorities in each case concerning product safety, and intervention such as investigation should happen in cooperation with such autorities.

The basic delegation instrument should thus give a definition of the Community concern.

First of all, as the common process tends to ensure uniform intervention in international cases, it seems appropriate to take inspiration from the general terms of the Dassonville case.[115] Intervention of the Commission would then occur where the production or marketing of an unsafe product or substance has an effect, direct or indirect, actual or possible, on the health of persons or the integrity of properties in several Member States.

Secondly, Community interventions would be limited to those cases where an immediate uniformity of results is required, but out of reach on basis of current international law. This implies the use of a criterion for emergency.

It does not seem that those criteria should receive further precisions. Habilitation to the Commission for the control of the application of Community law in other areas shows that some powers of appreciation is inherent to such process, while it is subject to a jurisdictional control by the Court of Justice

The intervention process should affect all products, nowithstanding the existence of sectorial policies in Community law, namely agriculture, transport, social policy or environment protection.

Until now, as long as no corresponding sectorial intervention system is implemented, such process would not interfere with present legal enactments particular to these areas, which leave to Member State the responsibility for controlling the correct application of Community law within its own territory. For example, several directives concerning dangerous products - as the Seveso Directive or the Directive on transport of wastes - only detail general preventive measures prior to the occurrence of an accident, but not after an accident has occurred. Obviously, information and experience collected

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115. Case 8/74, 11.07.1974 1 Case 5/71, 2.12.1971, Schèppenstedt; case 64/76, 4.10.1979, Dumortier; case 116/77, 5.12.1979, Amylum. 2 Case 5/66, 14.07.1967, Kampffmeyer, about a national safeguard measure.

by special services in these sectorial contexts should be at the disposal of the intervention authority, in order to appreciate correctly and quickly the cases submitted to it.

If special intervention processes were implemented in sectorial contexts, normally these special procedures would prevail. However, such multiplicity would create conflicts in fringing occurrences, and impede a fast decision in a specific case.

C. - Jurisdictional control of the organ

Respect for rule of law, in particular for the jurisdictional protection of individuals, is central to Community law. As has been said above, this principle limits the possibility of delegation of powers to an autonomous organ. It also excludes any waiver clause in the above described delegation instrument in order to remove all or part of the jurisdictional controls established by the Treaty.

Thus, intervention measures relating to the safety policy would be subject to the general mechanisms of jurisdictional control set up by the Treaty, as is also the case for measures concerning the competition or the anti-dumping policy. It means that individuals affected by a regulation or by a decision could, under the general prevailing conditions, bring a case before the Court of Justice to obtain the annulment of it (Art. 173, al. 2), oppose the illegality exception (Art. 184) or seek to obtain compensation in the sense of Article 215.

Appeal by individuals to the Court of Justice against a regulation relating to an unsafe product, raises the question of direct and individual interest of the claimant in the sense of Art. 173, para. 2. However, this question would not be particular to this new field, and could receive the same answer as the one given by the Court about anti-dumping regulations.

With regard to the civil liability of the Community, it is certain that the new powers conferred could lead to claims before the Court. As is well known, the probability of the claimant obtaining compensation is rather slight, when the damaging act is not of a purely administrative nature but concerns the conduct of a policy, i.e. an activity of normative character. This would be the case here.

Thus, the claimant would have to prove the damage, the damaging fact and a causal relationship between these elements. According to the Court of Justice, the act must violate a superior principle of specific protection of the individuals, and this violation must be sufficiently characterized, manifest and gravel. So far, there could not be any liability when the authority acts with an appreciation power. Nevertheless, it is incumbent on the competent authority to examine conscientiously a case submitted to it as the "guardian" of the Treaty in the sense of Art. 1552. On the other hand, criteria of specificity and gravity require that the damage affects a determined category of operators and exceeds the normal risks of economic activities.

From a procedural point of view, the Single European Act provides for the creation, by the Council, of a Tribunal joined to the Court of Justice. According to the terms of new Art. 168A of the Treaty, proceedings can be initiated at the Tribunal by individuals and it seems competent to judge all cases requiring an appreciation of full jurisdiction, namely the calculation of a fine in the sense of Art. 172 or a claim for civil liability. It can also examine claims introduced by individuals for the annulment of a decision or regulation, namely in the field of competition or anti-dumping policy, and in the present field as well.

Conclusion

The analysis of the implementation of a Community product safety policy in institutional terms reveals that such policy would be incomplete without the implementation of a common process ensuring uniformity of interventions in case of an accident creating a risk of damages to persons and/or properties in several Member States.

As is linked with the establishment of a general Community rule providing for the duty to put into circulation safe products, such process concerns the control of the application of Community law. As yet, it is incumbent to States to provide for all necessary measures in order to ensure this application.

The limits of State jurisdiction in international cases, following present international administrative or penal law, suggest, however, the necessity to derive a common control process. Such a process should allow for the intervention of Community institutions and, according to the rules governing execution and application of Community

law, mandatory powers besides the Council could be attributed to the Commission only.

The Commission could receive the power to take all measures in order to prevent the marketing of an unsafe product, including the possibility of fines in case of violation of said measures by individuals concerned. These powers, however, would come under the jurisdictional scrutiny of the Court of Justice. They would be provided for by a general delegation instrument. This regulation should define the procedure of intervention, but also the cases for intervention. For the latter, it could have recourse to the concepts of emergency and of community interest, as developed in other areas of Community law.

This process should take into consideration existing preventive measures, aiming to give the Commission all useful information about dangerous products and accidents. It should also establish cooperation with national authorities, namely with a view to investigation.

