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European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards

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Editorial note

This Working Paper forms part of a series of five volumes dealing with the "Europeanisation" of product safety law. They are the result of a study carried out on behalf of the Commission of the EC which has so far been published only in German[*]. The publication of this English version has been made possible by a grant from Directorate General XI.

The five volumes of this series of Working Papers should thus be read in context. Volume 1 (Chapter I) aims to show why product safety law has given rise to extremely diverse regulation patterns and to provide an overview of the most important instruments for action.

Volumes 2 and 3 (Chapter II) are concerned with recent developments in the relevant legislation of the economically most important Community Member States and of the United States. Volume 2 (Chapter II, Parts 1 and 2) contains reports on France and the United Kingdom, Volume 3 (Chapter II parts 3 and 4) deals with the Federal Republic of Germany and the US Consumer Product Safety Act 1972, which is of crucial importance in the international debate.

Volume 4 (Chapters III and IV) analyses the development of the "traditional" policy of approximation of law and of efforts at a "horizontal" European product safety policy. In both policy areas it proved impossible to realise the Community's programmatic goals. As far as policy on achieving the internal market is concerned, the Commission itself has pointed out the reasons and called for, and implemented, a fundamental revision of traditional legal approximation policy. This reorientation of Community policy is dealt with in Chapters IV; it describes the most important precursors of the new internal market policy, namely ECJ case law on Articles 30 and 36 EEC since the Cassis de Dijon judgment, and regulatory technique for the Low Voltage Directive and then analyses the new approach to technical harmonisation and standards, whereby the Community will restrict itself in its directives to setting "essential safety requirements", leaving it to European and national standardisation bodies to convert these safety requirements into technical specifications.

Volume 5 (Chapters V and VI) evaluates the effects of the Community's new approach to technical harmonisation and standards on product safety policy. Chapter V diagnoses a new need for action in the area of product safety policy, including in particular the internal organisation of the standardisation process, and participation by consumer associations in European standardisation. Chapter VI continues a comprehensive discussion of alternatives open for co-ordinating internal market and product safety policy. It argues that a policy of "deregulating" Member States' product safety legislation would not be feasible, and opts for a "positive" supplementation of the new approach by a horizontal Community product safety policy. This option is elaborated in a number of recommendations.

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* Christian Joerges, Josef Falke, Hans-W. Micklitz, Die Sicherheit von Kosnumgütern und die Entwicklung der Gemeinschaft, Baden-Baden: Nomos 1988.

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Chapter I
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Questions of product safety alarm the public again and again. Information on the hazardousness of products used daily in household and leisure activities, short- and long-term environmental hazards, and risk associated with materials and technical faults at the workplace occupy the media, attract the attention of experts, provoke a search for the guilty and demands for remedial measures to be taken by the State[1]. In addition to concern about the hazards of large-scale technology, public attention is focused on dangers presented by medicines, foodstuffs and chemicals, whilst in comparison, technical consumer products tend to offer less spectacular things to say[2]. The emphasis of sociopolitical and legal discussion is similarly distributed[3]. Empirical research aimed at showing how attitudes towards hazards caused by technology change and at drafting appropriate recommendations for the policy treatment of such risks[4]mainly covers large-scale technological projects. Legal science concentrates on the development of environmental law and new regulations, particularly on pharmaceutical products and also on chemicals. Against this background it is easy to forget that in the field of technical consumer products the results of large-scale and intensive accident research are available, that this research is indispensable in assisting companies to make decisions on the technical design of products, and that regulations on the safety of technical consumer products have long since left behind them the naive notion of abstract safety standards which can be fulfilled completely. However, the key legal concepts expressing this realisation sound more familiar, more small-scale and less ambitious. Product safety law is not concerned with threshold values, as in the case of law covering the environment, labour and foodstuffs or with "effectiveness" or "non-objection certificates" as in the case of pharmaceutical products, but with the "generally accepted state of the art" ("allgemein anerkannte Regeln der Technik", § 3 of the Gerätesicherheitsgesetz) or with justified safety expectations which manufacturers have to comply with in accordance with the Product Liability Directive.

There are objective reasons for these differences. The risks of nuclear power stations, the level of residual risk to be tolerated or the long-term effects of air pollution or food additives place different requirements on the identification and legal assessment of risks than do the dangers resulting from defective cots and playpens. Nevertheless, it would be illusory to imagine that the problems of technical consumer products are simple. The potential danger is considerable, and it can be just as difficult to assess the contribution of a construction feature towards accidents as it is to assess the health hazard of chemicals (see section 1 below). In connection with technical consumer products as well, we must ask which risks are unavoidable, which must be eliminated at all costs and which should be reduced through design requirements. The alignment of corresponding decisions to technical standards specifying general safety duties is equivalent to setting a threshold value establishing the extent of permissible risks in general terms (see section 2 below). And finally, a range of subtle and expensive instruments has also been developed for the purpose of regulating the safety of technical consumer products. The simple blanket clauses of safety laws in this area are entirely compatible with a regulatory practice which proceeds no less demandingly than is

customary in the present-day regulation of health or environmental hazards (see section 3 below).

☐ 1.The identification of risks

The potential danger of technical consumer products was for a long time underestimated or only rarely appreciated by the public. A change in attitude began to be noted in the fifties and sixties. As early as 1961 the United Kingdom passed a first product safety law (the Consumer Protection Act 1961)[5], and in the Federal Republic of Germany the Act on Technical Work Materials (Gesetz über technische Arbeitsmittel) of 1968 (GtA) was replaced in 1979 by the Appliances Safety Act (Gerätesicherheitsgesetz) (GSG) which laid down a general safety obligation for technical consumer products[6]; since 1983 France has had a general law on consumer safety (Loi No.83-660 relative à la sécurité des consommateurs)[7]. The sixties saw the development in the USA of a widespread social regulation movement which led to a large number of legislative measures[8]. The establishing of the National Commission on Product Safety in 1968, one of the most popular successes of this movement, can be regarded as the birth of a modern product safety policy for technical consumer products[9].

1.1 Data

> "Americans __ twenty millions of them __ are injured each year in the home as the result of incidents connected with consumer products. Of the total, 110,000 are permanently disabled, and 30,000 are killed. A significant number of them could have been spared if more attention had been paid to hazard reduction. The annual cost to the nation of product-related injuries may exceed $5.5 billion"[10].

This much-quoted passage from the final report of the National Commission on Product Safety on the potential hazards of technical consumer products refers to all accidents in which these products played "a role". As a result, a number of States subsequently developed accident information systems aimed at systematically identifying the involvement of consumer products in accidents and the data[11] provided by these systems are as worrying as the National Commission on Product Safety's figures.

In 1981 the Consumer Product Safety Commission reported that the use of consumer products had led to 33 million injuries and 28,000 deaths[12]. In Britain, where a start on preparing accident statistics was made in 1976 (England and Wales), the number of injuries requiring medical treatment is estimated at 3 million per year and the number of deaths at 7,000 per year[13]. In the Netherlands, the 1985 annual report on the Privé Ongevallen Registratie Systeem (PORS) revealed that in 1984 there had been 633,000 accidents necessitating hospital treatment and 2,141 deaths[14]. The European Commission estimates that in the Community as a whole there are more than 30,000 deaths and 40 million injuries each year, at an annual cost of over 30,000 million ECU[15].

Shortly after publication of the National Commission on Product Safety's final report, an alternative survey method was tried out in the form of a "Household Safety Study"[16] financed by several American companies and government departments. In the first phase of the study 27,000 households were questioned about injuries and damage sustained during the past three months. In the second phase diary records of 22,000 households covering a similar period were evaluated. "Environment-linked" accidents were found to be the most important category, with accidents in sport and play in second place; the user's own "misbehaviour" was universally found to be a major factor in the cause of accidents. A similar method was adopted for a study of household and leisure accidents carried out in 1985 on behalf of the Government of the Federal Republic of Germany by the HUK (association of insurance companies)[17].
According to the findings of this study, 3 million home or leisure-time accidents requiring medical treatment or having an effect lasting for more than 14 days (and 100 million minor accidents) can be assumed for the Federal Republic of Germany[18], with 12,000 deaths per year. In order to be able to define the role of products more precisely, the study distinguishes between five accident categories. According to the study, only in the case of "handling" accidents, which account for 17% of accidents, are faulty appliances a potential cause; in practice they are responsible for still fewer, only 2% of all accidents. If cases of incorrect use are disregarded and a distinction made between old and new appliances, the figure falls still further. The conclusion is that "technical shortcomings on newly purchased machines, tools or other appliances are clearly an insignificant factor in the causes of household and leisure accidents"[19].

☐ 1.2 <="" a="">Recording problems
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<="" a="" style="color: rgb(0, 0, 0); font-family: "Times New Roman"; font-size: medium; font-style: normal; font-variant-ligatures: normal; font-variant-caps: normal; font-weight: normal; letter-spacing: normal; orphans: 2; text-align: start; text-indent: 0px; text-transform: none; white-space: normal; widows: 2; word-spacing: 0px; -webkit-text-stroke-width: 0px; text-decoration-style: initial; text-decoration-color: initial;">"Measuring" hazards is a science in itself. When developing accident information systems it is necessary to reflect on whether data should be collected from hospital accident units and/or doctors' surgeries, how a representative sample can be obtained, to what level of detail information on the nature of injuries, the victims and the circumstances of the accident can be collected, and which product categories it would be useful to distinguish[20]. However, the data collected after clarification of all these questions still do not permit any definite conclusions on how dangerous products are. As well as the accident rate, the seriousness of injuries is also important. It is very difficult to grade and assess injuries. In the USA, the National Electronic Injury Surveillance System (NEISS) uses an Age-Adjusted Frequency-Severity Index for this purpose, taking into account not only the accident figures for individual product categories, but also the average nature of injuries, with an additional distinction by user's age[21]; as of late, accident-related economic costs are also calculated, using an Injury Cost Model.

The "measuring" of product hazards can be taken even further. It seems logical for critics of the NEISS to insist that intensity of product use be considered or to call for epidemiological studies which would provide more accurate statistical information on the extent to which specific population groups are affected, or for the U.S. Product Safety Commission itself to test new procedures for gathering data on causes of accidents[22]

But accident circumstances are extraordinarily complex[23]. They are influenced both by permanent and fortuitous background factors (physiological and psychological capabilities and environmental factors on the one hand, and personal factors such as illnesses and external circumstances on the other), and by unexpected events which distract the person's attention or disturb his concentration. Product quality, the effect of normal wear on the same, and sudden faults are no more than contributing factors to a complex process. Consequently, accident information systems can treat the data they collect on the involvement of products in accidents only as an impulse for more detailed follow-up studies of typical accident patterns or individual accident circumstances - the only way to obtain true information on the contribution of design features towards accidents. Such studies inevitably lead to a question of appraisal: as soon as statements on the hazardousness of products are no longer limited to statistical connections between product characteristics and accidents, in other words, where the safety of products is to be judged, a distinction has to be drawn between the spheres of responsibility of manufacturers and users. We shall return to this subject presently.

The difficult measurement and classification problems encountered in developing and applying accident information systems cannot be evaded by alternative study methods either. The example of the HUK study and its conclusion brings this difficulty out. While the survey method used there does allow all accidents to be taken into account and distortions to the data resulting from concentrating on hospital accident units to be excluded, the involvement of hospitals has the advantage that a suitably trained external observer can record the relevant data immediately after an accident (particularly useful in the case of accidents involving children). A survey, by contrast, depends on the psychological skill of the interviewer and the ability of the interviewee to express himself and remember things accurately, which means that in some cases, particularly accidents to children, no reliable information can be obtained. The most important advantage of accident information systems over later surveys is, however, probably that they rule out one severe source of error, namely the victim's memory or forgetfulness[24].

The HUK study not only aims to measure hazards, but pursues the ambitious goal of assessing the safety of products as well. For this purpose a very small number of "case studies" were carried out, with the cases selected from among the handling accidents. These studies, based on the interviews with the persons concerned, contain some very firm assessments (users chose "easy alternatives", acted "carelessly", "did not pay attention", "were thinking about television", "were trying to carry too much luggage", "selected an unsuitable position", or "were distracted by children")[25]. Such assessments are no doubt unavoidable in evaluating product safety. But simply questioning accident victims is a very poor basis for making judgments. A pilot study by the US Consumer Product Safety Commission[26] shows that only 27% of accident victims surveyed were capable of answering the question whether their accident should be attributed to a product defect, to the age of the product, to its design, to their own errors, personal inadequacies or environmental factors[27]. It

also stresses that the interaction between survey personnel and respondents influences the findings in ways that are hard to calculate, that there is a tendency on the part of accident victims to blame themselves, that it is, above all, unrealistic to expect reliable, appropriate statements on product defects, and even less design faults, from users, and that therefore interviewers must be trained not only psychologically, but also technically. Clearly, therefore, a product hazard survey that is not only to measure the involvement of products in accidents but also to supply conclusions as to causes and responsibilities has to be a much more sophisticated matter than the HUK study has been.

☐ 2. Assessment of hazards

According to the well-known statement by W.W. Lowrance, "a thing is safe if its attendant risks are judged to be acceptable"[28]. The references to the limitations of accident information systems and the weaknesses of the HUK study will no doubt have demonstrated the importance of the distinction between identifying the hazards of products and assessing their safety. "Safety" is a normative concept and cannot be assessed by a generally applicable unequivocal formula. Safety assessment procedures must therefore be flexible, above all because the hazards to be assessed vary tremendously in nature and intensity.

☐ 2.1."Proper use", "foreseeable use", "foreseeable misuse", "unreasonable risk of injury"

In the legal policy debate on consumer product safety, the distinction between "proper" and "foreseeable use" or "misuse" plays a central role. The distinctions represent intuitively plausible demarcations of the spheres of responsibility of manufacturers and users. Those who would like to see the responsibility of manufacturers limited to cases where products are put to their proper use plead for predictability and delimitation of liability, and at the same time appeal to the independence and judiciousness of users. Those who on the other hand wish to make manufacturers take account of foreseeable misuse are quickly accused of adopting paternalistic attitudes, and seem to assume that technical progress tends to place excessive demands on users. Between the two extremes of proper use and foreseeable misuse lies the category "foreseeable use". This compromise formula allows the manufacturer to be made liable in cases where, for example, his subjective definition of the use of his products does not correspond to the "normal" use; on the other hand, the user's own responsibility in the case of a foreseeable but "unreasonable" use is established.

The legal discussions on these divisions have an important fundamental meaning, but their practical significance is limited. The abandoning of "proper" use as the basis for manufacturer's liability acknowledges that what safety law is about is social protection, which no manufacturer can determine unilaterally by laying down what "proper use" is, nor any consumer ignore in making his purchase decisions. In this context, the abandoning of the criterion of proper use is fundamental, and there is general agreement on this.

However, § 3 (1) of the German GSG explicitly protects the user of technical consumer products only where they are put to their "proper use" and also refers to the "generally accepted state of the art". In explaining the phrase "proper use", § 2 (5) of the GSG does, however, state that this is either the use specified by the manufacturer or the "normal" one for the product. These criteria may clash; accordingly, the reference to "normal use" means that the manufacturer no longer has the power to "define" the care to be expected from users of his product[29]. Even more importantly, especially in connection with safety matters, the relevant standards (DIN 820, Part 12, and DIN 31.000/ VDE 1000) lay down more stringent requirements, specifying that "foreseeable misuse" must be taken into account. This amendment to § 3 (1) of the GSG on the assessment of safety aspects corresponds to the general trend in present-day safety legislation and product and manufacturers' liability law[30]. Whilst it is important to retain this basic consensus on safety policy, it is difficult on the other hand to deduce precise criteria for establishing the appropriate safety level from the alternatives to "proper use". All norms are both capable of being interpreted and in need of interpretation. If, as required by DIN 820, Part 12 and DIN 31.000/VDE 1000, foreseeable misuse must be taken into account, a decision must be made on whether and to what extent this has to be done at the product design stage ("direct safety technique") or whether other protective measures are needed ("indirect safety technique"), or whether safety information should be sufficient ("indicatory safety technique")[31]. The concept of "foreseeable" use leaves similar room for interpretation. Whilst Article 1 of the French Consumer Safety Act of 21 July 1983 ([32]) refers to "conditions reasonably foreseeable by an expert" and the level of safety which can "legitimately" be expected, a decision is still required on the degree of anticipation to be required of the manufacturer and where the limits of legitimate consumer expectations lie. The fact that such decisions involve a difficult compromise between hazard avoidance, technical possibilities and economic constraints is well-known from product liability law[33].

In the face of these problems the American Consumer Product Safety Act 1972 has contented itself, in § 1 (b)(2), with describing the aim of the legal regulations as protecting the consumer against an "unreasonable risk of injury". It is evident from the background material, though not from the text of the Act itself, that a multiplicity of factors are to be balanced against each other: the likelihood of damage, its severity, the usefulness of products, the costs of anti-hazard measures, but also the obviousness of dangers, so that the question of the user's own responsibility remains an essential and legitimate aspect[34].

As a result, terms such as "foreseeable use" and "foreseeable misuse" are certainly helpful in developing safety standards and in offering some guidance to courts and competent authorities[35]. At the same time, however, the need to adapt these terms shows that in order to be able to specify the appropriate safety level, a whole series of further aspects must be considered and assessed.

☐ 2.2 Hazard assessment, freedom of decision and cost-benefit analysis

The contrast between the "paternalistic" protection of the consumer against his own foreseeable incorrect behaviour on the one hand and insistence on the consumer's own

responsibility in the case of incorrect use of products is a permanent feature of the entire debate on the justification for and limits of product regulation by the State. The contrast between "paternalism" and "own responsibility" also takes the form of a dispute between political and moral judgement on the one hand and economic rationality concepts on the other. But not only have new terms been invented in these debates; relevant framework conditions for an appropriate decision on the level of safety have also been reconsidered.

☐ 2.2.1 Political and moral hazard assessments

As soon as the safety level of technical consumer products is recognised as a normative decision problem, the question of the rationality of the procedures concerned has to be settled whilst at the same time the selection of a particular decision procedure also affects the criteria taken into account to arrive at a decision[36]. As long as the manufacturer does not have to comply with a specific safety level and consumers may define their own safety interests and are themselves responsible for observing the same, the safety level will remain a function of supply and demand decisions.

On the other hand, if the "accepted" state of the art is to be regarded as the binding minimum norm, the logical consequence is to make technical experts responsible for laying down these rules[37]. Finally, anyone who does not wish to leave safety decisions to market forces, but also does not wish to abide by the average level or the state of the art and sees the guaranteeing of safety as a political task will assign this task to either State authorities or independent agencies.

R. B. Lave has drafted a list of how such agencies can be used[38]. The elimination of hazards by strict bans can be called for, but as a rule such bans quickly turn out to be unenforceable. The best available technology can be demanded, but this norm, too, is usually controversial and particularly in the case of technical consumer products would be an illusion. Another possibility is to balance the health risks for a product against its uses, either ignoring or taking particular heed of economic factors; this means that in the first case the decision is based on safety criteria only, whilst in the second case all socially relevant factors will be considered. Even if in the latter case the decision framework remains discretionary, it is suitable for application in connection with consumer product safety regulation. The technical complexity and hazards of such products vary considerably. Some are essential despite inherent dangers, e.g. kitchen knives. Sometimes there can be a dispute about how necessary products are, as in the case of the banning of skateboards in Norway[39]. The ability to come to terms with hazards varies from one age group to another, as a result of which design safety demands also differ. Finally, the effects of safety requirements on production costs and selling prices do not just have an economic significance. They can put products beyond the means of specific population groups and thus have a discriminatory effect.

This large number of potentially relevant aspects does not exclude appropriate structuring of the decision process. This is illustrated by the OECD report on "Product Safety, Risk Management and Cost-Benefit Analysis"[40], which distinguishes six groups of considerations: general aspects of the product concerned (in particular its distribution and its usefulness); technical characteristics (including a check on technically possible alternatives); analysis of

hazards attributable to design or misuse respectively; analysis of hazards due to the organisation of the production process rather than to design; differentiation by age groups, recognisability of dangers, likelihood of misuse; increased costs resulting from safety requirements and anticipated economic effect of a reduction of hazards.

☐ 2.2.2 Economic rationality criteria

In view of the intangible nature of normative safety policy decisions, the search for "objective" decision-making criteria is certainly understandable. The current call, particularly in the USA, for safety policy to be brought into line with cost-benefit analyses is often combined with a promise of clear and rational decision-making criteria. Cost-benefit analyses are seen as an instrument of regulation. However, the criteria of such analyses are linked to a view of the safety problem derived specifically from the market economy, namely the conceptualisation of the "optimal" safety level as an economically rational decision balancing the cost and benefit of safety. Microeconomically, this means that the usefulness of safety measures is to be measured in terms of willingness to pay for a reduction of hazards that entails costs. A cost-benefit analysis of safety measures cannot take account of individual safety decisions (readiness to accept costs), as the cost and benefit of such measures affect consumers as a whole (and not always to the same extent). Cost and benefit must each be aggregated, and the conceptualisation of the safety problem as an economic problem then means that the total cost of a measure should not in any event exceed its total benefit[41].

As far as the cost side is concerned, quantification can be based on the anticipated effect of a measure on the market price of the products concerned. Limitations on usability (e.g. time taken to open safety locks, etc.) and costs of implementing a regulation must be estimated, whilst on the other hand the medium- or long-term scale advantages which the introduction of a universally binding safety standard may bring must also be taken into account. It is still harder to quantify benefit. In addition to savings on medical costs and wage payments to sick workers, the suffering of potential victims must also be quantified; the American Consumer Product Safety Commission bases its findings on solatia awarded by American juries[42], whereas the corresponding "benefit" in Europe would be considerably lower. The most familiar quantification problems concern deaths. One way is to use loss of income, but more widespread is recourse to wage differences between hazardous and less hazardous occupations, since an approach can be based on observable behaviour patterns on (labour) markets[43].

Taking a position in principle on the application of cost-benefit analysis to problems of safety regulation serves little purpose unless we go into the details of the different variants of this analysis method. However, a thorough cost-benefit analysis indisputably involves considerable expense, is often based on very unreliable estimates[44] and does not take account of possible distributive effects or the effects of regulations on competition; furthermore, criteria for calculating benefit in cash have to abstract from individual suffering, so that cost-benefit calculation requires willingness by the decision-maker to take an abstract approach.

☐ 3. Instruments of safety regulation

The spectrum of regulatory action is wide, and the possibilities include preventive approval regulations, performance standards, certification procedures, voluntary standards and safety symbols, warnings, safety campaigns, follow-up market controls (recalls and bans) and rules on liability. Employment of all these instruments is dependent on prior strategic and conceptual thinking. Product hazards can be reduced preventively by product bans, compulsory safety regulations or standards and certification requirements, as well as by information campaigns and, especially at work, by training measures. Liability rules, follow-up market control measures and safety-conscious purchasing advice also have an indirect effect on the safety level of products. However, in practice the decision on which of these possibilities to apply is very much subject to objective constraints. The most obvious of these is a direct result of the area concerned: the number and diversity of technical consumer products, technical progress and the different behaviour patterns and protective interests of users make positive regulation of all safety aspects of consumer products impracticable. Accordingly, if only for pragmatic reasons, it is advisable to assess the efficiency and performance limitations of the market mechanism before introducing any regulatory measures.

☐ 3.1 Self-regulation by the market and market-complementary regulation

Markets, too, are regulatory mechanisms. Their particular characteristic is that they do not specify the "regulatory outcome", but rely on the supply-and-demand discovery process. It can be shown that under certain circumstances markets bring about an optimum allocation of resources. This applies to the price-performance relationship in general and therefore also to the safety level of products. Here, too, it is a matter of weighing up benefit and cost in order to decide which safety precautions are economically viable and which hazards should be tolerated. However, the market process brings optimum results only under certain model conditions which in practice are difficult to guarantee, particularly as far as the level of safety is concerned[45]. This is particularly true of the rationality of a consumer's safety decision[46]. Only a "fully" informed decision would be economically rational. This condition is sometimes followed strictly, sometimes less so. It will certainly not be fulfilled, in fact it cannot be fulfilled, as long as the stage reached by medical research does not permit conclusions on health hazards. On the other hand, this condition is not sufficient in cases where the user of a product endangers not only himself, but others as well. "Normal" cases are more difficult to assess. The hazards are recognisable, but the user does not bother to obtain the information, for reasons of economy or convenience. Attention is drawn to hazards, but the information cannot be processed; hazards are seen but ignored, since "bad things always happen to the other guy"[47]. In addition, suppliers can put such cases of "information failure" to strategic use. In any event we should not expect product advertising to draw attention to hazards, and we must not automatically assume that a high level of safety is always beneficial to the supplier[48].

☐ 3.1.1 Information policy measures

If under certain circumstances markets produce an optimum level of safety, the logical consequence is to react to safety problems primarily by means of regulative strategies aiming to guarantee the functional conditions of the market process. The policy of informing the consumer then has priority, especially as the individual consumer then has the freedom to make the best decision to suit his purposes. The actual organisation of such measures is in fact difficult and their effectiveness often questionable[49]. In order to "fully" compensate for information deficits, information should be supplied to the consumer in such a way that he can recognise and take notice of it. Simplification may help where receptiveness is limited, but information must also be expressed in a suitably explicit manner in order to overcome tendencies to ignore it. However, as shown by the example of the warning on swimming pool slides required by the Consumer Product Safety Commission[50], these objectives may conflict; for instance, information in restrained form may be ineffective from the safety point of view, whilst effective information may have a dubious effect from the point of view of competition. Such conflicts can also occur in the case of broader information policy measures. Safety symbols can under certain circumstances be awarded or product tests designed in such a way as to provide simple and reliable safety information without unfairly distorting the competition process on the supply side. However, the safety effect of such measures is dependent on a large number of peripheral conditions[51]. Finally, whilst general information campaigns in principle reach all persons potentially concerned, they are a regulatory instrument with a tendency to go beyond the framework of an information policy aiming to optimise market processes[52].

☐ 3.1.2 Product liability

A manufacturer's strict liability for defective products constitutes, from the viewpoint of economic analysis of liability law, a form of compulsory insurance of consumers against particular hazards involved in the use of products; the customer's freedom to choose "uninsured", but cheaper, products and to rely on his own care in using the product is thus lost[53]. However, the obligation on the manufacturer to take responsibility is only an incentive to reduce product hazards. It remains up to the manufacturer what steps he takes in response: design changes, liability insurance, waiting and seeing. This indirect mode of operation of liability law, which exploits the market mechanism, explains why product liability is often interpreted as a "pro-market" alternative to direct government regulation of product safety, and recommended as such.

The actual effects of product liability on the level of safety of consumer products depend on the details of liability, the treatment of development hazards, the requirements in respect of proving a connection between product defects and damage, the level of penalties and consequences of co-responsibility, etc. Moreover, only an analysis of these detailed regulations can show how far product liability in fact relies on the logic of the market process, and how far it additionally switches risks according to criteria of social acceptability. There are also other various factors which, independently of the more detailed legal aspects of liability, restrict its regulatory effects[54]. First of all, it is highly doubtful whether penalties under liability law are or ever can be so formulated as to produce the required safety policy effects. At any rate the "signals" of product liability law are rather too irrational; for example,

in the case of injuries to children a death can be "cheaper" than a serious injury. Secondly, the reactions of firms to claims for damages depend on contingent circumstances: the competition situation on relevant markets, the internal organisation structures and financial strength of the firm concerned, and its willingness not to simply ignore the possibility of future penalties in favour of sure short-term advantages. A third cause is the insurability of the liability risk. Insurance premiums are obviously not specifically matched to risk. It seems possible to make distinctions only between branches or product groups, as adapting premiums to product-specific risk factors in all cases would not be compatible with the philosophy of insurance protection, nor in any case with insurance practice[55]. A fourth weakness of product liability law stems from the extreme selectivity of the private prosecution system. Product liability law can neither guarantee that injured parties will take upon themselves the trouble and financial risk of a private prosecution, nor can or should it exclude out-of-court settlements[56].

☐ 3.2Product standards

The weaknesses of information policy and product liability law mean that in principle the justification for preventive safety regulations is undisputed. It is also undisputed that the technical complexity of product regulations and of continually adapting them to technical progress is beyond the means of general parliamentary legislation procedures, meaning that the task of introducing specific regulations has to be delegated. In this connection there are ideally two alternatives: the introduction of legally binding safety regulations by specialised public agencies, or the introduction of self-administered safety norms by the industry concerned. However, in practice these ideal alternatives are not encountered; product regulation is dominated by hybrid systems with a tendency towards "corporatism".

☐ 3.2.1Mandatory product standards

As the assurance of safety is one of the duties of the State, it would appear logical to make State authorities responsible for drafting product regulations. This is the path followed by modern product safety laws. The UK Consumer Protection Act 1961 delegated the issuing of safety regulations to the executive authorities, giving Parliament only the right to participate in the process, and the right of subsequent annulment[57]. In the USA the Consumer Product Safety Act, in its original version of 1972, went even further. It set up, in the form of the Consumer Product Safety Commission, a State agency (though protected from the direct control of the House of Representatives or the Administration), which was allowed to fix its own priorities and draft its own regulations[58]. The practical and organisational problems of such an allocation of responsibilities match the complexity of a comprehensive normative assessment of hazards[59]. For such an assessment it is first of all necessary to "measure" risks, i.e. to develop an information system for the identification of product hazards. A second precondition is that the authority concerned should be competent, from the technical and scientific point of view, to assess design characteristics of technical consumer products, to identify any risks and develop technically feasible requirements aimed at reducing the risk. A third precondition is that it should be competent, from an economic and sociological

viewpoint, to assess the social consequences, implications for competition policy, costs and benefits of a regulation. Authorities invested with only legal competence to pass product regulations are not in a position, or if so only to a limited extent, to carry out a comprehensive assessment of risks.

Technical safety legislation has nowhere made adequate provision for the assessment of risks, whether in organisational or in technical terms. In the UK, the CPA 1961 was based on State adoption of standards drafted by the competent institutions and did not seek to set up independent administration for the implementation of safety regulations; these shortcomings were only partly counterbalanced by later measures[60]. In the USA, the CPSC was set up taking into account the preconditions for drafting product regulations. However, there, too, the available resources meant that from the outset only selective action was possible; above all, the legal and technical fields of responsibility of the CPSC were subsequently reduced to such an extent that the Commission's role was limited to merely supervising standards drafted by the standards institutions, in sharp contrast to original intention[61].

☐ 3.2.2Technical norms

The normative aspect of safety assessment does not become any simpler when responsibility for drafting product standards is transferred to private organisations, and the practical and organisational advantages of reducing the burden on the legislative process in this way are offset by an endangering of the normative quality of safety regulations. In the past the impulse for the "voluntary" introduction of product standards came from the development of industrial mass production, as the need for technical standardisation became essential so that it would be possible to interchange and combine production elements[62]. This function of private standardisation is still valid, but has become more and more caught up in the whirlpool of society's increasing demands that "technical" solutions take account of safety and environmental aspects[63]. The basis for criticism is as simple as it is obvious[64]: as long as the industries concerned are themselves responsible for standards, genuine consideration of safety and environmental aspects cannot be expected. The justification of such reservations about self-regulation as opposed to State regulation is in principle generally acknowledged. It is therefore also generally accepted that such a transfer of decision-making functions must be compensated for by laying down special requirements for the drafting of standards, which in particular must guarantee a "balanced" representation of all interests concerned in the standardisation process and the consideration of "social" requirements, among them safety[65]. Finally, it is recognised that the State should remain in a position to set safety priorities and that standards should not become legally binding until they have been through an additional checking procedure.

The actual role played by "private" norms within the framework of genuine governmental product regulation on the one hand and the influence of the State on private standardisation on the other moderate the contrasts between basically governmental and private standardisation. However, for the time being the forms of interaction between State and society vary considerably. In the Federal Republic of Germany[66], the United Kingdom[67] and now at European Community level[68], the measure of influence of the State is restricted by conventions, or by mutually agreed "general principles". However, the formal rights of

participation of social groups differ, and the degree to which standardisation results are subjected to subsequent checks also does not seem to be uniform. In France the administration's possibilities for exercising direct influence seem to be more distinct[69]. In the USA the role of the CPSC in drafting voluntary standards has been defined in detailed regulations and its powers to introduce compulsory regulations remained significant for the inclusion of safety aspects in "voluntary standards"[70]. Consequently, the only principle to become generally accepted is that technical safety regulations should be developed by private standards institutions drawing on the technical expertise of the industries concerned ("it is expensive to reinvent the wheel"[71]). There is, however, no consensus on the regulative mechanisms to guarantee acceptance of private standardisation from the point of view of safety policy.

☐ 3.3 Follow-up market controls (recalls and bans)

All product safety policy instruments aimed at the preventive control of design hazards of technical consumer products have a selective effect. State regulations can cover only a fraction of risks potentially requiring regulation; private standards institutes too must lay down priorities and cannot enforce the implementation of their norms, which are not legally binding. When all is said and done, the primary function of product liability is to compensate for any damage, and its influence on the level of safety is indirect and incomplete. However, preventive safety measures are not only inevitably selective, but also imperfect. The complexity of accidents means that particularly in the development of new products it is impossible in advance to recognise all hazards precisely. The selectiveness of preventive safety measures and the uncertainty of hazard forecasts are already two reasons to suggest that monitoring products in use and powers of subsequent intervention are essential. However, follow-up market controls also have a redistributive function. If the marketing of dangerous products is banned, traders suffer economic losses; if the products are already in the hands of final consumers, the repair or exchange of the products or the payment of compensation involves additional costs. The development of effective instruments of follow-up market control is, in the context of these functions, a difficult task from the legal point of view. However, primarily because of the costs involved, the loss of image which the companies concerned may suffer and the potential effects on product liability procedures, follow-up market control comes up against considerable legal resistance.

In 1981 the OECD proposed solutions to the problems of follow-up market control based on the recall provisions of Section 15 of the CPSA 1972 [72]. The OECD report divides the procedure into three stages [73]: (1) The essential first step is the systematic recording of information on product hazards. The main information sources are accident information systems and reports from supervisory or certification authorities, followed by reports from manufacturers and importers, and complaints from consumers and consumer organisations. (2) When the dangers have been identified, suitable remedies must be taken. First of all, the consumers concerned must be warned about the hazards, then positive action must be taken to eliminate hazards and provide compensation for any damage. Measures must be adapted to the individual case; repairs may be sufficient, but in some cases products will have to be exchanged or destroyed and damages paid. (3) For the collection of information, assessment

of hazards, and the preparation and monitoring of remedial measures it is necessary to set up a central authority which is in a position to carry out follow-up market control and must therefore be invested with the required legal powers.
No Community Member State has yet fulfilled these requirements. German law provides for marketing bans (§ 5, GSG), but a recall obligation exists only in conjunction with producers' liability [74]. English law provides for "prohibition orders" and "prohibition notices" which the Secretary of State can invoke in the case of "imminent hazards" (see § 3 (1) a-c of the Consumer Safety Act 1978); in practice, however, these instruments are not applied and it is not intended to develop them into a recall procedure [75]. In France the Consumer Safety Law of 21 July 1983 is a potentially far-reaching instrument providing for recalls through the State machinery, but as yet it has hardly been tried out [76].
In the face of such reticence and resistance in the Member States, it should be noted at this point that the Community's current efforts to complete the internal market will be bound to have consequences for the development of follow-up market controls. The principle that products with European certificates of conformity manufactured according to foreign standards or tested by foreign institutes should be allowed to move freely in all Member States will encounter safety-motivated reservations which may also be linked to protectionist interests. We will return to the resulting need for action at a later stage[77].

☐ 4.Summary

Product safety represents a scarcely consolidated policy area, where information measures, liability rules, self-regulatory mechanisms and legal intervention exist side by side. Each of these instruments fulfils specific functions and therefore uses different regulative mechanisms. However, at the same time each instrument leads its own legal life; as yet there is no coherent product safety policy to co-ordinate these instruments, take account of the effectiveness of each, harmonise safety standards and control the development of legal instruments with the overall aim of reducing product hazards. As far as the approximation of laws in the European Community is concerned, this situation results in both problems and opportunities. The difficulties stem from the fact that the approximation of laws in a specific field involves inter-State co-ordination of heterogeneous legal instruments, and therefore may result in changes which lead to gaps in protection, in turn causing difficulties in reaching agreement or even resistance to the implementation of Community law. On the other hand, as shown by the example of environment law, it is precisely in new policy areas that willingness to change and learn is likely to be encountered - provided that integration policy provides the incentives and constraints that are needed to bring about innovation.
FOOTNOTES

1. See the colourful, though USA-related, examples given by Feldman, 1980, 73 et seq.; Lowrance, 1976, 102 et seq.
2. Though there are some counter-examples, the most prominent being Nader, 1965.
3. Cf. for more details Brüggemeier *et al*., 1984, 8 et seq.
4. Cf. Paschen/Bechmann/Wingert, 1981.

5. Cf. Chapter II, 2.2.
6. Cf. Chapter II, 3.3.3.
7. Cf. Chapter II, 1.2.
8. Pertschuk, 1982, 5 et seq. and the summary in Bollier/Claybrook, 1986, 275 et seq.
9. Cf. Chapter II, 4.1; also OECD report Safety of Consumer Products, 1980, 14 et seq.
10. National Commission on Product Safety, Final Report, 1970, 1.
11. Cf. OECD, Data Collection Systems, 1978.
12. Evidence of Commission Chairman S. Statler, given to the hearings before the Subcommittee on Health and Environment of the Committee on Energy and Commerce. House of Representasupratives, 98th Congress, First Session on H.R. 2271 and H.R. 2201, 5 and 12.3.1981, No. 97-4, Washington D.C. 1981, 321. For the bases of these estimates cf. Chapter II, 4.2.
13. Cf. Cmnd. 9302, The Safety of Goods, 1984, White Paper, para. 9, and details of the British system in Chapter II, 2.5.
14. Cf. Stichting Consument en Veiligheid, Report of 1984, 1985, 2 et seq., 10, 12, 46. The report "Veiligheid in de privésfeer" (Tweede Kamer, vergaderjaar 1983-84, 18.453), Nos. 1-2, 12, 17 et seq., estimates the dangers of accidents resulting from medical treatment at 2 to 2.6 million.
15. Cf. Section 6.2. of the report (COM (84) 735, section 6.2) on the model study attached to the Commission Proposal for a Council Decision on introducing a Community system of inforsupramation on accidents in which consumer products are involved (7 January 1985); for further details see Chapter III, 3.3.
16. Chicago 1972.
17. Pfundt, 1985; cf. for more details Chapter II, 3.1.
18. Pfundt, 4 et seq.
19. Loc. cit., 190.
20. Cf. OECD, Data Collection Systems, 1978, 27 et seq. and the two preliminary studies published in the Netherlands on the extension of the PORS Bruggers/Rogmans, 1982 and Rogmans, 1982.
21. Cf. Chapter II, 4.2.1 and by way of comparison the OECD report, Severity Weighting, 1979.
22. Cf. Chapter II, 4.2.2.
23. Cf. Netherlands report "Veiligheid in de privésfeer", (note 14 supra), 21, and Compes, 1986 and Gürtler, 1986.
24. Cf. Chapter II, 3.1.
25. Pfundt, op. cit. (note 17), 1985, 99, 101, 105, 119. Such assessments can be found even in cases that have elsewhere led to governmental regulations. Thus, the section on lawn-mowers states that the majority of accidents were caused by blades that were running or slowing down, but it states even earlier that the machine is dangerous not during mowing as such, but when stopping, starting or being cleaned (loc. cit., 136). It was precisely these characteristics that led to the development of relevant safety standards in the US (see Chapter II, 4.3.2.2).
26. US Consumer Product Safety Commission, Division of Hazard and Injury Data Systems: Results of a Pilot Study to Collect Causal Data from Victims Treated in

Hospital Emergency Rooms for Product-Related Injuries from April 15, 1985 through April 28, 1985, Washington, D.C. 1985.

