CHAPTER III:

The "traditional" harmonisation policy approaches to removing technical barriers to trade and efforts at a "horizontal" European product safety policy

The process of European integration affects the laws of product safety in many ways. Every law approximation policy measure, whereby the Community harmonises its legal and administrative provisions in the interest of the "functioning of the Common Market" (Art. 100 EEC, 1st paragraph), that also relates to the conditions for marketing products, necessarily contains substantive provisions that may in Member States act to promote or else to place restraints on product safety policy. These restraints may be preempted decisions at the choice of regulatory instruments and substantive definitions of the safety level to be aimed at. As well as law approximation policy, primary Community law restricts the Member States' field of action. While ECJ case law on Arts. 30 and 36 EEC has confirmed Member States' responsibility for product safety, it also subjects this responsibility to checks against principles of Community law. Finally, the Community has, following adoption of its Consumer Policy Programmes, developed approaches towards a "horizontal" European product safety policy of its own.
It nevertheless remains difficult to specify the nature of the Community's influence on product safety law more exactly, to recognise the consequences of the integration process for law in Member States and to find answers to the questions of what product safety policy tasks the Community should be responsible for and which instruments it ought to employ in so doing. Jurists are accustomed to approaching such questions by seeking to clarify and demarcate the competencies of the Community and Member States. However apparent and inevitable this delineation of competencies may be, it rapidly emerges that the legal framework set by the EEC Treaty leaves the Community with enormous latitude, and can hardly define the priorities of Community policy (1.1 infra). Since Community law determines the process of Europeanisation of product safety policy only to a very limited extent, it is tempting to fall back on economic and politicalscience theories in explaining the actual course of this process. But attempts to date to reconstruct the process of European integration using economic models or political structural analyses have scarcely gone beyond the development of relatively abstract hypotheses on the effects of the general European policy framework conditions (1.2 infra). In view of this ambiguity not only in the law but also in sociological integration research, it is presumably justified in analysing Community practice to begin with long-term political programmes that the Community has taken as a guide in influencing product safety law: the 1969 General Programme on removing technical barriers to trade, and the programmes to protect and inform consumers (2 and 3 infra). It is the fate of political programmes, and not only where the Community is concerned, to never fully realise their original objectives. But the Community's responses to discrepancies between its original programmatic conceptions and the actual course of the integration process will be further analyzed in Chapters III and IV.

1. Framework conditions for the Europeanisation of product safety policy

The Community's competencies are by no means comprehensive. Its legislative acts in principle operate indirectly in Member States. The Community has genuine administrative powers in only a few policy areas. All this influences both the orientation and the implementation of Community policy. All the same, these general framework conditions do not constitute insuperable legal barriers to the Community's possibilities of influencing product safety law.

1.1 The openness of the legal framework

A first indirect possibility for the Community to intervene in Member States' product safety law is offered by Art. 30 EEC. Alhough the ban on discriminatory import restrictions and all measures having an equivalent effect is by Art. 36 EEC for measures which, among other things, serve "the protection of health and life of humans", this has not prevented the ECJ from subjecting non-discriminatory marketing regulations to substantive verification1. Hopes or fears that the ECJ would use this supervisory possibility in order to "deregulate" product safety law in Member States have however not been realised2.
Accordingly, the provisions of Arts. 100 et seq. EEC on approximation of laws remain the most important basis for Community policy. Art. 101 EEC even provides the possibility of adopting directives by qualified majority where legal differences are "distorting the conditions of competition in the Common Market". Significantly, the Community has refrained from attempting to clarify the conditions for applying this provision, which are controversial in the literature3, thereby circumventing the difficulties of reaching consensus on law approximation measures under Art. 100 EEC. This cautiousness is hardly surprising. It is one of the indications that the limits to Community action in fact cannot be determined purely "legally"4.
The Community's powers to take measures to approximate laws on product safety under Art. 100 EEC cannot de facto be limited by binding the Commission to particular integration policy objectives. There have of course been repeated attempts to derive the limits to Community competence specifically in areas of "social regulation" (chiefly health, consumer protection and the environment) from the requirement in Art. 100 EEC, stating that law approximation measures should have to do with the market5. But it cannot be denied that differences in product safety law constitute non-tariff barriers to trade and therefore "directly affect the establishment or functioning of the Common Market". This realisation leads directly to the position that in order to avert emergent regulatory differences the Community can exert a shaping influence "even in anticipation of the development of new legal areas"[6]. If as is the prevailing view today, the law-making competencies of Art. 100 EEC are taken in connection with the preamble and Art. 2 EEC[7], and further bearing in mind that in drafting directives the Community can lay claim to very wide discretion[8], then it is hard to identify any definitive legal bounds to product safety policy harmonisation at all. Moreover, in addition to the instrument of the

directive, the Community has by Art. 235 EEC a second and likewise very far-reaching power to act. This provision may, as the ECJ has confirmed[9], be taken advantage of where directives do not offer an "adequately effective means" to attain treaty objectives. The demonstration that no clear limits to the Europeanisation of product safety law can be derived from the new Art. 100 a, Arts. 100 and 235 EEC does not explicitly respond to the questions of "dynamic" interpretation of these provisions. It may be very hard to derive clear criteria for the delimitation and control of European law-making activity from differences between the Community legal system and Member States' constitutions. But one indirect consequence, which is hard to grasp in formal legal terms, is definitely irrefutable: entry by the Community into areas of social regulation will lead to a conflict of
objectives between a law approximation policy oriented merely towards market integration as such and a legislative policy oriented towards the substantive quality of regulations[10].
The Community's powers under Arts. 100, 100 a and 235 EEC compensate for the absence of genuine powers of direct action and administration by the Community. The most obvious way to reach uniform administrative practice is to harmonise the conditions for recognising national administrative acts[11]. The objective connection between approximation of laws and harmonisation of administrative practice is undeniable, particularly in the area of product safety law. Admittedly, such co-ordination is enormously complicated in practice, especially since, as M. Seidel rightly stresses[12], it affects the political "quality" of the integration process: it means an "approfondissement" of the integration process, legal reservations against which are not justified, but can at the same time be perceived by Member States as a threat to their sovereignty, and by national administrations as a restriction on their powers.

1.2 Excursus into integration theory

In practice, the potentially enormously broad legal framework for Community policy in product safety law could be used only extremely selectively and incompletely. The discrepancy between what is legally possible and what is politically feasible is a central theme of sociological integration research, which not only explains the difficulties of the integration process but looks to guide the choice of integration policy strategies. Recently in this area, the American economic theory of federalism has been taken up, and efforts at a political interpretation of the Community's legal order have been renewed.

1.2.1 The economic theory of federalism and conflicting economic interests in connection with the Europeanisation of product safety law

The economic theory of federalism seeks, in its normative part, to answer the question of what regulatory tasks can more rationally be handled ("economically") at a central level, and which better at a decentralised level. "Positive" federalism theory then tries to identify the factors that actually determine the actions of those involved in politics, and bases recommendations for political strategies on this positive analysis[13]. Normative

arguments for centralisation (federalisation) of regulatory activities apply where the costs and advantages of a measure cannot be confined to a particular jurisdiction ("externalities"), where regulatory differences can be strategically exploited by economic actors, starting off a regulatory "race to the bottom" ("prisoner's dilemma"), where duplication of administrative tasks (e.g. in the area of research) causes superfluous costs ("diseconomies of scale"), where the scale advantages of uniform regulation outweigh the chances of innovative product design and where federalisation weakens the influence of interest groups[14]. While such normative considerations can, *cum grano salis*, be transferred to the European situation notwithstanding the institutional differences between the Community and the US, this is much less true of the positive analysis. The current federalism debate presupposes an already economically integrated market, a parliamentary democratic constitution for the "central government" and the existence of a federal administration with a wide range of tasks and powers. It is on this institutional framework that the assumptions about interests and about the behaviour of industry, unions, consumers, and State and federal political actors are based, which in turn underlie hypotheses about the chances for a federal take-over of regulatory tasks from individual States or about the - at present more topical[15] - efforts at decentralisation. The Community situation differs from that of the US in several respects. This is primarily true as regards the process of political opinion-forming and decision-making. Political actors, who are according to the assumptions of economic theory oriented either to the expectations of a particular clientele ("constituency politics"), or to more general regulatory attitudes and programmes ("electoral politics") lose part of their possibilities of self-presentation and influence, which are guaranteed only nationally, if they involve themselves in dealing with regulatory task at the European level[16]. European business maintains different interests and possibilites of influence . It has a degree of integration comparable with the US in only a few areas and therefore finds it enormously hard to develop a consistent position on uniformisation of product safety requirements. The two aspects mentioned are also connected with the different underlying assumptions of American federalism and of European integration. Explanations for the emergence of American federalism largely relate to situations concerning the introduction of new regulations or their generalisation, whereas the Community as a rule finds itself facing firmly established regulations that tend to differ in nature and intensity[17].