CONSIDERATIONS SHAPING FUTURE CONSUMER PARTICIPATION
IN EUROPEAN PRODUCT SAFETY LAW

H.-W. Micklitz

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I. An Alternative Introduction

In the Federal Republic of Germany (FRG), product liability cases are brought before the special chamber of the Federal High Court (Bundesgerichtshof BGH), with jurisdiction for product liability cases. Judges sitting in this court have in addition to their vocation already earned themselves a reputation in legal writing. Yet even these judges get into difficulties when they have to decide whether the producer has complied with necessary technical precautions in protecting the user from injury. This requires a degree of outside assistance which is to be found in technical standards. Infact there are several thousand of them, and judges find it hard to know whether they actually reflect the present state of art, or have since become obsolete; whether perhaps they will be contested by technical experts or consumers. Thus, a Federal High Court judge has to keep informal methods close at hand and does not rely exclusively on expert advice. By simply picking up the phone, the judge is in contact with the person responsible for employment protection at the Federal Public Prosecutor's Office. In product liability circles people know each other, and their reputations. Informal conversation determines the bounds of arguments made in a given case and the judge will obtain all the background information necessary to the procedural process, on an informal basis, which appears in the written judgment, if at all, in coded form.

My point here is not to claim that such conversations are unprofessional. The small, but everyday affairs can illustrate much more about the role technical standards play (or can play) in practice, where they supposedly play no role. It therefore becomes all the more important to find procedures which guarantee third party (in our case consumer) influence in the development of technical standards - giving consumers a formal guarantee of participation in standard-setting procedure, whose standpoint could then take effect directly through the producer - likewise participation in post-market control. The terms 'procedure' and 'participation' are couched in the sense used in the debate on the role of the consumer in product safety law. This refers to the inclusion of the consumer in the standardisation process, in post-market control, as a person with no direct interest, but who represents the public interest. As can be seen then, we are not dealing with legal redress, but the right to be heard.

My starting point is that consumer participation is deficient at both levels of regulation.[116] I would go further in stating that existing fundamental principles of EC law, provide basic elements for the development of a procedural right to participation, which should be founded as an extension of the right to safety. In the long term, any such EC-based procedural right needs to be founded on consumer participation in the processes of standardisation and post-market control.[117]

My considerations for this stem from two diverse sources: firstly, from a debate concerning the constitutional grounding of the participation of environmental organisations, or third parties, in cases where the safety or environmental impact of industrial plants is considered in the approval procedure;[118] alternatively, from a typically German perspective, where procedural rights are comprehended as complementary to basic constitutional rights, and not as an integral part of the democracy.[119] Here, I intend to put safety law and industrial sites planning law on an equal footing. This approach may seem surprising, in view of the different perspectives, procedural regulation and product regulation[120], given the multifaceted developments or risk-based arguments, and

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116. The state of consumer participation in standardisation and decision-making over post-sale control is described in the expanded German script.
117. My considerations are based largely on a study written for the European Commission, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, Ch. Joerges/ J. Falke/ H-W. Micklitz/ Gert Brüggemeier; Baden-Baden Nomos 1988.
118. For a comparison between safety policy in factory planning law and product safety, see Sicherheitsregulierung und EG Integration, Brüggemeier/ Falke/ Holch-Treu/ Joerges/ Micklitz, ZERP DP 3/84 p. 23 et seq.
119. Neumann in Demokratischer und Autoritärer Staat, 1957 p. 20 et seq.
120. For this distinction and its meaning for product safety law, Brüggemeier et al. op cit. FN 118 p. 23 et seq.

clearly requires an explanation.[121] In industrial sites planning law, participation in the administrative decision-making process and participation in the standard-setting process are distinguished.[122] The processes of development of technical standards are identical in principle; in both areas of law, problems of access to jurisdiction and participation resemble each other throughout and can be discussed alongside each other.[123] By contrast, it seems that participation in the approval procedure for the construction of a site of potential danger to the environment can hardly be compared with the possibility of consumer participation in post-market control procedure. This is because, in industrial sites planning law, the danger to the environment originates in the plant itself, the consumer cannot avoid exposure to danger. In product law on the other hand the situation is quite different. In this case, the consumer seems to imperil himself, since he makes a decision to purchase a product. He exposes himself to risks which first appear through the marketing of a product.[124] It is therefore a

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121. In this respect see E. Gurlitt, Die Verwaltungsöffentlichkeit im Umweltrecht 1989, p. 131 et seq., who tries to found a similar interpretation for the admissibility of product law (for medicine and chemicals).
122. Also G. Winter, Die Angst des Richters bei der Technikbewertung, ZRP 1987, p. 247.
123. Besides, there are limits: it is precisely the reticence of German administrative courts to develop procdural rules for the calculation of technical standards which supports the administrative checking systems, cf. Winter op cit. FN 122 p. 427, mit Nwen aus der Rechtsprechung und der Literatur. There is no approval procedure. This is very different from product safety law. This may help to explain why civil courts have far fewer difficulties than administrative courts in laying down the meaning of control in relation to technical standards.
124. Such an approach is supported by the attempts of Laubinger, Grundrechtsstruktur durch Gestaltung des Verwaltungsverfahrens, in VerwArch 73 (1982) p. 76, who likes to differentiate between "the gravity of the action, the probability of injuring a person's rights and the degree of legality of the action according tot he nature of the good."