27. All the same, 10% of those questioned identified manufacturing or design faults as causes of accidents. This very high proportion by comparison with the findings of the HUK study is a further indication of the relevance of forgetfulness in the case of retrospective studies. In 11% of cases, product misuse was seen as the cause of an accident; 42% of these, though, concerned children under ten, whose "mistakes" were in part typical childish behaviour.
28. Lowrance, 1976, 75; similarly cf. e.g. OECD report, Product Safety, 1983, 13.
29. Cf. Chapter II, 3.3.3.1.
30. Cf. Chapter II, 1.6. and on European Law Chapter III, 3.5.
31. Cf. Chapter II, 3.3.5.
32. Journal Officiel 115 No. 168, 2261; cf. Chapter II, 1.
33. Cf. for details Brüggemeier, 1986, Nos. 544 et seq.
34. For details on the difficulties of interpreting the "unreasonable risk" test, see Hoffman, 1976, 401 et seq.; see also LaMaccia, 1975, 849 et seq.
35. This debate is therefore fully documented; cf. Chapter II, 1.2 for French law, Chapter II, 2.6.2 for British law and Chapter III, 3.5 and VI, 3.3 for European law.
36. Cf. in particular Lave, 1981, 8 et seq.
37. Consistently, DIN 31.000/VDE 1000 says that in case of doubt, safety requirements take priority over economic considerations.
38. Lave, 1981, 8 et seq.
39. Cf. OECD report, Product Safety 1983, 34 et seq.
40. Loc. cit., 45-51; a more general and even more sophisticated list is provided by Lowrance, 1976, 86 et seq.
41. Out of the extensive literature available, cf. Miller III/Yandle, 1979; a brief introduction can be found in OECD, Product Safety, 1983, 63 et seq.
42. Non-authorised memorandum of the US Consumer Product Safety Commission of 25 February 1986 by P.H. Rubin, 3.
43. A summary of the situation can be found in Viscusi, 1983, 93 et seq.
44. Cf. Chapter II, 4.3.2.2 (lawn-mowers) and 4.3.2 (formaldehyde) and the examples in OECD, Product Safety, 1983, 79 et seq.
45. Cf. Oi, 1973; Streit, 1984.
46. This is even conceded by Viscusi, 1984, 5 et seq.
47. G. Calabresi, 1970, 56.
48. Cf. Akerlof, 1970.
49. For the up-to-date situation cf. Dedler *et al*., 1984.
50. Cf. Chapter II, 4.3.2.1.
51. Cf. Silberer/Raffée, 1984.
52. Cf. Mayer/Nicosia, 1976.
53. Cf. on economic analysis of product liability, Adams, 1985, 17 et seq.
54. Cf. Pierce, 1980, Sugarman, 1985; Eads/Reuter, 1983; Brüggemeier, 1987.
55. See also Schäfer/Ott, 1986.
56. Ramsay, 1984.

57. Cf. Chapter II, 2.2.2.
58. Cf. Chapter II, 4.1.1.
59. See 2.2.1 supra.
60. Cf. Chapter II, 2.2 and 2.3.
61. Cf. Chapter II, 4.4.
62. Cf. Marburger, 1979, 181 et seq.; Kypke, 1983, Chapter III; Hamilton, 1978, 1331 et seq., 1368 et seq.
63. Cf. Schuchardt, 1979, 236 et seq.
64. Cf. summary given by Hamilton, 1978, 1379 et seq.
65. Cf. Marburger, Rechtliche Bedeutung, 1982, 138 et seq.
66. Cf. Chapter II, 3.4.2.
67. Cf. Chapter II, 2.6.2.
68. Cf. Chapter IV, 3.5.
69. Cf. Chapter II 1.7 for more on this.
70. Cf. Chapter II, 4.4.
71. Hamilton, 1978, 1447.
72. OECD, Recall Procedures, 1981; for US law cf. Chapter II, 4.5.
73. Cf. in particular OECD, Recall Procedures, 1981, 14 et seq., 31-32.
74. Cf. Chapter II, 3.5, and Brüggemeier, 1986, Nos. 563 et seq.
75. Cf. Chapter II, 2.3.3 and 2.4.
76. Article 3 of Loi No. 83-660 (note 32) and Chapter II, 1.5.2.
77. Chapter III, 3.4; Chapter IV, 3.3 and 3.4; Chapter V, 3.2 and 4; Chapter VI, 3.4.

Chapter II:

Examples of product safety legislation

It is no coincidence that up-to-date comparative accounts of Member States product safety laws are largely unavailable. This is no coincidence. Technical safety law, to the extent that it deals with technical consumer goods, has been largely ignored by academic legal science, and is therefore given less importance in comparative law. Moreover, product safety law is much more strongly bound up with technical and organisational administrative structures than, for example general civil law. These structures must be recognised in order to understand its regulatory functions, but are hard for the foreign observer to gain access to. The description below will therefore have to proceed selectively, and will be confined to the laws of France, Britain and the Federal Republic of Germany. Restriction to these States is problematic because it means overlooking innovative developments in smaller Member States and the current situation in new ones. But the choice of France, Britain and the FRG is in line with the economic importance of these States and their general influence in the Community. U.S. law is also taken into account, since important stimuli to the further development of product safety law have come from the American Consumer Product Safety Act.

Part 1:

Product safety law in France

French product safety law is hard to fit into a market-oriented approach[1]. The French analytical framework, conceived from a State or administration viewpoint, of prevention/repression/reparation, cuts straight across a German market-oriented category frame of market-related rules, setting of standards and follow-up market controls[2]. Given the emerging Europeanisation of safety policy, it is important to grasp what convergence exists and seek to bring it into a European, self-contained product safety policy.

1.1 French perspectives on product safety law

An approach to the field can be established from a schematic overview of French safety and standards policy. A historical outline of the development of both policies will be attempted. An evaluation of the process might seem to be a bold venture, but the Europeanisation of product safety has to start from a definition of the state of Member States' product safety policy. A more technical matter is the explanation of the French categorical framework of prevention/repression/ reparation, but this is a necessary prerequisite for an understanding of the specifically French way of perceiving and managing product safety policy.

1.1.1 Schematic overview of French product safety and standards policy

The diagrams below make no claim to completeness, but do aim to outline the tendencies operating in both policy areas. This cannot be done without considerable simplification. The state of legal development at the turn of the century has been taken as a starting point. This is simply because relevant laws were enacted in France shortly thereafter. The thread of development is then picked up again for pragmatic reasons after the Second World War, with special consideration going to the wave of reforms in the 1970's, which then led to a phase of regression. Since there has not yet been a coherent product safety policy in France, at least not including technical standards, development in both policy areas must initially be described separately. This leads to a time shift, since standards policy as it were, leapt over the reform phase of the 1970's, and did not take on importance in France until economic crises, unemployment and the wave of deregulation began to determine day-to-day politics.
For the conceptual framework, the classical French system of prevention/ repression/reparation[3]. has been adopted. A transfer of this conceptual approach into standards policy makes it possible to compare regulatory instruments in each policy area with each other and thereby show that there is no overlap.
"Prevention" includes the following measures: information, standard setting, both private and governmental, follow-up market control (administratively ordered recall), prohibition orders and the work of the French Consumer Safety Commission.
"Repression" concerns primarily penal sanctions, but also covers imposition of compensatory payments and accompanying measures of sanction (bans or recalls ordered by judges, confiscation, destruction, closures etc.).
"Reparation" deals with the French version of product liability.
The reasons for the French conceptual structure lie in the one-sided administrative perspective on product safety as a whole. The viewpoint has already undergone some changes through inclusion of reparation as an instrument of safety policy, first incisively practised by the Commission de la Refonte[4]. . The liberalisation policy pursued for some ten years now in France ought to lead to a blurring of the categorial outlines, since the private economy, the consumer and the courts will gain ground in safety regulation. However, at present, the whole political, legal policy and legal theory debate on standardisation and product safety in France continues to follow traditional lines.

1.1.2 Product safety and standardisation side by side

The conceptual framework of French product safety policy has (from the consumer's viewpoint also and especially) led to a very narrow understanding of product safety, which has no room for a number of relevant cross-connections. Thus, there is no systematic incorporation of standardisation into product safety policy. This is even truer of certification,

which is hardly discussed at all. Though product liability is included in safety policy, it is treated only as leading to individual compensation for damages, not as an instrument for controlling product safety. Finally, there is no discussion of the relationship between product liability and technical standard setting. The research approach pursued here, of bringing product safety and technical standards into relation with each other, meets in France, partly with rejection and partly with misunderstanding. It is rejected because the administration continues to be seen as the best guarantor of product safety; it is misunderstood because the connecting lines are not clearly seen, due to the absence of intermeshing between product safety and standards; indeed, perhaps they do not even exist. The last point is true, at any rate, for the sphere of product liability, which seems not to refer to technical standardisation at all.
The French government is responsible for the regulation of product safety[5] . Standards are set by order. The administration's responsibility for product safety has remained unshaken even after the reform attempts of the 1980's. The setting up of a Consumer Safety Commission[6] was fitted seamlessly into an administrative product safety policy, for all that was done was to shift tasks from the administration, without at all limiting ultimate administration responsibility and control. Looking closely from the French viewpoint, at the distribution of roles among the three powers, the cautious inclusion of the courts appears to be the most desicive change in the newly introduced product safety law[7] . Still existing legislative and executive mistrust of inclusion of the judiciary can be seen from the fact that though Art.1 is conceived as a general clause, it is not directed explicitly at the courts. Accordingly, until the significance of Art. 1 has become clear, more importance should be attached to the courts' power, newly introduced in 1983, to issue a banning order or withdraw products from the market by emergency procedure on application - and not just to the relevant secretary of state or consumer minister, or certain administration officials[8] . The 1978 law still saw product safety policy entirely from an administrative point of view, and was explicitly aimed at excluding the courts from prevention[9] .
French standardisation is a governmental task[10] . AFNOR has been incorporated into the governmental organisation of standardisation, with the duty of drawing up technical standards, which, however, must be supervised and checked by the Commissioner for Standardisation as representative of the State. AFNOR has discretion only insofar as it is allowed by the French administration. The essentially governmental and administrative organisation of standardisation also means that the reforms of the 1980's changed nothing. Nevertheless, the reform of 1983 is bringing shifts that might in the long run, lead to a change in the division of responsibilities between government and the economy. The keywords are privatisation and politicisation of standardisation. Privatisation has come in since the reform made the administration yield some of its tasks to the privately organised standards body AFNOR; politicisation because creation of the Supreme Council for standardisation makes the guidelines for standardisation policy into a topic of public debate. The parallel with the standardisation agreement reached in 1975 between DIN and the Federal Government is self-evident[11] . No intermeshing of the reform attempts in product safety law and in standardisation, which were pushed forward in parallel, took place, at least openly. With some exageration, one might say that product safety was discussed without standardisation, and standardisation without product safety. Para. 3 of the GSG (reference to standards) constitutes, from the German viewpoint, the bridge between the two policy areas. C. Germon

and P. Marano[12] proposed the "German solution" in their report to the French Ministry for Industry. No discussion of the advantages and drawbacks of the German approach took place. However, there were some hints at it. The rearrangement of French standardisation was aimed primarily at strengthening the French economy's competiveness; expansion of consumer protection and the setting up of a supreme council for standardisation were to enhance acceptance of French standards in public awareness. Though the German GSG and consumer trust in standards were taken by C. Germon and P. Marano as shining examples, the French plainly went their own way towards increasing national competiveness. Comparison of the reform proposals with the law shows that the French government ultimately shrank from copying the German method of reference.

1.2 The "safety philosophy" of the 1983 law

While Art. 1 of the French law on product safety[13] does lay down a general obligation on the manufacturer to bring only safe products to the market, reference to the "generally recognised rules of the art" (allgemein anerkannten Regeln der Technik) is lacking:
"Les produits et les services doivent, dans des conditions normales d'utilisation ou dans d'autres conditions raisonnablement prévisibles par le professionnel, présenter la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la santé des personnes".
The constitutive elements of this general clause are (1) the "autres conditions prévisibles par le professionnel" and (2) "la sécurité à laquelle on peut légitimement s'attendre". It is sometimes disputed that these are indeed two constitutive elements, since the "safety one may legitimately expect" also covers admissible use. This is not so[14]. The "other reasonably foreseeable conditions" describe the safety requirements on product manufacture. The addressee is the manufacturer. The "safety one may legitimately expect", on the other hand, defines the consumer's justified expectations of safety. Though the two viewpoints can theoretically be separated, they are in practice very similar. For the actual safety level must include requirements covering both the manufacturer and the consumer's expectations.

1.2.1 The general clause in Art. 1

The important innovation in the 1983 law was the general duty of safety imposed on the manufacturer. France was thus drawing the consequences of the almost complete failure of the 1978 framework regulations[15].
Only two orders were issued between 1978 and 1983. Accordingly, administrative regulation of the classical type could be regarded as having failed. The cumbersome decision-making process within the administration must have given the stimulus for setting up a separate consumer safety commission, which would have some autonomy at least in the areas of information gathering, assessment and processing. In 1985 the Commission had a budget of

2.4 million francs at its disposal, 500,000 francs of which were designated for research purposes. The secretariat consisted of four people, including a secretary.
According to the general clause, the Commission can itself consider almost any question and is not dependent on special authorisation by any order or provision. This was the specific weakpoint of the 1978 law[16]. Here there is no doubt that administrative cumbersomeness helped bring back the courts into the process of State standard setting. Yet even these changes do not alter the main thrust of product safety regulation. As before, the chief addressee is the administration, which alone can give the safety obligation legal bindingness, by specifying the general clause through the enactment of orders, or by a ministerial decree[17].
Since the French legislator has rejected adoption of the method of reference to standards, the question remains open as to how safety standards can be made specific.
Technical standards can be adduced as aids to interpretation, but their observance does not offer the French manufacturer any protection against action under Art. 1[18]. In practice, the manufacturer's main fear must be of the activities of the Consumer Safety Commission, which has explicitly stated that the safety requirements of Art. 1 may well lie higher than those of the technical standards drawn up by AFNOR[19].

1.2.2 Determination of safety levels

The shift in French safety philosophy emerges clearly from the change in wording from the 1978 safety law's "conditions normales d'utilisation" to the 1983 "autres conditions raisonnablement prévisibles par le professionnel (qui doivent présenter) la sécurité à la quelle on peut légitimement s'attendre". The 1983 safety law for the first time separated the distinct standpoints of consumer and manufacturer, and at the same time heightened the requirements on the manufacturer. The criterion is not proper use, but reasonably foreseeable use; this is what the manufacturer has to use as a guide in design and production.
Not many problems are presented by the consumer's position. The definition states clearly that it is not the individual viewpoint that should be decisive, but the position of the average consumer[20].
Far greater difficulties of interpretation are presented by the intensification of the safety obligations on manufacturers[21]. The elementary political significance of the change in safety policy becomes clear from the stormy parliamentary debate. Admittedly, the preliminary draft had focused on "condition anormale d'utilisation" (improper use), thus considerably contributing to heating the debate. Efforts then concentrated on clarifying what was to be understood by "autres conditions raisonnablement prévisibles par le professionnel". The French debate becomes comprehensible only if it is borne in mind that consumer organisations were pressing for adoption of "improper use". The move away from "condition anormale d'utilisation" made two things clear: (1) improper use resulting from culpable conduct by the consumer was not to be covered by the general clause; (2) on the other hand, foreseeable collective error was to be covered. The parliamentary debate centred on the "condition anormale" alone. By contrast, there was wide unanimity about obliging manufacturers to take account not only of foreseeable conduct but also specifically of

foreseeable misuse. But even the French formulation of the general clause is of no further help when it comes to distinguishing collective foreseeable misuse from misuse that is unforeseeable because it is improper. The distinction will be left up to the judge, who will have to decide how far the marketing of a faulty product is criminal, or else to be compensated for by payment. This presupposes that in the specific case, an order has been issued that makes the general clause specific.
It is hard to give any meaningful summary of experience with the new product safety law of 1983. The fact remains that France is the only EC-country where a "safety philosophy" that explicitly includes foreseeable "misuse" does exist.

1.3 Consumer Safety"Information policy and the Commission for Consumer Safety

A State policy on safety information has existed in France only since 1983. The 1978 law[22], even though its title includes "information to consumers", provided no measures to meet the consumer's specific safety requirements. It was only with the enactment of the 1983 law[23] and the creation of the Consumer Safety Commission that an instrument aimed essentially at improving information could be said to exist.

1.3.1 Information from regulatory bodies

The Commission has the task of gathering, analyzing and (within limits) informing the public of necessary data on product safety[24]. The establishment of a database is onbly possible if all authorities and institutions concerned with consumer goods and safety problems inform the Consumer Safety Commission of eventual infractions[25]. Theoretically, therefore, all authorities nationwide would be obliged to notify the Consumer Safety Commission of all damage, accidents, and suspicions that might have to do with the manufacture or use of an unsafe consumer item. The courts are included in the obligation of notification. In practise, this is a compromise in the dispute over the setting up a national accident surveillance system. Just as with other European Community Member States, France, too, in the early 1980's, gave out contracts for research into the feasibility of a national accident surveillance system to combat accidents and unsafe products[26]. The arguments adduced against the setting-up of a national accident surveillance system more or less coincide with the German stance against a Community one[27]. In fact, the Community directive on setting up an accident surveillance system has overtaken developments in France[28]. The Consumer Safety Commission has, since its creation, done the necessary preliminary work to permit a nationwide accident surveillance system. To date, four hospitals have declared their willingness to co-operate. The question of how far the notification obligation on French supervisory authorities is suitable for the establishment of a wider, or different, data picture is still open to debate. At any rate, the French courts have been *de facto* refusing co-operation[29]. The Commission's 1985-6 annual report allows no conclusion as to whether the authorities

furnish the Commission with information, or as to whether the information that does come in is at all of technical use to these authorities.
The Consumer Safety Commission is further responsible for sifting incoming data, determining significant points and selecting those to analyze further. Here it may draw on the help of the French laboratories. Its small staff makes it hard for the Commission to develop activities of its own to any noteworthy extent. It is largely reduced to using factual and issue analyses from third parties, or to trusting to their quality. Co-operation has intensified in the second year of the Commission's existence[30].
Data evaluation finds its formal conclusion in the production of reports or parliamentary position papers. These are later published in the activity reports for each calendar year. The Commission is aiming at publication in the French Official Journal[31].

1.3.2 Consumer information

The Consumer Safety Commission can also approach the public itself[32]. Though it is forbidden from sending reports or opinions to the press, it does have the possibility of publishing a summary. This has in fact been done and without objection. This means that the Commission has opened up a way of bringing safety problems in handling consumer goods to the attention of consumers. The Commission is at present considering how it can reach consumers more effectively. A quarterly publication of its findings, a safety bulletin as it were, might serve this end. For direct contact with the consumer, however, it has not yet been determined to whether the videotext system TELETEL, widespread in France (1.8 million users) can be successfully used to disseminate information. A pilot study has furnished conclusions about the prospects by the end of 1987[33].

1.4. Preventive regulation of product safety[34]

In the whole conception of product safety law, the administrative regulation of product safety stands at the centre of interest. For it is only if the general clause can be made specific in further administrative measures that it can - quite apart from the range of tasks of the Consumer Safety Commission - develop a legal effect on the commercial circles involved. The distinction between normal procedure and emergency procedure is central to an understanding of French safety law.

1.4.1. The normal procedure for product regulation

For removing unsafe products from the market, the law[35] provides for a still relatively cumbersome procedure, justified on grounds of finality and of possible heavy damages for

the industries concerned. In formal terms, the procedure can be split into two sections. The first phase takes place before the Consumer Safety Commission, which is called on by either the minister, a consumer organisation, the industry, trade or individual, to take up a problem. The Commission may also examine a matter itself. Once the procedure has begun, the Commission calls on experts from laboratories and other scientific institutions to evaluate the product. At the same time firms involved are consulted[36]. They can present their position and may make proposals for removing the hazard by modifying the product. The Commission has wide discretion as to how it acts during such negotiations. Only if it is convinced that the product fails to offer the safety required by Art.1 does it furnish a recommendation as to how the ministries should respond to the hazardous aspects of the product.
The *second phase* then takes place within the administration. The ministry or ministries are in no way bound by the Commission's suggestions. Their importance will ultimately depend on whether the relevant ministries tend to follow the recommendations, or to incorporate them into measures to be taken. According to the text of the law, two categories are available:
- firstly, general measures laid down by way of regulation, that concern a wide range of products or of services. These regulations require agreement among several ministries as to whether there is, in fact the need to adopt a regulation;
- secondly, specific measures, referring to a named product or service which may be laid down by ministerial order. Agreement among ministries is necessary before action can be taken.
By contrast, there are no differences as to the ministries' available means for banning a risk. The 1983 law considerably expanded the arsenal for combatting hazards with respect to the 1978 law[37].

1.4.2 The emergency procedure for product regulation

However, the normal procedure is much too clumsy when a danger that has arisen has to be responded to quickly. Accordingly, the law provides for the possibility of emergency measures, to be adopted without involving the Consumer Safety Commission. At the same time, though, they are provisional in nature. The only requirement for initiating the emergency procedure is the existence of an actual situation of risk. This need not be grave; it is the imminence of the damage that creates the urgency, not the severity. Accordingly, a non-immediate risk situation justifies initiation of only the normal procedure, even if it is severe. With a view to increasing the range of possibilities of intervention, the law[38] provides for various types of emergency measure, which coexist:
- the minister, or secretary of state, responsible for consumer protection may adopt a provision, without involving the Consumer Safety Commission. This kind of measure is valid for at most one year: long enough for decision-taking within the normal procedure as to whether a definitive regulation should replace the provisional one;
- a judge too can issue a injunction order for recall of a product. He makes his decision on application from a consumer organisation or a ministry. The provisions upon rights to take action derive from the Loi Royer[39]. The injunction order may not have a duration of more

than six months. The normal procedure has then to be used to decide whether the measure is to be maintained or suspended. Firms are no longer allowed, as hitherto, to market the products again after this period has expired. If penal proceedings are embarked on, the examining judge or the criminal court is competent. The judge can take only specific measures relating to a particular product;
- various administration officials specifically mentioned in the law[40] may seize products and even have them destroyed. Such measures will lead to the commencement of court proceedings, with involvement of the public prosecutor within 24 hours. A prerequisite is that the urgency of the measure be beyond all doubt. In cases of mere suspicion, the officials can only block the product for 14 days pending results of scientific and technical tests. Whatever the outcome of the measure, a copy of the record of proceedings is to be sent to the Consumer Safety Commission.
It is still quite unclear whether the emergency procedures will make headway.

1.5. Post Market controls

Any description of French safety law has to go thoroughly into the administration's role in follow-up market controls. Neglecting the whole repressive control machinery would give a completely distorted picture of French product safety law, since this is the area where control is centred[41]. The repressive powers will first be described (1.5.1), and then a special description of recall given (1.5.2).

1.5.1 Repressive product regulation

Scarcely anywhere else in French safety law does the fragmentary nature of its provisions emerge more clearly. This concerns, in part, the substantive legal requirements for action by way of post market control. There is nothing in the 1983 law that makes marketing unsafe products a criminal offence[42]. Were that so, the control authorities could engage in post market controls without first having to specify their powers by ordinance or ministerial decree. In the absence of any ordinance laying down specific penal sanctions for the manufacture and distribution particular products or groups of products, the only grounds for intervention have to be based Art. 1 of the 1905 law in its 1978 version. Since that date, the scope of Art. 1 has included acts of deception in connection with the use of the item to be sold[43]. Thus, for instance, sale of a hazardous product can be punished if the risks ought to have been previously brought to the buyer's attention. The fragmentariness of the 1983 Act in regulation is still more striking when it comes to the question of who enforces the law. The 1983 Act creates no administrative infrastructure, no special safety authority with hundreds of inspectors, but merely extends the area of action of the "Direction Générale de la Consommation et de la Répression des Fraudes" (DCRF)[44]. Admittedly, the 1905 law [45] also extended that body's powers of intervention; in part, to specific controls on products, but in a

more general sense, i.e. to the whole area of application of the 1905 law. This composite makes it hard to understand the control machinery, for outsiders and authorities as well.
The first step in control is the search for and establishment of breaches of the law. The relevant provisions of the 1983 law on the one hand, strengthen existing intervention powers of DCRF officials, and on the other, create new control instruments. A full picture cannot be given; we shall confine our description to an outline of the chief powers[46].
The officials have a right to enter firms' premises at any time of day or night. This access right is now extended to rooms not used exclusively for business purposes but also private ones. Should the person concerned refuse access, officials may inspect the premises only if the public prosecutor gives them permission. More recently, the officials have also been given the right to inspect production documents. Without prior court permission, they can seize dangerous products or remove them.
If breach of the law has been found, a broad range of sanctions is available. The prerequisite is either that a decree provides for punishment for the manufacturing or marketing of an unsafe product, or that the intervention requirements of Art. 1 of the 1905 Act are present. Sanctions available under the 1983 Act centre around a range of measures besides punishment that can be ordered at the time of sentencing. This requires the issuing of a decree in the normal procedure or else the issuing of a ministerial order in the emergency procedure. Three types can be distinguished: the court may order publication of the decision or require specific information of the public; it may order recall or destruction of the product at issue; it may confiscate illegally acquired gains.
In addition to the new provisions on measures accompanying punishment, mention should also be made of the codification of long-standing case law of the Higher Criminal Court, according to which the manufacturer of a product infringes upon Art.1 of the 1905 Act if he brings a product to market without first checking that it complies with safety and health provisions in force. The Higher Criminal Court had viewed criminal responsibility of the manufacturer as established when, against the explicit tenor of Art. 1, he could be accused merely of gross negligence[47]. The regulations take over the case law, but do not extend it to mere dealers. That does not mean, however, that dealers can escape their responsibility. French case law[48] has long recognised that they can be made responsible under the provisions of Art. 1 of the 1905 Act if they have neglected any of their specific duties (unsuitable storage, inadequate conservation, inadequate labelling). Indeed, a trader has even been condemned for breach of Art.1 of the 1905 Act because he had distributed goods whose nonconformity with the legal provisions was clear.
The closeness in content to comparable efforts at differentiation of product liability in German case law is evident. But while in the FRG breach of duty by the manufacturer or trader as a rule leads to entitlement to compensation for damage, France relies more intensively on an administrative solution to the problem. The parallel is interesting above all from the viewpoint of allocation of the burden of proof. German civil case law considers infringement of safety provisions in force (or non-compliance with technical standards) as a *prima facie* indication of the defectiveness of a product and therefore also of fault.
But *prima facie* rules of this kind are not enough to justify *criminal* condemnation of the manufacturer. In principle, the administration has to show that the manufacturer had not carried out the necessary checks. This seemingly clear burden of proof is however brought

into question by Art. 7 of the 1983 Act. Art. 7 states that a manufacturer who has not officially observed prescribed checks on verification of compliance with the law has, unless the contrary is shown, infringed Art. 1 of the 1983 Act. But there is a difference between Art.1 of the 1983 Act and Art. 1 of the 1905 Act insofar as the 1983 Act lacks a criminal law general description of an offence, allowing condemnation merely because a product does not comply with the requirements of the general clause. Nevertheless, one may envisage types of cases in which the presumption under Art. 7 of the 1983 Act leads to condemnation under Art. 1 of the 1905 Act[49].

1.5.2 Product recalls

The 1983 Act for the first time, provides the possibility of ordering he recall of a product. This requires either the issuing of a regulation or in urgent cases, a ministerial order.
Art. 2 says: "These *regulations* may likewise specify that products be removed from the market or recalled for modification, that the purchase price be reimbursed in whole or in part or products be exchanged, and that consumer information obligations be laid down". Art. 6 says: "They (the Ministers responsible for consumer protection or the departmental Minister concerned) may also order the publication of warnings and precautionary measures for use, as well as recalls for exchange, repair or full or partial reimbursement of the purchase price".
To avoid misunderstandings, it should be clear that the Courts, too, can order recalls on the basis of Art. 1 of the 1983 Act, without being empowered by a regulation or ministerial order. To date, no use has been made of the regulatory powers of Art. 2.
Conversely, it would be wrong to conclude on the basis of the formal absence of regulations that product recalls with involvement of governmental bodies do not take place in France. O. Dellenbach[50] has presented a case study that draws a strict distinction as to whether the safety threshold appearing in technical standards was demonstrably set too low, or whether a safety standard existed at all. In the first group of cases, Dellenbach has concentrated on three cases that caused much furore in France in the second half of the 1970's: (1) crash helmets that were subject to material fatigue; (2) fan heaters that easily caused fires; (3) electrically unsafe automatic egg boilers. In spite of all the differences in detail, the three cases took an almost identical course. The unsafeness of the products was discovered after a series of product tests. Attempts by consumer organisations to negotiate an agreement with the manufacturers on possible recall and its terms were to no avail. The consumer organisations then went before the public, while informing the competent authorities of the safety risk. Under public pressure, the French administration saw itself compelled to put pressure on the firms to ensure recall of the products.
The picture is less clear cut in areas where the technical standards contain no safety requirements: carry-cots and child-proof seals on cleaning products. Once again it were consumer organisations that discovered the problem. The campaign for child-proof seals gained additional weight through the involvement of anti-poison centres[51]. The campaign against unsafe carry-cots led, after six years, to the establishment of a technical standard, which was however declared non-binding and did not cover other similar dangerous products.

French consumer organisations had asked for the passing of a relevant regulation, on the basis of the Act of 10 January 1978 (the predecessor of the 1983 Act). The fight for child-proof cleaning product containers ultimately led to adoption of a regulation on the basis of the Council Directive of 18 September 1979; this concerned the harmonisation of legal and administrative provisions for the classification, packaging and labelling of dangerous substances (Art.15(2))[52]. Far more interesting than the course of proceedings in this group of cases is an international comparison of delays in making a regulation. In Britain a safety standard for carry-cots has been in existence since 1965, and child-proof seals have been compulsory in the U.S. since 1970[53].

1.6 Liability[54]

Following the development of contractual guarantee liability and of liability in tort virtually irrespective of fault between 1962 and 1972[55], French case law in the next ten years went on to make a considerable contribution towards bringing the two types of liability closer together[56]. While the rule of non-cumulation (of claims based on contract and tort) continues to apply, the case law has nevertheless *de facto* developed a unitary concept of fault for both law of tort and law of contract. This unitary concept of fault is based in law of contract on liability of the professional vendor, or else through direct liability of the manufacturer, while in law of tort it leads to liability irrespective of fault as the outcome, at least where the injured party was demonstrably supplied with a faulty product[57]. The injured party to the contract has the burden of proving that the defect had arisen before supply. This allocation of the burden of proof may lead to problems, particularly in supply chains where it can no longer be determined where the defect arose. Liability in tort presupposes, as in German law, that the injured party can show the defectiveness of the product.

A second important approximation of law of contract to law of tort lies in the development of groups of cases comparable to those in German law. This is true at least for defects in design, manufacture and instructions. Development defects can consistently be covered only by contractual liability in France. Conversely, as far as can be seen no duty to monitor products (post market or post sale duties) seems to exist in law of tort.

The approximation of the two types of liability has been considerably strengthened by adoption of the product liability directive[58]. The typically French problem of two types of liability according to whether the contractual partner or an uninvolved third party is the injured party was eliminated at the preparatory stage of the Community directive in favour of a unitary type of liability for injured contracting parties or an uninvolved third party. Though national law on contractual liability continues to exist, the classical distinction loses significance in practice.

An admittedly cursory survey of French case law seems to conclude that consumer disputes are of prime importance, but also points out that the most significant cases of injuries were involving specifically French peculiarities. Since no central gas supply was provided in France into the 70's (and to some extent is still not today), many households need to store propane gas containers. The explosion of these containers during transport, on consignment

or in use, have much concerned the French courts and made their contribution to the development of manufacturer liability in tort. A second specifically French variant in the development of manufacturer liability is the great importance of liability cases connected with the production, supply and use of agricultural products. Characteristically, French case law has transferred strict contractual liability to agriculture, without any beating about the bush[59]. Correspondingly, the French bill to implement the product liability directive is likely to include agricultural products[60].
France is ahead of all Member States in almost fully unifying the concept of defect in the area of prevention and repair. Art. 1 of the 1983 Act and Art. 6 of the Product Liability Directive, in the French version, are very similar, and in part identical in tenor. Throughout negotiations on the Product Liability Directive, France largely managed to push through its notion of defect[61].

1.7 Technical standardisation and product safety[62]

The basic structure of French standardisation, with its peculiar interweaving of government and the economy, was created by the Vichy Government in 1941[63]. It gives the French Government great influence on standardisation that goes beyond a single company. This influence primarily affects the organisation of standardisation. This is largely integrated with the national administration, if not organisationally then at least functionally. The Commissioner for standardisation exercises the office of Government Commissioner in AFNOR. AFNOR and the Bureaux de Normalisation (trade associations for standardisation) are part of the Service Public, i.e. they are comparable with firms under controlled administration. AFNOR's statutes are laid down by the State, which also determines and appoints its decision-making bodies. A special statute provides for financing of AFNOR through a parafiscal levy. Another peculiarity is the possibility of giving technical standards, gradations of legal effect. The range goes from quasi-binding for the administration to universal bindingness for the economy.

1.7.1 Privatisation trends

A multiplicity of ministerial decrees and orders over the decades has not shaken the basic division of tasks. The decree of 26 January 1984[64] on the status of standardisation also maintains the basic structure. At the same time, one may note a shift in responsibilities within the fixed framework from the State towards AFNOR, i.e. the private standardisation organisation. This development was actually already introduced with the 1941 Decree. Until last year, France had pursued the intention of organising standardisation governmentally[65]. Accordingly, AFNOR had no standardisation powers. It was only to encourage the drawing up of standards, verify the proposals from the standardisation associations and propose them for recognition by the Comité Supérieur de Normalisation. The 1941 Decree clearly cut back

administrative *standardisation* activities. This continues to be possible formally, but the emphasis in governmental activity has since been on the supervision exercised by the Minister for Trade and Industry or the Minister for Agriculture over all technical standardisation above company level. In practice, this control is exercised by a high official in the Ministry of Trade and Industry, the Commissaire à la Normalisation (Commissioner for standardisation). The Standardisation Commission is at the top of the French administrative hierarchy. Only five people work in it: the Commissioner himself, a deputy and three clerks. This small staff contradicts glaringly with the broad tasks assigned to the Commissioner by the 1941 Decree. He is not only to lay down general guidelines for the drawing up of standards, supervise the application of standards and decide on applications stemming from them, and supervise the work of the French standardisation agencies, but also - at any rate theoretically - to verify the content of each individual standard. In this he was supported at the time by the Comité Consultatif, which was later absorbed by the Comité Supérieur de Normalisation. The wide range of tasks led to manifold difficulties, which the Commissioner sought in 1964 to eliminate by abandoning practically all technical control[66]. But the Commissioner was unable to perform the other control tasks. In practice, what emerges as its most important task is the organisation of communication between ministers interested in standardisation and AFNOR, or the Branch Standardisation Committees. The relationship between the Commissioner for Standardisation and AFNOR as newly regulated in the 1984 Decree, takes account of developments over the last 20 years. Registration of technical standards had de facto been transferred to AFNOR before 1984, and it now decides on homologation as well[67]. All that remains of the former wide powers of the Commissioner for Standardisation is the duty of supervision and the right to veto. The Commissioner has also given up his arbitration role in standardisation committees, which had often given grounds for criticism[68].

1.7.2 Democratisation tendencies

The stepwise privatisation of standardisation - from governmental standardisation pre-1941 to comprehensive supervision and control over privately organised standardisation, from recognition of privately organised standardisation subject to an ultimate governmental veto - has run parallel with a process of democratisation of the guidelines of standardisation policy[69]. The term democratisation is justified in so far as the circles of participation in policy formation have been steadily enlarged. While in the Comité Supérieur de Normalisation, the State had dominated policy formulation; the economy was already given a place in the consultative activity of the Comité Consultatif. Creation of the Standardisation Supervisory Board[70] completed the opening to consumers and trade unions, which now have a seat and a say in a body with an important political role. "The Standardisation Supervisory Board shall propose to the Minister for Industry, taking account of national and international economic requirements, of the major national programmes and of the special needs of both sides of industry as expressed in the economic plan, the general orientation for standardisation work"[71]. Though without powers of decision, the Standardisation Board is to provide

assistance in setting French standardisation policy guidelines. In other words, the French State is trying to compensate for its retreat from standardisation by strengthening the participation of consumer organisations and trade unions. Democratisation of policy formation cannot therefore simply be equated with greater orientation of standardisation policy towards the needs of consumer organisations and unions.

1.7.3 AFNOR

The stepwise shift of standardisation work from the State towards AFNOR has considerably affected its range of action and tasks[72]. Today, centralisation and co-ordination of all French standardisation activity is incumbent on AFNOR. It passes instructions from the Minister's authority on standardisation or the Commissioner for standardisation to the Bureaux de Normalisation and verifies their implementation. It is responsible for supporting technical standardisation committees in working out draft standards, and for homologation procedure. In practice, standardisation work lies largely in the hands of AFNOR itself. The industrial standardisation associations are often not financially in a position to set up their own technical standardisation committees and maintain them. AFNOR has to provide assistance, set up a technical standardisation committee in the technical sector concerned and support it with staff and above all resources. Yet AFNOR is not entirely autonomous here, since the setting up of a technical standardisation committee requires ministerial authorisation.

1.7.4 Categories of standardisation

The shift in powers from Government to AFNOR can be most clearly seen in the various categories of standardisation, only two of which are, however, important for our purposes: approved and registered standards[73].
(1) *Approved standards* have existed since 1941. These are standards that have been given official recognition by the State. Approval takes place through ministerial decree, and is published in the "Journal Officiel". The 1941 Act does not define in any more detail what the verification criteria in the approval procedures are. Over-simplifying heavily, one might say that the Commissioner for Standardisation has to verify standards brought before him to see if they are against the "public interest". This category of standards is the most important, both in number and in the importance of each individual standard. However, the numbers are steadily declining in relative terms. While in 1968, 70% of all official French standards were still given approval, this percentage had fallen to 54% by 1972[74]. Observance of government-recognised norms was made compulsory for all national procurements by the 1941 decree. However, this obligation was not often applied in practice. Accordingly, the competent Minister, following detailed consultations between the various ministers, the Commissioner for Standardisation and AFNOR, issued an administrative order[75] whereby the bindingness of standards for government contracts in principle remained; the principle was not to be applied

rigidly, but flexibly, in accordance with the needs of the Administration and of the general public. Pragmatic count was thus being taken of the actual facts.
The 1941 Act also allows approved standards to be declared universally binding. Branches of the economy involved are then obliged to take the binding technical standards into account. The 1941 Act, however, fails to clarify the conditions in which this declaration of universal bindingness can be made. With the restructuration of standardisation, the decision on approval of technical standards was transferred to AFNOR. AFNOR has to check a proposed standard to see whether it is in line with the general interest and does not offer grounds for objections that might prevent its adoption (as a government-approved norm). Approval as a norm is declared by AFNOR's Administrative Board, after the proposed standard has passed the verification and control procedures. The Commissioner for standardisation can however oppose AFNOR's decision on approval of a draft standard. Decree No. 84/74 of 26 January 1984[76] contains no provision for the case where the Commissioner for standardisation makes use of his veto right. In particular, no procedure for taking up the conflicting interests is provided for.
At the same time, the Decree of 26 January 1984 once again confirms the bindingness of approved standards on public procurements by the State, public bodies or state-subsidised firms. Therefore, the previous legal position has basically remained unchanged. What is unusual, though, is the way in which the French Government seeks to stress this intention. Against customary usage, the Prime Minister had a circular to this effect published on 26 January 1984[77]. Its contents largely coincide with the 1971 compromise sketched out above. The circular nevertheless demonstrates how little attempts to increase the importance of the approved standards have borne fruit in practice.
As before, approved standards can be declared universally binding. But the conditions under which a declaration of universality can be made are now specified. Art. 12 of the 1984 Decree says:
"Where for reasons of public order, public safety, protection of the life and health of people and animals or safeguarding of vegetation, protection of national cultural treasures of artistic, historical or archeological value or for compelling reasons connected with the effectiveness of tax inspection, the propriety of business procedures and the protection of the consumer, the need arises, application of a confirmed (approved) standard may by decree be declared mandatory, subject to the special exceptions provided for under the conditions of Art.18 (admissibility of possible departures)".
This clarification was a response from the French Government to frequent criticism by the European Court of Justice and the Commission of the EC, of the general provisions allowing standards to be declared universally binding[78]. The links with European law will be more specifically dealt with below.
(2) *Registered standards* were introduced in 1966[79]. They have since enjoyed a steady increase in popularity. This is shown *inter alia* by the fact that by 1972, 33% of all French standards were already in this category, whereas in 1968 the figure had been only 18%. This popularity is closely connected with the simpler procedure for bringing out a registered standard. This category of standard is favoured above all in areas of rapid technical change. Registered standards have not been the object of governmental regulation to date. A change has taken place in practice, since registration initially took place through the Commissioner

for Standardisation but has gradually passed into the hands of AFNOR. Registration is not bound up with any verification of contents. It takes place when the technical standards committees consider the standardisation procedure to be complete and wish to make their results available to the economy. There is a link with approved standards to the extent that registered standards often constitute a preliminary stage towards government-recognised standards.

1.8 Certification and product safety

No special certification procedure for verifying safety standards, nor offering an external indication of them by a special safety mark exist in France. The proposal by C. Germon and P. Marano[80] to introduce a special safety mark, on the model of the German regulations, was rejected, for unknown reasons. Accordingly, safety can be an object of certification only along with other characteristics of the product. Types of this comprehensive certification are the mark of conformity (Norme Française) and the qualification certificates (Certificat de Qualification).