The differences between the American and European situations mentioned make it hard to transfer "positive" theorems of federalism theory. They do not, however, *a priori* preclude their adaptation to the specific conditions of European integration. For the area of environmental policy, which is related to the issue of Europeanising product safety law, E.

Rehbinder and R. Stewart[18] have tried just that. In their modelling of the integration process, they conceive the Nation States as the sole political actors. For the integration policy behaviour of the States they assume on the one hand identification with the interests of the domestic economy, and on the other a loyalty towards protective standards valid in their own legal system. This hypothesis states that faced with a Europeanisation of legal standards the States will weigh up its advantages and drawbacks for the competitive position of their own industries, but that they cannot simply offer domestic comprises between economic and social interests. For so-called product regulation[19], the interest position for "protection States" and "risk States"[20] appears as

such: as long as the protection States can exclude imports from risk States using Art. 36 EEC, the chances for harmonisation are good. The protection States will support it if the production costs caused by their domestic standards are higher, if setting up different production lines would not be economically sound and if foreign market opportunities are foreseen; the risk States will agree to the tightening up of standards where they expect advantages from access to markets in the protection States; finally, for pure "import States" the decision depends only on their own political calculations of the costs and benefits of a raised level of protection. Admittedly, the initial position changes where and to the extent that the restrictions of Art. 36 EEC have been lifted in favour of the principle of free market access in the protection State and/or products from the risk State merely need to be specifically marked. On such conditions, a risk State has in principle no longer any reason to agree to the tightening up of product regulations.

E. Rehbinder and R. Stewart themselves stress the limits to the explanatory capacity of their model[21]. These limits arise from the complexity of the economic interest situation, and are as a rule, not even homogeneous within the economy of a single Member State. The effects of harmonisation measure on firms involved in each case depend on the internationalisation of the economy, the size of the domestic market, their own competitive position, the costs involved in changing their output and expectations of the economic prospects - and it may, as the car industry shows, even pay to exploit different product standards in order to seal off regional sub-markets, and set up a sectorially differentiated price policy[22]. But not only the complexity of economic interests but also the "intrinsic logic" of political opinion-forming processes makes it hard to develop general hypotheses. In their negotiations at a European level, States need not concentrate on a particular product regulation, but can try to purchase gains in one sector through concessions in another. Political objectives within a government are just as unhomogeneous as business interests. The conduct of negotiations often depends on what department is responsible, how "high" the political value of the subject involved is rated and what influences the negotiators are exposed to. Awareness that a new regulation can, in any case, not be strictly monitored may facilitate acceptance. And last but not least, in agreements on product regulations, the object is often a uniformisation of regulatory methods, and therefore wishes for change have to deal with administrative inertia even apart from their political and ideological content.

Up to now, integration of these viewpoints referred into a more differentiated economic model[23]. But this finding is not a merely negative statement. Bearing in mind the economic interest situation and political opinion forming processes in the Community it means that uniform behaviour patterns cannot be expected and the chances of carrying through broadly based integration strategies are slight. As regards the economic and political starting conditions, adapted fragmentary advance and pragmatism in negotiation, are to be expected. The difficult conditions of integration policy encourage an incrementalism which has a tendency to obstruct the development of a coherent European safety law[24].

1.2.2 Legal structures and political decision-making processes

Political research into integration has an ambitious past to consider. Looking back it is evident that the expectation of functionalism (and of neo-functionalism, too), i.e. that the political integration process would involve objective, functional interdependences and gradually extend to increasingly wider sectors, underestimated the contingencies of political developments[25]. The centre of interest in political research on Europe therefore shifted to the Community's decision-making structures[26] and analyses of individual policy areas[27]. A repeatedly confirmed finding of political analysis is, as Joseph Weiler has shown[28], in striking contrast with the developments of the Community's legal structure: whereas in political decision-making processes a replacement of supranational elements by intergovernmental bargaining processes is inevitable, the supranational legal structures have developed into a European constitution which finds its expression specifically in the doctrines of direct effect, primacy and prior effect of European directives. The originality of Weiler's analysis is that he sees the presumed contradictions between the patterns of political decision-making and the legal structures as two characteristics of the European integration process that mutually determine each other. The discrepancies between the political and legal structures have not acted centrifugally, but rather as a balancing force that maintains the Community[29].
Weiler's theses are of equal importance for an understanding of the Community's legal structure and for advancing its policy programmes. They state that in order to stabilise and extend supranational legal structures, involvement of national political actors in the Community's political decision-making process is always necessary : the Community's precarious dual structure would be endangered by either neglecting Member States' political interests in making Community law or by neglecting principles of Community law in the Member States. These warnings coincide with the reservations against a purely formal legal treatment of the Community's powers under Arts. 100, 100 a or 235 EEC[30]. They have considerable practical implications for the connection between internal market policy and product
safety policy that is of interest here. For if it is true that the adoption and implementation of Community legal acts must not, at any rate *de facto*, neglect to include political actors from the Member States, then a harmonisation policy oriented towards the objectives of realising the internal market must also bear in mind the effects of its measures in other policy areas, and cannot overextend the political consensus that underpins it. We shall return in more detail below to the consequences of these theses for the relationship between internal market policy and product safety policy in general, and to the legal significance of the "internal market to technical harmonisation and standards" in particular[31].

2. Traditional policy of approximating laws in order to break down technical barriers to trade

The manifestations and consequences of technical barriers to trade will be discussed in (2.1), the general programme for their removal in (2.2) and the methods of harmonisation it provides in (2.3). Analysis of selected directives and proposals for directives shows that while this programme is primarily aimed at removing obstacles on the path to a common

internal market, by way of negative integration, it also partly contains detailed regulations on product safety (2.4). Safeguard clauses are responses to reservations by Member States (2.5). With the proposal for a directive on construction products, the attempt to delegate powers to the Commission failed (2.6). Criticism of the production of directives overloaded with technical details (2.7) and the considerable difficulties in converting them into law in Member States (2.8) prepared the ground for a reorientation of integration policy; a policy that seeks in other ways to pursue the goals of free movement of goods on the one hand, and safety and health for the consumer along with industrial safety and environmental protection on the other (3).

2.1 Manifestations of technical barriers to trade and their consequences

Following the abolition of customs duties and quantitative restrictions between Member States, technical barriers to trade[32] attracted public attention. The General Programme to remove technical barriers to trade in goods was aimed at removing obstacles arising from differences in legal and administrative provisions in Member States relevant to product quality.

For many goods, special requirements on production, import, marketing or use exist that may, because of different national characteristics, hamper free movement of goods. Among these are all administrative measures by Member State authorities that ensure compliance with these regulations. Of particular importance economically are the numerous, often very detailed, intercompany technical standards, aimed at both raising the safety level of technical products, and especially at rationalising business processes and increasing productivity through mass production. Technical legal regulations are often based on decades of tradition; it is often not easy to separate the objective of protecting particular legal values on grounds of public safety and order from attempts to fence off markets. This is, however, not the place to examine attempts by particular industries to take advantage of industrial property rights and technical standards thereby avoiding price and quality competition[33].