valid exercise to call to mind the fundamental basis of procedual participation. In industrial sites planning law, this ought to make it possible for the individual to effectively defend his constitutionally protected rights, for example, life and health. In industrial sites planning law, the public duty of protection is based on the principle that the State takes on a joint responsibility for risks.[125] There is nothing more to product safety law in this sense. In so far as the marketing of a product is coupled to statutory approval, the public duty is obvious. Technical consumer goods, however, are not submitted for statutory approval; in this case, however, the state has the task of guaranteeing protection of the individual through an effective post-market control system. Thus far, the post-market control procedure is functionally equivalent to an administrative decision for the approval of an industrial site.[126] Despite these arguments, the objection remains that, in product safety law, the consumer exposes himself to the risk of damage to health through his choice of purchase. The acceptance of such risk would only be conceivable where a consumer makes a decision knowing of the risks involved. In reality, the consumer has no choice and no possibility of making an informed decision. The decision is taken away from him by standardisation organisations, who define the level of safety required. The consumer himself is symbol-orientated. Seen in this light, it appears possible to make generalisations on the constitutional debate concerning procedurally guaranteed participation. Intellectually speaking, we can refer to Article 2(2) Basic Law (Grundgesetz GG), guaranteeing the right to life and procedural protection through the legal opinion of the German Constitutional Court

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125. See III 2 with reference to the Mülheim-Kärlich decision, BVerGe 53, p. 30 et seq.
126. This begs the question whether, in relation to the formulation of post-sale control, consumers should be granted a priori legal protection simply be exercising their right to a hearing - for comparison with the USA see Joerges et al., op cit. FN 117 p. 230 et seq..

(Bundesverfassungsgericht BVG).[127]

II. The Right to Safety

1. Statement of aims

Since President Kennedy's message to consumers in 1962,[128] the right to safety has been neatly dovetailed into the mainstream of consumer policy objectives. The European Community has likewise demanded,

> "an effective protection from dangers in the interests of health and safety of consumers",

in its two consumer policy Programmes of 1976 and 1981.[129] A long-awaited third consumer policy Programme has still to appear. 'The New Impetus for Consumer Protection Policy' 1985, however, lays down Community objectives for a safety policy. The policy of completion of the internal market has to be achieved through a general safety duty valid throughout the Community.[130] In a Communiction to the Council, 8th May 1987[131], entitled 'The Safety of Consumers' - which the Council acknowledged and approved on 25th June 1987[132] - the first conceptions towards a general product safety duty are developed. Programmes, impetus and communictions are not legally binding, although their precise legal effect is open to

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127. Winter, op cit. FN 122 p. 427; BVerGe 53, 30 (65), see esp.. the far-reaching statement of aims of OVG Lüneburg, NVwz 1985, 357 (Buschaus) as well as Judges Simon and Häusler in the Special Chamber of the BVerGe 53 p. 30 et seq. (Mülheim-Kärlich) 77.
128. Reprinted by Ev. Hippel, Verbraucherschutz 3. Auflage 1986 p. 281 et seq.
129. Details from N. Reich, Förderung und Schutz, diffuser Interessen durch die Europäischer Gemeinschaften, Baden-Baden 1987, RZ 68 p.160
130. 23 July 1985 COM(85) 314 final, approved by Council 26 March 1986 OJ C 167 5 July 1986
131. COM(87) 209 final
132. OJ C 176 4 July 1987

question.[133] No-one would dispute every collateral function of the programmes and formulations which lend support to the case argued.

2. Primary Community law

'The basic right of the Community consumer to health and safety' may be deduced through the decisions of the European Court of Justice (ECJ), based on the relationship between Articles 30 and 36, and the principle of proportionality. This was first conceived by N. Reich.[134] Such a basic right might be understood as an 'immanent barrier to Community action in the sphere if integration policy'.[135] Infact, the ECJ is trying to maintain the compatability of the objective of free movement of goods with the duty of Member States to protect its citizens from dangerous goods. The method of the ECJ is similar to that of the German Federal Constitutional Court (BVG).[136] It extends the effect of Article 30, 'measures having equivalent effect' - equally the laws of Member States governing social protection tend to be regarded as barriers to trade. Alongside the extension of the field of application, however, the ECJ broadens the conceivable legal justifications. The ECJ is developing a right to safety as a defense for Member States against the predominantly internal market aims of the Commisson. Article 100(a) (iv) employs, such a conception, at least indirectly. Within the limits of applicability of Article 100 (a), para. 1, Member States are empowered to reject harmonisation rules which are entirely based on internal market considerations, thereby denying Member State

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133. See Mertens AG 1982, 29 et seq., the legal validity of the international code of conduct was vehemently disputed, Horn (ed.) Legal Problems of Codes of Conduct for Multinational Enterprises, Vol. 1 Studies in Transnational Economic Law, Kluwer 1980; recently the teaching of the sources of law has grown in importance, see Pflug, Status und Kontrakt im Recht der AGB, 1986, as to the legal validity of the AGB.
134. op cit., FN 129, RZ 120 p. 227-229
135. op cit., FN 129, RZ 176 p. 301
136. In this respect, Denninger, Verfassungsgerichtliche Schlüsselbegriffe in Festschrift, R. Wassermann 1985, p. 269 et seq.

responsibility in safety matters, through a special safeguard procedure.[137]

The problem of developing a basic right to safety as a defensive right lies in its coupling to the objective of a uniform internal market. Such an approach complies with the logic of the development of the relationship between the movement of goods and product safety. It is confirmed by the readiness of the Commission to understand the harmonisation of product safety as a matter of Community concern, since a further division of the market is foreseeable as a result of divergent national post-market control decisions. This approach, however, limits ths conception of the right to safety. This can never become more than a right annexed to Article 30, and is always faced with the threat of being 'crushed' by the wheels of the internal market machinery.