1.8.1 NF mark of conformity

The conditions for awarding the French mark of conformity, NF, are regulated by a decree of 1942[81]. To that extent, certification was an integral part of the overall reorganisation of standardisation in 1941-43. The mark of conformity can in principle be issued for any product but is in practice more important for household appliances. The mark testifies that the product bearing it has met the standards drawn up by AFNOR or the standardisation associations, and subsequently been given approval. It is incumbent on AFNOR to check whether the product in fact meets the standard. From this standpoint, the NF conformity mark provides objective information. However, this information is often misunderstood by the consumer. Consumers believe that the conformity mark indicates a particularly high quality of product, whereas in fact the standard merely lays down a kind of minimum[82]. This problem is quite common and arises in other countries too. The safety of a product can theoretically be checked by the legally prescribed procedure where the underlying norm regulates important elementary characteristics of the product. This is exactly what happened with the technical standard on durability of crash helmets, since the French Government has by decree, obliged all crash helmet manufacturers to put their product through certification procedures. This is, however, a unique exception[83].
Criminal penalties can be derived from Art. 1 of the 1905 Act, if the manufacturer uses the NF conformity mark without authorisation. The civil-law position is not as clear[84]. The purchaser can, referring to the absence of conformity, terminate the contract and perhaps even claim compensation for damages. But the purchaser may also by Art. 1382 of the Code Civile claim damages from the Certification Office itself, if it has neglected to exercise its

control powers. Such a claim for damages is a purely hypothetical case, as even AFNOR is not in a position to set up an all-embracing control network to guarantee disclosure of infringements. Moreover, in the event of unauthorised use of the conformity mark NF, it would have to be clarified to what extent Art. 6 of the 1942 Decree ruling out such liability by the Certification Office, still applies.

1.8.2 Certificates of qualification

The conditions for issuing certificates of qualification are regulated in the 1978 Act[85], the predecessor of the 1983 Safety Act. The relevant passages have not been abrogated by the new Act. The motivation for the legal regulation of the issuing of certificates of qualification was the growing enthusiasm of industrial associations to pump up sales of their products by creating a quality mark for their association and regulating the certification procedure internally. Familiar examples are "Coton Flor" or "Qualité France". A problem, and not only from the consumer's viewpoint, was that neither minimum nor quality requirements existed for awarding the certificates. A 1976[86] commissioned by the French Government called for an end to this confusion. (for the sake of a properly functioning market).
The object of the 1978 legal regulations was to allow certificates of qualification only where they gave the consumer *objective* and *comprehensible* information on the characteristics of the product. This was to be secured partly by allowing certifications henceforth only by Government-recognised bodies. The competent Ministry, the Ministry for Industry, must verify the institution's impartiality during approval procedures, and guarantee in objective (technical) and personal terms, that the certification procedure can be properly carried out. By early 1984, 18 institutions had been accepted, AFNOR foremost among them. This seemed to have put a stop to the practice of self-certification of products to promote sales, but only on paper, since self-certified products have not yet disappeared from the French market.
In order to meet the self-set goal of providing the consumer with objective information, the legislature, would through the certification procedure, have to set minimum requirements for "quality". The difficulties of such an endeavour are obvious. The French legislature has dodged the issue by speaking merely of "certains caractéristiques" (certain characteristics), conveniently avoiding a more explicit definition of quality. Industry associations and consumer organisations were given the task of specifying through negotiations what the "certain characteristics" might mean in specific cases. These negotiations are given formal shape in an Advisory Commission to the Ministry for Industry. It is not hard to see the opposing positions of the parties to the negotiations. The consumer side sees the chances of objective information as maximised, if quality is standardised. Standardisation must, on this view, cover the functional and utilitarian characteristics of the product. Industry rejects the idea that quality can be standardised. Standardisation would allegedly eliminate differences between products and threaten the mechanism of competition. The debate closely resembles the discussions in the Federal Republic of Germany on the meaning and purpose of comparative product information on quality[87]. The German legislature, too, declined to define quality and handed over the task to both sides of the market. This road seems, in both

countries, to have ended in a blind alley. Neither has arrived at any noteworthy amount of comparative quality information. Theoretically, the French model could also be applied to the issuing of safety certificates. But this aim would be obstructed by the one-sided sales-oriented regulation of certificates of qualification. The safety of a product can be used only to a limited extent to boost sales.

1.9 The 1983 Act in the light of European Community law

The object of this analysis is to bring the French viewpoint into the debate on European safety law. The sole basis for a treatment of the French position to date is the study by J.-P. Pizzio[88]. His whole portrayal is adapted to the French way of looking at things, to the extent that European Community law is also considered and analysed from the viewpoint of whether administrative means of sanction are available to implement product safety. European Community policy has always allowed Member States much leeway in their implementation of the substantive law. The report keeps to this premise[89]. Community intervention with French administration arouses considerable mistrust. The inclusion of the Single European Act in the description gives Pizzio a chance to dive into the relationship between internal market policy and product safety policy in more detail. Since by contrast with environmental and labour protection, consumer protection was not included in the treaties as a policy objective, product safety must be subordinated to the goal of creating free movement of goods[90].
The analysis of the relationship between the Product Safety Act and European Community Law has been done in two stages. The 1983 Act is first checked for its interaction with free movement of goods, and then specifically for the effects of the new approach on French safety policy, and on the 1983 Act itself.

1.9.1 The 1983 Act and free movement of goods

(1) *Scope of the 1983 Act*: Art. 8 is aimed at regulating cases of conflict between Community law and the 1983 Act. The wording seems to make it clear that the 1983 Act is no longer applicable where the products concerned are already covered by a Community directive. An interpretation *au pied de la lettre* would have the consequence of excluding only regulation by *Statute*, while the French government would be free to regulate product safety by decree even in the event of conflict. This rather dishonest version is however immediately abandoned, and for all forms of regulation the substantive focus is whether the products have already been the object of a Community provision. It follows that in cases of total harmonisation France retains competence only in emergency cases, provided for in the 1983 Act. But even here Community law can retain primacy over French national safety law as long as the harmonisation measure includes a special safeguard clause explicitly covering such emergency measures[91].

(2) *The duty to notify regulatory measures under the 1983 Act*: If these are measures to be taken as part of a normal procedure, then the objective scope of the Directive of 28 March 1983[92] covers a comprehensive obligation of notification including now agricultural products, foodstuffs, medicaments and cosmetics[93]. To date (1986) the duty of notification has become relevant on two occasions, when the French legislature embarked on specifying the general clause in the 1983 Act by issuing special decrees[94]. In the first case, Pizzio notes a delay of nearly two and a half months, but the proposed decree has not yet come into force in France. The second case is more interesting, above all because it involves the first decree issued on the basis of the 1983 Act[95]. It forbids the manufacturer, sale and importation of erasers that look like foodstuffs. The Community has since, in response to various national measures banning imitations of edible products, adopted a wide-ranging directive on products of misleading appearance that are liable to endanger consumer health or safety[96].
The notification obligation becomes more problematic in the case of an emergency measure[97]. Certainly, the Information Directive provides for an abbreviated procedure, but localised bans, withdrawals from sale and the like, are not covered by the obligation of notification. However, since the French "Commissaires de la République" have wide-ranging competencies regionally, there is a loophole here for measures regulating safety that might escape Community notice.
Another question is the extent to which regional measures on product regulation are (or must be) notified to the Community on the rapid information system[98].
Pizzio[99] regards the notification procedure as extremely effective, since prior experience reveals that the Commission's consultation procedures offer adequate possibilities for making national safety regulations compatible with Community Law.
(3) *Compatibility of the 1983 Act with Articles 30 and 36 of the EEC Treaty*: "Measures having equivalent effect" discussed in Art. 30 EEC also include technical standards drawn up by AFNOR. A specifically French possibility of conflict results from the possibility of declaring standards legally binding by decree. Action was brought for breach of treaty, because of the legal bindingness of a technical standard on the manufacturing of refrigerators[100]. Following the Commission's intervention, France changed the scope and coverage of the standard but kept its legal bindingness[101]. Nevertheless France feels quite confident of its chances of justifying national health and safety provisions through Art. 36 EEC or the Cassis de Dijon Case Law on Art. 30 EEC.

1.9.2 The 1983 Act and the new approach to technical harmonisation and standards

In his commentary on the new approach to technical harmonisation and standards, J.-P. Pizzio[102] points to a number of noteworthy problems which are, however, only partly dealt with in his report:
- The essential requirements should be defined in such a way as to be capable of leading to sanctions (behind this there is once again, the specifically French - administrative - approach to safety policy).

- Member States should be banned from subjecting technical products to prior approval procedures.
- Should consumer protection necessitate the inclusion to any large extent of technical specifications in the fundamental requirements, recourse to the new approach would, he says, not be appropriate. Deciphered, this means that Pizzio doubts the effectiveness of reference to standards in this very area of the safety and health of persons.
- The problem of certification could be solved following the example of the Franco-German bilateral model; i.e. mutual recognition of certification institutes and their certificates, and also mutual recognition of safety marks (though one would have first to be created in France).

In very general terms, the new approach claims to have effects on the relationship between product safety and technical standards. Member States would have to adopt a policy of deregulation in the area of product safety. Accordingly,*de jure* or *de facto* binding technical standards would in the long term have to be broken down and adapted to the requirements of the common market. This would require the building up of trust in technical standardisation as a guarantee of product safety, but also, at the level of the Common Market, compel recognition of the equality, in principle, of safety levels, even where solutions differ.

At the end of the report, Pizzio[103] asks the decisive question: What happens when the Community has adopted a directive defining the safety requirements in principle but a Member State nevertheless wants to take national measures that go beyond the defined goal? The problem already arises with the Directive on simple pressure vessels[104], which, in departure from Art. 1 of the 1983 Act is based on a safety concept that does not include foreseeable misuse. By a circuitous route through a treatment of the Cremonini v. Vrankovich ruling[105] of the European Court of Justice, Pizzio[106] arrives at the following conclusions:
- The primacy of Community law makes it compulsory to allow even products that would not comply with Art. 1 of the General Clause of the 1983 Act to circulate freely. (Although Pizzio does not say this explicitly, the differing safety concepts in the Community Directive on simple pressure vessels (usage in accordance with instructions) and in the 1983 Safety Act would not be an obstacle to the capacity of their circulation).
- Recourse to Art. 36 would be open to Member States only when the basic requirements have not been fully defined.
- It would follow that where the Community has adopted particular directives on the basis of the model Directive, a Member State would be able to pursue a national safety policy only in the context of the safeguard clause procedure.

1.10 The bilateral agreement between the Federal Republic of Germany and France on the removal of technical barriers to trade[107]

In July 1983 Chancellor Kohl and French Prime Minister Mauroy agreed to the following measures on a reciprocity basis[108]:
- mutual recognition of safety standards of equal value from a technical viewpoint;
- improvement of relations between applicants and test centres;
- mutual recognition of test centres.

The negotiations for converting the agreement into national law on each side were handed over to a Franco-German working party. The object of the following account is not so much to give a detailed analysis of the bilateral agreement as to attempt to estimate the effect and function of the bilateral agreement for a European safety policy.

1.10.1 Background to the bilateral agreement

Immediately after enactment of the German Machine Protection Act (Maschinenschutzgesetz), various Member States were already active in Brussels to ensure that the Act would not have any negative effects on free movement of goods[109]. The Federal Government agreed at the time to incorporate foreign standards, especially those of Community Member States, in a separate list accompanying the Machine Protection Act (today the Appliance Safety Act (Gerätesicherheitsgesetz)). AFNOR then drew up a sixty-page list of 1,000 French standards on technical devices, which was submitted to the German authorities. On the German side, however, the view was taken that it was impossible to take the French standards into account. The requirement for the incorporation of a note into the standards in the annex to the Act was to be in compliance with the following three conditions:
a) the French standards would have to be available in German translation.
b) the French standards would have to contain specifications on the safety of persons.
c) the French standards would have to be individually verified by an expert committee.
In fact, the Federal Government did not then meet its formal agreement.
From the mid-70's onward, German technical standards and therefore the Appliance Safety Act as well were increasingly under fire from French critics[110]. There were reports of difficulties for French industry in exhibiting their goods at trade fairs in the Federal Republic. These obstacles to trade in themselves would hardly have been sufficient to make the technical standards into an object of high-level politics. But the issue acquired greater importance when in the late 70's and early 80's, the French made a connection between their growing current account deficit and technical standards. In fact, according to Commission statistics, German consignments to France more or less doubled between 1977 and 1982, thus rising by 100%, while in the opposite direction, the rate of increase was only around 75%[111]. We need not go into here whether there is indeed a connection between the balance of payments deficit and German standards as potential technical obstacles to trade. In any case, the French succeeded in moving in the European Community, in the person of DG III Director-General Braun. In a lecture to a German audience, Braun more or less adopted the French version as his own, by calling the Germans the secret sinners in the setting-up of non-tariff barriers to trade. Encouraged by the press, the equation 40,000 German standards = 40,000 technical obstacles to trade began to circulate.
On the other side, the Germans referred to a practice of French authorities begun some time in the early 1980's of adopting decrees that *de facto* made the import of German products into France impossible[112]. These decrees for particular individual groups of products were always built up on the same pattern: (1) the product had to meet a French standard and (2) this had to

be documented by a test certificate and a NF-mark. The majority of decrees concerned safety requirements for wood-working machines[113].
These mutual reproaches led in 1983 to the surprising outcome of a bilateral agreement. Apparently, following the controversially pursued public debate, pressure to negotiate was so great on both sides that action had to follow. The exchange of ideas and information between the authorities and the relevant institutions intensified. One product of the intensified relationships was the colloquium organised in Strasbourg in June 1984 by the Franco-German society for science and technology on co-operation between German and French testing and standardisation institutions[114]. At this conference, competent experts discussed the areas that the Community had mentioned in the preliminary work on the model directive as deserving priority in harmonisation : construction, measuring equipment, materials testing and welding techniques.
But the bilateral agreement did not fully meet with acceptance. The joint declaration by AFNOR and DIN makes reservations about the need for a bilateral level of standardisation clear[115]. Bilateral agreements might, from the viewpoint of the standardisation institutions, serve a transitional function only as an interim solution for relevant problem areas, while in principle, standardisation at European or international levels was a goal. It is hard to say how far the commencement of an action for breach of the Treaty against the French decrees on admission of woodworking machines was directly or indirectly induced by the bilateral agreements[116]. It is, in any case, conceivable that through its action, the Community wished to pull the rug from under the bilateral agreements between France and the Federal Republic. One indication in this direction is the almost complete identity in the thrust of the German and European criticisms of French administrative practice. In the action for breach of treaty, the European Community attacks precisely those market admission regulations on woodworking machines that had been the basis for the German attacks on the French Government[117]. On the other hand, the Commission's bill of complaint was not submitted to the ECJ until July 1984, by which time the bilateral agreement had long been concluded.

1.10.2Results

Following the end of the political talks, AFNOR in an initial phase, checked at the highest level, 281 DIN standards in 19 branches of industry (excluding electrical engineering) to compare them with the 295 corresponding French standards[118]. This list was the starting point for initial activities by the competent authorities in both countries facilitating the circulation of goods. The conference organised by the Franco-German Society for Science and Technology supplies further illumination as to the chances and difficulties for the bilateral agreement. In relation to the three objects of the agreement mentioned at the beginning, the following provisional balance sheet can be drawn up: (1) the chances for mutual recognition of standards differ considerably from one branch of industry to another. The Strasbourg conference brought out highly differentiated findings in the branches discussed there. The situation in the construction industry is so different in both countries that necessary research work would first of all have to be done in order to be able to define political goals. By

contrast, the situation as regards measuring instruments is relatively clear. While there are considerable formal differences, in substance the two systems largely overlap. Harmonisation seems possible if the political will to break down the formal distinctions is present. The situation is different again in the area of welding techniques and material testing. Here the need for removal of existing obstacles to trade seems to be very great, but the objective meets with both political and technical difficulties. Experts all agreed when it comes to electrical engineering. Here the international network of technical standards and testing centres is so widely developed that a bilateral agreement could at most have negative effects.
The nature of the bilateral agreement has since become clear. It is certainly not concerned with facilitating trade in consumer goods. To that extent, there is only a very indirect connection with the topic being discussed here. However, the bilateral agreement is interesting in the way in which it uses techniques to make the legal systems compatible with the various foreign standards.
The A has, according to information from the French Ministry for Foreign Trade and Industrial Development, published an initial list C of 118 French standards[119] on the general administrative provisions of the Appliances Safety Act. The list is based on an assessment that the French standards listed therein are, in principle, equivalent to the German standards contained in list A. The authorities should intervene only where there is reason to doubt whether the French standards correspond to the safety level prevailing in the FRG[120].
French law requires different solutions, since it does not have the device of the derogating clause as in the Appliances Safety Act. Since manufacturers are obliged to comply with a norm specified by a decree (Arrêté), German standards can be incorporated into the system only if they also meet this obligation. This presupposes abstract verification of the equivalence of German standards before including them in the decree. The French Ministry for Industry has in this way incorporated 9 DIN standards important in the eyes of the German Federal Ministry for the Economy, into its system of binding technical standards, thereby giving them the same legal bindingness as the corresponding French standards[121].
(2) To improve the relationships between applicant and test centre particularly in the case of small and medium-sized enterprises, both governments have decided to explain the bases of the test centres' activities and the relationship between test centre and applicant. In the meantime, circulars for the test centres, in accordance with the Appliance Safety Act, and general guidelines for applying the conformity tests in accordance with the French decree on standards, have been published[122]. Both publications explain the administrative, technical and financial aspects of the national conformity tests.
(3) There is still a long way to go politically, before test centres are mutually recognised. Although there is agreement that certificates or test marks probably cause greater technical obstacles to trade than do different technical standards, the bilateral agreement has so far shown hardly any effect. Nevertheless, inclusion of the LNE (Laboratoire Nationale d'Essais) in the list of test centres under the Appliance Safety Act has begun. Information on this procedure is provided by the Joint Declaration by AFNOR and DIN[123].
"In the area of certification with the NF mark and the DIN test and inspection mark, AFNOR and DIN will collaborate by, in principle, carrying out tests of products and inspections of methods of manufacture in the country of origin, and by systematically aiming at mutual

recognition of these tests and inspections in the context of and in implementation of, the regulations drawn up for the purpose by CENCER".
This passage makes it clear that a strict distinction has to be drawn between full mutual recognition of test results *and* conveyance of certifying power to a foreign office. The furthest-reaching goal is full mutual recognition of test results, but at present efforts are being concentrated on conveying certification powers. This would mean, to give one example, that German testing institutions would be entitled to test French products to see whether they meet the requirements of the NF conformity procedures. Conversely, the Federal Republic has declared its willingness to grant French test centres the authority to confer the German safety mark GS, if full mutuality is guaranteed "with the maintenance of the usual reservations"[124].

1.10.3 Effect and function of the bilateral agreement on the creation of a Community safety policy.

The opposite poles of the analysis are an accusation of protectionism and a possible pioneering role. Protectionist tendencies might be pointed to in the bilateral agreement because, in the European Community, a Franco-German axis has been built up that might have detrimental effects on integration in the common market. While list C under the general implementing regulations for the Appliances Safety Act is at least theoretically, also open for the inclusion of norms of other European Community Member States, in France, explicit inclusion of foreign standards in the decree is necessary, in order to guarantee the possibility of in-state trade. This cumbersomeness of the French administration has readily been treated as an argument for the flexibility of the German system of reference to standards. This would, however, be to overlook that an administrative act is also necessary for incorporation in the list. To that extent, the accusation of protectionism applies both to France and to the Federal Republic. The tendency towards a Franco-German alliance within the Community is strengthened still further if the fact is included, that with regard to standardisation, the French are concerned above all with information technology[125]. Finally, the cautious attitude of both DIN and AFNOR should be pointed out, since both continue to maintain the objective of international standardisation and regard bilateral agreements as, at best, a transitional possibility, tending as they do to impede international trade in goods.
Yet there are positive things about the bilateral agreement, too. Mutual recognition of standards in special Franco-German committees is objectively nothing other than political harmonisation. Franco-German preliminary work, as done for instance at the Strasbourg colloquium in 1984, might thus accelerate procedures in the Standing Committee. Possibly even more important, however, is the attempt to achieve mutual recognition of test centres. The model directive did not cover this issue[126] and the standardisation organisations themselves have hardly made any progress outside the field of electrical engineering. A bilateral solution to this extremely important question might serve as a model for European regulations on mutual recognition. In very general terms, the bilateral agreement seems in relevant technical and political circles to have aroused considerable response and not only in Germany and France.

1. Since France can be regarded as a market economy in the German sense only conditionally; see Behrens/Korb-Schikaneder, 1984.
2. This classical approach can be found in precisely the same way in the consumer policy debate; see Calais-Auloy, 1985, 77 et seq.
3. This distinction is based essentially on the work of the Commission de la Refonte (note 2 supra) and the description of product safety law by Pizzio, 1984, 13 et seq. and 19 et seq., which is so far the sole comprehensive overall description of the law.
4. See Calais-Auloy, 1985.
5. For details see 1.4 infra.
6. See 1.3 infra.
7. Pizzio, 1984.
8. See point 1.4.1 infra.
9. Calais-Auloy, 1980, 113 et seq.
10. See point 1.7 infra.
11. Cf. Chapter II, 3.4.2.
12. Germon/Marano, 1982.
13. Loi no. 83-660 du 21 juillet 1983 relative à la sécurité des consommateurs et modifiant diverses dispositions de la loi du 1er août 1905, German translation in PHI 1984, 71 et seq.
14. Schmidt-Salzer, 1986, Art. 6, Nos. 13 et seq., 116 et seq., 138 et seq.
15. Loi no. 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services. The decisive passage of Art. 1 goes "dans des conditions normales d'utilisation". On the Act, see Calais-Auloy, 1980, 113 et seq.
16. Pizzio, 1984, 14-15.
17. More details in 1.4 infra.
18. Pizzio, 1984, 17, No. 13.
19. Commission de la Sécurité des Consommateurs, 1er Rapport au Président de la République et au Parlement, 1985 (cited infra as Commission, 1985), 15; Commission de la Sécurité des Consommateurs, 2ème rapport au Président de la République et au Parlement, 1986 (cited infra as Commission, 1986), 13.
20. Pizzio, 1984, 15.
21. On all this see Pizzio, 1984, 15-17.
22. Op. cit., 14-15.
23. See supra, note 13.
24. Pizzio, 1984, 19-20. and the two annual reports of the Consumer Safety Commission (note 19 supra).
25. Art. 14 (2) of the 1983 Act (note 13 supra).
26. Accidents Domestiques, 1981; cf. esp. the ministerial position on this report: Ronze, 1981.
27. See esp. Ronze, 1981, in his "Resumée et Conclusions".
28. See the Council decision of 22 April 1986 concerning a demonstration project with a view to introducing a Community system of information on accidents involving

consumer products, OJ L 109, 26 April 1986, 23; for details on this see Chapter III, 3.3.

29. For a criticism see Commission, 1985, 13.
30. Thus Commission, 1986, 12-14.
31. See Commission, 1986, 16-17.
32. On this cf. Commission, 1985, 15.
33. Commission, 1986, 5.
34. The following account is based on the final report of the Commission de la Refonte (note 2 supra) and the explanations by Pizzio, 1984.
35. Art. 2 of the 1983 Act (note 13 supra).
36. As stressed by Commission, 1985, 5.
37. On this see 1.5.2 infra.
38. Art. 3 of the 1983 Act (note 13 supra).
39. Calais-Auloy, 1980, 205 et seq.
40. Art. 4 of the 1983 Act (note 13 supra).
41. On this see the account by Pizzio, 1984.
42. Significantly, the Commission de la Refonte (note 2 supra, 82) calls for precisely this general penal clause.
43. Calais-Auloy, 1980, 128.
44. Pizzio 1984, 19 et seq.
45. Loi du 1er août 1905 sur les fraudes et falsifications en matière de produits ou de services.
46. This account is based on Pizzio, 1984, 19 et seq.
47. Calais-Auloy, 1980, 129, and references from the case law.
48. On this Pizzio, 1984, 25, No. 47.
49. Op. cit.
50. For an account of the issues, see Dellenbach, 1984, 32-44.
51. Activité des Centres Anti-Poisons, 1982.
52. OJ L 259, 15 October 1979, 10.
53. On issues connected with this regulation see Viscusi, 1985, 537 et seq.; see also Chapter II, 4.6.
54. The following account is based essentially on Viney, 1975; Ghestin, 1983 and Lamy Commercial, Concurrence-Distribution-Consommation, 1985, 1286 et seq., Nos. 4678 et seq.; a description from a German viewpoint is given by Weber/Rohs, 1984.
55. See Ghestin, 1983, 244 et seq. (esp. 251 et seq.), who follows the stages in the case law on the development of guarantee liability irrespective of fault. There is no key decision like the German Hühnerpest judgment (BGHZ 51, 90 et seq.) in the law of contract. The case is different in law of tort. Here the decisive judgment that altered the burden of proof in favour of the consumer was Cour de Cassation Civile, 21 March 1962, Bull. Civ. I, 155. Other decisions in this connection are in Viney, 1975, 76, note 19.
56. Much information can be found in Lamy Commercial (note 54 supra), 1286 et seq., Nos. 4678 et seq. A description of the legal position from a German viewpoint is offered by Weber/Rohs, 1984.

57. References in Lamy Commercial (note 54 supra), 1288, No. 4683.
58. Ghestin, speech at the Conference "Sécurité et Défense des Intérêts Economiques des Consommateurs. Droit National et Communautaire", 17-18 April 1986 in Dijon.
59. Lamy Commercial (note 54 supra), 1289, No. 4687 b).
60. Directive on liability for defective products of 25 July 1985, OJ L 210, 7 August 1985, 29; more in Chapter III, 3.5. An official French bill converting the Directive is not yet available.
61. This is largely due to Ghestin himself, who was involved in the government decision-making process in France and likewise belonged to the Commission de la Refonte which had worked out the 1983 Safety Act; see also Ghestin (note 58 supra).
62. A fundamental account in German is Lukes, 1979, 5 et seq.; the description is based on his account. Much information on the history is also in Rasera, 1980, 28 et seq.
63. The relevant acts, decrees and orders are reprinted in Germon/Marano, 1982, 109 et seq.
64. Décret no. 84-74 du 26 janvier 1984 fixant le statut de la normalisation, reprinted in Enjeux No. 44, 2/1984 52 et seq., and in German in DIN-Mitt. 63 (1984), 255 et seq.
65. Rasera, 1980.
66. On this Lukes, 1979, 22.
67. See 1.7.4 (1) infra.
68. Germon/Marano, 1982, 69 et seq.; Annex 2, "Rapport du groupe de travail - Normalisation et sécurité des travailleurs".
69. This process was introduced by Germon/Marano, 1982. On the "new" French standardisation policy, however, see also Marano, L'avenir de la normalisation, 1982; Marano, Quelle normalisation pour de nouveaux enjeux, 1982 and Antonmattei, 1982. Deux grands principes animent la réforme: concertation et décentralisation, entretien avec Laurent Fabius, Ministre de l'industrie et de la recherche, Enjeux No. 44, 2/1984, 48 et seq. (in which the political objectives are very clearly expressed). From a German viewpoint, Schulz, 1983, and the German translation of the address by Laurent Fabius at the first meeting of the Supreme Council on Standardisation, DIN-Mitt. 63 (1984), 610 et seq.
70. See note 64 supra.
71. From Art. 1 of the German translation of the Decree (note 64 supra).
72. AFNOR statutes were also amended accordingly. The version adopted by the General Assembly on 7 December 1983 is reprinted in Enjeux No. 44, 2/1984, 55 et seq.
73. The account in Lukes, 1979, 23-25, continues to be pertinent.
74. Figures in Lukes, 1979, 24.
75. Circulaire du 15 janvier 1971 relative à une recommendation de la section technique de la commission centrale des marchés publics convenant les spécifications techniques dans les marchés.
76. J. O., Février 1984, N. C. 1127.
77. Circulaire du 26 janvier 1984 portant sur la référence aux normes dans les marchés publics et dans la réglementation, J. O., février 1984, N. C. 1127, reprinted in German in DIN-Mitt. 63 (1984), 257-58.

78. On the background to the problem see Lukes, 1979, 28. The European reference is discussed under 1.9.1 (3).
79. Lukes, 1979, 25.
80. 1982, 52.
81. Reprinted in Germon/Marano, 1982, 124 et seq.; described in Lukes, 1979, 50 et seq.
82. Calais-Auloy, 1980, 94, No. 65.
83. For an account of the issues see Dallenbach, 1984.
84. On the possible legal consequences see Calais-Auloy, 1980, 95 f., note 13.
85. On this see Calais-Auloy, 1980, 95 (No. 9); Repussard, 1984 and Bonhomme, 1984; and comprehensively Schroeder, 1984.
86. Repussard, 1984, refers to this in his account, though without mentioning the exact title.
87. On this see Micklitz, Three Instances, 1984.
88. Pizzio, 1986.
89. Op. cit., 9-10.
90. Op. cit., 15.
91. Op. cit., 19 et seq.
92. OJ L 109, 26 April 1983, 8. For details on this see Chapter IV. 3.1.
93. OJ L 81, 26 March 1988, 75.
94. Pizzio, 1986, 31 et seq.; and basically Lecrenier, 1985.
95. Of 18 février 1986, published in J. O., 28 février 1986.
96. OJ L, 11 July 1987, 49.
97. Pizzio, 1986, 32.
98. Council decision of 2 March 1984 introducing a Community system for rapid exchange of information on hazards in using consumer products, OJ L 70, 13 March 1984, 16-17.
99. Pizzio, 1986, 33-34.
100. Written Question N° 835/2, OJ C 93, 7 April 1984, 1.
101. See J. O., Novembre 1984, N. C. 10307; and in general Pizzio, 1986, 38.
102. Op. cit., 52 et seq.
103. Op. cit., 65.
104. OJ L 220, 8 August 1987, 48.
105. ECJ [1980] 3583, case 815/79, judgment of 2 December 1980. For details on the Low VoltageDirective, see Chapter IV, 2.
106. Pizzio, 1986, 68 et seq.
107. On this see Laurent, 1984; Winckler, 1984; Strecker, 1984; joint declaration by AFNOR and DIN on standardisation, DIN-Mitt. 63 (1984), 194 f.; Becker, 1985; Winckler, 1985, Beauvais, 1985.
108. Thus Becker, 1985, 37.
109. Strecker, 1984, 123.
110. Laurent, 1984, 117,
111. Winckler, 1984, 120.
112. Strecker, 1984, 123.
113. On this see Becker, 1985, 34 and Table I.

114. AFAST, 1984.
115. Joint declaration by DIN and AFNOR (note 104 supra).
116. ECJ [1986] 419, case 188/84, judgment of 28 January 1986 - woodworking machines. On this judgment see also Chapter IV, 1.2.3.
117. It is sufficient to compare the decrees attacked by the Commission in case 188/84 (note 116 supra) with the survey in Becker, 1985, 35.
118. Laurent, 1984, 118.
119. BArbB1. 11/1984, 52 et seq. Cf. Becker, 1985, 37.
120. Op. cit., 37.
121. Op. cit., 37.
122. Op. cit., 38. The German paper was published in BArbB1. 11/1984, 52. Cf. also Chapter II, 3.3.4.
123. Joint declaration by DIN and AFNOR, DIN-Mitt. 63 (1984), 194-95.
124. Strecker, 1984, 124.
125. On this see Germon/Marano, 1982, throughout.
126. See Chapter IV, 3.3.2

Part 2

Consumer product safety law in Britain[1]

2.1 Introduction

In the world's oldest industrial country, consumer product safety law has followed the path of development typical of most developed societies. It follows the tradition of governmental technical control beginning in the 19th century, and develops relatively late out of technical (plant/factory) safety law and safety-at-work law. Accordingly, it concentrates firstly on protection of life and limb. Its instruments are administrative control and criminal sanctions. Moreover, safety law for consumer products is, more than technical safety law and safety-at-work law, *market regulation*. That places it under stronger requirements as to economic efficiency and public policy legitimation. In Britain, too, this ambivalence marks the structure of existing consumer product safety law and the current debate on prospects for extending it.

2.2 The Consumer Protection Act 1961

2.2.1 Pre-history

Technical safety law in England and Wales stands unchanged within the tradition of the heroic age of the 19th-century factory acts. This command and control model of government regulation of safety as a rule consists in a broad definition of goals by the legislator. To achieve the goal, an administrative structure is set up. To a great extent, the administrative body autonomously determines measures to be taken in order to secure the legal objective. Implementation and verification is incumbent on an inspectorate on the spot. Accordingly, there is relatively wide freedom of action. Informal conflict settlement and cooperation are clearly to the fore. Recourse to the criminal courts constitutes the ultimate - rarely used - legal means of sanction against safety infringements. While the Health and Safety at Work Act 1964 - the first comprehensive regulation of British safety-at-work law - still largely follows this regulatory model (with a separate administrative structure), consumer product safety law took a different road from the outset[2].

Till the end of the 1950's, there were legal regulations only for individual cases of particular consumer products [Fabrics (Misdescription) Act 1913; Heating Appliances (Fireguards) Act 1952; Oil Burners (Standards) Act 1960][3]. In 1959 the Committee on Consumer Protection was set up and in 1960 submitted an interim report, followed by a comprehensive final report in 1962[4]. The main impetus for this initiative came from the "consumer sovereignty fallacy", which could no longer be overlooked. The Committee's proposal aimed at institutionalizing consumer power in the form of a governmental Consumer Council made up of independent persons[5]. Its main tasks were to be: gathering information, verifying the existance of a need for political action and influencing the public to take specific consumer-protection policy measures. Fifteen years later, the 1976 Green Paper on consumer safety again advocated the setting up of a Consumer Committee[6]; 21 years later a consumer protection committee of this type was set up in France[7]. In Britain, by contrast, legislation took a different course. In 1961

- before the Committee on consumer protection had finished its work but in implementation of some of the recommendations from its interim report - a safety law covering all consumer products was enacted for the first time: the Consumer Protection Act (CPA).

2.2.2 The content of the CPA 1961

The Consumer Protection Act (CPA) of 1961, slightly amended in 1971 and 1977, is a mere *framework law*. It does not itself contain any substantive regulations of relevance to safety. Essentially, it covers three points:
- Section 1 implements the main recommendations of the 1960 Interim Report of the Committee on Consumer Protection[8]: the executive (the competent Secretary of State) is empowered to enact binding safety requirements for particular types of product where this appears advisable. The safety requirements relate to two things: 1) requirements on composition, content, planning, design, manufacture and packaging of products, to avoid danger to life and limb; 2) requirements on instructions and warnings to potential purchasers.
- Section 2 contains the *general obligation* on every professional seller of the product in question at all stages of trade to observe the safety requirements formulated in the Safety Regulations. This duty of observance does not apply to*inter alia* private sellers (Section 2 (3) (a) CPA) or exporters (Section 2 (3) (b) CPA).
- Section 3 regulates the sanctions for infringing the Safety Regulations. Infringements of the duty of observance pursuant to Section 2 are subject to criminal proceedings (Section 3 (2) CPA). In the event of damage, *any* person damaged by the unsafe product can raise criminal compensation claims against the seller (offence of breach of statutory duty - Section 3 (1) CPA). General common-law entitlements to compensation remain untouched (tort and contract)[9].

2.2.3 Assessment

All in all, the CPA 1961 keeps to the approach of individual case regulation in safety law. Competence to regulate the individual cases is simply shifted from the legislature to the executive. For enactment of safety regulations, the CPA makes no formal approval by either House of Parliament necessary. Usually, though, the Joint Committee on Statutory Instruments, a joint committee of both Houses of Parliament, is involved. Section 1 (5) lays a duty on the Secretary of State to consult "such persons or bodies of persons as appear to him requisite" before issuing a regulation. A safety regulation can be suspended at any time by decision of either House of Parliament ("negative resolution procedure" - Section 1 (6) CPA). The CPA 1961 is innovative in its consumer protection policy effect in two ways: by extending the power of legal regulation to *all consumer products* and by making safety regulation *dynamic* through delegating power to issue safety regulations to the executive without involvement of Parliament. One weakness is implementation. No separate

hierarchical administrative structure was set up to apply the CPA. Verification of observance of safety requirements was instead left to the local authorities, the trading standards officers of the local Weights and Measures Authorities. These are entitled - but not obliged (!) - to carry out inspections within the area of application of safety regulations, and to take random samples of goods for further investigation. They are not given any further powers. In particular, the local implementing bodies cannot issue any prohibition orders. Over and above formal sanction, the CPA trusts to voluntary observance of the safety regulations and to the market-complementary method of consumer information or sensitization. Altogether, between 1961 and 1978, eighteen safety regulations on the basis of the CPA were issued[10]. There do not, however, seem to be any indications as to how many sellers had proceedings brought against them in that period for breach of safety regulations.

2.3 The Consumer Safety Act 1978

2.3.1 Background

A further stock-taking of consumer product safety law in Britain came fifteen years after enactment of the CPA, in the form of the 1976 Government Green Paper on "Consumer Safety"[11]. This summarized the existing prospects for a British consumer product safety law, which in the later White Papers of 1982, 1984 and 1985 where merely taken up again in part and given new emphases. Four main points have been chosen to demonstrate shortcomings of consumer protection policy[12]:

- Lack of regular systematic *information* on product-related accidents and of in-depth studies on the exact involvement in accidents of such products, or on cumulative causes of accidents; lack of international exchange of information;
- Lack of *BSI standards* for consumer products, and difficulties in developing and/or updating them;
- *Cumbersomeness* and *procedural restrictions* of safety regulations, in particular the absence of any possibility outside the regulations to respond to new hazards, issue banning orders, or have products recalled;
- Weaknesses in implementing safety regulations.

Among the proposals for improving consumer protection we shall here deal only with the set of technical standards. In order to secure a wider range of specific technical standards, the Government is contemplating the following possibilities[13]:

- Introduction of special safety standards;
- Setting of time limits for developing new technical standards; in this context, adoption of the offeror procedure practised by the American CPSC is recommended[14];
- Generalized formulation of safety requirements in safety regulations, even if no British Standard is available, so that manufacturers themselves can develop appropriate technical solutions;
- A shift to the method of non-binding reference to technical standards in safety regulations;

- Development of conformity marks;
- Encouragment of economic associations to develop self-regulatory codes of conduct in the area of consumer safety law, similar to the codes in the area of competition law, encouraged by the Office of Fair Trading since 1973.

2.3.2 The content of the CSA 1978

An initial partial response to the criticism and proposals in the 1976 Green Paper was the Consumer Safety Act 1978[15/16]. The characteristic of this Act, still authoritative today, is flexibility on the sanctions side. The rigid two-dimensionality of overall empowerment by statute and regulation of individual cases by the executive is abandoned. Besides the safety regulation, three other instruments are added to the executive's range of safety law measures; the prohibition order, the prohibition notice and the notice to warn. The only one important in practice is the prohibition order, which supplements safety regulations by acting as a time-limited emergency measure.
The CSA essentially contains five points:
(1) Section 1 lays down "the law" of safety regulations. The objects of the regulations are firstly - here made explicit for the first time - the *safety* of consumer products[17], and secondly the furnishing of consumers with appropriate*information* (Section 1 (1) CSA). The way these goals are to be met through the regulations is set out in detail in Section 1 (2). A notable feature, as a further reflection of the proposals in the 1976 Green Paper, is the prominent place given to technical standards. Technical standards as a substantive reference point for safety regulations appear in four of the nine points. In the context of measures to inform and warn the consumer, marks are also explicitly mentioned.
The procedure for enacting safety regulations is, by comparison with the CPA, made formal. Competence remains with the executive (Secretary of State). However, the duty of consultation is extended. The Secretary of State is now obliged to consult organizations that represent interests affected by the regulation (Section 1 (4) CSA). One example of what this means is that in connection with the Novelties (Safety) Regulations 1980, 66 people and/or organizations were consulted. Additionally, safety regulations must now be approved by both Houses of Parliament (Section 7 (7) - "affirmative resolution procedure")[18]. Both mean considerable complication and prolonging of the procedure for issuing safety regulations.
(2) Section 3 regulates the new instruments of action. The clumsiness of the safety regulation procedure is evidently to be compensated here by opening up additional possibilities of rapid regulatory intervention.
Prohibition orders (Section 3 (1) (a) CSA) are orders that prohibit the sale of a particular group of products[19]. The Secretary of State has in principle to announce the issue of a prohibition order 20 days in advance, secure opinions and check those received. This "preliminary procedure" may be dispensed with only in urgent cases ("emergency procedure"). The prerequisites for an "urgent case" are not specified in any more detail. Prohibition orders expire by law after 12 months. Additionally, they may at any time be waived by decision of either House of Parliament (Section 7 (6) CSA).