Technical standards and trade regulations for a product that differ from one country to another may also unintentionally hamper trade. These standards and regulations may have been deliberately created for protectionist reasons, but rather out of a desire to create uniformity, raise the safety of appliances or protect consumers, the environment or workers. Those particularly affected are foreign suppliers without enough economic strength to produce separate product lines to meet each set of national requirements. They are alleged to have their international competitivity notably cramped, in particular through insufficient possibility of exploiting the advantages of larger-scale mass production. Additionally, the price effects of non-tariff barriers and therefore the degree of protection for domestic suppliers are allegedly harder to estimate than for customs duties. The impenetrability and complexity of technical barriers to trade and the possibility of changing them rapidly are said to create considerable information costs and to hinder planning of production and investment. Domestic industrial firms are said to unavoidably have considerable influence on the shaping of technical standards.

A number of additional factors influence the extent to which differing technical standards and trade regulations lead to economic problems[34]. Flexibility in adaptation is greater in

expanding markets and also in the early stages of a product cycle. Differences in standards hit harder as modificaton costs increase. Suppliers with the highest turnover on given markets play more or less the role of "standards leaders".
The economic effects of protectionist measures in general, including duties, levies, quotas and technical or administrative barriers to trades[35] have
frequently been discussed[36]. Among those repeatedly mentioned are higher prices for consumers, restriction of quality competition, loss of economic adaptability and medium- to long-term risks for jobs safeguarded in the short-term by protectionist measures.

2.2 The General Programme for the elimination of technical barriers to trade: a survey

The General Programme of 28 May 1969 for the elimination of technical barriers to trade resulting from disparities between the provisions laid down by law, regulation or administrative action in Member States[37] aims at harmonising national regulations regarding marketing and the use of particular important selected products, through directives under Art. 100 EEC. The mutual recognition of national regulations was out of the question as a procedure in principle, since it can be considered only for cases where regulations are more or less equivalent, particularly as regards objects of legal protection and production costs[38]. The programme consists of four Resolutions and a gentlemen's agreement. Two Council Resolutions contain a *timetable* for eliminating barriers to trade in the industrial sector[39] and in foodstuffs[40]; the latter area will not further be discussed.
According to this very ambitious but utterly
unrealistic programme, the Council was to decide on 114 harmonisation directives for industrial products in three six-month periods between mid-1969 and the end of 1970[41]; the decisions were each to be taken within six months of presentation of the draft. Regulations were planned above all for motor vehicles, agricultural tractors and machinery, measuring instruments, electrical machinery and equipment, pressure vessels, fertilizers, dangerous preparations, lifting equipment and lifts, and other miscellaneous goods.
A further resolution[42] provided for the *mutual recognition of national inspections*, which are conditions for the marketing of many products. The principle of mutual recognition, applies, however, only in so far as national rules for marketing are equivalent or have been rendered so by Community harmonisation measures.
To *adapt directives to technical progress*, two simplified procedures are provided for[43]: in cases of particular importance, the Council will decide on a Commission proposal, by qualified majority. Otherwise the Commission will be empowered to enact amending provisions, but in doing so must call in a committee on which Member States are represented. Should the committee support the Commission's proposed regulation by qualified majority, then it may be enacted; otherwise the Council will decide by qualified majority within three-months time. Should it not do so, the Commission itself may decide[44].
Finally, the Member State government representatives meeting in the Council agreed, by way of a "gentlemen's agreement", on *standstill*

arrangements[45]. Governments were required for a particular period, in principle, to refrain from taking national legal or administrative measures for products covered by the programme, and to supply the Commission drafts of national legal and administrative measures. National measures "urgently required on ground of safety or of health" are excluded. This standstill arrangement has since been replaced by the directive laying down a procedure for the provision of information in the field of technical standards and regulations[46].
The Council Resolution of 21 May 1973[47] supplemented the General Programme for the elimination of technical barriers to trade in industrial products, because of the intensification of internal Community trade and the increasingly more pressing (or publicised) problems connected with environmental and health protection, adding such sectors as motorcycles, packaging, toys, equipment and machinery for building sites, petrol additives and fuel oil. Finally, in its Resolution of 17 December 1973 on industrial policy[48], the Council presented a thoroughly revised timetable for the elimination of technical barriers to trade in the field of industrial products. More than 100 additional directives were to be adopted in the four-year period which terminated at the end of 1977[49].

2.3 The methods of harmonisation provided for in the General Programme

In an annex to its original proposal for the General Programme, the Commission gave some fundamental indications on the harmonisation solutions still useful for understanding the new approach today. It distinguished the following five solutions[50]:
a) "Complete" solution: in this procedure, also known as *total harmonisation*, national regulations are completely replaced by Community ones. In complete harmonisation, only products that fully conform with directives may be marketed in the Community. The full harmonisation approach means the biggest loss of sovereignty for Member States, places particular requirements on political consensus formation and requires comprehensive detailed regulations at the Community level, but in the long-run results in the furthest-reaching harmonisation. This approach has so far been chosen, apart from the foodstuffs sector, in directives on hazardous substances and preparations, cosmetics and pharmaceuticals.
b) "Alternative solution": this procedure, better known as *optional harmonisation*[51], leaves to suppliers, the freedom to choose between orienting their products to national law or to Community-law requirements. Products meeting the Community requirements cannot be refused access to the market in any Member State. This approach, the prevailing one in the area of industrial products, does ease political agreement, but has drawbacks from the viewpoints of harmonisation and also of product safety. The number of recognised rules is increased, so that it is harder to compare what is offered. Where safety standards differ, a manufacturer that avoids higher standards which in general mean higher costs, can secure competitive advantages[52]. Optional harmonisation thus tends, given significant differences in safety and a sizeable volume of cross-border trade in the products concerned, to promote a reduction in the safety level. The reasons adduced in favour of the Community regulation in cases of optional harmonisation - longer manufacturing series, better use of output, greater rationalisation - do not apply to

many small- and medium-size firms that market their goods only domestically. In favour of optional harmonisation, it may be said that Member States have more leeway to take national peculiarities into account, and that national adaptation to technical progress is possible without amending the directive. Because the market is opened up for products that meet the Community standard, consumer choice is increased and competition among manufacturers stepped up.

c) "*Reference to technical standards*": On this method, directives refer, in order to specify safety requirements, to harmonised technical standards worked out by standardisation bodies[53]. This method of harmonisation has so far been applied only in the Low Voltage Directive[54], though the European Parliament[55] and the ESC[56] had selected it in their opinions on the draft general programme as the most promising of solutions. The Economic and Social Committee stressed that reference to technical standards was particularly suitable for sectors where there was experience in harmonising technical standards, and offered the greatest possibilities for
elastic adaptation to the demands of technical progress and for the introduction of new technical ideas. Almost pre-empting the new approach to technical harmonisation and standards, the ESC states:

"It would thus be conceivable for a Community directive first to list the safety objectives to be attained and then to state that these will be taken as having been attained where a particular standard, initially harmonised at Member State level, has been complied with. This provides an opportunity to demonstrate that the safety objectives can be met even without complying with the standard concerned"[57].

The legal literature had further defined this method of harmonisation by the early 70's, setting forth fairly clearly the outline of the new approach[58]. While sliding reference to the successively newest version of a standard was rejected as inadmissible[59], conferring law-making powers to privately organised standardisation organisations, the preferred model was, for directives, only to prescribe compliance with basic requirements, with technical standards merely being cited to determine these basic requirements. Accordingly, manufacturers are not bound by the technical standards, but can show compliance with the basic requirements otherwise than by meeting standards[60]. The directive should lay down the basic requirements in a general clause embodying a rebuttable presumption that these requirements have been met by anyone who has complied with a particular technical standard in its latest version[61]. Where a manufacturer departs from the general clause, the onus is on him to prove that the generally formulated requirements of the general clause, which alone is *legally* binding, have nevertheless been met. Conversely, the authorities have the onus of showing that though technical standards referred to have been complied with, basic requirements set out in the general clause are not met[62]. In order that technical standards should not remain "merely a non-binding indication and aid to interpretation showing the specific content of the basic requirements in the individual case"[63] thereby bringing the success of harmonisation into question, Member States should "take all necessary measures to ensure that administrative authorities recognise goods as meeting the basic requirements if they comply with the standards decided on by the Commission following consultation of the Standards Testing Committee"[64].