A starting point for a fundamentally different understanding of the right to safety, independent of the internal market approach, could be taken through Article 130 (r) paragraph 1. Article 130 (r) assimilates environmental protection to the inventory of objectives of primary Community law, a privilege - as it is well known - which is denied to consumer protection. Yet before we turn to the content of Article 130 (r) para. 1, it is necessary to enquire into the meaning of consumer protection pursuant to the Single European Act (SEA).[138] The latter only appears in Article 100 (a) para. 3, and is also subordinated to the aims of internal market policy. In order to deduce a right to safety independent of the internal market, Article 100 (a) para. 3 therefore offers no foothold, chiefly because it addresses only the Commission and this could probably not be submitted to the jurisdication of the ECJ.[139]

It is worth mentioning that Article 100 (r) para. 1 extends into environment issues, since a detailed definition of protection of health is presented as an aim

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137. Also Reich, op cit. FN 129, RZ 176 p. 301
138. See esp. the position of the European Consumer Law Group, Consumer Protection in the EEC after the Ratification of the Single Act, in JCP Vol. 10 No. 3 (Sept. 1987), p. 319 et seq., mainly written by Reich.
139. Reich, op cit. FN 129, RZ 176 p. 297 et seq.

of environmental policy. Theoretically, the right to safety could be incorporated into health protection, and accordingly be brought under the expansive and protective wing of environmental law as a constitutional right of the EC.[140] The problems of coordination between Articles 130 (r), 100 (a) and 100 have triggered off discussions on their interrelation.[141] One could almost say that there is some agreement to subordinate internal market orientated health regulations, Articles 100 and 100 (a) respectively, and only comprehend such regulations within the framework of Article 130 which pursues genuine health policy objectives.[142] For our purposes, the distinction is like the opposition of chalk and cheese. Admittedly, it is realistic, but it destroys the chance of giving new meaning to a concept of health without it being merely annexed to the movement of goods. And this is precisly the point. To date, the conception of product safety, and equally that of a right to safety, focus on possible risks which result from the circulation of goods. Both neglect the conditions of production and removal of these products. A change in approach is required, equally 'infecting' product safety law with environmental law considerations.[143] Statements are to be found in D-G XI preparatory work on a directive product safety in which

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140. Also N.C.D. Ehlermann, The Internal Market Following the Single European Act, CMLR 1987, pp. 361 382 et seq., who want to see environmental protection regulation limited to procedural regulation. This however, once again heightens the disparity between factory planning law and product law which we believed we had already overcome in our arguments, above III.
141. For an overview, see Joerges et al., op cit. FN 117 pp. 374-375; Krämer, The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law, CMLR 1987 659 et seq.; Reich, Schutzpolitik in der Europäischen Gemeinschaft im Spannungsfeld von Schutznormen und institutioneller Integration, Schriftenreihe der juristischen Studiengesellschaft, Hannover, Heft 17, 1988.
142. In this respect, Krämer, op cit. FN 141; Reich op cit., FN 141.
143. See Winter, Perspektiven des Umweltrechts, DVB 1988, p. 659 et seq.

waste should be considered as a problem of regulation.[144] Article 130 (s) should become the key to understanding safety policy and safety law in terms of environmental policy and environmental law. For this to be the case, however, one still needs a dogmatically conceived legal understanding of the interrelationship between the provisions.

3. Secondary Community law.

The Directive on product liability completes the safety policy conceptions of the New Approach. It is not incidental that the approval of the directive and adoption of the New Approach come together in the Council at the same time. The safety policy programme of the Community, 'credo', was timed to run from the middle of 1985 in the following way: post-market control falls to Member States, the EC limits itself to the organisation of exchange of information and the coordination of regulatory actions; the directive on product liability aapplies indirect pressure on the manufacturer to produce safe products only and protects the integrity interests of the Community consumer. I do not believe that the policy of the time was already directed 'towards the creation of a right to safe products for all consumers' by simply using the notion of 'defective products' in the directive as a common basis.[145] The unilateral alignment of compensation for damages, as well as its incorporation into the safety policy of the New Approach weighs against that idea. The gaps in safety policy can only be closed by a separate directive, which imposes a duty on the producer to bring only safe products into circulation.[146] In the meantime, a first proposal has been developed which will soon be published in the Official Journal. The chances of the project being achieved is quite another question. Only, it has become clear that the safety policy conception in

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144. Ch. Joerges and the author are members of a formally constituted working committee of DG XI.
145. But see Reich op cit. FN 129, RZ 120 p. 228
146. In this respect, Joerges et al., op cit. FN 117 p. 447 et seq. See Communications(89) 162-SYN 192, Vorschlag für die Richtlinie des Rates zur Ausgleichung der Rechts- Verwaltungsvorschriften der Mitgliedstaaten über die allgemeine Produktsicherheit.

the New Approach needs to be supplemented.[147] This is central to our hypothesis because a definitive basis of the right to safety is linked to the adoption of a special directive on product safety.

III. The Right to be Heard[148]

Both Senates of the Consitutional Court have derived a duty to observe procedural formalities, based of Article 2 para. 2 of the Basic Law (GG), which excludes, as far as possible, injury to the party protected by the Law.[149] Underlying this is the idea that the State must honour its protection duties by providing procedural guarantees. It seems to me that the essentially German idea of procedural rights flowing from basic rights, still has a role to play despite all reservations about transferring the German model to the creation of a Community right to procedural participation. This is because, according to 'productivist concepts of the EC',[150] integration is to be achieved through the concept of negative integration.[151] The political impetus of Member States has not sufficed for the formulation of democratic rights in Treaty and the SEA.[152] For this reason, the democratisation of the movement of goods must be deduced as a necessary consequence of of productivist concepts.