Prohibition notices (Section 3 (1) (b) CSA) are issued to a particular person. The procedure for issuing prohibition notices is regulated in Schedule 1, Part II, CSA - in too much detail and out of all proportion to their practical relevance. Intensive exchange of information between the trader/importer affected and the Secretary of State is provided for. This seems to amount to legal regulation of the prevailing practice at the implementation stage of informal settlement of disputes.
Notices to warn (Section 3 (1) (c) CSA) are instructions to suppliers to provide information or warnings on particular hazards of products supplied by them[20].
(3) *Contraventions* of prohibition orders, prohibition notices or notices to warn issued by the Secretary of State are criminally (Section 2 CSA) and civilly (Section 6 CSA - offence of breach of statutory duty) actionable.
(4) For the first time, a comprehensive *information right* of the Secretary of State is also given legal embodiment. He may secure information, call for documents and ask to see them, etc. Breaches of this duty on suppliers constitute an offence.
(5) Section 5, taken together with Schedule 1, Part III, regulates in detail the powers of the implementing agencies. These are - as under the CPA - confined to the right to enter business premises, see documents, take samples of products for further investigation, and where necessary, secure assistance from authorized agencies to enter business premises by force and, in compliance with prescribed procedures, forcibly open receptacles.

2.3.3 Assessment

The thinking of the CSA 1978 is characterized by the division of labour between safety regulations and prohibition orders. Prohibition orders are a response to new types of product hazard. During their 12 months duration, experience accumulated can be used to decide whether there is justification for extending the provisional measure into a safety regulation. Of the eight prohibition orders issued under the CSA between 1978 and 1983, six have been converted into safety regulations. Prohibition notices and notices to warn played no significant role in practice.
Statements on the effectiveness of the CSA in guaranteeing the safety of consumer goods can only be tentative. Compared with the eighteen safety regulations made under the CPA between 1961 and 1978, fourteen were made under the CSA between 1978 and 1985[21]. As regards formal punishments for contravention of safety regulations and prohibition orders, the government's first five-year report (pursuant to Section 8 (2) CSA) to Parliament on practice with the CSA (and CPA), of 1983, gives the following figures[22]:
Contraventions of safety regulations

Period	Number of persons convicted	Number of breaches of the law
Nov. 78 - 31.3.79	54	59
1.4.79 - 31.3.80	98	142
1.4.80 - 31.3.81	109	158

1.4.81 - 31.3.82 185 439
1.4.82 - 31.3.83 256 665

Much greater importance, however, attaches to "soft implementation", to cooperation between the on-the-spot implementing agencies, the trading standard officers, and the manufacturers and traders concerned.
Summarizing, one may say that there is consumer product safety law in Britain only to the extent that safety regulations and/or prohibition orders have been issued under the CPA and CSA. Local implementing agencies can act only on the basis of these provisions for individual cases. Their powers are limited to the disclosure of breaches. They have no powers to prohibit further sale of unsafe goods, far less order recalls of products that cause damage. The CPA and CSA continue the traditional dual strategy of British safety law unchanged: (1) voluntary compliance with safety regulations following informal warnings from the authorities, and (2) where necessary, penal sanctions. The only additional possibility is an official Government warning through the media against buying particular products.

2.4 Present prospects for development

2.4.1 Legal reform projects

Six years after enactment of the CSA, the 1984 Government White Paper "The Safety of Goods"[23] took a new look at British consumer good safety law. Moving on from the fundamental Green Paper of 1976, it singles out the following two main weaknesses of the CSA.
As regards *implementation*, the possibilities offered for pursuing the most effective and cheapest road to consumer protection, namely preventing unsafe products coming to market at all, are too slight. Obligatory safety checks or safety marks as legal prerequisites for sale are rejected, with explicit reference to problems in connection with Community law (technical barriers to trade). Instead, more lasting preventive effects are expected from higher criminal penalties (higher fines), and extension of powers for local implementing agencies to make preventive checks is recommended. Moreover, local authorities have no way of preventing further illegal sale of goods or of withdrawing goods from the market that are clearly out of line with safety regulations or prohibition orders. Above all, institutional provisions are required in order to catch unsafe imports (specially from non-EEC countries) at the frontiers.
It should be noticed in passing, that these suggestions led to an amendment to the CPA and CSA, the Consumer Safety (Amendment) bill, which was enacted in August 1986. As regards the problem of checks on imported goods, obviously felt to be urgent, the customs and excise authorities are given the right to impound imported products for 48 hours for investigation by the competent local implementing bodies. They have also to inform the competent bodies of any suspicions they may have.

The range of instruments available to local implementing bodies is extended by the introduction of the *suspension notice*. This allows the competent authorities, on justified suspicion of infringement of a safety regulation or prohibition order, to issue sales bans valid for 6 months. Finally, for the first time (!), the possibility is opened up of withdrawing unsafe products from the market. On application from a local authority, a court may order the destruction or confiscation of incriminated goods. Recall procedure is still not provided for.

The decisive step towards making British consumer good safety law effective is however seen as a change in the underlying conception: replacement of individual case regulation through safety regulations and prohibition orders by generalization of the safety law approach. The introduction of a *general safety duty*, already present in the Health and Safety at Work Act (Section 6 HSWA) and favoured in the 1976 Green Paper, is once again advocated. This duty would require all manufacturers and traders (importers, wholesalers, retailers, etc.) to bring only safe goods to market in Britain. It would allow the implementing agencies, without having to pass through safety regulations or prohibition orders, to proceed directly against any trader because of any consumer product, provided it be *unsafe*. While the CSA 1978 was still endeavouring to give an exhaustive definition of the concept of safety (Section 9 (4))[24], the 1984 White Paper completely abandons any such legal semantics of safety. The safety of consumer goods is defined by referring to "sound and modern standards of safety". The 1984 White Paper has thus brought into cosnumer product safety law what was originally achieved in 1974 by the HSWA, but later only hinted at by the CSA 1978: the step to delegalization, or to "legislation by reference to standards" (J. Fraser). "Sound standards" are in the first place British Standards[25], but also European and international standards that have been recognized as such. Observance of relevant standards would indicate "due diligence", and rule out criminal responsibility[26].

The 1984 White Paper's approach - possibly influenced by similar considerations at the European level - very strongly links interests in the international competitivity of the British economy[27] and in safety and consumer protection policies. Once this link is set up, experience shows that the latter have the worse of it. The consequences of this kind of "reference to standards" approach for consumer product safety policy are obvious, even though they have not yet been drawn and do not seem at all realizable: development of genuine (consumer product) safety standards and/or effective consumer involvement in the standardization process.
The 1985 White Paper "Lifting the Burden"[28] again expresses the Government's intentions in legal policy: to move towards a general safety duty and wind down single-case regulation. This consumer protection policy approach is now even more closely tied in with an overall deregulation programme intended to eliminate needless regulatory burdens and costs for the British economy.

2.4.2 Consumer Protection Act 1987

In November 1986 the British Government published the draft of a Consumer Protection Bill[29], which was passed by Parliament in summer 1987. The Consumer Protection Act 1987 (CPA) contains three substantive sections:
(1) Incorporation of the Community Product Liability Directive into British law; (2) revision of the CSA 1978 by introducing a general safety requirement and (3) a regulation on deceptive price indications. In this context only the second part, on consumer protection or consumer product safety (consumer safety) is of interest. This part came into force in autumn 1987. It thus brings both aims - generalization of consumer product safety requirements and policy of reference to technical standards - into legislative practice. In the future, the supreme principle in British consumer protection law will be not to bring any goods to the market that "fail to comply with the general safety requirement". Consumer goods within the meaning of the Act are products intended for private use and consumption. Separately regulated areas like cars, medicines, tobacco, etc. are excepted.
The general safety requirement is not met if consumer goods "are not reasonably safe having regard to all circumstances" (Section 10 (2) CPA). Among such circumstances are mentioned: (1) characteristics of goods that would constitute a defect within the meaning of the Community Product Liability Directive; (2) technical (safety) standards; (3) the technical possibility of producing a product more safely, if this is in reasonable relation to the costs incurred, etc.
The new Act does not apply to secondhand goods; to goods not intended for the British market; or to retailers to whom the lack of safety was not apparent. Moreover, it is always a sufficient defence to show that the product meets the requirements of a safety regulation or a tested technical (safety) standard. The *regulatory* instruments of the CSA 1978, as last augmented by the 1986 Amendment, are unchanged. In particular, the general safety duty does not correspond to any general recall powers for the competent Government offices. There is only the limited possibility of issuing a suspension notice on the basis of an existing safety regulation or prohibition order.
As far as penalties go, a distinction has to be drawn: breach of the general safety duty is merely an offence punishable by fine or imprisonment. There is *no* civil sanction. This is kept for the new product liability law[30], as a conversion of the Community Product Liability Directive. Contraventions of specific governmental regulatory measures, in particular safety regulations, retain their traditional twofold character as crimes and as the torts of breach of statutory duty.

2.5 Accident information systems

The consumer protection policy debate in Britain takes on a special quality because the relevant legal policy work was set on an empirically based scientific foundation. During the mid-70s, the UK began developing the most comprehensive accident information system of the times alongside NEISS in the US, namely the Home Accident Surveillance System (HASS). In 1977, following an initial stage in 1976, a system for collecting data on accidents at home and in the garden was developed in England and Wales. Twenty hospitals with 24-hour accident and emergency services were incorporated into the system as information

sources. In an alternating pattern, ten hospitals at a time supply data on non-fatal accidents requiring medical treatment in hospital. Fatal accidents are surveyed and assessed by the Office of Population Censuses and Surveys (OPCS). According to the last available HASS report, from 1986 and based on 1985 figures[31], every year in Great Britain, i.e. England, Scotland and Wales[32], 5005 people die in home accidents and 3.1 million people are sufficiently seriously injured as to require medical treatment. Home accidents constitute 40% of all fatal accidents in Great Britain (as against 42% road accident deaths), and at 34%, are by far the largest proportion of accident victims treated in hospitals. The number of fatal home accidents in the narrower HASS survey area, England and Wales, has been very stable at around 4800 since 1980.

The hospital figures collected by HASS on non-fatal accidents are systematically assessed and published every year. In particular, the annual report contains product-related data on accident frequency. Additionally, the Safety Research Section of the Department of Trade and Industry does in-depth studies, or has them done, to determine where there is need for political action in the form of a safety regulation.

The Community experimental model accident survey system of 1981 was largely inspired by this British example. Its present successor, the demonstration project of 22 April 1986, is however patterned more closely on the Dutch model (PORS), under test since 1980. It seems superior to HASS in three respects: (1) non-restriction to house and garden, but inclusion of leisure and sport activities; (2) inclusion of fatal accidents too; (3) diversification of information sources to more than just hospital casualty services. In Britain, HASS is at present being extended on the model of the Community demonstration project; specifically, a Home Accident and Death Database (HADD) is being added, into which sport and leisure accidents are subsequently to be integrated. The pilot stage began in November 1986 with one initial hospital. Inclusion of Scotland and Northern Ireland, i.e. the extension of the accident information systems (HASS/HADD) to Great Britain and to the United Kingdom as a whole, is still awaited.

2.6 Technical standardization

2.6.1 British Standards Institution

The central institution for standardization in Britain today is the British Standards Institution. The BSI is similar in history and structure to the DIN. It started in 1901 as the Engineering Standards Committee, founded by engineering associations. The first technical standard was on rolled steel sections for rails. In 1918 it became the British Engineering Standards Association. A Royal Charter of 1928 gave it legal capacity. The present name was adopted in 1931. The tasks of the BSI, as formulated in Royal Charters of 1928, 1931 and 1981, consist primarily in developing technical standards and in certification of products.

Today the BSI is headed by a board responsible for general standardization policy. Below the board are six Councils in specific areas: building, chemistry and health, engineering, electricity, technology and computing. There is also a Quality Assurance Council, responsible for product certification, tests and inspection. In 1984, the latter was transformed into the

National Accreditation Council for certification bodies. Its tasks are to monitor and authorize for product certification and quality assessment, certification bodies other than the BSI. Practical standardization work is done by some 300 technical committees[33]. These committees are comprised of some 28,000 experts, primarily from interested business circles who work on a voluntary basis. The BSI has more than 1074 permanent employees.
Besides the technical committees, the Consumer Standards Advisory Committee is of importance from the viewpoint of product safety. Some 70-80 representatives of consumer associations take part in this endeavour. The Consumer Committee developed out of the Women's Advisory Committee introduced in 1951. Its task is to ensure involvement of consumer interests in the standardization process. The Consumer Committee is at present represented on 230 technical committees. Since consensus or unanimity by Committee members is a precondition for adoption of a technical standard by the BSI, opposition by a consumer representative can block a standard.
At present there are 10,124 British Standards. 8,900 standards are being worked on (more than half of them international standards). The BSI budget currently amounts, according to the 1985-6 Annual Report, to 26 million pounds. This sum is mainly derived from contributions of the 18,000 members, from the sale of standards specifications and from government contributions (4.5 million pounds).

2.6.2 Methods of reference to standards"

British Standards, like DIN standards, are mere recommendations. They have no legal standing[34]. This has all changed since the British Government adopted the "reference to standards" policy in worker and consumer protection law in the late 1970's. This policy is in turn determined by the great political value attaching to British Standards for the international competitivity of the British economy in the last decade, especially following UK entry to the EEC in 1973. Among political expressions of this situation are the (already cited) 1976 Green Paper "Consumer Safety", the General Agreement on Technical Barriers to Trade, to which Britain acceded in early 1980, the 1982 Memorandum of Understanding between Government and BSI, and particularly the 1982 White Paper "Standards, Quality and International Competitiveness".
Ignoring for the moment the possibility of using British Standards for contractual description of performance, something done above all by the State when placing orders, there are four particular important ways for giving technical standards legal relevance[35]:
- *Incorporation*. A formerly widespread method is to incorporate a British Standard, in modified form or sometimes *verbatim*, into a safety regulation. An example of this is the Oil Heaters Regulations of 1961/1966. By contrast with reference proper, here it is the regulation itself - even though partly incorporating a British Standard - that independently, and exhaustively, regulates the technical requirements.
- *Strict reference*. With this reference method, so far the major one in Britain, the provision (as a rule a safety regulation) refers for safety standard, test procedure, etc. directly to a British Standard, indicating the BS number and date. Compliance with this technical standard is then a legal obligation. In German terminology, this is a case of rigid/static legal reference.

Any change to the technical standard necessitates adaptation of the safety regulation. Examples of this are the Heating Appliances (Fireguards) Regulations (1973) and the Nightdresses (Safety) Regulations 1967.
- *Undated reference*. In this case the safety regulation refers to one or more specific standards by simply mentioning the BS number, but compliance with the norm is not made binding. The manufacturer/importer then has alternative possibilities of meeting the safety requirements. This reference is made on a "deemed to satisfy" basis.
- *General reference*. The legal provisions may however also describe the safety requirements in general, or abstractly contain a general safety obligation[36]. The manufacturer/importer/trader is free to choose the way he wishes to meet the requirements. One acceptable way will be to comply with the relevant British Standard, or equivalent technical standards, if they exist. More recently, the Ministry has gone over to providing so-called *administrative guidance*. Here there is a clear statement of which technical norms satisfy the safety requirement concerned. This reference is made on the so-called "approved" basis. Practical examples are the Electrical Equipment (Safety) Regulations 1975, the Building Regulations and the area covered by the HSWA. By contrast with administrative provisions under § 11 of the German GSG, administrative guidance has no formal legal standing.
This model ("approved" basis) ought also to be applicable now that a general safety duty has been statutorily introduced into consumer product law. Specific safety requirements will now be defined by "sound and modern practice" or "sound and modern standards of safety". What this in turn means would have to be specified in approval schemes, which would no doubt be worked out under BSI direction with broad involvement of governmental and consumer representatives. Technical standards passing this test of certification or approval would then be published in a list, comparable to that for administrative guidance.
Though they have no legal significance, informal recommendations of technical standards by local implementing agencies continue to be of great importance in practice.
The two methods of non-binding legal reference to technical standards ("undated and general reference") seem to be becoming steadily more common in Britain. In particular, the 1982 Government White Paper "Standards, Quality and International Competitiveness" is decidedly in favour of this regulatory approach ("statute plus BSI"). The parallels with the "new approach" to harmonization of technical standards at Community level are unmistakable. The introduction of a general safety duty in consumer product safety law, announced in the 1984 and 1985 White Papers and brought about through the Consumer Protection Act 1987, is merely a consistent development of this legal area, in respect to both industrial policy and consumer protection policy.

2.6.3 Product certification

Certification is an area that has been intensively discussed and dealt with in Britain, partly also from trade policy standpoints. In 1982, certification procedure was available for between 200 and 300 types of products. In the most part, BSI kitemarks are issued. Product certification is handled by the BSI through the Certification and Assessment Department. In

addition to this department, there are other recognized certification institutions in particular areas. Two examples are the British Electrotechnical Approvals Board (BEAB) for electrical products and the British Board of Agreement (BBA) in the area of building and construction.
In Britain, three marks of conformity or quality are commonly used:
- *BS number*. Mere use of the BS number is the least effective measure. It is merely a statement by the user or manufacturer, not checked by anyone else, that the product has been manufactured in accordance with the relevant British Standard.
- *Kitemark*. This conformity mark has existed since 1903. Authorization to use the kitemark is given by the BSI following checking at the manufacturing plant to ensure that the requirements are met. At the end of 1986 there were 1,365 kitemarks. The BSI Inspectorate carries out continual checks to ensure that the provisions are still being complied with.
- *Safety mark*. Since there are (as yet) no specific safety standards to date, and a British Standard is not necessarily oriented towards coverage of all possible relevant safety requirements, a safety mark was introduced in 1974. Firms may use it on products that have met special safety requirements when tested by the BSI. In practice, however, the safety mark has evidently not yet caught up with the kitemarks. Compared with the 1,365 kitemarks at the end of 1986, there were only 37 safety marks.
A fairly important procedure in Britain is that of *quality assessment*. This centres not around an individual product, but rather on whether a manufacturing or service firm in general meets the requirements of BS 5750[37], the BSI's basic quality standard. Firms that meet the requirements - at present there are 1,402 of them - are registered by the BSI. This registration also seems to be of interest to the firms concerned from a marketing viewpoint.

2.7 Liability

Traditionally in British safety law, the main non-administrative response to contraventions of safety regulations is criminal sanction[38]. The CSA lays down penalties of up to three months imprisonment and fines of up to 1000 pounds (Section 2 (4)). However, the conditions under which the accused may put forward the defence of due diligence are in each case regulated in detail[39]. While the HSWA 1974 explicitly excludes civil sanctions, they are explicitly permitted by the CPA 1961 and the CSA 1978. The Consumer Protection Act 1987 once again provides only criminal sanctions for breaches of the general safety requirement (Section 10 (1) CPA). As to liability, in consumer product safety law in England and Wales there were three possible grounds of claim, of which however we shall describe only the first two in more detail, given their more direct relevance: breach of statutory duty, negligence ("product liability in tort") and contract. Henceforth the new product liability law embodies a third one (modified strict liability).

2.7.1 Breach of statutory duty

The offence of breach of statutory duty is the most interesting one from a liability point of view, even if to date, it has no practical importance[40] with regards to consumer product safety

law. This institution is controversial in the English legal literature on liability. Dias/Markesinis, for instance, say that it lies "between" liability on grounds of negligence and strict liability[41]. Firstly, Section 6 (1) CSA clearly states that breaches of obligations under safety regulations, prohibition orders or prohibition notices constitute a civil offence of breach of statutory duty. It seems also to be undisputed that this is strict liability, since the criminal law defence of due diligence is ruled out. Liability is based on merely marketing an unsafe or damage-causing consumer product. However clear this differentiation may seem, the demarcation becomes unclear when one comes to consider the cases of primary interest here, where the manufacturer/trader has complied with a technical standard referred to (in particular a British Standard). No problems arise with the case where a safety regulation bindingly prescribes compliance with a particular standard (Section 1 (2) (b) CSA). Here, compliance with a technical standard that ultimately proves technically inadequate (for instance, because it is out of date) excludes breach of statutory duty as a ground of liability. More interesting, since it will no doubt be of greater importance in the future, is *non-mandatory* reference to technical standards, for instance, pursuant to Section 1 (2) (c) CSA.

For civil liability on grounds of breach of statutory duty, it must here suffice for the plantiff to show that there has been a breach of the relevant safety regulation, in other words, an unsafe product has been brought to market. Since action for breach of statutory duty does not require negligence, the defence that a relevant British Standard has been complied with is not admissible. The main defence open in breach of statutory duty cases is to show that the person suffering the damage is (largely) co-responsible. Compensation for damage is limited to personal injuries. Exclusion of liability or limitation of liability is null and void[42]. Whether the courts will maintain this line of interpretation in the sense of "strict liability" in England and Wales is
at present completely uncertain. Firstly, no relevant decisions have been taken as yet. Secondly, with the Consumer Protection Act 1987, British legislation has in part taken a different course. Breach of the general safety requirement now introduced has been specified solely as the elements of an offence. The liability aspect has been left for British product liability law, which has to implement the Community product liability Directive. By contrast with the National Consumer Council's expectations expressed in 1984[43], the offence of breach of statutory duty does *not* extend to the "general safety duty". Breach of statutory duty remains confined to the safety regulations and comparable governmental regulatory acts. Most recently, there has been a noticeable general trend by courts in England and Wales to look at the political objectives lying behind individual-case statutory regulations in order to specify the content and extent of the statutory duty and the circumstances that define its violation[44]. Since it has, however, become clear since the 1980s that in the view of both Government and Parliament, "sound and modern standards of safety" ought to define the scope of the duty, it cannot be ruled out that if standards "approved" by the BSI[45] are observed, liability for breach of statutory duty will not arise.

2.7.2 Negligence

Liability under the common-law offence of negligence takes us outside the narrower context of consumer protection law. Entitlement may here arise - subject to any special provisions of accident insurance or labour law - for anyone harmed by a product: a worker in a production process; a businessman in connection with goods he uses in his trade; the final private consumer. Liability for damage lies primarily with the manufacturer of a product, who also has to answer for negligence by his employees, on the principles of vicarious liability. Offence-based manufacturer liability on grounds of negligence[46] developed relatively late in English common law. Whereas in the US and in Germany the foundations had been laid by similar decisions at the highest judicial level at around the same time, 1915-16[47], this did not come about in England until 1932. The landmark decision *in re* M'Alister (or Donoghue) v. Stevenson[48] for the first time assumed positive duties of care between persons outside contractual relationships, which could be breached merely by being negligent ("not using reasonable care"). Subsequently, negligence liability by manufacturers of defective products was consolidated. The general duty of care was differentiated into manufacturing duties ("production defects"), design duties ("design defects") and duties of instruction ("marketing defects"). Procedurally as well, it may now be taken as a basis in England and Wales - comparable in this respect with the FRG - that it is in principle sufficient for the injured party to show that interests protected under the law of tort have been injured during proper use of the product in question. By the *res ipsa loquitur* rule, the manufacturer's negligence is (refutably) presumed.

As regards the law of evidence, it is in principle to be taken as a basis in English law that conformity with a standard or departure from one is not synonymous with conduct in accordance with or contrary to one's duty. Non-compliance with a British Standard engenders a strong presumption of negligence. Observance of relevant technical standards to which non-binding reference has been made places the onus on the plaintiff to provide positive proof of the manufacturer's negligence. In cases of strict reference, compliance with the technical standard concerned should suffice to rule out negligence.

At least since Walton v. British Leyland UK Ltd. (1978) a duty to monitor a product and respond accordingly seems to have been recognized. This is the counterpart in law of tort to the regulatory "notice to warn". In Walton v. British Leyland, the car manufacturer was condemned to make compensation for damages, on grounds of tortious breach of a duty of recall. English law has also developed duties of care and transaction under law of tort for the marketing stages. The doctrine of "strict liability", taken in by most US States since 1963[49], has not yet been accepted by English law of tort any more than by German producer liability law.

2.7.3 The present legal policy situation (1987)

The forthcoming implementation of the Community Product Liability Directive in British law and the British Government's undertaking to introduce a general safety duty into consumer protection law, in 1987 broke the ground for innovative developments. These included: (1) Introduction of a general safety duty into the Consumer Safety Act; raising criminal penalties; removal of the offence of breach of statutory duty from the CSA, with revised

provision for it in a special act on product liability; (2) Introduction of a general safety duty into the CSA, with retention of possibly raised criminal and civil sanctions; implementation of the Community Directive in a separate product liability act.
The Consumer Protection Act 1987 largely implemented the second option. Accordingly, British product liability law will, as far as consumer goods are concerned, in the future be based on three principles:
- Modified strict liability under the Product Liability Act (implementing the Community Directive);
- Breach of statutory duty insofar as safety regulations or comparable measures have laid down specific duties as to conduct;
- General liability in common law, specifically under law of tort (negligence).
Infringement of the newly introduced general safety requirement remains irrelevant for purposes of civil law. only Only criminal sanctions are provided.

2.8 Information

As regards information on product hazards, two addressees should in principle be distinguished: (1) the regulatory authority and (2) potential purchasers of the unsafe product.

2.8.1 Information of regulatory bodies

As regards information to governmental agencies on damage-causing products, the 1976 Green Paper referred to the following sources[50]:
- individual Government departments;
- complaints about product defects from MPs and the public;
- local authorities;
- consumer associations and the Royal Society for the Prevention of Accidents;
- the national and international press and specialized journals;
- the BSI;
- the Office of Population Censuses and Surveys (OPCS).
Most important by far is the HASS/HADD accident information system which has been extremely effective in reporting on non-fatal accidents in England and Wales. HASS and HADD are described above.

2.8.2 Information to purchasers of products

Purchaser information outside the market traditionally plays a major role in Britain. Three elements in particular should be stressed: comparative testing of goods, conformity marks and consumer education.

As in other countries reported on, *comparative tests of goods* have long been customary in Britain, too. A prominent role in this connection is played by the Consumer Association Ltd. This is a private-law non-profit-making organization founded in 1957, financed exclusively from membership dues. Membership at present amounts to some 700,000 persons. The Consumer Association carries out comparative tests on all types of consumer goods and relevant services. Test results are published in the magazine "Which?", directly available only to members. Since, however, test results are also reported on television and in the press and the magazine is available in public libraries, the Consumer Association and "Which?"[51] have an importance in general for consumer education that cannot be much less than the German Stiftung Warentest and its magazine "test".

In addition to general "brand names" (including various types of marks used by various firms or businesses), conformity marks or trade marks are of importance as conveyors of information to purchasers. Certification trade marks, above all the BSI kitemarks, are regulated in general in the Trade Marks Act 1938 (S 37). Authorized use of the conformity mark testifies to compliance with particular quality or safety requirements.

One peculiar feature of the British situation is the importance attached to consumer protection, here primarily in connection with safety in the home, through *consumer education*, even in school. The Royal Society for the Prevention of Accidents (ROSPA), maintained from public funds, is the main vehicle of the endeavour to get safety questions brought into syllabuses. The government's Press and Information Office supplies schools with film material for the purpose. Television stations broadcast corresponding "safety messages" in pauses between programmes.

1. The account is confined to England and Wales.
2. On the development of consumer protection law in Britain in general, see Borrie, 1984.
3. The latter two were repealed by the Consumer Protection Act 1961 and replaced by safety regulations under the CPA: the Heating Appliances (Fireguards) Regulations 1973 and the Oil Heaters (Safety) Regulations 1977.
4. Final Report of the Committee on Consumer Protection, 1962.
5. Op. cit., 278 ff.
6. Consumer Safety. A Consultative Document, Cmnd. 6398, London HMSO, 28.
7. Cf. Chapter II, 1.3 above.
8. Interim Report of the Committee on Consumer Protection, Cmnd. 1011, London HMSO 1960.
9. Cf. 2.7 below.
10. Regulations made under the Consumer Protection Act 1961, Section 1, now in force.
11. SUBJECT STATUTORY INSTRUMENT No.
    The Stands for Carry Cots (Safety) - Regulations 1966 SI 1610
    The Nightdresses (Safety)- Regulations 1967 SI 839
    The Toys (Safety)- Regulations 1974 SI 1367
    The Electrical Appliances (Colour Code) Regulations 1969 SI 310

The Electrical Appliances (Colour Code) Regulations 1970 SI 811
The Electrical Appliances (Colour Code) Regulations 1977 SI 931
The Electric Blankets (Safety) Regulations 1971 SI 1961
The Cooking Utensils (Safety) Regulations 1972 SI 1957
The Heating Appliances (Fireguards) SI 2106 (amended by Regulations 1973 1977/167)
The Pencils and Graphic Instruments (Safety) Regulations 1974 SI 226
The Glazed Ceramic Ware (Safety) Regulations 1975 SI 1241
The Electrical Equipment (Safety) Regulations 1975 and 1976 SI 1366 and 1208
The Vitreous Enamel-Ware (Safety) Regulations 1976 SI 454
The Children's Clothing (Hood Cords) Regulations 1976 SI 2
The Oil Heaters (Safety) Regulations 1977 SI 167
The Babies' Dummies (Safety) Regulations 1978 SI 836
The Cosmetic Products SI 1354 (amended by Regulations 1978 (also S2(2) ECA 72) 1984/1260; to be revoked in 1988)
The Perambulators and Pushchairs (Safety) Regulations 1978 SI 1372
The Oil Lamps (Safety) Regulations 1979 SI 1125
(The Cosmetic Products (Amendment) SI 1477 (revoked by Regulations 1983 (also S2(2) ECA 72) 1984/1260)

12. Consumer Safety (loc. cit, fn. 6).
13. Loc cit., 11 f.
14. Loc cit., 16 ff.
15. Cf. Chapter II, 4.3.1.
16. On the information aspect cf. 2.8 below.
17. We shall not here go into the technical legal difficulties arising from continued co-existence of the CPA with its regulations and the CSA.
18. The concept "safe" is defined in Section 9 (4) CSA: "Safe means such as to prevent or adequately to reduce any risk of death and any risk of personal injury from the goods in question or from circumstances in which the goods might be used or kept, . . .".
19. For details on procedure, see Weatherill/Woodroffe, 1985, 93 ff.
20. Details of the procedure are regulated in Schedule 1, Part I, CSA.
21. The procedure is regulated in Schedule 1 Part III CSA.
22. Regulations made under the Consumer Safety Act 1978, Section 1
23. subject statutory instrument no.
24. The Dangerous Substances and Preparations (Safety) Regulations SI 136 (amended by1980 (also S2 (2) ECA 72) 1985/127)
The Upholstered Furniture (Safety) SI 725 (amended byRegulations 1980 1983/519)
The Novelties (Safety) SI 958 (amended by Regulations 1980 1985/128)
The Filament Lamps for Vehicles (Safety) Regulations 1982 SI 444
The Upholstered Furniture (Safety) (Amendment) Regulations 1983 SI 519
The Pedal Bicycles (Safety) Regulations 1984 SI 145
The Pedal Bicycles (Safety) (Amendment) Regulations 1984 SI 1057
The Motor Vehicles Tyres (Safety) Regulations 1984 SI 1233
The Cosmetic Products (Safety) Regulations 1984 (also ECA 72 & CPA 61) SI 1260

The Gas Catalytic Heaters (Safety) Regulations 1984 SI 1802 The Food Imitations (Safety) SI 99 (amended by Regulations 1985 1985/1191)
The Dangerous Substances and Preparations (Safety) (Amendment) Regulations 1985 SI 127
The Novelties (Safety) (Amendment) Regulations 1985 SI 128
The Food Imitations (Safety) Amendment Regulations 1985 SI 1191

25. According to Weatherill/Woodroffe, 1985, 122.
26. Cmnd. 9302, London HMSO, July 1984.
27. Cf. fn. 17.
28. In November 1982 a memorandum of understanding between Government and BSI was signed, recognizing the BSI as the national standardization body and aimed at speeding up production of technical standards. It is reprinted in the White Paper "Standards, Quality and International Competitiveness", 1982, Annex A.
29. For details see 2.7 below.
30. Cf. esp. the White Paper, "Standards, Quality and International Competitiveness", London HMSO 1982.
31. Cmnd. 9571, London HMSO, July 1985, based on an interministerial study on administrative and legislative obstacles for small firms in Britain: "Burdens on Business", London HMSO, March 1985.
32. Reprinted in PHI 1987, 18-26. The Consumer Protection Act 1978 is published by HMSO, London 1987.
33. Which came into force on March 1988, as Part I of the Consumer Protection Act 1987.
34. Home Accidents, 1986.
35. Figures for Scotland are supplied to HASS by the Scottish General Register Office.
36. The data refer to the BSI's Annual Report for 1985-6.
37. Every British Standard contains the following clause: "Compliance with a British Standard does not of itself confer immunity from legal obligation".
38. Cf. also BS O: A Standard for Standards, Part 1, 1981, clause 9.
39. E.g. Section 6 (1) (a) HSWA 1974, which, borrowing from § 3 (1) GSG, postulates a general duty "to ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to health when properly used".
40. BS 5750 has since been adopted internationally as ISO 9000.
41. With the general political trend towards deregulation in Britain too, the interministerial study "Burdens on Business" (op. cit., fn. 28), p. 62, has recently for the first time unreservedly recommended restriction to civil law and to insurance solutions. But even outside the narrower area of consumer product safety law, increasing decriminalization of economic regulation is being called for. Cf. Tench, 1981; Breaking the Rules, 1980.
42. Section 2 (6) CSA; Section 12 Consumer Safety (Amendment) Bill.
43. According to information from the legal expert of the Department of Trade and Industry's Consumer Safety Unit, no action for compensation on the basis of breach of

statutory duties can be traced. See also the DTI's document of November 1985, "Implementation of EC Directive on Product Liability", § 42.

44. Dias/Markesinis, 1984, 156. Cf. also in general Stanton, 1986.
45. Section 3 (1A) CSA, introduced by the Unfair Trade Act 1977.
46. The Safety of Goods (loc. cit., fn. 23), 7-10.
47. Dias/Markesinis, 1984, 158.
48. Cf. 2.6.2 above.
49. Cf. esp. Hepple/Matthews, 1985, 258 ff.
50. RGZ 87, 1 - Brunnensalz (1915); Mac Pherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
51. A.C. 562 (1932).
52. Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 377 P. 2d 897.
53. Cmnd. 6398, 1976, page 2.
54. The "Shopper's Guide", published by the DTI and originally a possible competitor for "Which?", is of no significance today.

Part 3
Product safety policy in the Federal Republic of Germany

The description of product safety policy in the Federal Republic of Germany will concentrate mainly on the Appliances Safety Act and its implementation in practice (3.3) and on technical standardisation of relevance to safety (3.4). A final section deals with liability for technical consumer products that cause damage (3.5). The account is introduced by notes on home and leisure accident research (3.1) and a discussion on some general questions on the German system of reference to technical standards (3.2).

3.1 Research into home and leisure accidents

While industrial accidents in particular have for years been fairly completely covered by the occupational accident insurance associations, as have road accidents and accidents in schools and nurseries[1], the Federal Republic lacks comparable statistics for the area of home and leisure. The Federal Government did not take part[2] in the Community pilot experiment relating to a Community system of information on accidents involving products outside the spheres of occupational activities and road traffic[3], and was also reluctant about the demonstration project decided on in April 1986 with a view to introducing a Community system of information on accidents involving consumer products[4]. It based itself primarily on a study concerning home and leisure accidents, carried out by the Association of Liability Insurers, Accident Insurers, Automobile Insurers and Legal Costs Insurers (HUK-Verband e.V.)[5]; until then, findings on home and leisure accidents were available only for selected groups of people and types of accidents[6].

The HUK study treats as a home or leisure accident, an occurrence in which a person doing something involved with either road traffic, an occupation or school suffers an injury requiring medical treatment or leading to impairment for at least several days. An initial survey asked 89,393 representatively sampled households[7] whether one or several household members had suffered a home or leisure accident in the last 12 months. The figures collected are not stated, though the projection based on them is. This estimates home and leisure accidents with personal injuries requiring medical treatment or at least leading to rather long-time impairment at some 3 million for the Federal Republic; 15% of those injured will require hospital treatment. The number of trivial home and leisure accidents is estimated at over 100 million per year[8]. It is further stated that in 1982 approximately 11,000 fatal accidents occurred in road traffic, some 2,500 at work or school, and some 12,000 at home or in leisure time. More than 75% of the last group of victims are over 64[9].

In methodological evaluation of the study, the extremely high forgetfulness curve should be noted. For in the period within a month of the survey, 5.3 times as many accidents are mentioned as in the period within 12 months of the survey; for accidents with hospital treatment, there was still a forgetfulness factor of 2.1 for the same period[10]. This rules out

comparison of the HUK study with accident survey systems that collect figures directly from accident stations immediately after the accident, and also arouses doubt as to the reliability of the detailed accounts of the circumstances of accidents. Doubts about the study's methodological grip arise also from the fact that not a single accident resulting in death was covered and that the proportion of accidents involving children was only 15%, whereas for instance in the Netherlands study it was 30%[11].

A second phase of survey asked for further details on the course and consequences of accidents, in telephone interviews on a total of 3,064 accidents[12]. The breakdown by individual category of accident is as follows[13]:

Accidents in sport and games 44%
Accidents in locomotion 24%
Accidents in manipulation 17%
Accidents involving motion on the spot 8%
Passive accidents 8%

Manipulation accidents are 12% with a machine and 32% with a tool. These two categories together make up 8% of all accidents surveyed; because of the relatively slight consequences of the accidents and the resulting higher forgetfulness rate, the proportion is probably to be estimated higher in reality[14].

The case studies did not from the outset provide any category for covering design-related causes of accidents, but made only the following behaviour-based assignments[15]:

- Infringement of elementary safety rules 2%

- Failure to observe a fairly obvious safety rule 15%

- Everyday situation that "went wrong" 72%

- Accident to child because of clumsiness, with
adult unable to intervene 10%

As a whole, the HUK study summarises to the effect that technical inadequacies in newly purchased machines, tools or appliances seem to play no part in the causation of home and leisure accidents. The Appliances Safety Act was supposed to have ensured that hardly any inadequate, dangerous to handle machines were still being sold. 99% of home and leisure accidents are seen as being the consequences of more or less serious mistaken actions[16].

In his politically ambitious account and assessment of the study, Mertens comes to the conclusion that accidents with appliances and machines as yet undamaged by wear and tear that have been used properly and safely, accounted for much less than 0.5% of all home and leisure accidents[17]. This supposedly obvious conclusion, that the major part of appliance and machine accidents are due to improper or unsafe use or to damage through wear and tear, can

derive support only from the "case studies"[18] on the handling accidents, which are, however, full of very tendentious assessments. Mertens also presupposes that wear and tear and mistaken actions are negligible when it comes to setting technical standards. The Stiftung Warentest comes to a quite different estimate. It believes that many accidents today classed as user-caused could very quickly come to be seen as appliance caused if the necessary creativity were applied to thinking how foreseeable misuse could be avoided by suitable technical arrangements[19].

We do not wish here to go any further into the fact that in 1984, 24% of appliances tested by trade inspection offices in any case proved defective[20] nor into the serious, widespread shortcomings in systematic market control by the North Rhine-Westphalia Central Office for safety technique that have come to light[21]. One observation of Mertens that remains convincing is that data collection on accidents must be made much more detailed if it is to be of use for technical standardisation. What he deduces from this, however, is not the need for intensive directed studies, for instance on handling accidents with appliances and tools, but instead the basic principle of "hazard analysis that has stood the test of decades" which makes it possible to prevent accidents beforehand by applying technical safety principles to removing danger spots and sources of risk. According to Mertens, the Community should "concentrate more on intensifying supranational work on technical safety regulations and standards"[22], instead of focusing its accident prevention work on appliance and machine accidents that have already occurred.

3.2 The reference technique in general

A characteristic of German product safety law, as of German safety law in general, is the "interplay between governmental legal standards and private technical standards drawn up by technical and scientific associations, in a complex multilayered system of standards"[23]. The object of technical safety law is on the one hand, to protect life, health, property and the environment against damage from technical products and installations, and on the other, to provide legal guarantees in connection with economic activities bound up with certain technical risks. To this end, statutes and legal ordinances lay down binding safety objectives, vaguely defined using such formulae as "generally recognised rules of the art", "state of the art" or "state of science and technology". These indefinite legal concepts are amplified by references to technical rules or standards drawn up by public-law committees of experts or by private standardisation associations. Manufacturers or users of potentially dangerous technical products or installations are not legally bound by the technical rules or standards, but may choose other solutions if at least the same level of safety is achieved (deviation clause). This is intended to take account of the rapid development of modern technology and avoid hampering progress and producing rapid outdating.