While its proponents presented as an advantage that standardisation in this procedure in principle remains a matter for industry[65], critics adduce constitutional reservations, complaining that
"in view of the existential importance of environmental and consumer protection for our society today, a regulation can be tenable that leads to industrial organisations' wide-ranging powers of decision in determining the level of safety in manufacturing and utilising technical products"[66].
d) "*Conditional mutual recognition of tests*": Where harmonisation fails because Member States hold to their own safety regulations, products from one Member State should be exportable to another on the following two conditions:
- that the exported product complies with manufacturing provisions applying in the country of import;
- that competent authorities in the country of export carry out checks according to the methods applying in the country of import[67].
e) "*Mutual recognition of tests*": Here, checks carried out in one Member State are *automatically* recognised as valid by all Member States. This solution can be considered where in a given branch of industry there is very far-reaching correspondence between technical and administrative regulations in force, so that prior harmonisation of national legal provisions seems superfluous[68].

2.4 Conversion into national law of the General Programme on elimination of technical barriers to trade

2.4.1 General survey

The programme to eliminate technical barriers to trade has to date been converted into law in only fragmentary fashion and with considerable delays[69]. Table 1 gives a picture of the number of Commission proposals for directives, Council directives and Commission directives on adjustment to technical progress for the years from 1968 to 1986.

Table 1: Programme to eliminate technical barriers to trade in industrial products - number of Commission proposals for directives, Council directives and Commission directives on adjustment to technical progress for the years from 1968 to 1986 (absolute and cumulative)(1)

Year	Commission proposals		Council Directives		Difference between colums 2 + 4	Commission adaptation directives (2)	
	Abs (1)	cum. (2)	abs. (3)	cum. (4)	(5)	abs. (6)	cum. (7)
1968	18	18	-	-	18	-	-

1969	13	31	1	1	30	-	-
1970	5	36	9	10	26	-	-
1971	7	43	11	21	22	-	-
1972	12	55	3	24	31	-	-
1973	12	67	11	35	32	1	1
1974	33	100	14	49	51	2	3
1975	15	115	12	61	54	1	4
1976	13	128	21	82	46	4	8
1977	6	134	15	97	37	1	9
1978	11	145	15	112	33	5	14
1979	8	153	11	123	30	9	23
1980	25	178	10	133	45	1	24
1981	22	200	7	140	60	5	29
1982	5	205	7	147	58	14	43
1983	6	211	8	155	56	7	50
1984	8	219	16	171	48	7	57
1985	5	224	4	175	49	12	69
1986	11	235	19	194	41	5	74

(1) Determined from data on elimination of technical barriers in Community trade in the annual general reports, especially the tables in the annexes.

2. Including four Commission directives on methods of analysis for verifying the composition of cosmetics and the Commission directives on sampling and analysis methods for fertilizers of 22 June 1977 (OJ L 213, 22 August 1977, 1) and on procedures for verifying the characteristics, threshold values and explosion resistance of ammonia fertilizers with high nitrogen content of 8 December 1986; OJ L 38, 7 February 1987, 1.

By the end of 1986 the Council had adopted 194 directives on the adaptation of Member States' legal and administrative provisions on trade of industrial products. Since 1974 it has had average "arrears" of some 50 Commission proposals for directives. By the end of 1970 only 10 directives had been adopted. According to the original 1969 Programme, the figure should have been over 100. It was not till June 1978 that adoption of the hundredth directive on elimination of technical barriers to trade in industrial products

could be hailed[70]. The directives adopted as a "package" in September 1984[71] had been awaiting decision before the Council for nine and a half years.
Most directives contain minutely detailed technically regulations[72] and do not differ significantly in content from technical standards. This entails long preparatory periods, considerable possibilities of external influence by the expert industrial circles involved, on overloading of the high-level political decision-making procedure in the Council with technical details and a pressing compulsion to adapt the directives to technical progress (or sometimes to advances in knowledge). By the end of 1986 the Commission had already adopted 74 directives on adaptation to technical progress[73].
Table 2 gives a survey of the sectors covered by the Council directives and the Commission directives on adaptation to technical progress.

Table 2: Programme to eliminate technical barriers to trade in industrial products - Number of Council directives and of Commission directives on adaptation to technical progress in individual areas (as at 31 December 1986)(1)

Area	Council directives	Commission adaptation directives
Vehicles	58	23
Chemical products (2)	33	16 (3)
Measuring devices	30	10
Agricultural tractors	24	2
Construction machines and appliances	11	5
Electical appliances	8	5
Textile products	5	1
Pressure vessels	5	0
Motor cycles	4	0
Lifts and lifting devices	3	2
Cosmetics	3	10 (4)
Miscellaneous	8	0
Total	192	74

1. Derived from data on elimination of technical barriers in Community trade in the annual general reports, especially the tables in the annexes.

2. Hazardous substances, lacquers and paints, pharmaceuticals, plant-health products, fertilizers, detergents; except for cosmetics.
3. Including Commission directives on sampling and analysis methods for fertilizers of 22 June 1977 (OJ L 213, 22 August 1977, 1) and on procedures for verifying the characteristics, threshold values and explosion resistance of ammonia fertilizers with high nitrogen content of 8 December 1986; OJ L 38, 7 February 1987, 1.
4. Including four Commission directives on methods of analysis for verifying the composition of cosmetics .

Of 192 directives, 145 are in the four areas of motor vehicles, agricultural and forestry vehicles, measuring devices and chemical products. The first three sectors mentioned are particularly favourable for approximation of laws. In the area of measuring devices, the Community can in its harmonisation work, call upon far-reaching international agreement regarding weights and measurement[74]. In the vehicle sector, it can largely refer back to technical directives from the ECE in Geneva - the Economic Commission for Europe, a United Nations regional organisation. This not only signifies a saving of time for the Commission but a possibility for European vehicle manufacturers to offer their products on extra-Community market without special costly adaptations[75].

2.4.2 Total harmonisation - directives on hazardous substances

A special place is occupied by the directives that follow the principle of total harmonisation, hazardous substances with regard to fertilizers, and cosmetics. By contrast with most of the directives, they concern areas not normally regulated by technical standards. The directives in the area of classification, packaging and labelling of dangerous substances and preparations[76] were based on preliminary work done by the ILO, the Council of Europe and the OECD but not yet reflected in national legislation. Here the Community has given Member States a lead[77]. This is true particularly of the sixth amendment to Directive 67/548/EEC[78], which is the basis for chemicals laws in the Member States.
In contrast, the regulations restricting marketing and use of certain dangerous substances and preparations[79], much more detailed in application, almost always go back to initiatives by Member States barring dangerous substances on grounds of health protection or public safety, or introducing restrictions on their use. Quite clearly, these are ad hoc regulations, though adopted with considerable delays[80]: The underlying Directive 76/779 contains no criteria for including substances in the annex to the Directive. If hazards appear (and bans or restrictions are issued in Member States), a unanimous Council resolution, based on a Commission proposal, and following opinions from the European Parliament and the Economic and Social Committee, must be adopted. However, speedy mandatory measures should be required to avoid severe health risks[81]. A ban issued by one Member State and a Commission proposal for a ban give manufacturers and traders enough time to quickly sell off the dangerous substances in countries that have not yet applied the protective clause[82].