1. Statement of aims

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147. This is a further opinion expressed in our book, Joerges et al., FN 117 p. 431 et seq.
148. By way of clarification: we are not concerned with legal redress of citizens/ consumer organisations in this context.
149. BVerGe 53 p. 31 et seq. (55 et seq.) (minority vote).
150. Reich, op cit. FN 129, also Th. Bourgoignie/ D. Trubek, Consumer Law, Common Markets and Federalism in Europe and the USA, 1987, p. 99 et seq.
151. Reich treats the shortcomings of this concept in relation to consumer and environmental protection, op cit. FN 129.
152. Alternatively, the EP draft, references in Reich, op cit., FN 129 p. 26 FN 19

'The right to be heard' lies at the heart of consumer policy, as does the right to safety. It is different to the right to safety, however, in that it has never been concretized in legal terms. Its expression in the consumer programme has remained purely placatory.[153] The programmes insist on participation in relevant political decision-making processes. This may lie in the concentration of consumer policies on the enforcement of substantive rights. The interventionist approach to consumer law, however, has come to a halt. The prevalent policy of incentives and cooperation in itself should allow room for the development of a policy on consumer participation,[154] yet hitherto it has not come to this.

2. Primary Community law

Renewed statements on procedural developments can be found in the decisions of the ECJ based on Article 30. This grants the consumer the right to choose and freedom of choice with respect to his need for satisfaction for his products.[155] The acknowledgment of such a right, first and foremost, brings a change in perspectives: consumers are not only indirectly affected by the free movement of goods, they are consignees and consignees have 'rights'; consumers can only choose when they have alternatives and when they are informed about the possible alternatives. Alternatives create obligations, that means retaining a competitive market and not restricting the consumer;[156] information about alternatives signifies making demands on the producer or possibly the 'State', which are aimed at the consumer receiving help in finding his way about the market. In the broadest sense, a process for the dessemination of information must be founded. The right to a market-informed decision not only offers the consumer

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153. See the second Community consumer programme, Bulletin EC 4/79 18 et seq.
154. As far as can be seen, the BEUC has likewise not systematically grasped the concept of consumer participation at various levels. for an overview see Krämer, EWG - Verbraucherrecht, 1986, RZ 46 et seq.
155. This is emphasised by Reich, op cit. FN 129, RZ 14 p. 52, citing Steindorff ZHR 148 (1984) 338 and Donner SEW 1982, 362 et seq.
156. Here Reich has in mind the parallel imports urged by the Commission, op cit. FN 129, RZ 120 p. 228.

the opportunity for active participation, it also burdens him with the responsibility of participation, or of mere passivity. In this sense, Article 30 engenders a right to participation or a right for participants, from which concrete requirements can be developed.[157] Thus it follows: (1) Article 30 is not only aimed at Member States and producers, rather it provides the consumer with a legally guranteed position in relation to the movement of goods, and, (2), a role which the consumer can only fill if producer and Member State take the necessary procedural precautions. To this end, the decisions of the ECJ based on Article 30, show tendencies comparable to those in Constitutional Court decisions, setting aside a procedure for the basic rights flowing from Article 30 and guaranteeing the exercise of those basic rights. Since the Cattenom decision,[158] it should have become clear that ECJ considers formal competence to be a minimal requirement for procedural rights.

3. Secondary Community law

The prospects for a concretisation of procedural participation seems to be out of the question. In recent years, the Commission has certainly laid the foundation stones for environmental law and consumer law. In spite of a dearth of regulation, one can easily identify the impetus of EC policy: procedural participation in post-market control, the administrative approval procedure respectively only comes into question at national level. Procedural participation in European standardisation takes place, however, not only at national level but notably also at Commuity level.

Thus, Article 4 of the Advertising directive[159] contains

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157. I attempted this approach for the right to general Community provisions, my interpretation of Article 30 should allow the consumer to elect his best right; H.-W. Micklitz, Der Schuts des Verbrauchers vor unlauteren Allgemeinen Geschäftssbedingungen, Typescript 1988.
158. Decision of the Court, 22 September 1988, Case 187/87.
159. Guidelines 84/450 EWG 10 September 1984 on The Approximation of Laws and Regulations of Member States on Misleading Advertising, OJ L 250/17 19, September 1984.

procedural stipulations to be followed before national authorities or jurisdictions; a parallel provision is planned for the draft directive on unfair contract terms.[160] It imposes a duty on Member States to take appropriate procedural measures without specifying what is to be understood by this. Strictly speaking, the directives are significant since they oblige Member States to set minimum standards for post-market control. However, they neglect to lay down any concrete provisions concerning the role of the consumer. Consumers may be entitled to take a joint (class) action as in the FRG, thus post-market control itself becomes privatised; equally they can be excluded from post-market control only if the authorities are present to undertake the supervision of pertinent laws.[161] Here again, the provisions remain obscure regarding their objectives. The fact nevertheless remains that the consumer/third party must be included in the procedure. The shift to Community level offers far lesser prospects. In the EC, consumers are not included in the vast majority of committees,[162] which in fact pave the way for the formation of the EC's own administration, be it in the form of pre or post-market control. There are no exceptions to the rule that, consumers/third parties have no access to proceedings negotiated there, nor to information exchanged. A little information is given to them, as is the case for the general public, in the form of often delayed and incomplete reports and committee activities.

With this in mind, it is amazing to have to acknowledge that consumer participation in standardisation at a European level was generally thematised and 'regualated', even if both documents could not easily be assigned to secondary Community law. The agreement of the Commission on collaboration with CEN/CENELEC[163] is admittedly, formally legitimated by the Council Decision 16th July

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160. DG XI/124/87 - EN, Further Draft Articles for Discussion on Unfair Contract Terms, June 1987.
161. Council Guidelines 27 June 1985 on the verification of compatibility of certain public and private projects (85/337/EWG); OJ 175/40, 5 July 1985.
162. In this context, see Krämer, op cit. FN 154, RZ 63, o page 48 he estimates the number of committees to be 200.
163. Printed in DIN-Mitt. 63 (1985), 78 et seq.