The choice among the expressions "generally recognised rules of the art", "state of the art" and "state of science and technology" determines the lag in adapting legal requirements to

technical or scientific advance[24]. The legally indefinite expression "generally recognised rules of the art" focuses on the prevailing view among technical practitioners, on what is generally regarded as tried and tested in professional practice. This criterion always lies behind further technical advance. The formula "state of the art" shifts the legal criterion for what is permitted or commanded to the front line of technical development; the decisive point is not what is generally recognised or established in practice, but what is technically necessary, appropriate and possible, even if commercial practice is not yet in line with it. If a requirement mentions the "state of science and technology", those precautionary measures regarded as necessary according to the latest scientific findings must be used. If this cannot yet be achieved technically, permission may not be issued, since the limit to the requirement is not set by what is currently technically achievable. Detailed technical rules have been displaced from the context of governmental law-making to the allegedly more flexible level of non-governmental regulation, so as to permit quicker adaptation to technical progress but above all to allow for representative collaboration by "interested circles" in industry and the economy, science, technical monitoring organisations and other interested and expert groups in society. P. Marburger speaks of the structural principles of flexibility and co-operation[25]. R. Wolf calls the standardisation logic of technical regulation a "self-regulatory mechanism in the shadow of regulative policy"[26]. Before dealing with the specific form of private technical standardisation and its controlled adoption by government in the area of safety of technical consumer goods in detail, we shall briefly summarise the German debate on the legal admissibility of reference to technical rules[27], since the legal admissibility of the new approach to technical harmonisation and standards raises similar questions.

There is no dispute as to the admissibility of *rigid reference*[28] in which a law or regulation refers to a quite specific version of a technical rule. Here the legislator can verify the content of the technical standard, and the content of the standard referred to cannot be altered without assent by the legislator. Rigid reference to technical standards is nothing other than a drafting abbreviation in the text of the statute. It does not transfer any legislative powers to non-legitimated non-governmental bodies, and it complies with the constitutional principle of certainty of law. Due to the amplitude of the reference, the content of the technical rule referred to is binding not only for the administration but the citizen as well.

Since rigid reference bindingly prescribes a particular technical solution, it is a suitable method for linking legal standards with technical rules only where one or several technical standards can be referred to, where technical development has already reached some sort of end-point and major innovations are unlikely, or will remain irrelevant as far as the object of legal protection is concerned. By comparison with statutory regulation of individual technical questions, rigid reference means unburdening the legislative bodies and the statutory text of detailed technical questions, allowing more flexible adaptation to technical advance, since it is not the text of the statute or regulation that has to be reworked, but only a formal correction to the reference that is required.

The admissibility of *sliding or dynamic reference*, where reference is made to one or more technical standards in their most current form, was long disputed[29]. P. Marburger names four legislative functions of sliding reference[30]:

- To free the legislator or regulator of a regulatory task for which they usually lack the necessary technical understanding[31] (unburdening the legislator);

- To keep the text of the statute or ordinance free of complicated and often very voluminous detailed technical provisions (unburdening the law);

- To allow rapid adaptation of the content of the law to technical advance, by shifting the technical details of safety regulation out of the formal legislative procedure (flexibility);

- To allow involvement of expert circles in law-making (co-operation).

The involvement of "expert" circles *may* be a guarantee that technically practicable and also adequate safety solutions will be adopted if it can be made certain that the competent experts are in fact represented on the relevant standards committees. Involvement of those concerned in establishing technical standards ought to increase willingness to comply with the standards. This ought not, however, to be bought at the price of adopting objectively unsuitable regulations because of one-sided representation of interests - and "expert" circles are always also "interested" circles. The interests concerned must be represented truly comprehensively, including suppliers, consumers and representatives of the public interest[32]. The procedure of private technical regulation, and specifically the way it is actually done and not what it said on paper, decides whether sliding reference will lead to adoption of apposite regulations in the public interest or decisions in the particular interest of manufacturers[33].

Large constitutional objections have been raised against the admissibility of sliding reference to technical rules[34]. It has been seen as disguised transference of law-making power to private persons, as infringement of the democracy principle, of the constitutionality principle, specifically of the precept of certainty and clarity of law, of the requirement for proper publication of laws and of the principle of separation of powers.

These objections are upheld against the admissibility of *sliding reference in supplementation of standards*, making reference *directly* and bindingly to technical standards in their successively current forms[35]. With this form of reference, in which the technical regulations referred to become binding law in their current version for both citizen and administration, the legislator or regulator refrains from determining the content of the law, or leaving it to private standardisation bodies. What this comes down to is a blanket law, a law whose content can be altered at the whim of the private regulator.

Sliding reference in specifications of norms[36] occurs always in connection with an indefinite term in the legal text, which it serves to specify. The law may, for instance, prescribe compliance with the "recognised rules of the art"; as a rider or in connection with this, it may then be stated that particular technical standards count as such recognised rules of the art.

What is legally binding on the manufacturer of a product or the operator of an installation is only compliance with the statutory safety standard, which thus conclusively determines the duties as to conduct. Often special procedures are being developed to control response to relevant technical rules. Thus, the Federal Ministry for Labour and Social Affairs verifies DIN standards of relevance to safety before including them in list A of the General Administrative Regulation under the Appliances Safety Act[37]. The new approach to technical harmonisation and standards likewise creates, through administration of the list of standards, a possibility of checking the harmonised standards and the declared national equivalent ones for their compliance with the underlying safety requirements[38].

This *additional* reference to specific technical rules is intended on the one hand, to give addressees of the norm an indication of how to comply with the legal safety requirements, and on the other, to oblige the competent authorities to accept appliances or installations that meet the technical standards listed. Firms are free to choose solutions non complying with the technical rules provided that at least the same level of safety is attained. If they keep to the listed technical standards, there is a refutable presumption that the statutory safety duty has been met. Whether a technical regulation referred to in fact meets the statutory safety standard is subject to judicial verification. The competent administrative authorities remain free to act against a product manufactured or installation operated in accordance with the standards in cases of a concrete risk. Observance of technical standards acts merely as an indicator of compliance with the statutory safety obligation.

3.3 The Appliances Safety Act and its application in practice

The German law on technical appliances (the Gerätesicherheitsgesetz - Appliances Safety Act (GSG))[39] is regarded as a model for both the Low Voltage Directive and the new approach to technical harmonisation and standards. The GSG, an offshoot of labour protection law, has developed into one of the most important German laws for preventive protection of consumers against defective products, and at the same time forms a link between governmental product safety policy and safety-related technical standardisation. In presenting the GSG, one must therefore immediately include technical standardisation of relevance to safety.

3.3.1 Lines of development

The 1929 Industrial Safety Bill already included the basic idea of guaranteeing safety for workers through quality requirements on appliances; the competent authorities themselves were to determine the requirements on machines needed to protect workers' life and health. In the same year, the ILO adopted a recommendation on responsibility for protective devices on mechanically driven machines. In 1963, it extended its earlier recommendation and decided

on Convention No. 119 on machine protection, with the supplementary recommendation No. 118. This was the basis for the Machine Safety Bill (Maschinenschutzgesetz)[40], which assumed the following guidelines:

- All technical appliances should be covered, whether for use in factory, office, home or leisure;

- Safety requirements on appliances should not be detailed in regulations, but emerge from safety rules developed by experts;

- In principle, manufacturers or importers should be responsible for the perfect safety of products.

This meant that three decisive steps had been taken: manufacturer responsibility was to aim at *preventive hazard elimination* through safety-minded development, design and manufacture of technical appliances. Until then, only the employer had been under an obligation, as part of a labour-law duty of care in accordance with the industrial safety and accident prevention regulations, to make only safe appliances and machines available to the employees on his premises. Even more than the businessman, the non-commercial final consumer is with advancing technical content, no longer in the position to verify the technical safety of appliances. Accordingly, the idea developed in the industrial safety context of preventive hazard protection is consistently extended to *all technical utility goods*, including those for home and leisure use[41]. With the rapid development of technology and the range of goods offered, the focus is placed not on administrative quality requirements but on the *generally recognised rules of the art*, to which special provisions and regulations are a guide. The supervisory authorities confine themselves to spot checks and to intervention in hazardous situations.

Effective from January 1980[42], the law on technical work materials that had come into force in November 1968 with the brief title "Maschinenschutzgesetz" (Machine Safety Act) was amended. It was given a new brief title "Gerätesicherheitsgesetz" (Appliances Safety Act), more appropriate to its broadened scope; it assumed inspection of installations, provided legal guarantees for the safety mark "GS = geprüfte Sicherheit" (safety-tested) introduced by the Federal Minister of Labour, and its scope was, to some extent, extended to dealers[43].

3.3.2 Scope

The GSG is addressed to manufacturers and importers in so far as they market or display technical work materials by way of trade, or independently in the context of a business undertaking (§ 1 (1) GSG). Although the Länder[44], the consumer associations and the Trade Supervisory Offices[45] had advocated bringing dealers fully under the GSG, they were covered only exceptionally[46] on the grounds that retailers were not in a position to make technical safety assessments of products and that there were sufficient possibilities of fighting

the danger at source. § 1 (3) GSG explicitly states that the employer's responsibility under the industrial safety and accident prevention regulations remains unaffected. In this connection, particular importance is attached to § 5 of the Accident Prevention Regulations, "General Provisions" (VBG 1), which obliges the businessman to require suppliers to furnish only those technical work materials that are in line with the Accident Prevention Regulations and the generally accepted rules of the art in safety technique and industrial medicine.

The GSG applies to all technical work materials for which there are no specific regulations. Accordingly, it does not apply to vehicles in so far as they are subject to road traffic regulations, nor to technical work materials which by nuclear safety provisions are subject to special requirements, or which are used exclusively by the Army, the Technisches Hilfswerk, the border guards or the police, nor where other provisions aimed at hazard prevention pursuant to § 3 GSG regulate the marketing or display of technical work materials (§ 1 (2) GSG). Accordingly, for instance, toys are governed by the Foodstuffs and Consumer Goods Act as regards any toxic properties, and by the GSG with respect to mechanical risks.

Technical work materials are, according to § 2 (1) GSG, ready-for-use equipment such as tools, working equipment, working machinery, powered machinery, and lifting and conveying devices which can be used for their purpose without the addition of other parts. This work equipment is by § 2 (2) GSG placed on the same footing as protective equipment, lighting, heating, cooling, ventilating or air-conditioning equipment, household appliances, sports and do-it-yourself appliances and toys[47]. Appliances intended exclusively for export may be displayed on Federal territory even though they do not meet the requirements of the GSG, provided that it is clearly indicated that they are intended only for export[48].

3.3.3 General safety obligation - *§ 3 (1) GSG*

The core of the GSG is the general safety duty under § 3 (1) GSG:

"A manufacturer or importer of technical work materials may market or display these only if they are, according to the generally recognised rules of the art and the industrial safety and accident prevention provisions, of such a nature that users or third parties are when properly using them, protected against dangers of all kinds to life or health as far as the nature of that proper use permits. Generally accepted rules of the art and the industrial safety and accident prevention provisions may be departed from where equal safety is guaranteed in another manner".

Users and third parties are thus to be protected against dangers of all kind to life and health. By way of guaranteeing comprehensive hazard protection, § 2 (4) of the General Administrative Provisions on the GSG (AVV-GSG)[49]explicitly states that this concerns not only the classical technical aspects of safety such as protection against moving parts or pieces thrown off, stability or protection against touching current-carrying parts[50], but also such

hazards as those resulting from noise, air pollution, heat emission or other effects of use. This means that ergonomic approaches have to be taken into account and all possible effects of working materials on their users are to be considered[51].

However comprehensively the object of protection may be defined, the other elements of the general safety duty on manufacturers and importers are defined restrictively.

3.3.3.1 Proper use

The GSG protects the user only in so far as he uses appliances "properly". § 2 (5) GSG contains a legal definition, naming two circumstances from which proper use emerges: (1) a subjective characteristic, namely the manufacturer's or importer's indications (particularly those contained in publicity) on ways of using the technical work materials; (2) an objective characteristic, namely the standard use deducible from the design and construction of the technical work materials.

The manufacturer's or importer's indications as to application may contradict the normal use deducible from design and construction. In such cases of conflict, it is always, according to the Münster Administrative Appeals Tribunal[52], always the normal use deducible from design and construction that applies. The appliance must take account of users' habits. The manufacturer cannot escape his responsibility through instructions for use that go against the uses predictable from the appliance's design. The objective criterion of normal use is not subordinate to subjective criteria of indications from the manufacturer, but in cases of conflict overrides them. Otherwise, the manufacturer could avoid necessary safety measures through indications of use. Since the decision cited has apparently remained isolated, it cannot be assumed that the dispute as to interpretation of proper use has ended. Laborious justifications continue to be used to play down the equal-value objective criterion of § 2 (5)(2) GSG and give priority in case of conflict to the manufacturer's instructions for use[53].

The standards underlying safety-related standardisation work, DIN 820, part 12 and DIN 31000/VDE 1000, in part go beyond § 2 (5) GSG. Thus, DIN 820, part 12 states that:

"Technical safety requirements should be specified in such a way that (when the product is properly used) it is unlikely that people, animals or things will be endangered. Ergonomic considerations should apply. *Foreseeable mistakes should be taken into account*[54]."

This provision has wide-ranging importance, since DIN 820, in all its parts, is binding for the standardisation work of all specialised standard committees of the DIN[55]. At any rate, it provides consumer representatives on standardisation committees with arguments for basing the establishment of safety standards not on the manufacturers instructions but on usual habits, including mistaken ones.

DIN 31000/VDE 1000 takes the following conceptual specification for proper use:

"Proper use within the meaning of this standard is the use for which the technical product is suitable according to the manufacturer's indications including those in publicity. In cases of doubt, it is a use that would be taken as usual from the design, construction and function of the technical product. Proper use also includes compliance with operating and maintenance conditions stated and the taking of foreseeable misuse into account[56].

DIN 3100/VDE 1000 starts from the basic idea that using technology brings hazards resulting in part from the technical products themselves, in part from the way people handle technical products[57]. Even hazards caused by foreseeable misuse should be combated by design measures, primarily those of direct safety technology, supported by those of indirect safety technology. In practical standardisation work, the three-stage method for safety design[58], among the engineers that more or less monopolise standardisation work is likely to diminish the importance of the debate on proper, usual or foreseeably incorrect use.

3.3.3.2 Generally recognised rules of the art and the industrial safety and accident prevention provisions

§ 3 (1), the key provision of the GSG, refers in its definition of the safety criterion to the "generally accepted rules of the art" and to the industrial safety and accident prevention provisions. No lesser criterion could be conceived; the requirements clearly lag behind advancing technological development. Accordingly, when a technical rule is generally recognised, it is the experts that have to apply the rules of safety technology that are authoritative. They must primarily be convinced that the rules of the art are in line with the safety requirements to be placed on the technical work material. This technical safety solution need not be the one prevailing in practice, but must have been adequately tested in practice and have proved itself under operating conditions[59]. Even where the technical standards referred to follow higher requirements, and are for instance based on the "state of the art", this does not tighten the general safety duty under § 3 (1) GSG, since it is only compliance with generally accepted rules of the art that is made binding legally.

Whether DIN standards ought to come up to the "state of the art" or merely reflect "generally accepted rules of the art" is not entirely clear in DIN's own mind. On the one hand, DIN 820, part 1, which lays down the basic principles for standardisation work, says that standards have to *take account* of the current state of science and technology and of economic circumstances[60]. In referring to the state of science and technology, DIN did not wish to anticipate the severest criterion in the conceptual triad of the Federal Constitutional Court's Kalkar Decision[61]/[62]. Along with the state of science and technology, economic circumstances are also to be "taken into account" at the same time. DIN 820, part 4, states that a standard must be reworked if it is no longer in line with the state of the art[63]. The guidelines for standardisation committees give the working groups the task of ensuring that standards are in line with the findings of science and the state of technology[64]. The principles for applying DIN standards state rather soothingly that while the rules for establishing DIN standards call for the consideration of the state of the art, it is nonetheless difficult to meet up with these demands due to the steady advance of technology[65]. Finally, the indications to

users of DIN standards indicate as an objective that DIN standards ought to be introduced as "accepted rules of the art".

The clear impression one derives is that the formulations (of engineers) in the various DIN regulations are completely detached from the conceptual considerations of lawyers on technical safety law.

The industrial safety and accident prevention regulations[66] are not binding solely in so far as they reflect the generally recognised state of safety technology. They are binding not because of consensus by authoritative experts, but because of the autonomous legislative power given by Government to the agencies of legal accident insurance, or from their character as legal ordinances. Many industrial safety provisions are based on the enabling provisions of §§ 120 e, 139 a GewO (industrial code); others on the Chemicals Act, the Nuclear Act, the Explosive Act or the Federal Mining Act. Important examples of mandatory industrial safety provisions include:

- Verordnung über Acetylenanlagen und Calciumcarbidlager, 27.2.1980 (BGBl. I, 220) (Ordinance on Acetylene Plants and Calcium Carbide Stores), with a number of technical rules for Acetylene Plants and Calcium Carbide Stores, drawn up by the German Acetylene Committee;

- Verordnung über Arbeitsstätten, 20.3.1975 (BGB1. I, 729) (Workplaces Ordinance), with around 30 directives on workplaces;

- Verordnung über die Aufzugsanlagen, 27.2.1980 (BGBl. I. 205) (Ordinance on Lift Installations), with a number of technical rules for lifts drawn up by the German Committee for Lifts;

- Verordnung für Anlagen zur Lagerung, Abfüllung und Beförderung brennbarer Flüssigkeiten zu Lande, 27.2.1980 (BGBl. I, 273 (Ordinance for Installations for Storing, Bottling or Transporting Combustible Fluids by Land), with some 40 technical rules for combustible liquids, drawn up by the German Committee for combustible liquids;

- Verordnung über Dampfkesselanlagen, 27.2.1980 (BGBl. I, 173) (Steam Boilers Ordinance), with some 65 technical rules for steam boilers, drawn up by the German Steam Boilers Committee;

- Verordnung über Druckbehälter, Druckgasbehälter und Füllanlagen, 27.2.1980 (BGBl. I, 184) (Ordinance on Pressure Vessels, Pressurised Gas Containers and Filling Plants), with some 35 technical rules for pressure vessels, drawn up by the Technical Committee on Pressure Vessels under the Central Office for accident prevention and industrial medicine of the Association of Mutual Indemnity Associations, and 90 technical rules on pressurised gases drawn up by the German Pressure Vessels Committee;

- Verordnung über Gashochdruckleitungen, 17.12.1974 (BGBl. I, 3591) (Ordinance on High Pressure Gas Lines), with 40 technical rules on high pressure gas lines, drawn up by the Committee on High Pressure Gas Lines;

- Verordnung über gefährliche Stoffe, 26.8.1986 (BGBl. I, 1470) (Ordinance on Hazardous Substances), with more than 50 technical rules for hazardous substances, drawn up by the former Committee for Hazardous Working Materials and by the Committee for Hazardous Materials.

By § 708 (1) RVO, the Berufgenossenschaften (Mutual Indemnity Associations) are autonomously entitled to enact accident prevention provisions binding on their members, employers and employees. These are worked out by technical committees that include experts from the indemnity associations and also representatives of the Gewerbeausfsichtsämter (Factory Inspectorate Offices), of producers and users of technical work material, of the trade unions and of employers, and are adopted by the Assembly of Representatives, which has a parity-based composition. Before they can enter into force, they require approval by the Federal Minister for Labour. Quick response to new technical developments is out of the question, since this procedure for issuing rules takes 5 or 6 years[67].

The accident prevention regulations in general contain detailed indications only on rules of conduct for employees and the wearing of protective equipment[68]. Indications on safety design for machines and work equipment are by contrast formulated only very generally, in turn often referring to the "generally recognised state of the art". Accordingly, the hope of using the industrial safety and accident prevention regulations to bring safety requirements more in line with the present state of technology or science[69] is illusory. In 1982, the DIN and the Indemnity Associations finally concluded an agreement whereby the latter would in principle - apart from instruction for actions - restrict themselves to formulating general safety objectives which the DIN would then specify[70]. This means that with regard to accident prevention, all technical regulatory material will, in the medium-term, rely on DIN standards.

3.3.3.3 Deviation clause

The deviation clause[71] of § 3 (1) (2) GSG is intended to make progress in safety technology possible and also to allow the manufacturer to depart from the generally accepted rules of the art as long as the safety technology solution he chooses is at least equivalent. This provision for departure becomes relevant where a technical rule contains not only general objects of protection, but detailed technical model rules. In such a case the technical safety objective which is to be attained in some other way has first to be derived from them[72].

The deviation clause is of particular importance for foreign manufacturers and importers. In general, they, too, have under the GSG, to observe the "recognised rules of the art" on the

territory of The Federal Republic[73]. If the foreign rule of art is not identical with the domestic one but nevertheless provides the same level of safety, the product may not be objected to[74]. If the same safety level is attained, the deviation clause thus allows foreign manufacturers to continue large production runs without losing the German market for safety reasons[75]. It thus leads to the same outcome as the case law on Articles 30 et seq. EEC. For goods from Community countries, it follows from Art. 30 EEC that they are freely marketable in all Member States if they have been marketed legally in the country of origin, unless the importing country can refer to objects of protection under Art. 36 EEC or to binding requirements in the sense of the Cassis judgement[76]. If the same level of safety is maintained, any appeal to Art. 36 EEC in order to protect against dangers to life or health is ruled out. The bilateral agreements on mutual recognition of German and French standards[77] make it easier to use the GSG deviation clause, since list C in the general administrative regulations for the GSG gives the French standards that are, until proof of the contrary, to be taken as equivalent in safety level to the German standards. At the same time, the bilateral agreement is an indication that neither using the GSG deviation clause nor following ECJ Case Law on Articles 30 et seq. EEC are enough to avoid obstacles to trade between Member States.

The deviation clause applies in favour of manufacturers and importers even in respect of accident prevention regulations. Here distortions of competition may arise because an employer as user of work materials does not have a similar entitlement to deviate where the same safety is guaranteed[78]. As far as capital goods are concerned, a remedy could be found here if the various mutual indemnity associations declared a willingness to allow for corresponding departures in the accident prevention regulations[79]. The problem will lose practical importance as the accident prevention regulations come to specify only general objects of protection but not the technical details for meeting them[80].

It is controversial whether a manufacturer or importer who appeals to the deviation clause has to show that the same safety has been achieved in another way[81], or whether the authority wishing to intervene must establish that the other technical safety solution is not equivalent[82]. Products are certainly freely marketable in principle without prior permission, even where the manufacturer takes advantage of the deviation clause. However, where the authorities intervene in the presence of a specific hazard, there is more to say for the idea of obliging a manufacturer or importer who departs from the regulation position to provide facts or proof of equal safety.

The obligation to comply with generally accepted state of the art and the industrial safety and accident prevention regulations does not apply to manufacturers or importers where the technical work materials have, according to written statements by the proposed user, been manufactured to order (§3 (2) GSG)[83].

3.3.4 Incorporation of standards in the lists

In Annexes A, B and C to the General Administrative Regulations on the GSG, the Federal Minister for Labour and Social Affairs indicates rules of the art, compliance with which leads to a presumption that work material is in line with the legally required level of safety. Through continual supplementation and corrective adjustment (at present, twice yearly), the latest results of standardisation work and technical practice in the area of accident prevention are taken into account. In October 1987 the individual lists included a total of 1,708 safety rules[84], which break down as follows:

List A (domestic technical standards)

DIN standards or VDE definitions 1,277
DVGW standards 3
VDI rules 25

List B (accident prevention regulations, etc.)

Accident prevention regulations (UVV) 85
Implementing instructions on the UVV 64
Directives, safety rules and leaflets from the mutual indemnity associations 115
Ordinances, administrative regulations, technical rules and directives for installations monitored under § 24 GewO 21

List C (foreign technical standards)

Standards of the French Standardisation 118
Organisation AFNOR

This breakdown brings out the overwhelming importance of DIN standards or VDE definitions, which account for some 3/4 of the safety rules indicated. Table 1 gives an overview of the numerical development of regulations under the GSG. Since 1970, the number of safety rules included in the lists has more than quintupled. The lists are subject to continuing review. For instance, the September 1986 update deleted 112 technical rules and included 169 new ones.

In November 1984 list C was opened. On the basis of the bilateral agreement between France and the Federal Republic[85], it contains standards from the French Standardisation Organisation AFNOR, notified by the Ministry for Foreign Trade and Industrial Development, on which the competent authorities in the Länder, the Committee on technical work materials, and interested circles have been heard.

Table 1: Development of regulation work under the Appliances Safety Act and number of recognised test centres(1)

Year	Number of listed standars		Number of recognised test centres
	A and B	C	
1970	287	-	-
1971	529	-	2
1973	623	-	21
1975	679	-	49
1977	823	-	62
1979	925	-	69
1981	983	-	69
1983	1210	-	76
1984	1210	118	76
1986	1565	118	76

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(1) Compiled from the 1985 Annual Report of the Federal Institute for Industrial Safety, 23, and the first supplement to lists A, B and C of the General Administrative Regulations under the Act on Technical Work Materials, September 1986, Bundesarbeitsblatt 9 (1986, 63-70).

If a manufacturer or importer refers to a standard in list C, the Trade Supervisory Office only then - unless safety is evidently guaranteed in another way, pursuant to the deviation clause in § 3 (1) (2) GSG - asks for this standard to be submitted in German. If the work materials prove to comply with the French standard, equal safety counts as guaranteed[86].

The Federal Minister of Labour is, as a rule, involved in the issuing of implementing regulations on the accident prevention regulations and in bringing out technical safety rules and leaflets of the accident insurance agencies; indeed, accident prevention regulations require his approval. In general, accordingly, no additional technical testing is necessary for inclusion of these regulations in list B[87].

3.3.5 Principles of safety standardisation

In establishing the technical norms for inclusion in list A, the Appliances Safety Division of the Federal Institute for Industrial Safety[88] and the DIN Committee on Safety Technology work closely together.

The Commission on Safety Technology was set up in 1965 in connection with the preliminary work on the Act on Technical Work Materials, on the initiative of and with financial support from the Federal Minister of Labour[89]. Its tasks are, above all, to encourage safety standardisation work in the specialised DIN standardisation committees, co-ordinate safety standardisation in DIN, select suitable DIN standards for inclusion in the lists and propose them to the Federal Minister of Labour, and, acting on suggestions from the Federal Institute for Industrial Safety and the Trade Supervisory Offices, test whether standards with safety provisions are still in line with the current state of the art[90]. It co-ordinates involvement of safety experts from the Factory Inspectorate and the Federal Institute for Industrial Safety in the specialised standardisation committees, and in 1975 submitted a proposal, never discussed in detail, far less applied, to set up an accident information system also covering the home and leisure sectors[91]. It includes representatives of Federal Ministries and of the Länder labour authorities, of the Federal Institute for Industrial Safety, of the legal accident insurance agencies, of the trade unions, of employer associations, of the Federal Association of German Industry, of standards workers and of science.

The Federal Institute for Industrial Safety delivers opinions on draft standards with safety relevance as part of the regular procedure for establishing standards, and tests the standards proposed by the Safety Technology Committee for inclusion in List A. In a kind of written soundings-taking procedure, it then gives expert circles interested a chance to comment on proposed changes or additions, though without going as far as a new round of discussion on the standards[92]. In order to secure the broadest possible consensus of all expert circles and to cover all reservations and all findings, umbrella associations in industry, trade and handicrafts, and the unions, standardisation workers, the DIN Safety Technology Committee, the Länder labour authorities and the members of the Committee on technical work materials are asked to participate[93].

At this stage, immediately before publication of the lists, the number of objections still being raised is very small. This is due, above all, to the fact that test criteria are laid down in detail for all standardisation work in DIN 31000/VDE 1000, "general guidelines for safety design of technical products"[94] and DIN 820, part 12 "standardisation work, standards with technical safety provisions, design"[95].

DIN 820, part 12, published in May 1977, which brings together experience to date in the DIN Safety Technology Committee, the Federal Institute for Industrial Safety and the Federal Ministry of Labour, provides the structural criteria that safety standards must meet for inclusion in list A of the general administrative regulations under the GSG: safety requirements must be laid down concretely and unambiguously, and compliance must be

fully and unambiguously testable. Requirements must be specified so exactly that test results are reproducible.

More important than these formal structural criteria are the substantive requirements that DIN 31000/VDE 1000 lays down for the safety design of technical products. The eventual standard of March 1979 had been preceded as long ago as December 1971 by a preliminary standard based on preliminary work under the auspices of the Federal Ministry of Labour[96]. It was to act as the basis for the specification of safety standards or VDE definitions[97] and allow initial assessment of technical products as regard safety, in so far as valid, specific and complete standards for this are not or not yet available[98]. Its provisions are to be specified in standards for individual types of technical product or in VDE definitions for individual types of electrical equipment, and supplemented by indications as to relevant tests[99].

The safety design of technical work materials is seen in the first place as a design task for engineers. In safety design the preferred solution should meet the safety objective in technically rational fashion as well as being economically the best, and *in case of doubt*, safety requirements take priority over economic considerations[100]. The following three-stage method applies: technical products should be so designed that no hazards are present (direct safety technology). If this is not or not fully possible, special safety devices that come into play automatically should be used (indirect safety technology). Only in third place come indications of the conditions under which hazardous use is possible (safety through instructions). The technique of safety through instructions is to be used in combination with direct and indirect safety technology even where hazards with products can be prevented only by particular actions on the part of the user[101]. This restriction can amount to excluding foreseeable misuse from design safety technology and allocating it to the technique of safety through instructions.

To supplement and extend the general guidelines of DIN 31000/VDE 1000, technical safety provisions for particular areas that overlap specialities or safety objectives should be summarised in basic standards (infrastructure)[102]. Finally, in order to allow the DIN standards to have full product-specific effect, groups of products or individual products should be covered in standards for special fields or standards for components[103].

3.3.6 The safety mark "GS = geprüfte Sicherheit" (safety-tested)

The GSG does not have an obligation to test technical work materials, but offers manufacturers and importers the possibility of securing confirmation from a recognised test centre, after a design test, that their appliances meet the provisions of § 3 (1) GSG or of a legal ordinance adopted pursuant to § 4 or § 8a. If the result is positive they secure the right to use the safety mark "GS = geprüfte Sicherheit", uniform for all types of appliance and accompanied by an identification of the test centre (§ 3 (4) GSG)[104]. It was introduced by the Federal Minister for Labour in 1977, after the Association for a Safety Mark had spent seven

years failing to agree on one. It is intended to provide the consumer with a simple and easy means for choosing safer products. The GS mark serves the marketing interests of manufacturers and is also a way of lessening the burden on supervisory authorities, who should refrain from testing appliances bearing the mark[105], unless there are grounds to suspect its illegal use.

The Federal Minister for Labour and Social Affairs, after consulting the Committee on Technical Work Materials and with agreement from the Upper House of the German Parliament, determines by legal ordinance the testing centres competent for the design test. These must be suitable in staff and equipment for the task, economically independent and able to offer guarantees of reliable testing. The list of test centres also lays down the fields for which a test centre is recognised. At present there are 78 recognised centres[106], among them 10 technical control boards, the Bavarian Provincial Institution for Trade, the Association of German Electrical Engineers, the German Vehicle Testing Association and three mail-order firms[107], each with an intensive range of competences, plus 27 specialised committees of the Indemnity Associations, three DIN standards committees, the Federal Institute for Materials Testing and 32 other test centres with very specific areas of competence[108]. In the context of the bilateral agreement between France and the Federal Republic, the Laboratoire Nationale D'Essais was also recognised as a test centre in December 1985. Recognition is preceded by verification of the Federal Institute for Industrial Safety, relating *inter alia* to staffing and equipment and including a demonstration from some of the areas of coverage applied for[109].

In order to arrive at uniformity of testing practice, test centres must undertake to participate in the information clearing houses for test centres in their field attached to the Committee for technical work materials, and comply with agreements arrived at there. Apart from individual test contracts, the test centres have the following tasks. Should they find that technical work material for which they have given authorisation to use the safety mark has been supplied defectively, they have to cause the manufacturer or importer to provide a remedy. If the faults are not removed, or unsafe appliances continue to be marketed, the Trade Supervisory Offices are to be informed. They have to note accidents arising in using appliances tested by them and see to the removal of faulty goods still found. They have to transfer their experience from testing work into standardisation and regulatory work[110]. If an applicant for a test refers to a French standard contained in list C, the test centre has to apply the French standard where the technical work material is not in line with the relevant German standards and equal safety is not obviously guaranteed[111].

The GS mark has been widely used for many technical consumer goods. The total number of types of appliance or machine with valid GS marks amounted by 31 December 1985 to 85,000[112]. Applicants for the GS mark have the chance to ask for the criteria related to their appliance so as to be able to take the safety requirements in force more reliably into account, even at the design stage of technical work materials. Since in the case of many technical consumer products there is competition between various test centres, one cannot ignore the danger that differing test criteria might be applied and that manufacturers and importers might choose test centres likely to give them more favourable test results than others. The

only remedy is extension of the information network among test centres, and the checks on test centres by the Federal Institute for Industrial Safety, active since 1984.

In safety checks carried out by the Stiftung Warentest, appliances bearing the GS mark continually display serious safety shortcomings[113]. The reasons adduced are that particular identifiable test centres interpret the regulations in force less strictly than would be necessary, that products are altered after securing the mark, and that the safety regulations applied are inadequate.

3.3.7 Monitoring by the Trade Supervisory Offices; banning orders

The competent supervisory bodies for monitoring the Appliances Safety Act are the 71 National Trade Supervisory Offices. These offices have a very wide range of tasks, with responsibilities for protection against nuisances, social industrial safety and, in the area of technical industrial safety, for workplaces, monitored installations, dangerous work substances, explosive materials, radiation protection, organisation of industrial safety in factories and, of course, for technical work materials[114].

An extensive empirical study in 1979 showed that they devoted only a fraction of their working time, some 2.2%, to application of the Appliances Safety Act[115]. The trade supervisory offices are not obliged to make systematic checks on all technical work materials or all manufacturers or importers. Since 180,000 types of technical work materials come newly on to the market each year[116], this would be far beyond their resources. From considerations of effectiveness, the principle applied is that of directed monitoring activities. They have to check technical work materials where a competent authority for industrial safety or legal accident insurance agency, officer of policy or other authorities, user of technical work materials or centre dealing with hazards protection under the GSG (Stiftung Warentest, works councils, test centres) has submitted a report on a defective technical work material or on an accident in using a technical work material[117].

Because of time overloads on trade supervisory officers and on the Federal Institute for Industrial Safety, a unique possibility has been neglected. This would be the introduction of an accident information system which would, though not being representative, specifically examine cases where defective technical appliances had caused accidents or led to serious hazards. It is hard to understand why no resources have yet been found for systematic evaluations of defect reports passed on to the Länder, in which manufacturers or importers of products whose safety has been impugned have their headquarters[118].

Since the primary objective of the GSG consists in preventive hazard protection, trade supervisory offices might temporarily become active at fairs and exhibitions of more than local importance[119] in order to test work materials on offer there, with an economical use of staff[120]. In 1984, 54% of all inspection in connection with the GSG took place at fairs and

Part 4:

The US Consumer Product Safety Act and its implementation by the Consumer Product Safety Commission

Adoption of the 1972 Consumer Product Safety Act (CPSA) by the 92nd Congress was a success for the consumer movement and its legislative impact in the US. The CPSA and its implementation through the Consumer Product Safety Commission (CPSC) of 1973 are, however, important even outside the United States. The new legislation and its regulatory machinery has served as a model or at least a stimulus in all countries where product safety law has been further developed[1]. Moreover, the many amendments to the CPSA and the difficulties in applying it have been taken as an illustration of the inadvisability of increased government influence on product safety[2].

Political controversies within the United States over the CPSA make an analysis aimed at deriving general conclusions for product safety law even more difficult. Whether the regulatory approach has "proved" itself, what supervisory machinery has been "successful" and what has "failed", what regulatory strategies ought therefore to be taken over at national and/or European level - all these points would be much easier to judge if implementation of the CPSA had taken a more peaceful course. But irregularities and constant amendments seem to be a typical feature of product safety policy and product safety law, and description and interpretation have to go along with them. These considerations are taken account of in the description below by presenting the CPSA not only in its current version, but in its original one as well (4.1), and by always referring to the constantly fluctuating conditions in which the CPSA had to operate (4.2-4.5).

4.1 The original version of the CPSA and amendments to it

The CPSA's adoption in 1972 was the conclusion to years of preliminary work. The most important preparatory step was the setting up of the National Commission on Product Safety[3], proposed in 1967 by Senator Warren Magnuson, initiator of many consumer policy legislative acts. The fact that Senator Magnuson was not aiming directly at enactment of a general product safety act but leaving the development of suitable proposals to an independent commission did much to help make his initiative successful[4]. The Commission, appointed by President Johnson in 1968, was able to carry out its preliminary work and hearings unmolested by the usual antagonistic pressures. In 1970 the Commission presented its voluminous final report[5]. The report not only submitted the findings of broad-based surveys - on product hazards, accident information systems, voluntary product standards, consumer education, the state of product safety law, the relationship between Federal law and State law, product safety policy in other countries - but also contained proposals for general product safety legislation, the core of which was to be the setting up of a new independent agency[6].

4.1.1 The CPSA 1972[7]

Two years after publication of the Commission's final report, the CPSA was passed by both Houses of Congress. On all major points, the Act followed the ideas of the preparatory Commission. This is all the more remarkable because the law, in both overall conception and regulatory machinery, broke new ground in many respects:

- This firstly applies to the CPSC itself. There have long been independent commissions in the area of so-called economic regulation (the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Trade Commission[8]), but transfer of protection of consumer safety interests to an independent agency was an innovation[9]. The autonomy of the CPSC was shielded against both private and governmental interests. The five Commission Members are each appointed for seven years; budget appropriations need not be approved by the Office of Management and Budget (OMB), but simply by Congress directly[10].

- It is also true of the broad range of tasks of the CPSC. The CPSA covers all consumer goods, except where other agencies are involved in monitoring safety hazards as part of their competence[11]. Additionally, the CPSC was handed the administration of specific existing acts[12]. The Commission thus has a kind of general catch-all competence that always applies wherever there are no more specific regulations that take priority. But even where such priority regulations affect particularly important goods (particularly automobiles and pharmaceuticals), the scope remains significant. The jurisdiction of the CPSC is reckoned to apply to 15,000 consumer products[13]; the often cited estimate by the National Commission on Product Safety that some 36 million consumer product accidents occur yearly[14] relates to these products not covered by special regulations.

- A further innovation was the attempt at making safety regulation "scientific". Section 5 CPSA provides for systematic collection and analysis of accident data, and gives the Commission tasks and powers in the area of research[15].

- Another breakthrough is the introduction of a wide variety of regulatory machinery, ranging from information policy measures through standard setting and provisions for bans, up to an elaborate recall system[16]. This gamut of measures has greatly encouraged the international debate on product safety policy[17] and may be regarded as exhaustive: there is probably no safety policy measure conceivable which has not already been tried out within the framework of the CPSA.

The CPSA's overall conception can be reduced to the two not necessarily mutually compatible strategies of making product safety policy "scientific" and "democratic": product safety was declared a public goal, and entrusted to a relatively independent government agency that was to set its priorities, seek effective methods and in short pursue a "rational"

policy; at the same time, however, the new institution was to differ from traditional bureaucracies, to take up safety policy submissions from the general public and to promote participation by interest groups.

4.1.2 Amendments

The original consensus expressed in the National Commission on Product Safety's 1970 Report had made enactment of the CPSA possible. This consensus, however, did not last. The controversies over the legal justification for a government product safety policy and its appropriate means, largely dormant during the preparatory phase of the Act, came to the fore at a later date and have never yet been settled.

CPSC adverseries succeeded in bringing about severe budget cuts in the 1980's. The first budget for 1974, still solely based on recommendations from the Food and Drug Administration, amounted to some 30 million dollars[18]. When the Commission then asked for its own appropriations for 1975 and 1976, it managed to secure increases to some 37 and 42 million dollars respectively from Congress[19]. Until 1981 the budget kept to this figure in nominal terms, and was then cut in 1982 to 33 million dollars[20]. It is still at this level today[21]. Staffing is one aspect that reflects this development. The Commission began in 1973 with 579 workers, reached a peak of 914 in 1977[22], and then gradually shrank back to its original number. It should be kept in mind that the dollar has lost some 50% of its value by comparison with 1974[23] and that therefore a return in nominal terms to the 1974 budget means halving it *de facto*[24]. What suffered most from all these cuts were the technical and scientific divisions of CPSC and its "field offices", whose tasks lay particularly in the area of follow-up market control. Their numbers were cut from 13 to 5[25].

4.1.2.1 Mandatory standards and product bans

The most important amendments to the CPSA concerned regulations on the issue of product standards. Authoritative prescription of mandatory safety standards was, according to the National Commission on Product Safety's recommendations and the concepts behind the Act's procedures, to be the most important instrument of the new product safety policy[26]. Standards could according to Section 7 (a) (1) and (2) CPSA 1972 refer to performance, composition, contents, design and construction, finish or packaging. However, apart from informational requirements, the Commission was to confine itself to performance standards wherever possible. A procedure was introduced that would give consumer associations a say in developing standards: the so-called offeror procedure. This made standard setting open to tender, and the Commission had the possibility of financially supporting its development by the selected offeror (Section 7 (d) (2))[27].