2.4.3 Optional harmonisation - Directives in the automotive sector

The most detailed regulations at Community level are for the vehicle market[83], which is also of paramount economic importance for internal trade[84]. All directives are based on the principle of optional harmonisation. In 1982, the Commission checked the extent to which Member States had bindingly prescribed compliance with Community standards domestically and to which manufacturers voluntarily followed Community provisions[85]. The finding was that except in Italy and The Netherlands, where Community standards are mandatory, manufacturers still largely have a choice between domestic provisions and Community directives. Manufacturers largely apply about half the directives, especially those on environmental protection and active safety. Otherwise, they apparently prefer national provisions. The Community standards have practically no effect where technical specifications are not legally regulated by national standards. Accordingly, manufacturers are only partly exploiting the oft- proclaimed advantages of longer production runs. The differing national provisions are apparently advantageous for dividing up and separating markets and preventing parallel imports[86].

Harmonisation directives in the vehicles sector are summarised in Table 3.

Even with the revised programme, considerable delays clearly emerge. The large number of directives can be explained by the fact that directives have been issued for practically all vehicle components. This concerns all the technical provisions that vehicles must meet, after securing EEC type approval in one Member State, in order to be marketed without further checks in other Community countries[87]. As Table 3 shows, since October 1978 all that remains to be done in order for EEC type approval to come into force is to produce directives for windscreens, tyres and the weights and dimensions of particular vehicle components.

The delays are attributed to the so-called "Third-Country" problem[88]; the fear that goods from third countries might take advantage of EEC-type approval to catch on easier to the Common Market. In the Council, even after adoption of 15 directives long-blocked because of this problem[89], and after adoption of the regulation on the strengthening of the common commercial policy (in particular, on protection against prohibited commercial practices[90]), it was not possible, in the same day, to overcome differences of opinion in the vehicle sector as to whether third-country products should secure access to the Community type-approval systems introduced by the harmonisation directives. By its international undertakings, the Community is obliged where reciprocity is guaranteed to give imported products equally favourable treatment with Community products[91].

While harmonisation work in the vehicle sector was initially and primarily aimed at the advantages of long-production runs, other aspects have become apparent for some time, since new production techniques allow flexible adaptation to different technical requirements. These aspects include noise levels, air pollution, fuel consumption and passenger safety. On 30 March 1984 the European Parliament adopted a resolution introducing a programme of Community measures to promote road traffic safety, and also called for an integrated programme including measures regarding vehicle construction and equipment, road construction and road signs, and road traffic regulations[92]. Among proposals are the obligatory equipping of all private cars with laminated windscreens, headrests and fog glass, anti-lock braking systems in all lorries and other safety devices, and the laying down of minimum standards on a large number of safety aspects. These includes the quality of car tyres and rigidity of the passenger compartment, mandatory technical checks by independent test centres, and measures to

remove vehicles with design faults from the market. It is clear that the originally largely commercially oriented policy to guarantee free movement of goods is gradually being overshadowed by an integrated policy on road traffic safety and aspects of environmental and consumer protection, even though the Council still remains closed to the idea of an integrated programme to promote road traffic safety[93].

Table 3: Directives on the approximation of Member States' legal provisions regarding vehicles

Regulatory objective of directive	Date of proposal (1)	Adoption of directive		Lag in months (3)
		Planned (2) month/year	achieved	
Type Approval	7/68	1/70	2/70	1
Admissible noise level and exhaust equipment	7/68	1/70	2/70	1
Measures against air pollution by petrol engines	10/69	7/70	3/70	0
Containers for liquid fuel and its safe transport	7/68	1/70	3/70	3
Licence plate fixtures	unpublished	1/70	3/70	3
Steering equipment	2/69	7/70	6/70	0
Doors	12/68	7/70	7/70	1
Equipment for sound-level marking	8/68	1/70	7/70	7
Rear-view mirrors	8/68	1/70	3/71	14
Brakes	12/68	7/0	7/71	13
Radio interference removal for petrol-driven vehicles	unpublished	1/70	6/72	29
Measures against the emission of pollutants by diesel engines	12/71	7/0	8/72	25
Internal equipment	12/71	7/74 (7/70)	6/74	0 (42)
Security equipment against unauthorised use	7/72	new	12/73	-
Behaviour of	9/72	7/74 (7/70)	6/74	0 (48)

steering gear in collisions				
Strength and anchoring of seats	5/73	1/75	7/74	0
Projecting edges	12/73	1/75	9/74	0
Reverse gears and speedometers	8/74	1/76 (1/70)	6/75	0 (66)
Licence plates	8/74	1/76	12/75	0
Safety belt anchorage	8/74	1/76	12/75	0
Lighting and signalling installations	6/74	1/75 (1/70)	7/76	19 (79)
Rear lamps	1/74	1/75	7/76	19
Contour lights, side lights, rear lights and brakelights	12/74	1/75	7/76	19
Direction indicators	12/74	1/75 (1/70)	7/76	19 (79)
Rear-numberplate lighting	12/74	1/75	7/76	19
Main-beam and dipped headlights	12/74	1/75	7/76	19
Fog lights	12/74	1/75	7/76	19
Towing equipment	12/74	1/77 (7/70)	5/77	5 (83)
Rear fog lamps	12/76	1/75	6/77	30
Reversing lights	12/76	1/77	6/77	6
Parking lights	12/76	1/77	6/77	6
Safety belts and restraints	12/74	1/76	6/77	18
Driver view field	12/75	1/77 (1/70)	9/77	9 (93)
Marking of starting equipment, telltale lights and indications	11/76	1/77	12/77	12
Defrosting and demisting equipment for glass surfaces	11/76	1/77	12/77	12
Windscreen wipers and washers	11/76	1/77 (1/70)	12/77	12 (96)
Internal heating	12/76	1/77	6/78	18

Wheel covers	12/76	1/77	6/78	18
Headrests	12/74	1/76	10/78	34
Fuel consumption	1/80	new	12/80	-
Engine performance	1/80	new	12/80	-
Safety windscreens(4)	9/71	7/74 (7/0)	not yet adopted	
Pneumatic tyres(5)	12/76	1/76 (7/70)	not yet adopted	
Weights and dimensions of particular vehicles(6)	12/76	1/77	not yet adopted	

Notes to Table 3:

1. Sometimes a directive was preceded by several drafts; the date here is that of the last draft.
2. Determined from the timetables in the General Programme to eliminate technical obstacles to trade of 28 May 1969 (OJ L 76, 17 June 1969, 1) and the Council Resolution of 17 December 1973 on industrial policy (OJ C 117, 31 December 1973, 1). Figures in brackets are the earlier dates sometimes specified in the 1969 General Programme. In every case the implication is either 1 January or 1 July.

   (

3. Figures in brackets indicate the lag behind the original date in the 1969 General Programme.
4. Commission proposal of 20 September 1971, OJ C 119, 16 November 1972, 21.
5. Commission proposal of 31 December 1976, OJ C 37, 14 February 1977, 1.
6. Commission proposal of 31 December 1976, OJ C 15, 20 January 1977, 4. This proposal relating to private cars should not be confused with the directive on the weights, dimensions and certain other technical characteristics of particular goods vehicles, OJ L 2, 3 January 1985, 14.