1984,[164] yet equally it is doubtful whether the Commission can conclude legally binding contracts which provide for the delegation of Community authority to private standardisation organisations.[165] Leaving aside legal quality/nature, it still remains a fact that, according to the agreement, the circles working in that field ought to be included, and that the Commission will 'contribute to the ascertainment of suitable arrangements according to the circumstances'. A right to participation is acknowledged, but concrete provisions for the form of participation are completely absent.

The official communication of the Commission of 11th December 1987, is hardly more helpful.[166] It concretises general principles. Its legal quality is therefore tied to the estimation of its worth. The Commission is urging for increased consumer participation at national level to ensure that consumer interests are injected into CEN/CENELEC in the form of national representation. Just how this is to projected at a European level remains open to speculation.[167] The Commission wants to 'have a new agreement with CEN/CENELEC concerning new working techniques'.The Commission is free to take the initiative. In accordance with the Council Decision, it has a political mandate which it is only carrying out very hesitantly. The problems would therefore seem not to lie in the lack of will on the part of Member States - they have carried out the formal requirements of the Council Decision - but in the engagament of the Commission, where conceived, and possibly in its own conception, as the joint European administrative organ. Secondary[168] Community law points towards the existence of a right to participation, but leaves its form undisclosed. In this analysis we therefore come back to primary Community law to consider the questions which can possibly

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164. Printed in DIN-Mitt. 63 (1984) 681
165. See also Joerges/ Falke/ Micklitz/ Brüggemeier op cit., FN 117 p. 403
166. COM (87) 617 final 11 December 1987.
167. There are informal ideas for this, whose actual value is difficult to assess, see Joerges et al., FN 117, p. 427.
168. I use the term in parenthesis, because it is not used in the traditional sense of Community law, and the justification of the interpretation was attributed later.

be resolved there; whether or not concrete requirements can also be deduced on procedural form from the acknowledgment of the right to participation.

4. Requirements for the content of procedural participation in the standardisation process.

Again, light may be thrown on the problem with an introductory survey of German constitutional debates. G. Winter[169] is of the opinion that the development of procedural requirements in the standardisation process is for 'mainly terra incognita' in German administrative and constitutional law. This opinion holds true as long as it refers to the Mülheim-Kärlich decision of the Constitutional Court. In this case, the majority of the judges finally decided to leave the decisive question unresolved and follwed established legal requirements.[170] It must also be stated that, at a lower jurisdictional level, there are voices which urge for a much more tangible procedural form for the standardisation process. Here one could mention the OVG Lüneburg,[171] which introduced the concept of legitimation through procedural requirements, without defining, however, what the term really means. The dissenting opinions of judges Simon and Heussner are more informative in the Mülheim-Kärlich decision of the Constitutional Court, since they refute the possibility of deriving 'procedural form by direct application of objective fundamental criteria embodied in Article 2, para. 2 Basic Law on a case by case basis; on the other hand they state the case for a 'higher degree of State responsibility.... both in relation to the normative form of the procedural right, and for its application.'[172] They consider the verification of the constitutionality of the commission responsible for the development of technical norms to be valid, and similarly the verification of certain procedural provisions used in the drafting of standards.

It is certainly true that a complete statute containing rights and duties for participants cannot be deduced from the constitutional right to be heard. At the same time,

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169. op cit., FN 122 p. 427
170. BVerGe 53, 30 et seq., 66
171. NVwZ 1985, 357 (Buschhaus)
172. Dissenting opinion of BVerGE 53, 71 et seq. (77 and 78).

however, one can imagine the development of procedural principles to be observed in accordance with the constitution and which cannot be undermined by the 'tricks' of procedural technicalities. Accordingly, a step in this has been taken by the Constitutional Court in a key decision concerning the procedural rights of asylum-seekers.[173] Following this decision, both the rights of audience of the interested party and the formal decision of competence to take jurisdication belong to the central body of procedural rights. The limits of the general principles of procedural participation, valid for technical standards, arise from the function of participation in procedure in a democratic society. Its most important aspect consists in increaseing public awareness, it does not amount to taking over the role of spokesman for the economy or government,[174] and can neither be brought in a decisive context into the realm of protection of individuals.[175]

- The formal shaping of procedure: the content of basic rights is empty if the participants have no idea whatsoever about what facilities are available to them. Thus, it is necessary to define and set forth rights and duties in written form.

- Access to information: rules of procedure must endure that consumers receive all the information necessary to

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173. BVerGe 56, 216 et seq., 242 et seq., also Gurlitt, FN 121, 134 et seq.
174. This seems now, as was previously the case, to be the position adopted by the BVerGe and at least partly the OVG, see BVerGe 53 31 et seq. (63 and 64); also Winter op cit. FN 122, p. 427. The criteria developed by courts giving legal protection at administrative hearings are very general and basically apply in the form of procedural rights.
175. In relation to the function of a hearing procedure for a democratic polity see, once again Gurlitt, FN 121, 47 et seq.. In a nutshell one could say that the right to be heard legitimates the outcome if the decision was based on public procedure. On the other hand, procedural rights need to be assured by special jurisdictions, if the outcome hs already been determined before the procedure begins.

make a choice. One must strive for equality of information for all the parties involved in procedure.[176]

- Access to allocation and distribution systems: procedural rules must guarantee that the consumer can form his own opinions and viewpoints in the distribution system.