These provisions have undergone far-reaching changes. In 1978, the CPSC was given the possibility of refraining from the offeror procedure[28]; in 1981 the procedure was then completely abolished[29]. At the same time Congress fundamentally changed its originally critical attitude towards mandatory standards: the Commission was henceforth to aim exclusively at performance standards and duties of information, but no longer to prescribe the "design" of a product (Section 7 (a)). Still more important: "the Commission shall rely upon voluntary consumer product safety standards . . . whenever such voluntary standard would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards" (cf. also Section 9 (b) (2) (B)).

Additionally, the Commission was mandated to draw up a "final regulatory analysis", setting out in detail the costs and benefits of the regulation it had in mind and the alternatives it had considered (cf. Section 9 (c) (1) and (4), (f) (2) (A) and (B)). Also in 1981, the CPSC's quasi-legislatory independence was considerably cut back. By the newly introduced Section 36, Congress can now veto a product safety rule desired by the Commission[30].

The amendments to Section 9 CPSA did not affect only the issuing of mandatory standards. They also concerned regulations on the banning of products. Such bans could be promulgated under Section 8 CPSA 1972, where products presented a disproportionate risk of injury, and this hazard could not be eliminated by a standard. Since Section 8 (2) requires a product ban to be promulgated "in accordance with Section 9", the possibility of "voluntary" standards must now be looked into before a ban is ordered , and above all, an exact cost-benefit analysis produced[31].

4.1.2.2 Right of petition and public information

Among the regulatory innovations of the CPSA 1972 was the power for interested persons and organisations to call on the Commission to develop or change a product regulation, and even in some cases to compel it through the courts to take action (Section 10 CPSA 1972). This possibility of influence was abolished in 1981. All that now apply are the general (more restrictive) provisions of the Administrative Procedure Act[32]. The practical significance of this revocation seems, however, to be slight in the light of a silent transformation through the 70's in function of the right of petition[33].

Considerable effects were however produced by corrections to the CPSC's information policy, first through the courts and then confirmed in legislation. The relevant provision of Section 6 CPSA distinguishes between information concerning business secrets (Section 6 (a)) and other information on product hazards (Section 6 (b)). The first category of information was already according to Section 6 (a) CPSA 1972, to be treated confidentially. Other information was, however, pursuant to Section 6 (b) CPSA 1972, to be passed on. In so far as this made particular manufacturers identifiable, they had to be given a chance to state their position, and the Commission was bound to control the accuracy of information as far as

possible, and verify the fairness of any publication. A liberal information policy is in any case in line with the general objectives of the CPSA (Section 5 (a) (1)), as with those of the Freedom of Information Act 1972[34], which in principle obliges the American authorities to comply with a request for information where not explicitly prevented by specific laws.

The CPSC thus had to face the difficulty of reconciling these rights to information with the restrictions contained in Section 6 (b) CPSA. It used the expedient of differentiating between a "passive" and an "active" way of passing on information. Whereas in the former case the Commission would merely refer to data it had received, in the latter it would verify this data prior to official promulgation. This practice led to some controversy[35], and was then definitively overthrown by a Supreme Court decision[36]. In 1981, Section 6 CPSA was entirely recast. Since then, a manufacturer can, pursuant to Section 6 (a) (3), designate any information concerning him as confidential, and have recourse to the courts against its being made public, should the Commission find this designation unjustified (Section 6 (a) (6)). Even where business secrets are not involved, the Commission is to inform manufacturers before passing on any information, secure their opinion and verify the accuracy of all indications (Section 6 (b) (1)); here, too, the manufacturer can, in case of dispute, call for a decision by the courts (Section 6 (b) (4)). The Commission's possibilities of action through information policy have been severely restricted through these new requirements[37]. A 1983 initiative[38] by Senator H.A. Waxman to reverse these changes was unsuccessful[39].

4.1.3 The regulatory "philosophy" of the CPSA in 1972 and the American deregulation movement

The legislative and statutory history of the CPSA has to be seen in the context of the rise of the consumer protection movement in the US during the 1960's, and the subsequent "revolt against regulation"[40], which became official under the Reagan adminstration. This debate is so complex and at the same time so bound up with American traditions and conditions that it would be neither possible nor advisable to present it even in outline. However, in order to understand and assess the CPSA and its present significance, some indications as to the concrete repercussions of those developments on the CPSC's conceptual approach are necessary. These were partly encouraged by the general political "climate", partly mediated through the influence of individual politicians and partly brought about through the legislative interventions described. Yet a description merely explaining the Commission's conceptual approaches is admittedly risking crass simplification. By American standards, the CPSC is a very small agency, but it is not a monolithic block. Changes to its policies do not take place abruptly and uniformly, but in laborious, conflictual processes. With these reservations, three stages in the CPSC's history may be distinguished:

- The initial phase, 1973-8: "[Chairman] Simpson and his staff have attempted to design their organisation from the beginning so that its goal is clear and its method of standard setting minimises arbitrariness. This is what political scientists have always asked heads of new

agencies to do. Now one has. It will be interesting to see what difference it makes". These sentences end one of the first reports on the CPSC[41]. Its generously optimistic verdict was founded above all on the endeavour to make product safety policy "scientific", and therefore, in particular, upon the efforts of the newly established Commission to arrive, on the basis of its data surveys, at rational debate and determination of priorities[42]. These initial hopes were later disappointed[43]. The Commission did not succeed in developing and effectively applying a convincing programme. It took four years before three product regulations could be adopted (on swimming pool slides, matchbooks and plate glass)[44]. Information policy instruments and recall possibilities were not fully used. Not only industry but consumer associations as well gave vent to severe criticisms[45]. During the 1977 Congressional Hearings, J.E. Moss, himself a major proponent of enactment of the CPSA, confirmed the general misgivings very clearly[46].

- The Commission's public image improved following the 1978 appointment of Susan King as its new chairman[47]. The Commission then trimmed down its overambitious standardisation programme, opened up an important new field of activity with its "chronic hazards program"[48] and made a prudent use of its regulatory instruments - mainly by making the recall provisions of Section 15 (b) CPSA effective[49].

- Primarily due to its successes during the consolidation phase following 1978, the CPSC managed to survive the deregulation wave following President Reagan's assumption of office. Moves by the OMB under D. Stockman to take away the Commission's independence and integrate it into the Department of Trade were unsuccessful. However, the Commission had to accept the cuts to its budget described above as well as the legislative amendments between 1981 and 1983 and interventions in personnel policy[50]. All these corrections were, and still are, marked by a clearer orientation of the Commission towards criteria of economic efficiency and self-control of its activities through cost-benefit analyses. A memorandum drawn up by P.H. Rubin, Associate Executive Director of the Division for Economic Analysis[51], documents this trend. The memorandum points to budget restrictions on the Commission, and recommends cost-benefit analysis as a way of using scarce resources more effectively[52]. But its ambitions go further: all regulatory machinery should be verified on cost-benefit-analysis criteria, and the assessment of safety hazards implicit in individual consumer decisions should be recognised as the ultimately binding rationality criterion of safety policy[53].

4.2 The accident information system and the CPSC's policy priorities

Any product safety policy, whatever regulatory philosophy it may follow, is bound to set priorities. This need becomes all the more urgent, the more comprehensive is its scope and the greater the room for manoeuvre of the safety policy agency. The collection of data on accidents and accident risks is an obvious preparatory step towards a rational priority policy[54].

The CPSC has various simple and more ambitious information sources available. It collects newspaper clippings; it accepts consumer complaints through a free telephone service ("hotline")[55]; Section 15 (b) CPSA obliges manufacturers and traders to notify the Commission of product hazards[56]; also noteworthy in this connection is information from the Commission's "Field Services"; and a co-operation agreement was concluded with the Association of American Trial Lawyers, which systematically gathers information on product liability actions[57].

However, all these sources are of secondary importance. More significant is the systematic evaluation of death certificates, along with reports from the "Poison Control Centers" and especially the data from the "National Electronic Injury Surveillance System (NEISS)".

4.2.1 The National Electronic Injury Surveillance System

A system for collecting accident data (the "Hospital Emergency Room Injury Reporting System") had already been developed in 1969 by National Commission on Product Safety Executive Director William V. White, and was extended in 1970 by the Food and Drug Administration. The Commission was able to draw on this preliminary work when it began immediately building up its own accident information system[58].

The characteristic feature of this system is its orientation towards current accident data. These data are gathered from selected hospital emergency services; originally numbering 119, they were reduced to 74 in 1979 and to 64 after 1984. Especially trained personnel in these stations allocate accidents associated with the use of products to 19 general categories and some 900 more specific sub-categories, grade their severity (on a scale of originally 8, now 7 grades), the nature of the injury (by allocating it to one of 250 categories of injury), and the age and sex of those involved. These figures are transferred on a daily basis to the CPSC's computers. In a Consumer Product Hazard Index, the frequency and severity of hazards associated with a product are determined, and additionally evaluated on an Age-Adjusted Frequency-Severity Index.

Today the NEISS still supplies data on some 200,000 accidents per year. However, it allows only retrospective conclusions as to the involvement of products in causing accidents and/or the co-responsibility of product users. Accordingly, the NEISS data have always been treated as only a starting point for in-depth studies. Only these follow-up studies can and should determine typical accident patterns and, when appropriate, the dangers arising from a particular product[59].

4.2.2 Criticisms of the NEISS

The suitability of the NEISS as a source of data for determining priorities for action was always a controversial issue. Objections concern partly technical factors which can be corrected, such as the reliability of the data collection and the differentiation of product categories. Other decisions, such as the concentration on accident emergency services[60], are difficult to alter. It seems even more difficult to respond to objections concerning the suitability of the data themselves; e.g., collection of accident figures is alleged to be demonstrative of the hazardousness of a product only if it can be related to the intensity of its use[61]; the scaling of the intensity of injury according to a hazard index is said to be arbitrary[62]; the precision of accident evaluation is said to vary according to the type of product involved, particularly because of geographical differences in product use, to such an extent that no conclusions as to priorities for action can be based on the NEISS data[63].

Some of these objections are unacceptable to the CPSC, for partly conceptual, partly pragmatic reasons; others have clearly influenced the development and evaluation of the data system. Here it must be remembered that the NEISS was oriented towards the original conception of the CPSA, and that later legislative amendments, budget restrictions and reorientations of the Commission's safety policy inevitably affected the structure of the accident information system. Thus, the decision in favour of an accident coverage system and against the time-consuming evaluation of general investigations of accidents was a result of the endeavour to secure data on product-related hazards as rapidly as possible; the concentration on hospital casualty departments took account (among other things) of the recognition that, for instance, doctors in private practice could hardly be induced to draw up accident reports[64]. Original ideas about the Commission's possibilities of opposing recognised hazards by producing mandatory standards was certainly too optimistic. But the reasons for changes in its orientation were manifold. On the one hand, the Commission felt that priorities - notably the "chronic hazards program"[65] - had at times to be determined by a conscious policy. Furthermore, the Commission, responding to both its own experience and to external restrictions, moved towards co-operation with private standardisation organisations in working out standards and shifted part of its activities into the area of follow-up market control. NEISS, in turn, was forced to adapt to all of these changes. On the other hand, while budget restrictions did not exclude refinements to assessment methods, they did *de facto* rule out adoption of proposed cost-intensive improvements[66]. Thus, in 1985 the CPSC tried out survey methods aimed at integrating data on accident causes, in particular on product defects or mistakes by product users, into the NEISS[67]. This study was aimed primarily at saving costs on the in-depth investigations. Likewise, the call for the Commission's safety policy to be oriented towards economic rationality criteria was taken into account only in connection with the evaluation of accident data[68].

4.3 Mandatory standards and bans

The original expectation that hazards arising from consumer products might primarily be combated by adopting mandatory product standards is particularly striking to a German

observer. In Germany, the legislative restraint on issuing general clauses in safety law and the shifting of regulation and monitoring tasks to privately organised institutions had already taken place in the 19th century[69]. The ramification of institutions of "private-governing" is so firmly established and their professional competence so undisputed that consumer policy initiatives aim only at reorganisation of the co-operative relationships between government agencies and non-governmental self-regulatory bodies and at some pluralisation of standard-setting procedures[70]. From a German viewpoint, the CPSA appears as an extraordinarily ambitious project: the private sector's technological and scientific capability lead was to be compensated for by the setting-up of an independent agency, while at the same time the standard-setting process was to be opened up pluralistically and all those involved were to be offered comprehensive legal protection.

The regulations embodying the original conception of standard setting concern firstly, the involvement of the public in determining action priorities through petitions under Section 10 CPSA 1972 and tendering for standardisation contracts by the offeror process under Section 7 (d)-(e) CPSA 1972, and secondly, the verification and development of regulations within the Commission pursuant to Section 9 CPSA 1972.

4.3.1 Public participation

Section 10 (a) CPSA 1972 gave all interested parties, i.e. individual consumers and consumer organisations, and firms, the right to call upon the Commission to enact, amend or withdraw a product safety regulation. By Section 10 (d), such petitions have to be responded to within 120 days. Section 10 (e) further provided for enforcement actions in the event of rejection of petitions - though this right was to become available only three years after the CPSA's entry into force (Section 10 (e)). The draftsmen of the bill hoped that these provisions would both cope with the phenomenon of organisational "inertia" and promote the Commission's readiness to pay attention to publicly expressed safety interests.

In the first three years, the number of petitions as well as the Commission's readiness to take all motions seriously into account - e.g. regulations on earrings, umbrellas and platform shoes - was considerable. The petition process proved to be extremely resource-intensive, yet petitioners were usually disappointed[71]. Under the impact of the petitions and of the declared objective of Section 10 CPSA, the Commission was in four cases prepared to opt for the setting of standards, although the products concerned would not, according to the NEISS data, have deserved this attention[72]. This led to the Commission's first spectacular failure[73].

Under the second chairman, S.J. Byington, the petition procedure was tightened up in 1977. By that time the difficulties of working out mandatory product standards had become apparent. The petition process had therefore lost its attractiveness, especially to the consumer side. Only business remained active; it used the procedure to secure amendments to and exceptions from regulations in force[74]. The legislative reaction in 1981 was inevitable:

Section 10 CPSA was deleted. Since it was now the general provisions of the Administrative Procedure Act that applied, abolition of the special right of petition meant only formal ratification of a change that had already come about[75].

The same fate was in store for the offeror process pursuant to Section 7 CPSA 1972. According to the ideas of the National Commission on Product Safety, incorporated in the Senate bill, the danger that the Commission might be captured by business interests in working out regulations was to be averted by granting groups (not economically interested themselves) the opportunity to develop a product standard. Section 7 (b) (4) CPSA 1972 complied with these ideas by obliging the Commission to make its intention to adopt a product standard public and call upon "any person" to present suitable proposals. Section 7 (d) (2) further provided for the possibility of supporting such work financially.

In four cases, the offeror process led to product regulations (swimming-pool slides, matchbooks, plate glass materials, motor lawn-mowers). In only one of these cases, namely lawn-mowers, was a consumer organisation (the Consumer's Union) active; in two other cases (televisions, Christmas-tree lights) in which non-industrial organisations (the Underwriters Laboratories and the National Consumers' League respectively) were involved, the procedures ended with improved voluntary standards, so that in the Commission's view, adoption of a binding rule became superfluous[76].

The offeror process proved extraordinarily time-consuming, costly and frustrating for all concerned. Commissioner R.D. Pittle openly admitted all these shortcomings in the 1977 Congressional hearings[77]. Nonetheless, he did see ways of making the procedure effective: through more precise guidelines from the Commission, improved co-operation with the offeror in working out standards, and adequate financial support for the work of non-commercial organisations. According to the testimony of D.A. Swankin, who headed standardisation work on Christmas-tree lights for the National Consumers' League, Pittle's ideas were in this case largely realised, with great practical success[78]. However, no further testing of these improvements was carried out. The provisions on the offeror process were withdrawn in 1981[79].

4.3.2 Individual standards and typical regulatory problems

In the years 1973-1984, the CPSC issued only 22 binding product regulations. These included 7 based on the CPSA, 3 concerning regulations on informational requirements and some 7 product bans[80]. These figures appear rather modest. Whether they in fact reveal the Commission's inefficiency and/or the inadequacy of the Act itself could be decided only from a comparison with the cost and time incurred by private standardisation organisations, and a qualitative comparison of results. Account would further have to be taken of the fact that since standards are part of the public (though not purely governmental) system, additional potential for conflict arises, which may then be taken up again in judicial review of

administratively approved standards. A generalised evaluation of CPSA provisions is made still more difficult by the fact that every standard was a response to specific regulatory problems, and that patterns of conflict also varied. There would be no point in repeating the history of every individual standardisation process, since any attempt to derive general evaluations from this would inevitably fail. That notwithstanding, the description below should illustrate some problems in setting mandatory standards, on the basis of two well-known cases[81].

4.3.2.1 The pool slide debacle and the CPSC's product safety philosophy

The legal conditions on which a product rule may be laid down and the criteria it has to meet follow from Section 9 (b) and (c) CPSA. In their original version, these provisions referred to "unreasonable risk of injury" and "reasonable necessity" for a standard (Section 9 (c) (2) and (7) CPSA 1972); before issuing a product rule, the Commission was additionally to consider its likely effect on the utility, cost and availability of the products concerned (Section 9 (f) (1) (C) CPSA). On the basis of these vague expressions, the Commission first of all sought legitimation for its decisions essentially in hazard analyses, rejecting a legal obligation to quantify risks and costs[82]. In Aqua Slide 'N Dive Corp. v. CPSC[83], the leeway claimed by the Commission was significantly reduced. The Aqua Slide decision concerned the first product standard put through by the Commission, following a particularly painful experience. The initiatives for regulating swimming-pool slides had been begun by the National Swimming Pool Institute (NSPI, an industry group concerned) and the plaintiff itself (by far the biggest producer) using the petition proced[84]. Although according to NEISS survey data, the slides were far from being among the riskiest groups of products, the Commission decided to embark on a regulatory procedure, in view of the severity of accidents that did occasionally occur. It was at the same time revealing what its product safety philosophy was: accidents were attributable to clumsy or incautious but foreseeable types of use. In the offeror process, the NSPI was mandated to work out a standard. Only after three years was it finally promulgated[85]. In relation to slide design, the Commission, doubting its own competence, refrained from mandatory provisions and merely made recommendations. All that was bindingly required was a ladder chain and warning notice: "careless slides can cause paralysis", "careless slides can cause injury". The Aqua Slide 'N Dive Corp. opposed these requirements, fearing marketing disadvantages due especially to the indication of the nature of possible, though improbable, injuries[86].

The key legal question in judicial review of the standard was the interpretation of the provisions just cited of Section 9 CPSA 1972. The Court accepted that the Commission had to assume an "unreasonable risk" even in the case of extremely unlikely but severe injuries; but it reproached it for not having shown "reasonable necessity" for the regulation adopted. The Commission had not, it said, ascertained the economic effects of its regulation[87], nor tested the effectiveness of chain and warning[88]. Judge Wisdom's concurring opinion treated the relationship between economic cost and benefit much more decidedly: he agreed with the

Commission that the warning signs helped to reduce risks; but these benefits were out of proportion relative to the costs they would incur[89]. In other respects, the effects on competition had proved considerable, contributing to a monopoly position which was, ironically, now held by the plaintiff itself[90].

The differences in style between the majority opinion and Judge Wisdom's arguments show how problematic it is to infer from the Aqua Slide decision that the implementation of the CPSA should be guided by economic rationality criteria. In practice, though, the decision did have this effect[91], contributing to the 1982 amendment to Section 9 CPSA[92].

4.3.2.2 Lawn-mowers and the indefiniteness of cost-benefit analyses

The regulation of "walk-behind power mowers" was also taken up on petition from an industry group (Outdoor Power Equipment Institute, OPEI) in 1973. In this case, the initiative was aimed at securing official blessing for an already worked out voluntary standard[93]. The Commission, however, took the chance to then bring in a consumer organisation that had distinguished itself by its activities in this area (the Consumers' Union, CU). CU finished its work in July, 1975. The outcome was controversial: the OPEI criticised all the major technical proposals, as well as the cost-benefit analysis added by the CU.

This essentially explains the duration and intensity of verification of the proposals by the CPSC: the standardisation work was practically repeated yet again, with renewed official involvement, and not completed until 15 February 1979[94]. In the "findings" justifying the regulations[95], the effects of the Aqua Slide judgment are clearly recognisable. They contain a review of estimated numbers and costs of accidents with lawn-mowers, an analysis of the effects of the regulation on product costs and an account of the likely effects on accident figures and product costs of the most important safety requirements. This regulation has stood up to judicial review, with one marginal exception[96]. What is remarkable here is that the Commission's "safety philosophy", in showing its readiness for "paternalistic" protection of the consumer against his own foreseeable mistakes, was explicitly confirmed, while at the same time cost-benefit analyses acquired more importance.

The risks bound up with lawn-mowers are widely known. Accordingly, use leading to injury can be treated as misuse, and the existing safety level taken as a "proper" outcome of consumer demand[97]. However, the Court of Appeals, when it was called in, did not accept this argumentation: "Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risks . . . There is no evidence . . . that (consumers') presumed willingness to defeat protective measures is reasonable"[98]. This safety philosophy effects the bases for cost-benefit analysis. If consumer behaviour were declared to be the criterion for justifying regulatory intervention, then economic analysis as such would be superfluous; the willingness to take risks may then appear "unreasonably" high, only with regard to accident insurance and health protection provisions[99]. But leaving these difficulties

aside, and comparing merely the (estimated) increase in product cost with the (estimated) effects of the standard on accident figures and the (estimated) savings (though here delaying the purchase of a new mower and the concomitant use of old, hazardous machines would be particularly hard to estimate[100]); the fact remains that broad room for discretion in decision arises. The CPSC thus saw itself confronted with divergent cost-benefit analyses from the CU and the OPEI. It did a study of its own, which was revised once more following criticisms by the Standard Research Institute, called in by the OPEI[101]. The Court of Appeals declared itself satisfied with these efforts[102]. Since according to CPSC estimates, the cost-benefit analysis came out in favour of adopting the regulation, its legal significance ultimately remained undetermined; and the question remained unanswered as to whether measures were no longer "reasonably necessary" when their effects on product costs exceeded savings on treating accident victims. Admittedly, the CPSC success before the courts was wiped out on one important point through a legislative amendment to the regulation by Congress[103].

4.3.3 Product bans

According to Section 8 CPSA 1972, products giving rise to an "unreasonable risk of injury" could be "banned" unless some product standard promised appropriate protection. The banning procedure came under the provisions of Section 9 CPSA 1972 applying to standard setting, but not those of Sections 7, 10 CPSA 1972 on petitioning and the offeror process. The possibility of putting through regulations on its own account does much to explain the Commission's inclination, once the standard-setting procedure had proved unexpectedly complex and conflictual, to opt for the banning procedure. In fact, in at least two cases where issuing or tightening up a standard might have been conceivable, the Commission decided on product bans[104].

The most important field of application of Section 8 CPSA, however, became the hazards analysed under the "chronic hazards" program, from health-threatening, especially carcinogenic, chemicals, a case where recourse to Section 8 CPSA 1972 immediately lends itself[105]. The expectation that product bans might become an important regulatory instrument has however since been disappointed, an outcome foreshadowed by both the formaldehyde controversy and the 1981 legislative amendments.

The formaldehyde controversy began in 1976 with initial reports on health complaints from people living in houses treated with urea formaldehyde (UF) foam insulation for energy conservation. A true consumer movement developed against UF dangers, further stimulated by medical studies on the possible carcinogenicity of the product[106]. The CPSC initiated wide-ranging additional scientific studies, and initially suggested a regulation to oblige manufacturers to provide information on general (not carcinogenic) hazards[107]. It was not until 1981 that the Commission threatened to ban urea formaldehyde[108]. The proposal for a regulation, which takes up 23 closely printed pages, first describes the state of the medical studies and goes on to discuss the economic consequences of a ban. The avoidance of 23

cancer deaths yearly and other major health risks was said to be in line with the requirements emerging from the Aqua Slide and Southland Mower decisions, and to be in "reasonable proportion" with the economic drawbacks of a ban[109]. On 2 April 1982 the definitive ban was issued[110]. It was praised for its scientific justifications, once again spelled out, while the Commission's economic analysis was found to be heavily flawed[111].

The Court of Appeals, called in by a number of manufacturers concerned[112], did not go into calculations of the economic benefit of preventing cancer deaths against the cost of banning urea formaldehyde. The Court was able to avoid taking a position on this regulatory aspect because it already regarded "unreasonable risk of injury" as not proven. Measurements of UF burdens had not been effected by random sampling, and where this had been the case, they were often due to installation errors and therefore controllable by a standard. The experimental scientific basis for the assumption of carcinogenic effects was on the whole too narrow, and could not justify the Commission's risk estimates. The Commission's 1983 Annual Report[113] has a brief note on the outcome of the trial, which is very illuminating for its present position: "the Commission voted 3-2 to seek an appeal in the Supreme Court, but the US Solicitor General decided not to ask the Supreme Court to take the case". But it is not only the outcome of the formaldehyde controversy and the resulting requirements to demonstrate product risks that lessened the attractiveness of product bans become unattractive. Legal amendments in connection with the 1981 re-authorisation worked in the same direction: product bans could henceforth be issued only under the conditions introduced in Section 9 CPSA for the setting of mandatory standards.

4.4 Updating of "voluntary" standards

The explicitly critical attitude towards "voluntary" standards that characterised the NCPS Report ("chronically inadequate, both in scope and permissible levels of risk")[114] and was to have determined the regulatory approach in the CPSA 1972, had already changed by the mid-70's; it was finally reversed with the legislative amendments of 1981[115]. To understand this development and the CPSC's present support for voluntary standard setting, a few indications as to the structures of private standard setting in the US might be of assistance.

4.4.1 Standardisation organisations and procedures[116]

There are no less than 580 groups in the US concerned with developing standards, but the number of organisations of national importance is very small. For some influential agencies, standardisation activities are part of a general representation of professional or economic interests. This is true of the engineering societies ("American Society of Civil Engineers"; "American Society of Mechanical Engineers"; "Institute of Electrical Electronics Engineers"; "Society of Automotive Engineers"); they are "non-profit" organisations with individual

memberships, though their standardisation activities are supported and influenced by contributions from industry. By contrast, the trade associations represent manufacturers in individual industries. Both the engineering societies and the trade associations not only develop standards themselves but additionally participate in the activities of the most important standardisation organisations: the American Society for Testing and Materials (ASTM) and the National Fire Protection Association (NFPA). In view of its particular reputation, special mention should be made of Underwriters Laboratories (UL), an institution promoted by American insurers, dealing with, among other things, electrical hazards, fire protection and the development of test procedures. The activities of all these organisations are coordinated - which often means stimulated - by the American National Standards Institute (ANSI), which also represents the US in international contexts.

The standardisation organisations reacted to public criticism of the quality of voluntary standards in the 1970's by reviewing their procedural arrangements. Thus, standards brought before the ANSI must go through a procedure before being recognised as an "American National Standard". The ANSI must ascertain whether all those primarily involved have had a chance to express views and raise objections on whether the standard is "unfair" or ignores "the public interest"; additionally, all standardisation proposals are published and, where of direct relevance to consumers, passed on to a "Standards Screening and Revision Committee of the Consumer Council"[117]. The ANSI's procedural rules are more specific, and stricter, when it comes to organisation of standardisation procedures. For safety standards, inclusion of workers, authorities, insurers, consumers, and other groups is supposed to guarantee a balanced representation of interests, ("A consensus does not necessarily mean unanimous acceptance. Votes are weighted rather than counted"[118]), and guarantee that standards will actually be applied. All large standardisation organisations have similar procedural guarantees. This is the case in particular for the ASTM, which develops detailed "due process" requirements, and has, like the NFPA and the UL, set up "consumer sounding boards"[119].

4.4.2 The CPSC attitude

Running parallel to these reorganisation efforts of private standardisation associations, attitudes changed towards "self-regulatory" measures in general[120], as did the CPSC's position on voluntary standards in particular. In 1975, the CPSC was already developing forms of co-operation with private standardisation organisations[121] and regulating "employee membership and participation in voluntary standards organisations"[122]. In the statement concerning the 1978 Regulation on "Commission involvement in voluntary standard activities", the Commission explicitly dissociated itself from the National Commission on Product Safety's critical observations on voluntary standards[123]; at the 1981 Congressional hearings this attitude was confirmed by then Commission Chairman Stuart Statler, who pointed out that in 83 cases, the Commission had already collaborated on developing or revising voluntary standards[124]. The Underwriters Laboratory additionally stressed that the passing on of

accident figures by the Commission had already often led to private standardisation activities[125].

The 1978 Regulation just mentioned distinguishes between two forms of official involvement. "Monitoring" of the development of voluntary product standards involves observing the process and influencing it through directed questions, and providing accident figures and the results of in-depth studies. In the case of "participation", a Commission worker takes part in sessions of the private Standardisation Committee, and technical assistance is sometimes provided. The first form of involvement requires approval from only the Commission Executive Director; the second requires approval from the Commissioners themselves[126]. The object of both forms, and the type of support that the Commission can provide[127], is fully in line with the CSPA's general safety policy objectives. Support is accordingly also bound up with particular conditions on the standardisation procedure: it should be open to all interested parties and guarantee genuine involvement of consumers and/or small businesses; it must provide for revisions of standards; actual compliance is important; certification provisions should be worked out and standards themselves confined to "performance" regulations[128]. The Commission always keeps its option to issue a mandatory product regulation open, whether to make a voluntary standard generally mandatory or because a voluntary standard is inadequate from a safety policy viewpoint[129].

The 1981 legislative amendments did not formally cancel this policy statement, but they did reduce its practical significance, for many reasons. By the new version of Section 9 (b) CPSA, the Commission must always give preference to voluntary standards where they eliminate or "adequately reduce" the hazards concerned and "substantial" compliance is to be expected. This already guarantees that the Commission will await efforts toward voluntary solutions and cannot without further action ignore their outcome. Additionally, the new version of Section 9 (c) and (f) CPSA links announcement, and above all enactment, of binding rules with additional requirements. The Commission has not only to show that a product hazard will not be adequately reduced or that observance of a standard would be inadequate; it has further to provide a detailed "regulatory analysis" that must contain cost-benefit analyses of its regulatory proposal and of all alternatives contemplated. The Commission initially responded in 1984 to this change in conditions for co-operation with standardisation organisations, through a proposal to supplement the 1978 regulations on involvement in developing voluntary standards; it suggested a new procedure that would require special recognition of voluntary standards already being applied[130]. The declared aim of this proposal was to encourage application of safety standards and improve consumer orientation towards safety aspects of consumer products. But response to the proposal was discordant, and mainly negative. Industry feared distortions of competition and restrictions on innovation; standardisation organisations recalled the Commission's limited resources for implementing recognition procedures; the Consumer Federation of America protested against the Commission being converted into a sales promotion agency. The Commission decided to withdraw its proposal[131]. But this did not end efforts to further develop standardisation policy. A memorandum of 22 April 1985[132] incorporating suggestions from Commission departments and from public hearings describes and discusses a series of options ranging

from voting rights in setting voluntary standards via systematic announcements of regulatory procedures pursuant to Section 9 CPSA, up to the conclusion of co-operation agreements with standardisation organisations. The Commission decided to consider only three of these possibilities: to intensify its involvement in standardisation work on products particularly important in its view; to make direct contact with individual manufacturers before producing or amending standards; to refer to standards in its public information[133]. The practical importance of all these activities is hard for the outsider to estimate. However, thanks to its accident information system and its own technical competence, the Commission should continue to have considerable possibilities of influencing the production and promotion of standards of relevance to safety[134].

4.4.3 Standards and product liability

The intensification of "voluntary" standardisation in the US cannot be explained solely on the basis of the CPSC's original powers and its current encouragement of voluntary standards, but is to be attributed essentially to the influence of American liability law. American case law punishes neglect of a mandatory standard, but also non-compliance with a safety level laid down in a voluntary standard, as in principle "negligence *per se*"[135]. This sanction manifestly explains industry's willingness to follow voluntary standards[136]; it likewise explains the interest in having standards recognised by ANSI and making the standardisation procedure itself "fair"[137].

On the other hand, compliance with a standard in no way rules out product liability. Section 25 CPSA explicitly confirms this principle for mandatory standards: "Compliance with consumer product safety rules . . . shall not relieve any person from liability at common law . . ." However clear this position, court practice nevertheless responds in different ways when manufacturers appeal to their compliance with voluntary or with mandatory standards in product liability actions. Standards may, for instance, be adduced to establish the "state of the art" in product safety, or to support or confute expert testimony[138]. All these forms of observance of standards, however, depart from the principle that the courts autonomously determine the level of product safety intact; this principle is not questioned either by efforts at legislative channelling of product liability law[139].

4.5 Recalls

The recall provisions in the CPSA initially stood in the shadow of preventive standard setting, but soon developed into an important instrument for the CPSC, taking on additional importance after the 1981 restrictions. In the context of European product safety policy, the American example deserves particular attention not only because the new approach to technical harmonisation and standards delegates preventive product safety policy very largely

to private standardisation organisations, but also because the need for European framework legislation on follow-up market control seems irrefutable[140].

4.5.1 The CPSA legislative framework

Two provisions in the CPSA deal with response to hazards arising from already marketed products. By Section 12, the Commission may order seizure and/or public warnings, recalls, repairs, exchange or replacement of "imminently hazardous consumer products". However, the significance of this provision remained marginal[141]. The Commission has developed its follow-up market policy entirely on the basis of Section 15. This preference is not surprising: the criteria for intervention in Section 15 are broadly formulated, the potential for sanctions is rich in alternatives and can be treated flexibly.

Section 15 (a) CPSA provides sanctions against all "substantial product hazards" arising either from failure to comply with a binding rule or from product defect. Every manufacturer, distributor and retailer must by Section 15 (b) immediately inform the Commission if they obtain information that reasonably supports the conclusion that such hazard is present. On the basis of such reports and/or other sources of information (NEISS accident figures, consumer complaints, in-depth studies etc.), a hearing is held to which all interested circles, including consumers, are invited (see Section 15 (c) and (d)).

Should the Commission determine after such consultation that a "substantial product hazard" is proven, two measures are possible:

- "Notification" under Section 15 (c), whereby a manufacturer, distributor or retailer may be ordered to inform the general public, notify all manufacturers, distributors or retailers, or mail notice to every person who has purchased or received the product;

- The further-reaching possibilities of Section 15 (d), where it seems necessary in the public interest to repair a product, make it fit applicable standards, exchange it or replace it. Additionally, a "corrective action plan", showing how the order is to be implemented, may be required.

4.5.2 Application of Section 15 CPSA

The administration of this legal framework has been interpreted and refined by the Commission in its rules on "substantial product hazard reports"[142] and in a number of internal (though publicly accessible) documents. Some elements of this policy have already been emphasised: (1) the general clause of Section 15 (a) (2) on defects that lead to "substantial product hazards" has been clarified by the Commission using exhaustive circumlocutions ("a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or

function"), differentiations (design, manufacture, instructions), examples ("a knife does not contain a defect insofar as the sharpness of its blade is concerned") and assessment criteria (". . . the Commission and staff will consider: the utility of the product involved; the nature of the risk of injury which the product presents; the population exposed to the product and its risk of injury; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of product liability; and other factors . . .")[143].

(2) The obligation laid down in Section 15 (b) on manufacturers, distributors and retailers to report product hazards is regarded by the Commission as an indispensable precondition for its recall policy. It exhaustively commented on this obligation in 1978, defending it against criticism from firms involved[144]. The objections are quite understandable. Fears exist with regard to the negative effects of such reports on product liability suits, and also with regard to deterioration of image and hence of competitive position. The rule dating from 1978 sought to allay these doubts by explicitly treating the report itself as not constituting admission of a product defect[145]. In 1981 the legislator came to meet the interests of firms involved by making the new version of Section 6 (b) (5) CPSA provide that in principle information secured under Section 15 (b) be no longer published[146]. This legislative amendment, and probably also the Commission's budget difficulties[147], led in 1980-2 to a notable decline in the number of reports received. But the Commission's position was not lastingly affected. In 1984 it once more gave detailed justifications for the importance of the reporting duty[148], and managed to reverse the trend of the years 1980-2 again[149].

This strictness cannot be explained by the information function of the reports alone. Procedures under Section 15 CPSA were inevitably always largely based on other informational sources[150]. Assuredly, closer observance of the reporting duty would facilitate the identification of hazards. But the importance of the reporting duty also seems to lie in its compensating for the indefiniteness of the general clause in Section 15 (a) (2). The Commission's interprative leeway seems to strengthen its position vis-à-vis firms involved when negotiating a recall plan.

(3) As with all product safety policy instruments, priority setting is essential in follow-up market control. An instructive 1981 document[151] differentiates three types of injury and likelihood; it relates the severity of injury to the likelihood of occurrence, and thereby sets up three types of urgency to which cases arising can be allocated. These classifications show that the Commission sees follow-up market control as implementation of the statute, and orients use of its resources towards the objective of preventing hazards; consistent orientation of its policy towards cost-benefit-analysis criteria[152] would lead to another scale of priorities.

(4) The great flexibility that Section 15 (c) and (d) allow the Commission in its response to product hazards is exploited both in notification and in recalls and the drawing up of a "corrective action plan". The intensity of response, its specific shape and its monitoring correspond to the type of product and the urgency of the hazard[153]. A noteworthy point is the high rate of mutual agreement in the resolution of recalls[154]. This can be explained by

industry's interest in avoiding adverse publicity and product liability actions, and the Commission's interest in rapidly eliminating product hazards ("safety delayed is safety denied"). Willingness to compromise manifestly did not suffer from the 1981 legislative amendments.

4.5.3 The function of follow-up market control

The history of implementation of follow-up market control under Section 15 (b) CPSA is one of success. The figures are indeed impressive. Former Commission Chairman S. King reports that between 1973 and 1980 some 2,500 recall actions were carried out, concerning some 100 million products[155]. At the 1983 Congressional hearings, Chairman N.H. Steorts was able to point to 3,174 actions on 293 million products[156]. Commissioner Stuart M. Statler in 1980 called the provisions of Section 15 CPSA one of the Commission's most effective instruments, that could be used even to solve general product safety problems[157] - e.g. for an industry-wide recall because of a universally occurring design defect[158]. But there are limits to this kind of remodelling of Section 15 CPSA. The primary safety objective of recalls, namely to eliminate hazards arising from already marketed products, can never be fully achieved. The CPSC's implementation studies show this very clearly. Though the success or failure of a recall action cannot simply be read off from the percentage of returned products[159], it is nevertheless indisputable that the effectiveness of such actions calls for hard strategic decisions. The type of consumer information must depend on whether manufacturers or retailers have customer lists available; where necessary, suitable public media must be used. The intensity of information must take account of the hazards of the product concerned, but also of the attitudes, inhibitions and efforts of the final consumer. For all the doubts about the feasibility of recalls arising from these problems, it should nevertheless be borne in mind that recall actions can be used both to raise standards and to improve safety controls within firms. These feedback effects are also to be taken into account in assessing the "success" of recall arrangements.

4.6 Evaluation of the CPSC

Assessments of the CPSC's performance are as controversial as product safety policy itself. The analyses presented by consumer organisations arrive at positive results. According to calculations by A.K. Lower/A. Averyt/D. Greenberg[160], the falling trend in home and leisure accidents has been speeded up (twofold) by the Commission's activities; in the years from 1978 to 1983 alone, the CPSC is said to have prevented 1.25 million serious injuries and deaths, and saved some 3.5 billion dollars in consumer costs. W.K. Viscusi[161] arrives at a contradictory finding: the falling accident figures merely continued (even though more strongly), a trend that has not been significantly influenced by the CPSC. It is hardly surprising that there are also studies with findings fluctuating between the two results cited[162].