2.5 Safeguard clauses - response to Member States reservations

A number of directives contain safeguard clauses[94] allowing Member States to intervene should, despite compliance with Community standards, a hazardous situation suddenly arise calling for immediate action. Such safeguard clauses are essential to the extent that the Community provisions lay down rules for marketing and handling products Community-wide that take the right to appeal to Art. 36 EEC from Member States and adopt measures to protect the health and safety of persons[95]. The relevant provision usually runs:

1. Where a Member State has good grounds for believing that an EEC product, although satisfying the requirements of this Directive and the relevant implementing Directives, presents a hazard to safety or health, it may temporarily prohibit, or attach special conditions to, the marketing and use of that product. It shall immediately inform the Commission and other Member States thereof, giving the reasons for its decisions.
2. The Commission shall consult the Member States concerned within six weeks, then deliver its opinion without delay and take appropriate measures.
3. If the Commission considers that amendments to the relevant implementing Directives are needed, such amendments shall be adopted in accordance with the prodecure laid down in Art. 28; in this event the Member State which took the safeguard measures may retain them until these amendments come into force.[96]

The safeguard clauses are thus designed for cases where, after a Community provision has been enacted, a hitherto unknown or unrecognised hazard appears. The Member State, as responsible for the safety and health of its citizens and for other objects of legal protection, is allowed to take the necessary immediate action. At the same time, the notification of the Commission and other Member States and the involvement of the Committees to adapt the relevant directives to technical progress is aimed at securing amendment of the latter to cope with the hazard situation : this is to update Community law with regard to the hazardous situation that has emerged, so as to avoid obstacles to trade. A Member State that reacts more critically than others to hazardous situations can thus provide an impetus for the tightening up of Community standards. However, it must supply justification for temporary departure from Community law, and accept the fact that its intervention may not be lastingly confirmed by the Commission or in the committee procedure. Where, despite contrary decision by the relevant Community bodies, a Member State maintains its special measures, the Commission may bring it before the ECJ for infringement of Art. 30 EEC. Those who doubt that exercise of national police intervention powers is accessible to subsequent co-ordination through a binding Community procedure[97] have been refuted; Member States, in agreeing to the directive, have also agreed to verification of any further-reaching protective measures that may be necessary in accordance with the procedure laid down in the safeguard clause, so as to maintain already existing Community law. There is much to suggest that this question of principle remains obscured and that the safeguard clause procedure can be used pragmatically in a political negotiating process to adapt Community law to new hazard situations.

2.6 Proposal for a directive on construction products a failed attempt to delegate powers to the Commission

With its proposal for a directive on construction products[98], the Commission embarked in 1978 on the since abandoned attempt to develop an alternative to the cumbersome policy of harmonisation through vertical, product-related Council directives[99]. A framework directive from the Council was to contain common definitions for all construction products and lay down general rules on the form of implementing directives; these

implementing directives were, pursuant to Art. 155 EEC, fourth indent, to be enacted by the Commission, with feedback through a committee made up of Member State representatives (regulatory committee procedure). Implementing directives were to lay down more specific requirements for individual products or types of product, and guarantee that buildings produced using materials complying with the implementing directives would meet the generally recognised requirements, including safety requirements. These requirements relate to reliability, safety, hygiene, comfort and economy of buildings, and to specific properties of products[100]. Conformity of construction products with implementing directives was to be verified and established through an EEC-type approval certificate (Art. 8-12), an EEC-type examination certificate (Art. 13-17), EEC-type conformity checks (Art. 18-21) or through EEC self-certification (Art. 22-26); procedures were to be laid down in the individual implementing directives[101].

The reasons for the failure of this ambitious project are not entirely clear. Besides Member States' reservations at such far-reaching transfer of powers to the Commission[102] and Parliament's mistrust of the excessive influence for Government representatives in the committee procedure[103], rejection of central bureaucratic detailed regulation by industrial circles involved was important, as well as special features of the construction industry which, by comparison with other technical areas, was and is relatively localised and characterised by special local and regional traditions. As well as these political reasons, there were legal reservations regarding the proposed delegation arrangements, since all essential basic decisions were not left to the Council, but would be given over to the Commission without

its having any specific, detailed framework[104]. It is noteworthy that the Commission did not seek to follow the model of the Low Voltage Directive[105], but wanted to lay down the specific products standards itself in implementing directives. Here, however, it can always point to the fact, in contrast with the electrical sector, that only a few construction products are covered by international or European technical standards[106].

Aside from its failed attempt to secure far-reaching powers in implementing directives, the Commission is working on bringing out Eurocodes for the construction industry; these would be a set of European regulations based on the result of work by major international technical and scientific associations for the design, dimensioning and construction of buildings and engineering structures[107]. By contrast with the failed proposal for a directive on construction products of 1978, the 1987 proposal for a directive on construction products, with its strengthening of standardisation committees and the procedure of conformity certification, implies, above all, a strengthening of industrial circles involved. Because of the comprehensive competence of the proposed Standing Committee for the construction industry, the position of Member States ought, if anything, to be strengthened, even though from the purely legal point of view, they can assert their influence only through an advisory committee rather than a regulatory committee.

CONTINUE

1. Cf. esp. ECJ Case 120/78, Judgment of 20 February 1979, ECR [1979] 649 - Cassis de Dijon; see Chapter IV, 1.1.
2. For more details see Chapter IV, 1.2.
3. Cf. Röhling, 1972, 95 et seq., and more recently Collins/Hutchings, 1986, 197 et seq.
4. Cf. also the reports on the Commission's present consideration of activation of Arts. 101 et seq. EEC, in Collins/Hutchings, 1986, 198 et seq.; Pipkorn, Art. 101, No. 24.
5. From the German literature, see e.g. Kaiser, 1980, 102 et seq.; Börner, 1981.
6. Taschner, Art. 100, No. 23.
7. Cf. Close, 1978; Krämer, 1985, Nos. 6 et seq., 15 et seq., and for the analogous case of environmental policy Rehbinder/Stewart, 1985, 21 et seq., with other references.
8. Cf. only Langeheine, Art. 100, No. 13, with other references.
9. ECJ Case 8/73, Judgment of 12 July 1973, ECR [1973] 897 (907) - Massey-Ferguson.
10. Cf. Everling 1976, 170 et seq.; Langeheine, Art. 100, No. 54; Seidel, Künftige Regelungsprobleme, 1985, 170 et seq.; Bruha/Kindermann, 1986, 302 et seq.
11. Cf. Röhling, 1972, 156 et seq.
12. Seidel, Künftige Regelungsprobleme, 1985.
13. From the extensive literature, see Rose-Ackerman, 1981; Noam, 1982; Mashaw/Rose-Ackerman, 1984; Fix, 1984.
14. Mashaw/Rose-Ackerman, 1984, 115 et seq.
15. Fix, 1984.
16. For more details see Pelkmans, 1982, 116 et seq.; *idem*, 1984, 173 et seq. This fits the thesis developed by Scharpf in 1985 that willingness to convey powers of action to the Community was opposed by Member States' governments "own institutional interests".
17. Cf. Heller/Pelkmans, 1986, 245 et seq., esp. 397 et seq.; also Slot, 1975, 153. Scharpf, 1985, 34 et seq. calls the Community relationships with Member States a case of "policy overlap" that is closer to German federalism than to the American model.
18. Rehbinder/Stewart, 1985, 9 et seq.; Rehbinder/Stewart also apply their model as a starting point for analyzing the US federal system; however, they do not go any further into the state of American federalism theory, and in the revisions of the model this necessitates (op. cit., 177 et seq., 277 et seq.).
19. Rehbinder/Stewart, as in American literature on the whole (cf. only Mashaw/Rose-Ackerman, 1984, 129 et seq.), distinguish between product regulations and process regulations (the third usual category of industrial safety regulations can be left out in considering environmental protection). For Rehbinder/Stewart, product regulation involves only the product requirements necessitated on grounds of environmental protection; but regulations motivated by consumer policy grounds also belong to this category. By "process regulations" one means environmental provisions relating to production processes; they may be neglected for our purposes.