Coordination of committees: consumers have a claim to appropriate participation. The number and eligibility of the representative is to be determined by the type of body constituted.

- Reimbursement of expenses: the basic principles seem capable of being generalised beyond national boundaries.

5. Requirements for the content of a right to a hearing in post-market control.

If we are right in assuming that the idea that post-market control represents the equivalent for the approval of a plant which constitutes an environmental risk, then there is nothing to contradict the transfer of basic principles concerning valid minimum standards developed from procedural law into the from of consumer participation in post-market control. Literally speaking, this could not occur since the areas of applicability are distinguished. It should be possible, however, to develop fundamental principles for procedure. It is therefore a worthwhile exercise to bear in mind the varying roles which consumer participation could play in post-market control: they could produce public awareness of negotiation processes which typically take place to the exclusion of third parties; but they could equally assume the role of taking the initiative for administrative control - that would make the consumer the 'enforcer' of control authorities. Similarly, they could also open the way for consumers to construct their own information system enabling them to vent their grievances without engaging the authorities.

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176. The problem of protection of secrets seems to have no bearing on the standardisation of consumer goods. Perhaps this is because technical standards for consumer goods only have to correspond with `generally applied technical rules' (Joerges et al., FN 117, p. 147 et seq.), and lag behind scientific developments.

In this sense, they would no longer be the 'enforcers', but the 'watch-dogs' of international, or at any rate, European movement of goods. However, consumers could only play an active role; if their rights and duties were written down; if they had access to the information of the authorities, and when represented in the decision-making bodies, so that they could be given the opportunity to be heard.[177]

IV. Obstacles to the Extension of Participation in Procedure

My concern here is not to map out the political perspectives of a right to health or a right to appropriate participation in procedure. The current discussion is more orientated towards a consideration of the difficulties inherent in consumer participation in standardisation and equally post-market control.

1. Based on the structure of European standardisation.

CEN/CENELEC is the umbrella organization name for national standardisation bodies in the EC and EFTA countries. National standardisation bodies send representatives to the technical committees instituted by CEN/CENELEC. If consumers are to be able to take part in standardisation at a national level, then delegated representatives ought likewise to be able to formulate a joint position through national bodies in relation to its field of activity. CEN/CENELEC fear a doubling of consumer participation which would be incompatible with the sketchy structure of European harmonisation. Nor, it would seem, is there any representation of industry groups at the meetings of the technical committees. In fact, the aim of this critique is to lay bare a structural weakness. This is because the secretariat for coordination, the current 'Organisation for European Consumer Participation', has a structural advantage over European industry in relation to all

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177. A synopsis of national reports on post-sale in Member States, Australia and USA will make it possible to give a firmer basis to the requirements of participation, report for the Commission, H-W. Micklitz (ed.), Nachmarktkontrolle über Verbrauchsgüter in den Mitgliedstaaten der EG, to be published in ZERP Schriftenreihe.

deficiencies. Ideally, it is more suited to injecting a real European input into the standardisation process, a capacity which national industrial bodies are far from able to achieve. In other words, the process of arriving at a consensus, which national industries must first bring about through technical committees, has already been achieved by the observers at the secretariat for coordination, when they take their places on committees. It nevertheless remains that no objection can be raised in principle against European consumer participation based on structural divergency. Increasingly, at European level, consumers are gaining ground in the process of political coordination, which national industries have been organising effectively for a considerable period of time.[178] It is fair to say then that, theoretically, consumers go into negotiation with a consensual advantage.

2. Based on the type of cinsumer participation.

National bodies delegate technical experts to the CEN/CENELEC committees, which are often members of interested business concerns. Consumer participation in European standardisation is fed from preferred sources: (i) technical experts from relevant consumer advisory councils or consumer committees for national standardisation bodies; (ii) technical experts from national consumer and usually verification bodies; and (iii) independent experts from research organisations and laboratories etc.. The first group of technical experts from national consumer advisory bodies is not integrated into consumer participation.[179] The representatives of the second and third groups look upon it as unlikely consumer representatives, despite holding their expertise in good esteem, but fear creating 'fraternity of experts'[180] amongst those responsible for drafting standards. One can therefore also accuse European standardisation of being politial rather than technical standardisation. The politicisation of standards through

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178. See W. Brinkmann, Die Verbraucherorganisationen in der BRD und ihre Tätigkeit bei der überbetrieblichen technischen Normung, 1976
179. Joerges et al., op cit. FN 117, p. 414 et seq.
180. F. Wagener, Der öffentliche Dienst im Staat der Gegenwart, in VVDStRL 37 (1979) p. 214 et seq., 238.

consumers should therefore be seen as the true reason for CEN/CENELEC's policy of obstruction.[181]

3. Based on internal structural deficiencies in the organisation of consumer policy.

Alongside all the obstructions blocking the way to the development of efficient participation of third parties - Member States, Commission, industry and standardisation bodies - the consumer bodies themselves create their own obstacles. Here one could mention above all the problems in relation to the organisation of coordination between the consumer advisory committee and the four European consumer organisations. The present situation is that, in four years, the parties concerned have not managed to agree a clear organisational structure concerning the division of competences, with which they could launch an offensive against the Commission.[182] The dual role of the secretariat between the Consumer Consultative Committee (CCC) and European standardisation bodies weakens the position of consumers. There is no conception of how to purposively make use of the organisational advantage and tap the abundant resources of the national consumer bodies. This would require a systematically constructed system for recording and processing information for consumers.[183] As long as these twofold difficulties are not thrashed out, European consumer participation will in its present form continue to have to fight for its own survival.