Problems with evaluations like these arise because they have to identify and quantify factors, which explain the trend in accident figures and how they are influenced by the CPSC's activities. All the studies mentioned use simplifying, if not speculative, assumptions for this. More illuminating, though controversial as well, are analyses of individual measures and of their aggregated impact. The Commission itself undertakes analyses, which estimate effects after a measure has been fully implemented. Thus, for instance, the rule on children's cots is supposed to have prevented 50 deaths per year, the ban on TRIS in children's nightclothes to have averted 500 possible cancer cases, and the lawn-mower regulation to have reduced annual injuries by 60,000[163]. For the CPSC's co-operation with standardisation organisations and for recall actions[164], there are similarly impressive figures[165]. Critics of the Commission have questioned these success claims in individual studies. The careful analysis of the Mattress Flammability Standard 1973[166] by P. Linneman[167] finds that a reliable pronouncement on the standard's effects is impossible. He points out, however, that the Commission's regulation standard had simply adopted a voluntary standard, which had already been adhered to by industry to 80% Moreover, the Commission seems to have been prevented from adopting a stricter solution to the problem (namely promulgation of a standard on self-extinguishing cigarettes)[168]. W.K. Viscusi has checked all mandatory standards, in detail and overall, for their effects. His analysis of the 1973 Poison Preventive Packaging Regulation[169] concentrates on figures for child poisoning by aspirin. He disputes the success claimed by the Commission for compulsory child-proof containers; the poisoning rate, he says, fell generally, and the relatively better figures for the product covered by the regulation should be measured against possible counterproductive side effects of the regulation in other areas (such as "lulling" effects in non-regulated areas[170]). The phenomena mentioned by Viscusi certainly exist; however, it seems speculative to use them as evidence in an argument like his. The Commission's positive findings are, at any rate, supported by studies of the American Academy of Pediatrics[171]. In the case of the standard for children's cots[172], even Viscusi concedes an improvement in accident figures by 10%[173]; a demonstration that this improvement can be attributed to some general trend can hardly be provided.

These conflicting analyses cannot and will not be definitively assessed here. The controversies, at any rate, show how ambitiously research on effects must be designed if it is not only to determine involvement of the regulated products in accidents, but also clarify other possible influencing factors taking side effects of regulation into account. The CPSC can at any rate claim that its many critics have so far failed to undertake analyses which would conclusively question the benefits of standard-setting. And there can hardly be any doubt that the Commission's recall activities serve an extremely useful function - although they merit further evalution and improvement.

1. This influence can clearly be seen in the relevant OECD reports: Data Collection Systems 1978; Severity Weighting of Data on Accidents, Paris 1979; Safety of

Consumer Products, Paris 1980; Recall Procedures, Paris 1981; Product Safety, Paris 1983.

2. For the most fully worked-out criticism, see Viscusi, 1984.
3. Act of Nov. 20, 1967, Joint Resolution 33, Pub. L. No. 90-146, 81 Stat. 466 (1976).
4. See the brief and informative description of this strategy in Pertschuk, 1982, 41 et seq.; detailed descriptions in e.g. the note on the Consumer Product Safety Commission, 1975, 1079 et seq.; Schwartz, 1982.
5. National Commission on Product Safety. Final Report Presented to the President and Congress, Washington, D.C. 1970.
6. Only one of the six commissioners, H.L. Ray, dissociated himself from the Commission's proposals (loc.cit., 120 et seq.). He saw them as lacking more precise identification and consideration of incentives that could encourage industry itself to raise safety levels, and further recommended co-operation with private standardisation organisations. These suggestions have since been implemented. On the first point, see also the self-critical remarks by Commissioner M. Pertschuk, 1982, 141 et seq., and on the amendment to the provisions on mandatory standard setting, 4.1.2.1 infra.
7. Pub. L. No. 92-573, 86 Stat. 1207 (1972).
8. See the descriptions in Müller/Vogelsang, 1979, and Weber, 1986, 174 et seq.
9. See Scalia/Goodman, 1973. Creation of the CPSC completed the network of newly created agencies in the area of social regulation: the National Highway Traffic Safety Administration had been founded in 1966, the Occupational Safety and Health Administration in 1970 and the Environmental Protection Agency in 1970.
10. See §§ 4, 32 CPSA.
11. See §§ 3 (a) and 31 (a) CPSA.
12. Federal Hazardous Substances Act 1960, Flammable Fabrics Act 1953, Poison Prevention Packaging Act 1070, Refrigerator Safety Act 1956 and Cigarette Safety Act 1984.
13. Figures from Dr. G.C. Nichols, CPSC (International Affairs Division).
14. Op. cit. (note 5), 1.
15. See also Section 27 (a) CPSA.
16. Specifically, see Sections 7 (standards), 8 (product bans), 12 (seizures), 14 (certification), 15 (recalls).
17. See only the OECD Report "Safety of Consumer Products", 1980.
18. Not considering inflation, this would be equivalent to a 1985 figure of some 70 million dollars.
19. Figures in Cornell/Noll/Weingast, 1976, 478.
20. See table in Viscusi, 1984, 40.
21. 35 million dollars in 1984; 36 million dollars in 1985, approx. 35 million dollars in 1986 and 1987 (figures from CPSC Authorization Act 1985, 99th Congress, 1st Session, Report, 99-60 Calendar No. 138, 7 and from Statler, 1984, 93.
22. See Viscusi, 1984, 40.
23. See the figures accompanying the Consumer Product Safety Amendment Act of 1983, 98th Congress, 1st Session, Report 98-114, 9 et seq.

24. See the CPSC's figures in the Hearings before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce. House of Representatives, 98th Congress, 1st Session on H.R. 2367, 6/7 April 1983, Serial No. 98-29, Washington, D.C. 1983, 413.
25. See Consumer Product Safety Amendment Act of 1983, op. cit. (note 23), 9 et seq.
26. See references in Klayman, 1982, 99 et seq.
27. See the detailed description in the note, The Consumer Product Safety Commission, 1975, 1121 et seq.; on the petition procedure, see also 4.3.1 infra.
28. Act of November 10, 1978, Pub. L. No. 95-631, Section 3 (a), 92 Stat. 3742, 3743.
29. Pub. L. No. 97-35, § 1203, 95 Stat. 703, 704-13 (1981); details in Klayman, 1982, 100 et seq.
30. On the constitutional prerequisites for using the veto right, see the indications in Claybrook, 1984, 69.
31. For more details see 4.3.2 infra.
32. 5 U.S.C. § 553 (e) (1976).
33. See Schwartz, 1982, 45 et seq., 55 et seq. and 4.3.1 infra.
34. 5 U.S.C. § 552 (1976 and Supp. II 1978).
35. Cf. on the one hand Pierce Stevens Chemical Corp. v. CPSC, 585 F.2d 1382 (2d Cir. 1978), and on the other hand GTE Sylvania, Inc. v. CPSC, 598 F.2d 790 (3d Cir.), cert. granted, 100 S.Ct. 479 (1979); and exhaustively the Comment on The Consumer Product Safety Act, 1980, 1180 et seq.
36. CPSC v. GTE Sylvania Inc., 447 U.S. 102 (1980).
37. See submissions by S.D. Dornfield from the Society of Professional Journalists, jurist A.F. Popper and Commissioner St.M. Statler to the 1983 Congressional hearings (op. cit., note 24), 80 et seq., 90 et seq., 368 et seq.
38. Reprinted op. cit., 3 et seq.
39. Calendar No. 138, 99th Congress, 1st Session, Report 99-60 of 16 May 1985.
40. Pertschuk, 1982.
41. Kelman, 1974, 102.
42. For more details see 4.2 infra.
43. Symptomatic critical assessments can be found by the mid 70's in Cornell/Noll/Weingast, 1976 and Hoffman, 1976; see also Feldman, 1980, 58 et seq., 60 et seq.
44. For more details see 4.3 infra.
45. See Bollier/Claybrook, 1986, 171 et seq.; for further evidence see the hearings cited in note 46.
46. Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 95th Congress, 1st Session, No. 95-52, Washington, D.C. 1977, 1 et seq.
47. In 1977, during the brief transitional period from S.J. Byington's chairmanship, the Commission had already announced a change in its policy priorities (see 42 F.R. 53953, 4 October 1977).
48. For the programme and the opinion-forming process within the Commission see Merrill, 1981, 1264 et seq., 1297 et seq.

49. For details see 4.5 infra.
50. See Bollier/Claybrook, 1986, 173.
51. P.H. Rubin, Cost-Benefit Analysis, 26 February 1986 (internal memorandum of the CPSC).
52. Op. cit., 6.
53. Op. cit., 8 et seq., 3 et seq.
54. For the Community, see the Council Decision of 22 April 1986 "concerning a demonstration project with a view to introducing a Community system of information on accidents involving consumer products", O.J. No. L 109, 26 April 1986, 23.
55. See 16 CFR 1003.
56. According to the CPSC's 1982 Annual Report (5), in 1981 30,000 death certificates were still being assessed. The 1984 Annual Report (II, 4) points out that this programme had to be considerably curtailed.
57. For the beginning of the co-operation, see Statler, 1980, 80 et seq.; Johnson, 1982, 63 et seq.
58. On this see Kelman, 1974, 92 et seq.; Hoffman, 1976, 397 et seq. and the Commission document "The National Electronic Injury Surveillance System: A Description of Its Role in the U.S. Consumer Product Safety Commission", April 1986.
59. For more details see Kelman, 1974, 94 et seq. According to the Commission's 1982 Annual Report (5), in the 1981 financial year 235,000 accidents were surveyed through the NEISS system. In at least 2,000 cases follow-up studies were done. The 1983 and 1984 Annual Reports did not give any figures; it emerges, however, from the CPSC documents cited supra (note 58), that these figures continue to apply. Nevertheless, it should be borne in mind that as the statements by Commissioner E. Sloan to the 1981 Senate Hearings confirm, the budget cuts decided at that time had considerable effect here, too (see Hearing before the Subcommittee for Consumer Protection of the Committee on Commerce, Science and Transportation, 1 Dec. 1981, No. 97-87, Washington, D.C. 1982, 9 et seq.). On implementation of in-depth investigations, there are detailed product-specific guidelines (CPSC Order 901024, 13 January 1983).
60. See Hoffman, 1976.
61. Cf. already Cornell/Noll/Weingast, 1976, 484 and now Viscusi, 1984, 49 et seq.
62. See Cornell/Noll/Weingast, 1976, 483 and the statement by medical practitioner J. Greensher at the Re-Authorization Hearing before Congress in 1981 (Hearings before the Subcommittee on Health and the Environment, House of Representatives, 97th Congress, 1st Session, H.R. 2271 and 2201, 5 and 13 March 1981, No. 97-4, Washington, D.C. 1981, 21 et seq.).
63. Heiden/Pittaway/O'Conner, 1982; cf. Waksberg's reply, 1983, and the rejoinder by Heiden/Pittaway, 1983.
64. See Verhalen, 1985. Brief descriptions which also show the NEISS's further development are contained in each of the CPSC's annual reports (in Part II).
65. See note 48.
66. See Verhalen, 1985, 67 et seq.; J. Greensher, loc. cit. (note 62).

67. See the Commission document "Results of a Pilot Study to Collect Causal Data from Victims Treated in Emergency Rooms for Product-Related Injuries from April 15, 1985 to April 28, 1985 (1985).
68. The 1983 Annual Report (II, 6) for the first time contained detailed estimates of accident costs.
69. See Wolf, 1986, 71 et seq., 99 et seq., 114 et seq.
70. See Brinkmann, 1976.
71. For details see Hoffman, 1976, 412; Schwartz, 1982, 47 et seq. and the statements by Commissioner R.D. Pittle to the 1977 Congressional Hearings (loc. cit., note 46), 248 et seq., 358 et seq.
72. See supra 4.2.1.
73. See infra 4.3.2.1.
74. See Schwartz, 1982, 54.
75. Cf. 4.1.2.2 supra and the observations in Merrill, 1981, 1360, 1363 et seq. on the role of petitions in the area of carcinogenic substances.
76. See Schwartz, 1982, 61 et seq.
77. Loc. cit. (note 46), 270 et seq., 281 et seq., 285 et seq.
78. Loc. cit., 259 et seq.
79. See 4.1.2.1 supra, at note 29. Standards and bans in force can be found from CFR 16, 1000.
80. Figures in Viscusi, 1984, 58 et seq. G.C. Nichols (note 13 supra) mentions 36 procedures for mandatory standards and over 100 for voluntary ones.
81. Comprehensive analyses taking the CPSC's work as a touchstone to test divergent regulatory theories are not available. A general survey, primarily from a legal viewpoint, is offered by Lamatina, 1981; see also Schwartz, 1982, 57 et seq., 73 et seq. A brief assessment oriented to criteria of cost-benefit analysis can be found in Viscusi, 1984, 71 et seq., 88 et seq. For an illuminating political science analysis, see Feldman, 1980, 58 et seq., 73 et seq. The most comprehensive approach, though confined to the Commission's "chronic hazards program" is in Merrill, 1981.
82. See e.g. Merrill, 1981, 1279 et seq., with references.
83. 569 F.2d 831 (5th Cir. 1978).
84. The grounds for the petition are illuminating: Aqua Slide wanted to avoid a product ban or a compulsory recall under the Federal Hazardous Substances Act (see 569 F.2d 835).
85. 42 F.R. 2751 (19 January 1976).
86. 569 F.2d 842.
87. 569 F.2d 840.
88. On the effect of warning notices, observations were carried out for two days (loc. cit., 841); the ladder chain was tested by a Commission consultant on his neighbour's children; "This is not the stuff of which substantial evidence is made" (op. cit., 843).
89. 569 F.2d 845.
90. Schwartz, 1982, 51, note 130. The Commission's attempt to withdraw the regulation in 1981 was opposed by Aqua Slide and not pursued because of the cost of withdrawal proceedings.

91. See also D.D. Bean & Sons Co. v. CPSC, 574 F.2d 643 (1st Cir. 1978) on the partial review of the matchbook standards, and for the history and economic analysis of this regulation Kafoglis, 1979. Additionally, see Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980).
92. 4.1.2.1 supra.
93. On this see Schwartz's case study, 1982, 77 et seq.
94. 44 F.R. 10024 (15 February 1979), 16 CFR 1205.
95. 16 CFR 1205. 8.
96. Southland Mower Co. *et al*. v. CPSC, 690 F.2 d 499 (5th Cir. 1980).
97. Cf. esp. Viscusi, 1984, 94.
98. 619 F.2d 513.
99. See 4.1.3. supra.
100. See Lenard, 1979, 69, 71, 73.
101. 690 F.2d 523 et seq.
102. 619 F.2d 524 et seq.; for a criticism, see Viscusi, 1984, 94 et seq.; Johnson, 1982, 28 et seq., explicitly praises the CPSC's analyses and recommends it to private standardisation organisations for imitation.
103. See 16 CFR 1205.5, note 1.
104. Cf. Merrill, 1981, 1277, note 74 and Schwartz, 1982, 68 and the example of the "ban on unstable refuse bins", 42 F.R. 30300, 13 June 1977, amended by 46 F.R. 55925, 13 November 1981, 16 CFR 1301; the refuse bins had according to the Commission's findings led to 21 deaths (20 of them children); the product ban specified the nature of the bins concerned in detail (loc. cit., 1301.1.(b) and (e); cf. also the ban on particular types of children's bicycles under 16 CFR 1500. 18 (a) (12), which in turn refers to the requirements for bicycles (43 F.R. 60034, 22 December 1978, 16 CFR 1512); for an illuminating and critical discussion of bicycle regulations cf. Cornell/Noll/Weingast, 1976, 493 et seq.; the standard was essentially confirmed by the decision in Forester v. CPSC, 559 F.2d 774 (D.C. Cir. 1977).
105. On the structure of the program, see Merrill, 1981, 1296 et seq., 1310 et seq. Among the most prominent "victims" of the Commission was the chemical TRIS, which had since 1971, following a standard set by the Commerce Department, been used to treat sleepwear to reduce fire dangers. In this case the Commission presented its action as an interpretation of Section 2 (q) (1) (A) Federal Hazardous Substances Act (on the dramatic background, see Merrill, 1981, 1323 et seq.). For the losses resulting from the Commission's action, firms involved received, through the 1982 "Tris Act", compensation amounting to 56 million dollars (references in Bollier/Claybrook, 1986, 180).
106. See Bollier/Claybrook, 1986, 180 et seq.
107. 45 F.R. 39434 (1980); on this see again Merrill, 1981, 1354 et seq. and Ashford/Ryan/Caldart, 1983.
108. 46 F.R. 11188 (5 February 1981).
109. 46 F.R. 11200 et seq.
110. 47 F.R. 14366 (2 April 1982).

111. On the first aspect see Ashford/Ryan/Caldart, 1981, 360 et seq.; Fox, 1985, 84 et seq., and for an economic analysis Merrill, 1981, 1358 et seq.
112. Gulf South Insulation *et al. v*. CPSC, 701 F.2d 1137 (5th Cir. 1983).
113. II, 103; see also, for a criticism of the judicial critique, Ashford/Ryan/Caldart, 1981, 363 et seq. and Fox, 1985, 88 et seq.
114. Op. cit., (note 5), 62; see Hamilton, 1978, 1371 et seq.
115. See 4.1.2.1. supra.
116. On the following, cf. Hamilton, 1978, 1336 et seq.; Hemenway, 1975, 81 et seq.; Johnson, 1982, 6 et seq.
117. Hamilton, 1978, 1365 et seq.
118. For more on the consensus principle see Hamilton, 1978, 1361 et seq., and the critical remarks in Hemenway, 1975, 89 and in Opala, 1969, 45.
119. See Hamilton, 1978, 1349 et seq., 1384.
120. See Katz, 1976; Reich, 1984, 123 et seq.
121. See e.g. the references in Hamilton, 1978, 1404 and the testimony by Commission Chairman S.J. Byington in the 1977 Congressional Hearings, loc. cit. (note 46), 363 et seq., 373 et seq.
122. 40 F.R. 26025, 20 June 1975 (for the form in force at present, see 46 F.R. 29930, 4 June 1981, 16 CFR 1031).
123. 43 F.R. 19216 (4 May 1978), 16 CFR 1032.1.
124. Op. cit. (note 62), 321 et seq., 338 et seq.
125. Op. cit., 816 et seq., 823.
126. 16 CFR 1032.2 (b) and 1032.3 (a) and (b).
127. See 16 CFR 1032.4.
128. See 16 CFR 1032.5.
129. See 16 CFR 1032.6; cf. 1032.1 (c).
130. 49 F.R. 25005, 19 June 1984.
131. 50 F.R. 19699, 10 May 1985; the hearings and discussions that led to this decision are documented in the "Briefing Package on Proposed Amendment to Commission Policy Involvement in Voluntary Standards Activities", 14 December, 1984.
132. Alternatives for Support of Voluntary Standards.
133. Commission Guidance on Voluntary Standards Activities, Memorandum, 28 April 1986.
134. According to a memorandum from D.L. Noble of 14 May 1986, 15 participation projects and 31 monitoring projects were pursued in that year. The memorandum specifies in each individual case the nature of the hazards involved, and documents advantages and drawbacks to each individual project.
135. See Weinstein/Twerski/Piehler/Donaher, 1978, 56.
136. See Eads/Reuter, 1983, 40.
137. See 4.4.1 supra and Hoffman/Hoffman, 1980/81, 293, 295.
138. See Hoffman/Hoffman, 1980/1981, 288 et seq., and specifically on automobile standards Holley, 1982, 813 et seq.
139. See Dworkin, 1983, 612 et seq.

140. See Chapter I, 3.3, and for more details Chapter V, 4.
141. See Schwartz/Adler, 1984, 429.
142. 43 F.R. 34998 (7 August 1978), 16 CFR 1115.
143. 16 CFR 1115.4; and exhaustively Madden, 1981, 202 et seq.
144. 43 F.R. 34988-34998, 7 August 1978 (on the subsequently adopted rule, cf. in detail Madden, 1981, 211 et seq.).
145. 16 CFR 1115. 12 (a).
146. See 4.1.2.2 supra.
147. See Schwartz/Adler, 1984, 434.
148. 49 F.R. 13820, 6 April 1984; see also Statler, 1984.
149. Exact figures can be found in the memorandum from the divisions for "corrective action" and "administrative litigation" of 13 May 1985 and 11 May 1986; for previous years see Schwartz/Adler, 1984, 433, note 221; Statler, 1984, 93. However, the courts have cut down on sanctions for breach of the reporting duty. In Advance Machine Co. v. CPSC, 666 F.2d 1166 (8th Cir. 1981) and in Athlone Industries, Inc. v. CPSC, 707 F.2d 1485 (D.C. Cir. 1983) it was found that the Commission had to impose the fines provided for in Section 20 CPSA through the courts (on the importance of this decision see Zollers, 1985). In Drake v. Honeywell, Inc. 797 F.2d 603 (8th Cir. 1986) it was decided that breach of the reporting duty did not justify any right of private action.
150. See Schwartz/Adler, 1984, 433 and for the Commission's information sources CPSC Order 9010.34, 4 June 1984, 8 et seq.
151. Hazard Priority and Corrective Action Guidelines, 19 January 1981; see also the detailed description of the decision-making procedures in the Task Force "Report on Recall Effectiveness", 25 August 1980, table D and Madden, 1981, 234 et seq.
152. See 4.1.3 supra.
153. For details see Madden, 1981, 238 et seq. and Schwartz/Adler, 1984, 437 et seq. (on recalls), 411 et seq. (on notices), as well as, specifically on recalls, the detailed CPSC Order 9010.34 (supra note 150).
154. See Madden, 227 et seq.; Schwartz/Adler, 1984, 434. According to figures from former Commission Chairman S. King cited at the 1981 Congressional Hearings, loc. cit. (note 62), 22, over 90% of procedures under Section 15 CPSA were settled by mutual agreement.
155. S. King, loc. cit.
156. Op. cit. (note 24), 302, 310, cf. 320 et seq.; see also Statler, 1984, 92.
157. Statler, 1980, 79.
158. Schwartz/Adler, 1984, 439, note 260.
159. As stated again in the Recall Effectiveness Study, Loren Lange, Office of Strategic Planning, May 1978; the 1980 Report (note 151 supra) additionally points to a number of other relevant factors: the significance of the proportion returned depends on how many products are still being used at all, how many have been privately repaired following a warning and how many have been simply thrown away.
160. Lower/Averyt/Greenberg, 1983.
161. Viscusi, 1984, 271 et seq. and *idem* 1985.

162. Zick/Mayer/Snow, 1986.
163. CPSC figures to the 1981 Congressional Hearings, loc. cit. (note 62), 431; also 419, 426.
164. For 1981 cf. loc. cit. (note 163), 427; cf. also the 1983 Congressional Hearings, loc. cit. (note 24), 318 et seq.
165. The individual estimates may be added together. Thus, for 1981, the Commission arrives at a reduction, in relation to mandatory and voluntary standards, by 300 deaths and 125,000 injuries (loc. cit., note 62, 412); for 1983, 450 deaths and 248,000 injuries are claimed (loc. cit., note 24, 309).
166. 38 F.R. 15095 (8 June 1973).
167. Linneman, 1980, 469.
168. Bollier/Claybrook, 1986, 173; the standard has since been supplemented, see 16 CFR 1632 (1985).
169. 38 F.R. 21247 (7 August 1873), 16 CFR 1700.
170. Viscusi, 1984, 77 et seq.; see also *idem* 1985, 539 et seq.
171. See figures by Greensher/Mofenson to 1981 Congressional Hearings, loc. cit. (note 62), 81.
172. 38 F.R. 129 (21 November 1973), 16 CFR 1508.
173. Viscusi, 1985, 552.

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 verification[1]. 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 realised[2].
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 literature[3], 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 market[5]. 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	cum.	abs.	cum.	(5)	abs.	cum.
	(1)	(2)	(3)	(4)		(6)	(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	12/71	7/0	8/72	25

the emission of pollutants by diesel engines				
Internal equipment	12/71	7/74 (7/70)	6/74	0 (42)
Security equipment against unauthorised use	7/72	new	12/73	-
Behaviour of steering gear in collisions	9/72	7/74 (7/70)	6/74	0 (48)
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.

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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

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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.

CHAPTER IV:

The new approach to technical harmonisation and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low Voltage Directive, and the clarification of its operating environment by the Single European Act

Following several declarations by the European Council since 1982, achievement of a single European internal market has become the focus of the Commission's efforts towards integration[1]. The general economic and social policy consequences of achievement of an integrated internal market can hardly be overestimated, and the issues of the relationship between internal market and product safety policies, on which this study concentrates, cover only a small range of the questions that will have to be thought through in order to "complete the internal market". But even this range is wide enough. The far-reaching integration policy expectations bound up with internal market policy presuppose the overcoming of technical barriers to trade arising particularly from differences in product safety law in Member States: the European Internal Market cannot be achieved without the Europeanisation of product safety law.

The description of law approximation policy under the 1969 General Programme to remove technical barriers to trade[2] has repeatedly confirmed the notion that internal market policy must always include coverage of product safety policy implications of legal harmonisation measures. Let us only recall the broad use of escape clauses in relevant Community directives[3], the collapse of initiatives in the area of construction materials[4], the lack of success in efforts to supplement harmonised product standards in the automotive sector with an integrated safety policy programme[5] and the general resistance to a "horizontal" European product safety policy[6]. The problems with internal market policy can clearly not be explained exclusively by the fact that Member States seek to assert their own economic interests in negotiations on legal approximation measures; they point at the same time to the fact that the issue of product safety is felt as a politically sensitive area where political actors resist delegating powers of action and decision to the Community.

The documents in which the Commission explained its interpretation of the stagnation of legal harmonisation policy and the need for a new approach to harmonisation did not clearly address the connections between internal market policy and product safety policy. Instead, the Commission points primarily to the general difficulties of the European legislative process: the hurdles of the unanimity principle, the multiplicity of technical provisions in need of harmonisation and the quantity of national standardisation material and the need for flexible adaptation of harmonised provisions to technical developments[7]. This diagnosis is in line with the therapy recommended by the White Paper on completion of the Internal Market[8]: the Community should in the future base itself as far as possible on mutual recognition of the equivalence of national provisions or standards, confining itself in legal approximation policy to harmonising binding safety and health requirements, to be specified by the European standardisation organisations, supplemented by mutual recognition of national standards. The following description begins with the Commission's diagnosis and

view of the problems. It therefore initially ignores the connections between internal market policy and product safety policy, to concentrate on analysing the pre-conditions stated by the Commission and the new harmonisation policy elements so far discernible. But this procedure should in no way be regarded as uncritical acceptance of the White Paper's premises and expectations. The principle of equivalence and mutual recognition of national provisions referred to by the Commission will instead be considered in the light of an analysis of relevant ECJ case law and Articles 30 and 36 EEC regarding its scope; it will emerge that this case law already largely respects safety policy interests of Member States (Section 1 below). But the Commission's second premise, namely that the regulatory model of the Low Voltage Directive of 19 February 1973[9], the first to apply the technique of harmonisation of safety objectives and reference to standards at Community level, can be generalised, will likewise be shown to be highly problematic, since the regulatory technique of the Low Voltage Directive presupposed specific conditions in the electrical sector, and the safety policy and legal problems arising out of the Directive are by no means entirely solved (2 below). We shall then return to describing the new approach to technical harmonisation and standards (3 below). A further point to be clarified will be how the Single European Act, in particular Art. 100 a (4), will affect the applicability of the new approach (4 below). Finally, the new harmonisation policy will be considered in terms of its compatibility with the EEC Treaty (5 below).

1. Mutual tension between marketability of goods and product safety in the light of Articles 30 and 36 EEC

The relationship between marketability of goods and product safety requirements is fundamentally regulated in Articles 30 and 36 EEC. In recent years extensive ECJ case law has developed here, meeting with an extremely strong response in the literature[10]. As *Table 1* shows, of 140 judgments delivered by the ECJ by 31 March 1987 on free movement of goods, only a little over a quarter (42) were based on an action for breach of treaty brought by the Commission; such actions occurred in significant quantity only with the case law following-up the Cassis judgment.

Table 1: ECJ judgments on free movement of goods over particular periods, by type of proceedings (1)

Period of time	Preliminary Ruling (Art. 177)	Breach of Treaty (Art. 169)	Total per year	Judgments Preliminary	Breach of	Total Judgments
From 1968	8	1	9	1.8		

(2) 8 1 91.8 until Dassonville judgment (3)				
From Dassonville judgment until Cassis judgment (4)	25	3	28	6.2
From Cassis judgment until March 1987 (5)	65	38	103	12.7
Total	98	42	140	7.8

(1) Calculated from the European Court reports and communications regarding the ECJ's work.

(2) Case 7/68, Judgment of 10 December 1968, ECR [1968] 634.

(3) Case 8/74, Judgment of 11 July 1974, ECR [1974] 834 (Dassonville).

(4) Case 120/78, Judgment of 20 February 1979, ECR [1979] 649 (Cassis de Dijon).

5. Case 178/84, Judgment of 12 March 1987, published in NJW 1987, 1133 (Beer Purity Ordinance).

In the period after the Dassonville judgment the number of judgments handed down triples annually, and after the Cassis Judgment doubles again. Quantitatively, the most important group of cases relates to health protection, industrial property rights, regulations for the prescribing, designation and presentation of products and price regulation measures. The decisions relate mainly to the foodstuffs sector, with alcoholic drinks continually presenting the ECJ with an opportunity to develop its case law on free movement of goods. Outside the foodstuffs sector, there is a strikingly high proportion of judgments concerning medicines, and a small one for technical products. The following survey shows the product groups covered by judgments on free movement of goods handed down by the ECJ up to 31 March 1987:

Alcoholic drinks 20
Other foodstuffs 41
Pharmaceuticals 17
Technical products 8
Publications 7
Fuels, used oil 7
Foodstuffs 5
Pesticides 4
Animals 4
Tobacco 3
Plants 3
Other products 12
Not product-specific 9

We shall now review the development of the case law on free movement of goods to the extent that it is of importance for the development of the new approach to technical harmonisation and standards and to the need for a horizontal Community product safety policy. The case law on Art. 30 EEC and its impact on harmonisation policy will first be dealt with (1.1), then the case law on Art. 36 EEC and Member States' possibilities of action (1.2).

1.1 Development of the case law on Art. 30 EEC and conclusions for harmonisation policy

Art. 30 EEC prohibits quantitative restrictions on imports and measures having an equivalent effect between Member States; Art. 34 does the same for exports; Art. 36 allows Member States, under specific severely restricted conditions, to make exceptions to these prohibitions.

1.1.1 The concept of measures having equivalent effect and the Cassis de Dijon Judgment

It was first with the "Dassonville" judgment[11] that the ECJ undertook a comprehensive definition of the central concept of measures having equivalent effect. This basic rule has been repeated by the Court in large numbers of later judgments, and continues to be the basis for the case law; the Commission, too, observes it in bringing actions for breach of treaty against Member States. It says:

"Any trade regulations of Member States likely to obstruct Community internal trade directly or indirectly, actually or potentially, is to be regarded as a measure having equivalent effect to a quantitative restriction"[12].

With this, the ECJ has in the interest of free movement of goods gone far beyond the statement made by the Commission in Directive 70/50/EEC[13]. There it had distinguished between measures applicable without distinction to domestic and imported goods (Art. 3) and

those applicable other than without distinction (Art. 2). The latter group of discriminatory measures, of such a nature as to restrict imports, should without exception come under the prohibition of Art. 30 EEC. Measures applicable without distinction would by contrast conflict with Art. 30 EEC, only where "the restrictive effects on the movement of goods exceed the limits of the typical effects of such commercial regulations" (Art. 3 (1)). This is said to be the case notably where "the restrictive effect on free movement of goods is disproportionate to the object aimed at" or "where the same objective can be attained by another means hindering trade as little as possible" (Art. 3 (2)). The broad interpretation of the concept of measures having equivalent effect is also expressed by the fact that mere likelihood of a trade-restrictive effect is sufficient, so that the effect of restricting trade need not have actually occurred or have reached a particular intensity. Any sovereign measure, likely even only indirectly, to negatively affect the flow of goods between States is here in principle, a prohibited measure having equivalent effect. The "broad, catch-all criterion" for measures having equivalent effect opens up for the Community "wide-ranging possibilities for control of national measures"[14].

On general interpretive principles, Art. 36 EEC, which allows Member States to evade the prohibition in principle on quantitative restrictions and measures having equivalent effect, for the sake of particular objects of legal protection, is to be interpreted narrowly, and the list of objects of legal protection contained in it is to be treated as comprehensive[15]. With this as a starting point, the ECJ faced a dilemma if it did not want to subject the general power of Member States to regulate production and marketing or to control economic policy completely to the verdict of Art. 30 EEC. Either it could give an expansive interpretation to the object of legal protection in Art. 36 EEC or it could restrict the concept of measures having equivalent effect, at any rate for the area of measures applicable without distinction, by contrast with the Dassonville formulation[16]. With the well-known judgment in the "Cassis de Dijon" case of 20 February 1979[17], the Court of Justice took the latter path, thereby laying the foundations for a new approach to harmonisation policy in the area of free movement of goods and for systematic monitoring by the Commission of Member States' compliance with the Treaty in this area.

In this case, the ECJ dealt for the first time with a measure applicable without distinction. It explicitly stressed that in the absence of Community regulations on manufacture and marketing, it was a matter for Member States to enact the relevant regulations for their territory, and continued:

"Barriers to Community internal trade arising from the differences in national regulations on the marketing of its products must be accepted as long as these provisions are necessary in order to meet binding requirements, notably the requirements of effective tax control, public health protection, the integrity of trade and consumer protection"[18].

This makes it clear that restrictions on Community internal trade arising from regulations applicable equally to domestic and foreign products do not automatically fall under the prohibition of Art. 30 EEC, but may be justified, however, always requiring justification,

where there is no relevant Community regulation. The binding requirements do not constitute additional grounds of justification besides the objects of legal protection listed in Art. 36 EEC; instead, their presence makes a regulation or proceeding no longer describable as a measure having equivalent effect[19].

The list of binding requirements is not exhaustive: others that enter in are environmental protection and measures to improve working and living conditions[20]. This must, though, involve a non-economic objectives in the general interest, which take precedence over the requirements of free movement of goods. The Court of Justice does not rely here on the external justification for a measure, but seeks to disclose the "true reasons", to prevent, say, protectionist industrial policy objectives of Member States being pursued under the cloak of consumer protection[21].

Member States' measures must be necessary, and also proportionate in nature and implementation; they must be the means that restrict free movement of goods as little as possible[22]. Accordingly, for instance, marketing bans are not in general justified in order to protect consumers against confusion and deception; as a rule, indications on the packaging will suffice[23]. In testing the binding requirements, the principle of the second sentence of Art. 36 EEC should be applied, with the result that no primacy can be assigned to national regulatory powers when these are used as a means of arbitrary discrimination or as a disguised restriction on trade between Member States. Altogether, the ECJ has developed a carefully graded scheme for balancing between the Community objective of free movement of goods and particular regulatory interests of Member States, not a rigid scheme of rules and exceptions[24].

1.1.2 The consequences of the Cassis Case Law for legal approximation

In view of an increasing number of restrictions on free movement of goods and against the background of the evident bottlenecks resulting from the classical harmonisation concept, the Commission took the Cassis case law as a basis for explaining the scope of the Cassis judgment to Member States, the European Parliament and the Council in a communication, and for drawing some conclusions and guidelines for verifying treaty compliance and reorienting legal approximation policy[25]. It summarises the case law as follows, underlining the principle of mutual recognition:

"The principles deduced by the Court imply that a Member State may not in principle prohibit the sale in its territory of a product lawfully produced and marketed in another Member State even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. Where a product **Errore. L'origine riferimento non è stata trovata.** fulfills the legitimate objectives of a Member State's own rules (public safety, protection of the consumer or the environment, etc.), the

importing country cannot justify prohibiting its sale in its territory by claiming that the way it fulfills the objectives is different from that imposed on domestic products"[26].

It draws the conclusion that many barriers to trade can be removed merely by strictly applying the prohibition of Art. 30 EEC, where they are not justified by Art. 36 EEC or as mandatory requirements within the meaning of the ECJ case law. It announces that it intends to tackle commercial rules covering the composition, designation, presentation and packaging of products or requiring compliance with certain technical standards. For preventive control of potentially trade-restricting measures by Member States, it announces its proposal for an information procedure in the area of standards and technical provisions[27]. Above all, however, efforts at harmonisation are to be concentrated in areas "where barriers to trade to be removed arise from national provisions which are admissible under the criteria set by the Court"[28].

The case law on Art. 30 and 36 EEC means a demarcation between the principle of the country of destination, according to which all goods or services must meet the standards of the respective country of destination, and the contrary principle of the country of origin, whereby import of all goods legally marketed in the country of origin is unrestricted. With this demarcation, it simultaneously determines the extent to which measures on approximation of laws are necessary in order to eliminate barriers to trade[29].

The Cassis judgment (and the Commission communication) were on the one hand welcomed as, in principle, allowing marketing of the most diverse local specialties throghout the Community, thereby increasing consumer choice[30], but on the other hand criticised as facing the national legislature with the dilemma of either discriminating against domestic industry or giving up higher quality standards in favour of adaptation to the lowest common denominator[31]. The latter standpoint was represented particularly strongly by the government of the Federal Republic of Germany in the Cassis case:

"Ultimately, the regulation binding in all Member States would be that of the country setting the lowest requirements; since this legal conclusion would be based on the directly applicable provision of Art. 30, these legal changes will have to have been effected already, at latest by 1 January 1970. Because of the automatic effect of Art. 30, in the future further amendments to national legal provisions could be adopted continually as soon as only one Member State adopted a new regulation with lower requirements. In the extreme case, then, one Member State could, without any co-operation or information of other Member States, determine legislation for the whole Community. The outcome would be that the minimum requirements would, without the harmonisation provided for in Art. 100 EEC, requiring consensus by Member States, be reduced to the lowest level to be found in the regulations of any one of the Member States"[32].

To date, the fear that the new jurisprudence will lead to a levelling down to the lowest common denominator has proved unwarrented[33]. This is partly because Member States can defend themselves against undermining of standards by appealing to mandatory

requirements, where a legitimately pursued general object of protection of a non-economic nature is endangered[34]. Above all, however, it goes much farther to meet Member States interests in protection, especially as regards the very frequently mentioned protection of health[35], than the Commission with its rigid scheme of rule and exception and its stress on "very strict criteria" and on the possibility of non-compliance "only under very restrictive conditions" tries to make out. In its endeavour to bring in a change to its policy on eliminating technical barriers to trade, the Commission has enthusiastically had recourse to the Cassis case law, but has one-sidedly generalised the interpretive principles, which the ECJ, particularly in its subsequent case law, has still more finely differentiated[36].

It is plain that harmonisation remains indispensable only in areas where Member States can base themselves on objects of protection under Art. 36 EEC or on mandatory requirements[37]. However, a few restrictions should be mentioned: the Commission's rigid scheme of rules and exceptions between free movement of goods and Member States' interests in protection is not appropriate; the circumstances in which a Member State can appeal to mandatory requirements depend on the balancing out of many considerations, which can be done only from case to case. The principle of mutual recognition operates bilaterally between the States involved in the trade concerned but not uniformly at Community level[38]. Elimination of barriers to trade through Art. 30 EEC presupposes unless Member States voluntarily refrain from asserting particular domestic standards for imported products, an initiative by manufacturers, importers or the Commission, and can come about only reactively and case by case; law approximation can act preventively and much more comprehensively[39]. Furthermore, pronouncements of the Court of Justice can act only by way of quashing, in the sense that rules may be abolished without substitution, but not replaced by new requirements under the Community Treaty[40]. Finally, overstressing negative harmonisation through Art. 30 EEC would mean transferring to the Court evaluative tasks that normally fall within the province of the legislator[41].

There is agreement that application of Art. 30 EEC cannot be made dependent on prior harmonisation of laws. This was unmistakably stated by the Court of Justice in case 193/80[42], when it also stressed the different objectives of Articles 30 and 100 EEC[43]:

"The fundamental principle of a unified market and its corollary, the free movement of goods, may not under any circumstances be made subject to the condition that there should first be an approximation of national laws, for if that condition had to be fulfilled, the principle would be reduced to a mere cipher. Moreover, it is apparent that the purposes of Articles 30 and 100 are different. The purpose of Article 30 is, save for certain specific exceptions, to abolish in the immediate future all quantitative restrictions on the imports of goods and all measures having an equivalent effect, whereas the general purpose of Article 100 is, by approximating the laws, regulations and administrative provisions of the Member States, to enable obstacles of whatever kind arising from disparities between them to be reduced. The elimination of quantitative restrictions and measures having an equivalent effect, which is . . . carried into effect by Article 30, may not therefore be made dependent on

measures which, although capable of promoting the free movement of goods, cannot be considered to be a necessary condition for the application of that fundamental principle".

Art. 30 EEC offers citizens of the Common Market the possibility through the preliminary-ruling procedure of securing the application of Community law in the national sphere, especially since they do not have to bear political aspects in mind to the same extent as the Commission[44].

Technical standards drawn up by private institutions and therefore not legally binding, do not count as measures having equivalent effect within the meaning of Art. 30 EEC. There is a different case, however, where compliance with them is mandatorily prescribed *de jure* or *de facto* by government action[45]. To date, the Court of Justice has found a measure of equivalent effect in only one case where the measure was neither a sovereign one nor binding on its addresses. It arrived at this conclusion, against the Advocate General's opinion, in the case of the "Buy Irish" publicity campaign by the Irish Goods Council, an association of leading representatives of the business world set up as a company limited by guarantee, without investment of capital, to promote the sale of Irish products. It attributed the campaign as a whole to the Government, which had established the programme, made the major staffing decisions and borne the overwhelming share of the financing[46]. Comparable circumstances are not present in the case of technical standardisation by private standardisation bodies[47].