20. Since they are dealing with environmental protection, Rehbinder/Stewart talk about "environmental States" and "polluter States".
21. Rehbinder/Stewart, 1985, 9, 322 et seq.
22. Cf. Joerges/Hiller/Holzscheck/Micklitz, 1985, 345 et seq. and 2.4.1 and 2.4.3 infra.
23. This is Rehbinder/Stewart's very surprising conclusion, given the nature of their presentation of the economic integration model as the starting point for their considerations: 1985, 315.
24. For the - relative - success of traditional harmonisation policy and on the heterogeneity of "vertical" and unsuccessfulness of "horizontal" European safety regulations see 2.7, 2.8 and 3 infra.
25. See the literature survey in Behrens, 1981 and the references in Rehbinder/Stewart, 1985, 316 et seq. and Krislov/Ehlermann/ Weiler, 1986, 6 et seq.
26. As an example, see Bulmer, 1983.
27. Specifically on the programme for eliminating technical barriers to trade, see Dashwood, 1983, and on environmental policy the references in Rehbinder/Stewart, 1985, 265 et seq.
28. Weiler, 1981; *idem*, Community, Member States and European Integration, 1982; *idem*, Supranational Law and the Supranational System, 1982.
29. Scharpf's 1985 characterisation of the relationship between the Community and the Member States as a case of "policy overlap" very largely coincides with Weiler's analysis. Like Weiler, Scharpf, too, explains the unanimity rule on the basis of Member States' situations (and their governments "own institutional interests", see note 16 supra). However, Scharpf is interested only in the political conditions, which, despite the unanimity rule, impose constraints towards consensus formation at the European level (he specially mentions the density of regulation already attained, which excludes exit options and continually makes follow-up decisions unavoidable, 337 et seq.), whereas Weiler's analysis centres around the relationship between the conditions for political agreement and the Community's legal structures.
30. Note 10 in 1.1 supra.
31. Chapter V infra.
32. In general on technical barriers to trade see esp. Nunnenkamp, 1983; Page, 1981 and Slot, 1975. See also OECD, Consumer Policy and International Trade, 1986.
33. Cf. Pelkmans, 1984, 175-8. For the pharmaceutical industry see Stuyck, 1983 and Reich, Parallelimporte, 184; for car spare parts cf. Joerges/Hiller/Holzscheck/ Micklitz, 1985.
34. Cf. Gröner, 1981, 153-155.
35. On 6 November 1978, in a letter to Member State governments, the Commission complained of the rising protectionism within the Community, mentioning as major examples the following restrictive measures that led principally to complaints about restrictions on free movement of goods:

    - Documents on which imports or exports are dependent;
    - Frontier checking procedures;

- Setting up minimum or maximum prices;
- Payments of equivalent effects for duties and inspection fees;
- Preference regulations in favour of national industry in the area of public supply contracts;
- National regulations laying down technical or quality conditions for marketing, e.g. technical standards.

Cf. EC Bulletin 10-1978, 24 et seq.

36. More recently, see OECD, Consumer Policy and International Trade, 1986; OECD, Costs and Benefits of Protection, 1985; Lorenz, 1985; Schultz, 1985; Gutowski, 1984; also Hasenpflug, 1976.
37. OJ C 76, 17 June 1969, 1.
38. For detail on law approximation as a procedure for eliminating technical barriers to trade, see Seidel, 1969; *idem* 1971.
39. OJ C 76, 17 June 1969, 1.
40. OJ C 76, 17 June 1969, 5.
41. In March 1968, when the Commission proposed this programme (OJ C 48, 16 May 1968, 24), only 8 drafts of these were before the Council.
42. Council Resolution of 28 May 1969 on mutual recognition of tests, OJ C 76, 17 June 1969, 7.
43. OJ C 76, 17 June 1969, 8.
44. For details on this see Zachmann, 1977.
45. OJ C 76, 17 June 1969, 9. Cf. the Commission's recommendations of 20 August 1965 to Member States on prior notification to the Commission of particular legal and administrative provisions at the drafting stage, OJ of 29 September 1976, 2611/65.
46. Directive 83/189/EEC of 28 March 1983, OJ L 109, 26 April 1983, 8. For details see Chapter IV, 3.1.
47. OJ C 38, 5 June 1973, 1.
48. OJ C 117, 31 December 1973, 1, esp. Annex 2, 6-14.
49. It is noteworthy that the standstill arrangements are to apply to only 11 out of over 100 draft directives.
50. E.P. Doc. 15/68, VI, reprinted in BT-Drs. V/2743, 22 March 1968, 13 et seq.; for details on this see Slot, 1975, 80-89; cf. also Lauwaars, 1986, 2 et seq. Also very instructive on total and optional harmonisation is Part B of the agreement between CEN and the Commission on co-operation between CEN and the Commission of the European Communities as regards the Commission's work in the area of harmonisation of different technical legislation of Member States and the application of harmonised Community directives, DIN-Mitt. 53 (1974), 200.
51. On optional harmonisation see Grabitz, 1980, 44-47; 1985, Nos. 78-80; Seidel, 1971, 742 et seq.; Eiden, 1984, 61 et seq.
52. On this see Krämer, 1985, No. 79 and Grabitz, 1980, 45.
53. For more details on reference to technical standards see the chapter on Germany (Chapter II, 3), the discussion of the Low Voltage Directive (Chapter IV, 2) and that of the new approach (Chapter IV, 3).

54. Directive 73/23/EEC, OJ L 77, 26 March 1973, 29. The draft of the Low Voltage Directive was presented by the Commission on 12 June 1968 (OJ C 91, 13 September 1968, 19), only a few weeks after the General Programme for eliminating technical barriers to trade, which it had proposed to the Council on 7 March 1968 (OJ C 48, 16 May 1968, 24). On the Low Voltage Directive see Chapter IV, 2.
55. See point 5 of the European Parliament's Resolution, OJ C 108, 19 October 1968, 39 et seq.
56. See point VII (3) of the ESC's opinion, OJ C 132, 6 December 1968, 1 (4 et seq.).
57. Op. cit. - Cf. also Seidel, 1971, 745 et seq.
58. Cf. esp. Starkowski, 1973, 104-118, 143-160. More recently, see also Grabitz, 1980, 82-91.
59. Starkowski, 1973, 111 et seq.; Grabitz, 1980, 72-75. Röhling, 1972, 112-132 rejects any form of reference to technical standards as unacceptable.
60. Starkowski, 1973, 115 et seq.
61. In the formulation by Grabitz, 1980, 82-91.
62. Cf. Grabitz, 1980, 88.
63. Starkowski, 1973, 116.
64. Op. cit., 151.
65. Op. cit., 152.
66. Röhling, 1972, 114.
67. BT-Drs. V/2743, 14.
68. This solution should not be confused with the resolution on mutual recognition of tests (see the explanations in note 42 supra) since there harmonisation of legal provisions and equivalence of tests is assumed. Generally on the mutual recognition of certification and tests see Seidel, 1971, 748-750, who stresses that trust in other Member States' administrative actions is justified only where certification and tests are equivalent; see also Röhling, 1972, 142-160.
69. On this see also Pelkmans/Vollebergh, 1986.
70. Bull. EG 6-1978, 7 et seq.
71. OJ L 300, 19 November 1984, 1-187.
72. A particularly obtuse example was the recent 80-page (!) long Commission proposal for a Council directive on the harmonisation of the legal regulations in Member States on "steering wheels placed in front of the driver's seat on narrow-gauge machinery with pneumatic tyres", OJ C 222, 22 September 1985, 1. Directives adopted in the automotive sector up to 1985 total - excluding the numerous amending directives and directives on adaptation to technical progress - 602 pages mainly containing technical specifications and testing instructions.
73. Including 4 Commission directives on the testing of constituents of cosmetics and Commission directives on testing and analysis methods for fertilizers of 22 June 1977 (OJ L 213, 22 August, 1977, 1) and on procedures for testing the characteristics, threshold values and explosion resistance of ammonia fertilizers with high nitrogen content of 8 December 1986, OJ L 38, 7 February 1987, 1.
74. Cf. Lukes, 1985, 196.
75. Cf. Henssler, 1975, 175 et seq.; Lukes, 1985, 196.