4. Based on the administrative practice of post-market control.

We have seen that post-market control, despite all the differencies in regulation, points to a common end - the 'decision to control' is negotiated informally with the

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181. Moreover, which for their part could be promoted by industry. Paradoxically, dependency on the fleshpots of the Commission is accompanied by a growing independence of the industrial decision-making framework.
182. On the underlying quarrels, see Joerges et al., op cit. FN 117, p. 412 et seq.
183. cf. my suggestion, Data bank on Product Safety, presented to the coordination secretariat on 9 October 1986.

producer concerned and is never officially made public. Thus, the formal assurance of participation through the hearing procedure can only fall short. This does not make the demand for appropriate participation obsolete. Only the question has to be raised, how the right to participation ought to be shaped in order not to allow participation to dry up despite its factual exclusion from formal decision-making. In this context, it is helpful to reiterate the varying forms of participation in post-market control.

Consumers can only assume the task of taking the initiative if they are in a position to compel authorities to take action against defects and make them account for their actions. Therefore procedural guarantees must be coupled with the right to a fair hearing. One could also infer the imposition of constraints on the authorities to justify the adoption of informal measures of control. The turning point and crucial point of procedural participation is understandably the producer's fear of having to accept damage to his reputation through adverse publicity. This is an argument of only limited validity because an enterprise can incorporate consumer complaints about unsafe products into a selfish market model.[184] European consumer organisations can only work as 'watch-dogs' of the free trade of goods, if they build their own system for recording and processing information. Their participation in State post-market control mechanisms would more than anything have the function of feeding its own information system with the relevant data from the authorties. An important function could be taken over by the testing institutions, whose know-how has as yet not been put to use in the organisation of consumer participation. As a final remark, a certain degree of parallelism in post-market control between authorities and consumers would be desirable, as it would also be in relation to the standardisation process.

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184. For similar assessments of undertakings in marketing, cf. Bruhn, Konsumentenzufrieden und Beschwerden, Schriften zum Marketing, Band 41, 1982.

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Mr. Reinhard Wiehe, Researcher, EUI, Florence.

3. The Commission

Dr. D. Hoffmann - DG XI
B.W.K. Risch - DG XI
J.V. Monfort - DG XI
E. Previdi - DG III
H.C. Taschner - DG III

ANNEXE II: LEGAL MATERIALS

European Community Legislation

Council Directive on the Harmonisation of the Laws of Member States relating to Electrical Equipment designed for use within certain Voltage Limits, 19 February 1973, OJ 1973 L 77/29.

Product Liability Directive of 25 July 1985, OJ 1985 L 210/29.

Council Resolution on a New Approach to Technical Harmonisation and Standards, 7 May 1985, OJ 1985 C 136/1.

Proposal for a Council Directive on the Approximation of Laws of Member States relating to Machinery, 22 December 1987, OJ 1988 C 29/1.
First amended, 24 June 1988, OJ 1988 C 214/23.
Second amendment, 20 December 1988, OJ 1989, C 37/8.
Agreed, 14 June 1989, OJ 1989 L 183/9.

Proposal for a Council Directive concerning the Minimum Health and Safety Requirements for the use of Machines, Equipment and Installations by Workers, 11 March 1988, OJ 1988 C 114/3.
First amended, 22 March 1989, OJ C 106/13.

France

Loi no. 83-660 du 21 juillet 1983 relative à la sécurité des consommateurs et modifiant diverses dispositions de la loi du 1 août 1905, J.O. 115, no. 168, 2261.

The Federal Republic of Germany

Regierungs-Entwurf eines Gesetzes über die Haftung für fehlerhafte Produkte (Produkthaftungsgesetz - ProdHaftG), Bundesrats-Drucksache 101/88 vom 9/6/1988; Bundestags - Drucksachen 11/2247.

Law on Equipment Safety (Gesetz über technische Arbeitsmittel - Gerätessicherheitsgesetz), 26/4/1968, BGB. p. 717, last amended 18 February 1986, BGB. I, p. 265.

General Administrative Regulation for the Law on Equipment safety, 27/10/1970, BAnz. No. 205, 3 November 1970, last amended 11 June 1979, BAnz. No. 108, 13 June 1979.

Italy

See document, p. 56.

The Netherlands

Warenwet (Commodity Act), Wet van 28/12/1935, Stb.793, laatstelijk gewijzigd bij wet van 21 april 1988, Stb. 358.

Wet op de Medische Hulpmiddelen (Medical Device Act) van 15/1/1970, Stb. 52.

Spain

See document, p. 50

Sweden

The Marketing Act (SFS 1975:1418)

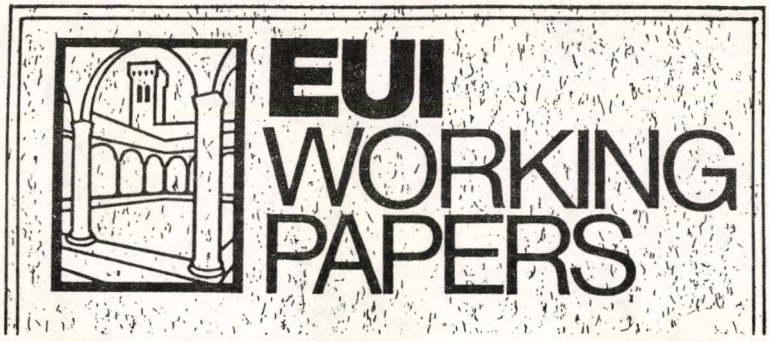
The Product Safety Act (SFS 1988:1604)

The United Kingdom

Consumer Safety Act 1978

Consumer Safety (Amendment) Act 1986

Consumer Protection Act 1987



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