76. Starting with Council Directive 67/548/EEC of 27 June 1967 on the classification, packaging and marking of hazardous substances, OJ L 196, 16 August 1967, 1. On this subject there were by the end of 1986, a total of 7 amending directives from the Council and 6 Commission directives on adjustment to technical progress. Additionally there were specific directives on the classification, packaging and marking of solvents, pesticides and paints, lacquers, print colors, adhesives etc.
77. Cf. Braun, 179 et seq.
78. OJ L 259, 15 October 1979, 10. This directive in turn follows the US Toxic Substances Control Act, Japanese chemicals legislation and relevant OECD proposals.
79. Starting with Council Directive 76/769/EEC of 27 July 1976 on restrictions to the marketing and use of certain hazardous substances and preparations, OJ L 262, 27 September 1976, 201. Here by the end of 1986, there were a total of 7 amending directives, including those on PCB, PCT, Tris, PBB, particular substances in game articles, benzole in toys and asbestos.
80. For the seven amending directives, it took an average of 30 months between Commission proposal and Council Decision - quick as procedures for directives go, but far too slow considering the imminent risks.
81. Accordingly, the Commission undertook a new advance in 1983, in order to make amendments to the annex possible using the Regulatory Committee Procedure, COM (83) 556 final of 26 September 1983. In the meantime, with strengthening of the Commission's implementing powers by the Single European Act (for details see Chapter IV, 4.3 infra) it has proposed the even quicker and more flexible procedure of the Advisory Committee, which provides only for informative consultation of Member States' representatives, COM (87) 39 final of 30 January 1987. Cf. also the corresponding proposal for a directive on the classification, packaging and labelling of hazardous preparations, OJ C 41, 19 February 1987, 17 et seq. See also Krämer, 1985, Nos. 239-241.
82. See the EAC's opinion on the proposal for a Council directive on the seven amendments to Directive 76/769/EEC, OJ C 112, 3 May 1982, 42 et seq. See also Written Question No. 650/79, OJ C 74, 24 March 1980, 6 et seq.
83. On this see Table 3 infra and Annex 13 to the Commission's Report on the European automobile industry, EC Bulletin, Supplement 2/81, 71-76, with a survey of the directives adopted for motor vehicles.
84. Automobile exports between Member States amounted in 1980 to almost 2.78 million units.
85. Commission activities and Community regulations for the automobile industry in 1981-3, COM (83) 633 final of 9 January 1984, 22 et seq.
86. In general on market delimitation in the automotive sector see Joerges/Hiller/Holzscheck/Micklitz, 1985. See also the report on behalf of the Committee for industry, currency and industrial policy on the automotive industry of the European Communities of 8 December 1986, EP-Doc. A2-171, 86, point 7. This product differentiation despite optional harmonisation should be separated from the "Third-Country problem" which arises particularly clearly in the automotive sector; on this see the references in notes 88-91 infra.

87. Directive 70/150/EEC on licences for motor vehicles and their trailers, OJ L 42, 23 February 1970, 1, as last amended by Council Directive of 25 June 1987 on the harmonisation of the legal provisions in Member States on licences for vehicle trailers, OJ L 192, 11 July 1987, 51.
88. See Commission activities (op. cit., note 85), 21; report on the Community automotive industry (op. cit., note 86), points 10 and 18; written questions No. 1498/81, OJ C 85, 5 April, 1982, 4; No. 1345/83, OJ C 52, 23 February 1984, 26; No. 1146/85, OJ C 341, 31 December 1985, 31 et seq.; No. 1291/85, OJ C 29, 10 February 1986, 13 et seq.
89. OJ L 300, 19 November 1984, 1-187. Cf. Bulletin EC 9-1984, points 2.1.9 and 2.1.70.
90. OJ L 252, 20 September 1984, 1.
91. Cf. the Council Decision of 15 January 1980 on provisions for applying technical regulations and standards, OJ L 14, 19 January 1980, 36, following approval of the GATT agreement on technical barriers to trade, OJ L 71, 17 March 1980, 29.
92. OJ C 104, 16 April 1984, 38; cf. also the report by the Committee on transport on the introduction of a programme of Community measures to promote road traffic safety, EP-Doc. 1-1355/83.
93. The Council merely took note of the Commission's plans, very modest by comparison with the European Parliament's ideas (OJ C 95, 6 April 1984, 2 et seq.); presentation of a programme is no longer being in question (OJ C 341, 31 December 1984, 1 et seq.). According to the time-table in the White Paper on the Completion of the internal market (COM (85) 310 final of 14 June 1985, 17), only three safety-related measures are listed in the automotive sector, as compared to five environment-related measures.
94. A comprehensive survey is given by Krämer, 1985, Nos. 242-246.
95. This is the ECJ's consistent case law; for more details on this see Chapter IV, 1.2.
96. Proposal for a Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the construction of goods. OJ C 308, 23.12.1978, 10 et seq. Identical or similar formulations can be found in Art. 21 of Directive 84/530/EEC (common provisions for gas installations), OJ L 300, 19 November 1984, 95; Art. 24 of Directive 84/528/EEC (provisions for lifting and conveying equipment), OJ L 300, 19 November 1984, 72; Art. 23 of the sixth amendment to Directive 67/548/EEC on the classification, packaging and marking of hazardous substances, OJ L 259, 15 October 1979, 10; Art. 10 of Directive 78/631/EEC (pesticides), OJ L 206, 29 July 1978, 13; Art. 12 of Directive 75/117/EEC (electrical equipment for use in explosive atmospheres), OJ L 462, 30 January 1976, 45; Art. 12 of Directive 76/768/EEC (cosmetics), OJ L 262, 27 September 1976, 169. Member States' temporary measures are confined to a maximum duration of 6 months, unless the Commission finds adjustment of the Directive necessary, as with Art. 9 of Directive 73/173/EEC (solvents), OJ L 189, 11 July 1973, 7; Art. 9 of Directive 74/150/EEC (licences for agricultural and forestry tractors), OJ L 84, 28 March 1974, 10; Art. 9 of Directive 70/156/EEC (licences for motor vehicles), OJ L 42, 23 February 1970, 1. On the protection clause in the Low Voltage Directive, see Chapter IV, 2.3.3.
97. Thus Seidel, 1971, 754.

98. OJ C 308, 23 December 1978, 3. For details on the basic problems raised by this proposal for a directive see Grabitz, 1980. See also Bub, 1979; *idem*, 1982; Blachère, 1982; Lindemann/Reihlen/Seyfert, 1984. Börner, 1973, 245 et seq., was already proposing basic directives from the Council with implementing directives from the Commission as a transitional solution until European standardisation bodies are in a position to produce recognised European standards.
99. The 1978 proposal has since been replaced by the proposal for a directive on construction products following the principles of the new approach to technical harmonisation and standards, OJ C 93, 6 April 1987, 1. On this proposal see Chapter IV, 3 infra.
100. Annex II to the 1978 proposal for a directive. Cf. the rather more detailed basic requirements formulated as performance requirements in Art. 2 and in Annex I in the 1987 proposal for a directive, relating to mechanical stability, fire protection, safety in use, durability, acoustic protection, energy saving, hygiene, health and the environment.
101. On conformity certificates, cf. Art. 13-15 and Annex IV in the 1987 proposal for a directive. According to this annex, the relevant standards or technical approvals should lay down the nature of the conformity certification (certification of product conformity, or quality control in the factory by an accepted office, manufacturer's own conformity declaration based on self-initiated personal checks or initial checks by a licensed testing centre), preference to be given in each case to the simplest procedure.
102. Cf. Braun, 1985, 181.
103. Cf. the European Parliament's opinion on the proposal for a directive on construction products, points 4 and 5, OJ C 140, 5 June 1979, 28 et seq. (29).
104. In detail, see Grabitz, 1980, 48-55.
105. As for instance e.g. Bub, 1979, 673-675.
106. Cf. Lindemann/Reihlen/Seyfert, 1984, 184 et seq. See also point 11 of the explanatory statement on a proposal for a directive on construction products, COM (86) 756 final/3 of 17 February 1987, 6, according to which 15% of national draft standards reported under the information directive on standards and technical regulations related to construction products, but only 3% of existing international standards.
107. For more on this see Breitschaft, 1984. On European standardisation in the construction industry in general, see Kiehl, 1987.