1.2. Development of the case law on Art. 36 EEC

On the conditions set out in Art. 36, Member States may break the prohibition in principle on quantitative restrictions and measures having equivalent effect and maintain or introduce regulations or practices restricting free movement of goods, in order to protect the objects of legal protection listed. These measures may not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States (Art. 36 EEC, second sentence).

With its underlying pro-integration approach, the Court has given this exceptional provision a narrow interpretation in several respects. Among the principles that can be taken as established are: Art. 36 covers only situations of a non-economic nature and cannot be understood as an escape clause against the economic effects of the opening up of markets[48]; the list of objects of protection in Art. 36 EEC is exhaustive and cannot be extended by conclusions from analogy, Art. 36 EEC is not intended to reserve particular fields for the exclusive competence of Member States[49].

1.2.1 Art. 36 EEC and Member States' room for manoeuvre

Only where Community directives provide for *complete* harmonisation of *all* measures necessary to safeguard the objects of legal protection mentioned in Art. 36 EEC and there are Community procedures to secure compliance, are Member States no longer able to appeal to Art. 36 EEC and take individual measures. Instead, they must press for amplification or amendment of the Community regulation, or take advantage of escape clause procedures contained in the Community regulation[50]. Here verification is required as to whether a Community provision constitutes a definitive regulation or was introduced only as a minimum measure, not ruling out additional national provisions[51]. Moreover, the content of the individual Community regulations and harmonisation programmes must be looked at to see whether all relevant objects of protection under Art. 36 EEC are already covered[52]. In other words, Community regulations have a blocking effect on Member States only to the extent that they actually meet the individual interests in protection under Art. 36 EEC. Should, for instance, a Community regulation take account of the mechanical hazards of a product but not the toxic ones, to that extent Member States' competence will remain.

This applies, too, where hitherto unrecognised hazards become manifest in an area that has been definitively regulated by the Community. Here the widespread escape clause procedures should ensure that the stage of harmonisation reached is not endangered by the need for additional action to guarantee protection of the objects of Art. 36 EEC; the desire of a Member State for additional safety measures will either prove unfounded following testing by the Commission or in breach-of-treaty proceedings before the ECJ, or else be incorporated in the Community regulation with effect for all Member States, where it proves justified and the necessary majority for an adaptation is secured.

1.2.2 Proportionality controls by the ECJ

The Court of Justice subjects measures justified in principle under Art. 36 EEC to strict proportionality control, refusing approval for a measure where the same objective could be secured by measures that less restrict internal Community trade. The Court of Justice has concluded from this that, for instance, Member States "may not needlessly require technical or chemical analyses or laboratory tests where the same analyses and tests have already been carried out in another member country and these findings are available to their authorities or can be made available on request"[53]. Admissibility in one Member State does not automatically justify admissibility in another unless a directive explicitly lays down mutual recognition of permits and certification. However, an importing Member State must for purposes of permits take similar tests and analyses already done in another Member State into account. Administrations of Member States must provide each other with administrative assistance in making test results available[54]. The Court of Justice has frequently stressed that it is in the interest of free movement of goods to carry out sanitary controls in the country of manufacture, and that it is appropriate for the sanitary authorities of the Member States concerned to co-operate in order to avoid duplication of checks[55]. This leaves untouched the power to carry out random checks. The Court has also concluded from the proportionality

principle that the aim of reducing the burden on the administration or reducing public expenditure does not justify any stronger intervention, and that administrations are bound to make reasonable efforts to secure the necessary indications by active administrative efforts[56].

1.2.3 Member States' leeway in evaluating questions of health protection and safety design

In recent years voluminous case law has developed on the question of health protection within the meaning of Art. 36 EEC[57]. It amounts to allowing Member States to engage in preventive health policies of their own where a Community regulation is absent, with the objective of keeping foodstuffs as free as possible from hazardous substances. National regulations may take account of climatic conditions, the population's eating habits and their state of health, and therefore differ from one country to another. Continuing uncertainties over scientific findings may also be taken into account.

On the basis of Art. 36 EEC, the Dutch prohibition on nisin as a conservation additive for processed cheese intended for the Dutch market, was found to be justified:

"If these studies have not yet reached unambiguous conclusions regarding the maximum quantity of nisin that a person can consume without serious danger to health, this is mainly because of the fact that evaluation of the risk bound up with consumption of this additive depends on a number of variable factors, in particular on eating habits in the country concerned and on whether, in determining the maximum quantity of nisin to be set for every product, not only the level to be set for a particular product, for instance processed cheese, is to be taken into account, but also those to be set for all other products to be rendered imperishable"[58].

When complete harmonisation has not been achieved, Member States remain free to take action if uncertainties still exist at a given stage of research. Both the eating habits of their population and the needs of free movement of goods must be taken into account to determine the extent to which they wish to guarantee protection of the health and life of people[59]. Accordingly, the Dutch ban on adding vitamins was declared to be compatible with Community law on the grounds that, although an health-endangering effect was not proven, it could not be ruled out given excessive consumption in the whole diet in its unforeseeable, unverifiable composition; the Court added, however, that marketing is to be permitted where the addition of vitamins corresponded to a genuine need, in particular in regard to technology or nutrition[60].

A particularly illuminating judgment regarding the far-reaching powers that the Court allows Member States in the area of preventive health protection was given in Case 97/83[61]. The Court held that Member States are free to set threshold values for microbiological substances in milk, to protect particularly sensitive consumers that may be well below the endangerment levels for normal consumers discussed by scientists, but not established with certainty.

Account may also be taken here of national usage regarding the storage of milk products between the moment of purchase and consumption.

Member States may also prohibit pesticide residues in foodstuffs entirely, leading to a trade block in treated food and vegetables. In this connection, they may adopt regulations which may be different according to the country, climatic conditions and the population's eating habits and state of health, and set different rates for the same pesticides in different foodstuffs[62]. While this judgment found a policy for preventing pesticide residues in foodstuffs to be compatible with Community law, another judgment found a policy to limit additives in food preparation to be permissible. Imported foodstuffs can accordingly be subjected to national licensing procedures which test not only whether the colouring agent used may be dangerous to human health, but also whether there is a technological, economic or psychological need for colouring the foodstuffs concerned. In assessing hazards, Member States must here take account of the findings of international scientific research, especially the work of the Community's Scientific Committee on Foodstuffs, but may in evaluating them into account take specific eating habits in the importing Member State[63].

In judgments on food additives and pesticide residues, the Court of Justice deduced from the proportionality principle of Art. 36 EEC, second sentence, the requirement that marketing bans be restricted to the extent actually necessary for the protection of health. A marketing ban will have to be lifted where according to the state of international scientific research, a substance presents no danger to health and meets a genuine need, notably one of a technological nature. Moreover, parties concerned should be allowed the possibility of applying, in an easily accessible procedure which must be completable within an appropriate time, to have use of particular additives made admissible through a legal act of general effect[64]. On the basis of these criteria, the German beer purity law proved incompatible with Community law, on the grounds that it was disproportionate to rule out all additives admissible in other Member States on grounds of preventive health protection, instead of adducing proof of health risk for each substance[65]. The submission of the German government, the defendant, stating that beer was a foodstuff consumed in considerable quantities by the German people and that on general preventive health protection grounds, it was advisable to restrict the quantity of additives consumed as far as possible[66], was rejected as insufficient. It was necessary to justify the exclusion of particular substances on grounds of specific hazards.

A judgment of direct relevance for technical safety law is the one in case 188/84 on the licensing of woodworking machines in France[67]. The French conception of industrial safety starts from the idea that users of machinery must be protected against their own mistakes, so that machines must be designed in such a way that they can be used, mounted and maintained without risk (design safety)[68]. In Germany, by contrast, the principle is that the worker must, through thorough vocational training and further education, learn to handle any problem that might arise in machine operations. The Commission expressed the view that Member States ought not to block the import of machines based on other conceptions of industrial safety, but

that have proven to be just as safe as appliances in accordance with the national regulation[69]. The Court of Justice accepted this principle but arrived at a different conclusion:

"Moreover, it may not prevent the marketing of products originating in another Member State which, in respect of the level of protection of safety and human life, are in line with what is aimed at in the national regulation. Accordingly, it would be contrary to the principle of proportionality for a national regulation to require that imported products should comply with every detail of the provisions and technical requirements applying to products manufactured in the Member State concerned, though they provide the same level of safety to users. By contrast, Community law in its present state does not oblige Member States to permit hazardous machines on their territory where these do not demonstrably guarantee the same level of protection to users on that territory"[70].

The Court of Justice ruled in favour of France, since the Commission, which was bringing the action, had not shown that the conception of industrial safety underlying the German safety provisions guaranteed the same safety for users of the machines as the French conception. It would even be irrelevant if it were statistically shown that machines manufactured according to the industrial safety conceptions of other Member States cause no more accidents than machines in accord with the French regulation, since mere consideration of statistics left out other factors such as the differing levels of employee training[71].

Lacking a Community regulation, accordingly, Member States are free to pursue their own safety conceptions and reject appliances and machines that cannot be shown to offer the same degree of safety, taking differing habits of use into account. The establishment of essential safety requirements according to the new approach is aimed at getting Member States to agree to a unitary safety conception or to several safety conceptions recognised as equivalent, so as to exclude in the harmonised area the sealing-off of markets by appeals to different ones.

2. From special case to model the harmonisation method of the Low Voltage Directive

Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits - the Low Voltage Directive[72] - with its new harmonisation technique of sliding reference to harmonised standards, became the model for the new approach to technical harmonisation and standards[73]. For many years it had been regarded by many officials in governments and the Commission as an original sin that ought not to be repeated[74]. With annual output worth some 80,000 million ECU in 1981, Community internal trade in electrical appliances amounted to some 35,000 million ECU; an estimated 70% of turnover in the electrical sector comes under the Low Voltage Directive[75].

2.1 Peculiarities of the electrical sector

There are good reasons why, for many years, it was specifically only in the electrical sector that the general-clause method of reference to the European state of safety technology was applied[76]. These reasons also indicate that experience with the Low Voltage Directive can be transferred only to a limited extent to other areas of industry[77]. Electrical standardisation has for decades occupied a special place in all industrial countries. The rapid pace of development in the electrical field would have been inconceivable without a highly developed regulatory apparatus for technical safety, containing comprehensive provisions for the hazards arising from electricity, which is not directly perceptible by the senses. By comparison with other manufacturing sectors, safety standards have in electrical engineering by far the greatest importance within the whole set of relevant standards. Electrical standards are more highly systematised and intermeshed than in other areas. This is because despite an almost limitless variety of products, there are comparable modes of operation and sources of hazards, but also because electrical products are almost without exception, dependent on particular supply and transmission systems. This means that very often appliances and installations from the most diverse manufacturers are connected with each other. Accordingly, comprehensive, and in view of the very high international trade in this sector, at least internationally compatible provisions are essential for the numerous points of intersection, and in order to guarantee interchangeability of parts. This has meant that with electrical standards, by comparison with other industrial sectors, there is wide-spread technical consensus both nationally and internationally, a very high density of regulation and a particularly high degree of application and bindingness of standards[78].

The particularly rapid technical development here calls for correspondingly quick and independent possibilities of action and a flexible organisational structure in standardisation work. Due to the overall postive experience with private standardisation organisations, there are in most countries no special national provisions in the electrical area. Table 2 gives a picture of the set of electrical standards and other standards in 1986 worldwide, in Europe and in Western Germany, bringing out the particularly strong position of electrical standardisation and its autonomy in standardisation as a whole.

Table 2: Numbers of electrical and other technical standards at national, regional and international levels in 1986(1)

Level of standardisation	Electrical	All other sectors
Worldwide	IEC: 2,325	ISO: 6,401
Europe	CENELEC: 501	CEN: 159
Federal Republic of Germany	DKE in DIN: 6,792	DIN: 13,145

(1) Source: DIN-Geschäftsbericht 1986/87, 24-33.

2.2 A conspectus of the Low Voltage Directive

The Low Voltage Directive applies to all electrical equipment for use with a voltage rating of between 50 and 1,000 volts for alternating current and between 75 and 1,500 volts for direct current (Art. 1). It covers in particular household electrical appliances, portable tools, lighting equipment, wires, cables and transmission lines and installation equipment. The Directive does not apply to particular groups of appliances in which there is great public interest, covered by specific directives (electrical equipment for use in an explosive atmosphere[79], electrical equipment for radiology and medical purposes, electrical parts for goods and passenger lifts, electricity meters) nor to electric fence controls nor radio electrical interference (see the list of exceptions in Annex II to the Directive). It is particularly important that even domestic plugs and socket outlets are also explicitly excluded[80].

Art. 2 lays down the basic requirements for marketable electrical products. Electrical equipment may be marketed only if "having been constructed in accordance with good engineering practice in safety matters in force in the Community, it does not endanger the safety of persons, domestic animals or property when properly installed and maintained and used in applications for which it was made". The reference to the state of the art - good engineering practice - means that what applies is technical development at a given point in time, not widespread recognition and a proof in practice of particular rules - which would mean that the rule would always lag behind steadily advancing technical development, as with the reference to "generally recognised rules of art" in the German Appliances Safety Act[81]. The affirmative statement that in the event of a differing level of safety technology in individual Member States, all ought to apply the highest level[82], does not fully bring out the graded harmonisation machinery of the Directive, developed because the desired success in harmonisation at an enhanced safety level could not be ensured simply by having product requirements follow directly from such a formulaic prescription.

Firstly, the principal elements of the safety objectives are listed in Annex I. This list of eleven safety objectives, kept extremely general in its terms, is a compromise between the countries that wished to content themselves with the general reference to good engineering practice in safety matters (the general clause method in pure form), and those that called for the safety objectives to be specified more exactly[83]. The safety objectives contain, among others, the following statements:

- Instructions on proper, risk-free use must appear on the electrical equipment.

- Manufacturers' or brand-names or trademarks should appear on the electrical equipment.

- The electrical equipment should be made in such a way as to ensure that it can be safety and properly assembled and connected.

- For protection against hazards that might arise from the electrical equipment, technical measures are to be prescribed, so that if the equipment is used in applications for which it was made and is adequately maintained, then protection against direct and indirect electrical contact is guaranteed, no dangerous temperatures, arcs or radiation are produced, there is adequate protection against non-electrical dangers and the insulation is suitable for foreseeable conditions.

- Technical measures are to be laid down to ensure that the electrical equipment meets expected mechanical requirements, is resistant to non-mechanical influences and stands up to foreseeable conditions of overload.

It is presumed that electrical products meet these safety objectives when the equipment:

- complies with harmonised standards (Art. 5), i.e. those produced by CENELEC;

- where harmonised standards within the meaning of Art. 5 have not yet been drawn up and published, complies with the safety provisions of the International Commission on the Rules for the Approval of Electrical Equipment (CEE) or of the International Electrotechnical Commission (IEC) (Art. 6);

- where no harmonised standards within the meaning of Art. 5 or international standards pursuant to Art. 6 exist, has been manufactured in accordance with the safety provisions of the Member State of manufacture, if it ensures equivalent safety to that required in the country of destination (Art. 7).

In order not to block technical innovations, which are in general followed only after a certain lapse of time by technical standards[84], products not complying with the technical standards mentioned but meeting the general safety objectives are also admitted to free movement (Art. 8 (1)). Conformity with the safety objectives may be shown by an expert report (Art. 8 (2)). The free movement of electrical products meeting the safety objectives on the terms just set out may not be impeded on safety grounds (Art. 3).

The presumed conformity of products with technical standards within the meaning of Articles 5, 6 and 7 is attested by a conformity mark issued by an accepted national body[85], or by a "certificate of conformity", or in the absence thereof, in particular in the case of industrial equipment, the manufacturer's "declaration of conformity" (Art. 10). Measures to restrict marketing or free movement may be taken by Member States only through the safeguard clause procedure (Art. 9).

2.3 Individual questions on the Low Voltage Directive and its application

For years there was considerable uncertainty as to the interpretation of the Low Voltage Directive. This resulted not least from the regulatory technique, which was unusual for many Member States, and was not cleared up until the ECJ ruling of 2 December 1980 in preliminary ruling procedure 815/79-Cremonini v. Vrankovich[86]. On the basis of this ruling, the Commission once again summarised the legal framework of the Directive and its application in a explanatory communication to all concerned[87]. Further clarifications emerged from the meeting of the working group on elimination of technical obstacles to trade in the electrical sector held on 20 December 1983, on application of the Low Voltage Directive[88]. The following observations on individual provisions of the Low Voltage Directive are based essentially on the Commission communication and the findings of that working session.

2.3.1 Harmonised standards

The pillars of the Low Voltage Directive are the harmonised standards within the meaning of Art. 5. They definitively replace other categories of technical standards mentioned in the Directive. They are to be laid down by the standards organisations joined together in CENELEC by mutual agreement, and should be brought up to the latest state of technological advance and of development of the rules of art of safety technology (Art. 5 (5), second sentence). To date, CENELEC has in connection with the Low Voltage Directive, produced well over 100 harmonised standards. Harmonised standards may be arrived at by

- drawing up a European standard, published by all national committees of CENELEC unchanged as a national standard, or by

- use of a harmonisation document to be incorporated verbatim, without change, in their national standards by all national committees of CENELEC[89].

The Commission publishes the harmonised standards in the Official Journal; this publication is for purposes of information and thus has a purely declarative function[90]. The list published in September 1984 summarised harmonised standards agreed on up to that date[91]. The 94 harmonisation documents[92] covered extend to the following areas:

Household appliances 43
Electricity lines 15
Work appliances and tools 13
Lamps 7
General safety provisions 6
Measuring devices 5
Miscellaneous 5

The results of CENELEC's work may be adopted by majority vote, effective for outvoted committees too, though in principle unanimity is aimed at and almost always obtained[93]. This procedure of unanimous voting by the national committees accords with Art. 5 of the

Directive, which says that harmonised standards are to be drawn up by "common agreement"[94]. This is justified on the basis that the Community legislator has left the method of reaching mutual agreement within the discretion of the standardisation bodies. Moreover, compliance with harmonised standards could not be mandatorily prescribed, but is merely a presumption that the safety objectives, the only decisive things, have been complied with. Finally, adoption and updating of the harmonised standards constitute a continuous process which in its effects is very similar to the procedure for adjusting directives to technical progress, which also operates by qualified majority. It should be added that the comparison between CEN and CENELEC specifically shows how much the adoption of harmonised standards and their adaptation to technical progress required on safety grounds is hampered if majority decisions do not also bind outvoted committees. Where there are serious reservations as to safety, the Member State, not the standardisation committee, has the safeguard clause procedure of Art. 9 open to it.

In the case of many harmonisation documents, various types of national divergence were provided for, namely

- mandatory departures of type "A" on the basis of differing legally prescribed requirements as to the extent of safety;

- mandatory departures of type "A" on the basis of the conditions of the electricity supply system;

- departures of type "B" on the basis of particular technical circumstances, elimination of which is a matter for the standardisation bodies[95].

Following the ruling in the Cremonini v. Vrankovich case, it was clarified[96] that type B departures are not admissible, since no discrepant national standards apply alongside the harmonised standards. Nor could type A divergences continue to claim any validity alongside a harmonised standard, since compliance with discrepant national safety provisions operates as a presumption of compliance with the general safety objectives only where no harmonised standards pursuant to Art. 5 or no safety requirements published pursuant to Art. 6 exist. They can be adduced only in connection with the safeguard clause procedure of Art. 9.

In this explosive conflict of interests, the Commission seeks as far as possible to ensure that the safeguard procedure of Art. 9 is not opted for, but solutions are found in informal ways by removing national discrepancies or incorporating them in the standard concerned[97]. Indeed, it explicitly notifies Member States of the possibility of affecting the production of harmonised standards through the various standardisation bodies[98]. K. Fitting has the following to say about a remarkable practice by the German authorities of securing for themselves a right of participation in European standards[99]:

"Following adoption of a harmonisation document by CENELEC" . . . "the DKE sends the competent German government department" . . . "initial copies of the drafts for incorporation

into national standards. The German government department, on the basis of the safeguard clause contained in the Low Voltage Directive, tests the substantive content of the standard to see whether there are serious technical safety objections to its adoption. If there are no grounds for applying the safeguard clause, a communication is sent to the DKE to the effect that publication in the relevant VDE publications can proceed. Following this publication the standard is finally also published in the Federal Gazette" . . . "with the consequence that a harmonised standard can now come about if the procedure in other Member States has likewise come to a positive outcome" . . . "Where the Federal Government has severe technical safety objections, it informs the DKE of these. There is no publication in the Federal Gazette, so that there can be no harmonised standard. Since the Federal Government is now applying the safeguard clause, it notifies the Commission of this fact, pursuant to Art. 9 of the Low Voltage Directive".

The safeguard clause, really intended as a remedy against the marketing of electrical equipment that complies with standards but is unsafe, is here being used so that the German authorities can check compliance of the intended harmonised norms with the general safety objectives. The new approach provides for a procedure of its own, though a Community one, in order to test harmonised standards adopted by the European standardisation bodies, or else the national standards that for the moment continue to apply, for compliance with the essential safety requirements[100].

National requirements arising from differences in climate, electricity network, voltages, types of plug and socket etc., which cannot be changed for a fairly long time, are incorporated into the text of the European standard as "special national conditions"[101].

Publication of safety requirements of international standardisation bodies pursuant to Art. 6 of the Directive has remained of no importance in practice. Consistently, this possibility of reference is no longer taken up in the new approach. If even the standards organisations cannot manage to agree on harmonised standards pursuant to Art. 5, it is very probable that the objections raised are so weighty that Member States will oppose planned publication in the consultation procedure provided for by Art. 6 (3)[102]. Note should, however, above all be taken of the CENELEC mode of procedure: it takes up work of its own only when no international standards are likely to be available in a reasonable time, but otherwise bases itself on IEC standards and confines joint amendments to these to a minimum[103].

2.3.2 Equivalence of safety level

Art. 7 has raised severe problems of interpretation. It says that where harmonised standards do not exist and no international safety provisions have been published, electrical equipment is admitted to free movement where it meets the safety requirements of the manufacturing country and offers the same safety as required in the country of destination. Following the Cremonini v. Vrankovich ruling, it may be taken as clarified that Art. 7 is transitional in

nature, applying only to the period where harmonised standards have not yet been established for the whole area of application of the Low Voltage Directive[104]. It is conceivable that in this transitional period national standards which lag behind the requirements of Art. 2 taken together with Annex I, that is, the general safety objectives, will in one Member State or another continue to apply. In this case, it should be ensured that the safety level prescribed in the importing Member State is not reduced. The importing country cannot however require the same safety also to be achieved by the same means, nor can it call for any higher degree of safety than that required by Art. 2 and Annex I[105].

Art. 7 also makes it clear that Member States may not link the marketing of electrical equipment that meets the prescribed safety objectives, to the condition of complying with particular provisions regarding quality or performance[106].

2.3.3 Safeguard clause procedure

A Member State which for safety reasons prohibits the marketing of electrical equipment or restricts its free movement, need only, but must always, employ the safeguard clause procedure of Art. 9, if conformity with the general safety objectives is to be presumed because a conformity mark, certificate of conformity from an authorised office, declaration of conformity from the manufacturer or expert report pursuant to Art. 8 (2) is available. It has to inform the Commission and all Member States on measures taken, since all are - at least possibly - "involved", and has to indicate the ground for its decision. If a measures has been taken because of a shortcoming in a technical standard, the Commission sees itself as obliged to act in order to maintain a uniform safety standard in the Community even where other Member States have no objections to the national measures[107], though the Directive does not provide for any action in this case. In its details, the safeguard clause procedure is rather unclearly and awkwardly constructed as regards its conditions, course and consequences. Its main function is in preventing Member States from unilaterally interfering with movement of electrical equipment meeting the general safety objectives, and in setting up a mechanism for mutual consultation and opinion. The Commission takes the role of a moderator here; it may secure opinions and pass them on, formulate recommendations or statements.

2.3.4 The CENELEC certification agreement

The application of a conformity mark to electrical equipment or the issue of a certificate of conformity by the authorised centers in Member States must, as the Cremonini v. Vrankovich judgment explicitly states, be recognised by *all* Member States as a rebuttable presumption of compliance with the technical standards pursuant to Articles 5, 6 or 7 and thus also with the safety objectives laid down in the Directive. This conformity mark or certificate thus gives entitlement to marketing and to free movement, subject to the safeguard clause procedure, in

the whole Community. Conformity marks are not only proof of conformity, but in countries where they have been issued by the competent centres in that country, additionally mean an indisputable commercial advantage. Accordingly, it is in the interest of manufacturers to secure the national mark of every Member State in which they wish to market their products. The CENELEC certification agreement of 11 September 1973 in the version of 29 March 1983[108] (CCA) facilitates the acquisition of such marks without needless repetition of tests. A manufacturer who has already secured a conformity mark on the basis of the prescribed tests may, by submitting the tests result on a form, secure the mark of another office too, in a rapid, informal procedure[109]. There are agreements between the test centres on initial inspection of the place of manufacture and on monitoring of the manufacturing process and of marketing. Where a manufacturer so desires, he can on the basis of *one* test acquire national conformity marks for all Member States more or less automatically. The Commission energetically supports this agreement, which it regards as an advance on the system of mutual recognition of conformity marks and certification in the Low Voltage Directive and as making introduction of a Community mark practically superfluous[110]. What is ultimately decisive is the initial test which does not necessarily have to be done in the manufacturer's country.

The HAR agreement describes a procedure for issuing and using a jointly agreed marking for cables and insulated wires meeting the harmonised standards[111]. National test centres mark the cables and wires not only with the national test mark but also with the CENELEC test mark HAR. Accordingly, in the area of cables and wires, a European test mark does exist which all certification centres have to recognise. A further special procedure exists for construction components in electronics, regulated by the CENELEC Committee for Electronic Components (CECC)[112].
Internationally, however with a restriction mainly to Europe, the certification of electrical products is organised by the International Commission for Conformity Certification of Electrical Products (CEE), recently integrated into the IEC[113]. Since 1963, its predecessor organisation[114], which until 1981 had also issued standards in the electrical sphere, had provided a system of certification, the CB procedure[115]. Under this system, tests by any member organisation are mutually recognised. The CB certificate as such does not give entitlement to application of a test mark, but merely facilitates the securing of other national test marks among the CEE member countries.

Public supervision, government influence or even any sort of consumer involvement are scarcely conceivable in the CENELEC certification system. There is only very restrictively any competitive situation among individual test centres, or mutual verification. It is clear that in the case of certification, marketing interests outweigh verification of compliance with standards. Besides the necessary cross-co-operation among certification centres, an international certification system ought to require that certification be centralised in the individual Member States, precise requirements be placed on the staffing and equipment of centres, clear test criteria worked out and ample consensus reached among centres involved when defining the target safety standard. The requirements would have to be strict. Once

conformity marks have been conferred, marketing restrictions can be arrived at only through a time-consuming, rather cumbersome safeguard clause procedure.

For certification questions arising in implementing the new approach, it would be useful to examine the extent to which use is made of certification by manufacturers even outside the industrial use of products, and what precautionary measures ought to or can be taken against misuse[116].

2.4 Inadmissible delegation of public tasks to private standardisation bodies?

Finally, it should be considered whether the form of sliding reference to technical standards chosen in the Low Voltage Directive does not constitute inadmissible delegation of public tasks to private standardisation bodies. The ECJ has not dealt explicitly with this question, but has not expressed any doubt as to the admissibility of the reference technique employed in the Low Voltage Directive[117]. The possible criticism has been brought out very succinctly by E. Röhling[118], in specific reference to the Low Voltage Directive, and can be summarised as follows:

Sliding reference to technical standards in their current version is alleged to constitute inadmissible delegation of sovereign powers to non-sovereign organisations, since the tasks transferred go far beyond mere implementing powers, Community agencies are allowed practically no influence on the production of the technical standards and the balance between Community institutions is encroached upon. Reference to standards can allegedly not be justified even on the grounds that it is a very technical matter, regulation of which would present Community institutions with insoluble tasks. Given that only vague, undisputed general safety objectives are laid down, standard-setting bodies are alleged to decide by themselves as to the extent of hazards the public is to be exposed to. Community institutions, moreover, are not so much allowing themselves in the case of application of reference standards to be guided by consideration of the hazardousness of the individual products, but more by the extent to which international standards exist for the given areas, or at least international standardisation bodies are viable. The standard-setting bodies are made up largely of representatives of interested business circles, not subject to any effective public control, and on the whole do not offer the guarantee of setting technical specifications oriented solely towards the requirements of the common good (consumer and environmental protection, safety). Finally, there is an objection on grounds of democratic legitimation, namely that the however weak control over Council members by national parliaments is still undermined.

These massive objections will not be gone into any further here in connection with the Low Voltage Directive. They arise in dealing with the new approach, in part with modified parameters, and will there be discussed in detail[119]. The Low Voltage Directive and the new approach have carefully been designed so as to leave the following legal fallback position

open[120]: products need meet only the essential safety requirements laid down by the Council. Harmonised standards, and to a restricted extent national standards, too, justify only a presumption of compliance with the general safety objectives, which could in principle also be met in other ways. Member States could satisfactorily meet their responsibility for consumer safety through the safeguard clause procedure as well as through the laying down of the fundamental safety requirements.

3. The new approach to technical harmonisation and standards

The development of a strategy aimed at guaranteeing the conditions for marketability of goods on European markets is among the essential legal requirements for renewed efforts to bring about the internal market. The new approach to harmonisation policy is justified above all by the principle of "equivalence" of safety policy objectives in Member States, supported by the Cassis de Dijon Judgment of 1978, which should require mutual recognition of national provisions[121] and permit the generalisation of the reference technique first practised in the 1973 Low Voltage Directive[122]. But the political impulses and preliminary conceptual date much further back[123]. Both the European Parliament[124] and the Economic and Social Committee[125] had already recommended the reference method in their resolutions or opinions on the 1969 General Programme to eliminate technical barriers to trade, as an alternative to the "traditional" method of approximation of laws[126]. In the early 70's, these suggestions were taken up in the German literature, and the outlines of the new approach were formulated[127]: Directives should lay down "basic requirements", and conformity with technical standards should justify a presumption of compliance with these requirements[128]. In accordance with this presumption, Member States ought to take "all necessary measures to ensure that administrative authorities recognise as conforming with the basic requirements, such goods as meet standards laid down by the Commission, following consultation of the Standardisation Committee"[129]. Manufacturers can furthermore declare, and where necessary prove, the basic conformity of products not complying with standards[130].

But these proposals were by no means unanimously accepted. As suggested notably by Röhling[131], the regulatory technique of reference to standards substantively meant delegation of legislative powers, inadmissible according to the EEC Treaty[132]; if the Community wished to take advantage of the expert knowledge of standardisation organisations, it ought first to guarantee the Commission's influence on the standardisation procedure in any such co-operation, and then adopt the procedure of Art. 155, fourth indent, for the legal "ratification" of the results of standardisation[133].

This already brings out the major legislative policy problems to be overcome in working out the new approach. The following survey will however give legal assessment second place to the solutions or proposed solutions developed by the Commission[134], in order to consider their practicability.

3.1 The Information Directive of 20 March 1983

The first legislative act in which the Community systematically embarked on the transition to a new harmonisation policy was the Directive of 20 March 1983 "laying down a procedure for the provision of information in the field of technical standards and regulations"[135]. This Directive went beyond the existing restriction of harmonisation policy to the legal and administrative provisions mentioned in Art. 100 (1) EEC to cover also their non-governmental appendage, namely national technical standards[136]. The directive was also innovative because of the measures by which it sought to oppose the emergence of technical barriers to trade. Art. 8 obliges Member States (and Art. 4 national standardisation bodies) to "immediately communicate to the Commission any technical draft regulation" (and national standards programmes and draft standards)[137]. This information is to enable the Commission to seek European solutions for the area concerned and initiate negotiations on such solutions. The legal instrument given by the Information Directive for this purpose is a time-limited anticipation of the primacy doctrine[138], which replaces the "Gentlemen's Agreement" of 28 May 1969[139]. The Commission or a Member State can cause adoption of technical regulations to be delayed for six months (Art. 9 (1)) and the Commission even by 12 months, if it announces an intended directive (Art. 9 (2)). Art. 7 (1) obliges Member States to ensure that standards are suspended for a period of six months if production of a European standard is intended. It is noteworthy that the Information Directive "institutionally" restricts the supremacy claim of European law by taking Member States' interests into account and giving standards institutions a possibility of collaboration[140]. These opportunities of influence are guaranteed by the Standing Committee of Member States' representatives set up by Art. 5, which shall be consulted on all important matters and may deal with any questions it finds important (cf. Art. 6 (5) and (6)). National and European standardisation organisations may themselves be represented on the Committee directly through experts or through advisers; in other respects they are recognised by Art. 6 (1) as permanent interlocutors. Member States' safety policy interests are taken into account by Art. 9 (3), which grants Member States the right "for urgent reasons relating to the protection of public health and safety" to introduce effective national provisions immediately.

The objectives of Europeanisation of technical regulations and standards and the institutional innovations in the Information Directive already adumbrate important components of the new approach. The Information Directive itself admittedly imposes in the first place a very considerable burden of work upon the Commission. Following entry into force of the Directive on 1 January 1985, the Commission had by May 1986, already received 80 relevant communications, brought about the postponement of procedures in 32 cases and announced the adoption of directives in 10 cases[141].

Evidently, however, the "information ethics" documented in these figures is still not enough. At any rate, the Commission pointed out in a communication of 1 October 1096 that failure by Member States to comply with their information and postponement obligations was an

infringement of Community law from which citizens of the States concerned could derive a right to non-application of provisions enacted in contradiction with the provisions of the Information Directive[142]. The Commission can base its legal position on ECJ case law on the direct effect of secondary Community law. However, the expectation that the postponement periods provided for in the Information Directive could allow European solutions for the pertaining technical regulations and standards to be found and applied would be unrealistic. The most important effect of the Information Directive is no doubt instead that the creation of an information system at the Community level and the involvement of the Member States and their standardisation organisations in the process of Europeanisation of technical regulations and standards[143].

This assessment is confirmed by the proposals submitted by the Commission on 20 February 1987. By these, the scope of the Information Directive is to be considerably expanded, extending in future to farm products, foodstuffs and fodder, pharmaceuticals and cosmetics[144]; at the same time, it is intended that the Standing Committee set up by Art. 5 of the Information Directive should be involved in working on standardisation contracts (Art. 1 (2)). The postponement periods in Art. 9 of the Directive are not extended. However, in the future, communication of a proposal for a directive to the Council (and not only announcement of a corresponding "intention") would bring on the postponement obligation (Art. 1 (3)(b)). The Commission's explanatory document of 13 February 1987[145] stresses that the various postponement periods resulting from the announcement to Member States of an intention and the communication of proposals for directives to the Council are not to be combined.

3.2 Harmonisation of safety objectives and their implementation in standards

The overstraining of the Community's law-making capacities by procedures under Art. 100 (1) EEC has led to the testing of three[146] strategies to reduce its burden. All are to be continued under the new approach. In accordance with the extensive interpretation of Art. 30 EEC[147] advocated by the Commission following the Cassis de Dijon decision[148], in areas where reliance can be placed on mutual recognition of national regulations and standards, harmonisation of laws is to be avoided where possible; existing regulations and standards are instead to be checked for proportionality[149]. The scope of this strategy is, however, limited[150]. Another way of unburdening the cumbersome procedure of adopting new directives is through the delegation of power to enact implementing provisions to the Commission pursuant to Art. 155, fourth indent[151]. The White Paper mentions the success of this method[152], which however cannot easily be reconciled with efforts at increasing involvement of standardisation organisations in harmonisation policy[153]. The third method of allievation, the reference technique first practised in the Low Voltage Directive of 19 February 1973[154], is unambiguously and emphatically favoured in the new approach.

This means, in the White Paper's terms, that harmonisation of legal regulations should in future be confined to "binding health and safety requirements", to "basic preconditions for a product's marketability", while production of relevant technical specifications should be left to European standardisation organisations[155]. The allaying effect of this inclusion of standardisation organisations in harmonisation policy depends in the first place on the demarcation between the "basic safety requirements" and the "technical specifications". The Low Voltage Directive, explicitly emphasised in the explanatory memorandum on the new approach as a model for the new regulatory technique[156], does describe the mandatory safety objectives comprehensively, but only by vague general clauses[157]. Descriptions of this nature, as the literature on the Low Voltage Directive brings out, allow only preliminary assessments; they become "practically applicable. . .only by actually adducing the standards"[158]. It is particularly this consequence of the reference technique that the new approach evidently does not wish to accept. According to the preparatory document of 31 January 1985, the essential safety requirements must be worded precisely enough "in order to create, on transposition into national law, legally binding obligations which can be imposed"[159]. The Model Directive approved by the Council contains the following addition: "They should be so formulated as to enable the certification bodies immediately to certify products as being in conformity, having regard to those requirements in the absence of standards"[160].

This addition has led to considerable hesitation and controversies. Pelkmans, for instance, warns[161] that it threatens to endanger the whole planning of the new approach and ought therefore to be understood merely as a call for involvement of national certification centres in cases where neither European or national standards guarantee the safety of a product[162]. In its report on technical harmonisation and standards in the Community[163], the European Parliament's Committee on Economic and Monetary Affairs and Industrial Policy called for the deletion of this addition, and an April 1986 question by one MEP[164] suggested that it be treated as non-mandatory. The answer to this question, communicated by Lord Cockfield on behalf of the Commission[165], makes the legal position clear and yet seems to dodge the issue:

As far as the requirements on the precision of safety objectives are concerned, the addition is "only a comment intended to define the relationship between the essential safety requirements (point B III) and the means of proof of conformity and effects (point B V 3). An essential aspect of the harmonisation arrangements proposed by the Commission in its communication of 31 January 1985 is that the manufacturer would be able to choose between certification by a third party on the basis of the essential requirements, on the one hand, and the declaration of conformity with standards, on the other. There is therefore a choice that makes it possible to retain the voluntary nature of standards, which is the basic feature of the **Errore. L'origine riferimento non è stata trovata.**.
The Commission in no way takes the view that this principle will necessarily lead the Council to adopt directives laying down very detailed essential safety requirements, since the testing bodies appointed by the Member States to check the conformity of manufactured products with the essential requirements, normally have expertise based on lengthy experience. This ensures that the obligations deriving from a directive that has clearly formulated the standard

of safety to be attained by the products in question will be correctly interpreted and applied. It will also be possible for suitable informal procedures to be established in each case, so as to allow satisfactory co-operation between the appointed certification and testing bodies, thus ensuring that the provisions of the directives in question are correctly and uniformly applied . . . The Commission considers, in any event, that such a question should be examined in connection with each specific case, rather than form the subject of a general discussion on the interpretation of the Council Resolution of 7 May 1985".

In the meantime, the first directives or draft directives based on the Model Directive are available, providing clearer indications of the function of the essential safety requirements. The Directive for simple pressure vessels[166], with its descriptions of the essential safety requirements, is not comparable with the general clauses of the Low Voltage Directive. The characteristics of the materials to be used are laid down in detail in Annex I[167]; further binding provisions deal with design and loading capacity, manufacturing procedures and requirements for commissioning the vessels. Regarding the volume of these provisions, the explanatory statement to the draft directive says that "differences of principle regarding aspects of safety" ought to be decided by the competent bodies of the Community, since otherwise they would "inevitably reappear at the level of European standardisation bodies"[168].

The second draft directive submitted on the basis of the new approach concerns the safety of toys[169]. Art. 2 (1) lays down a general safety obligation whereby manufacturers must bear in mind the foreseeable use of toys and the "normal behaviour of children". This general safety obligation is specified in Annex II, initially in "general principles", according to which children are to be protected not only against risks due to the construction and composition of the toy, but also, where design measures are not possible, against those inherent in its use[170]. The lengthy Annex II establishes requirements on physical and mechanical properties, flammability, chemical properties, explosion, electrical properties, hygiene and radioactivity. Annex IV additionally contains differentiated requirements as to warnings concerning the age of children, nature of the toys, and risks involved. All categories of risks and warnings were contained in the Commission's 3 July 1980[171] Draft Directive, from which they were taken over into the proposal for a framework Directive of 23 June 1983[172]. The 1980 draft dealt in Annexes V and VI with Community standards for physical and technical properties and the flammability of toys, but in 1983 corresponding standards were incorporated into separate directives[173]. A simplified procedure for amending these mandatory standards had been provided for both in 1980 (Art. 17) and in 1983 (Art. 13). The regulatory technique of the draft as now submitted thus builds on preliminary work already done. This continuity emerges particularly clearly from the fact that the binding standards in the 1980 and 1983 drafts merely took over provisions from the European standardisation organisations, seeking to make them mandatory even though not yet formally adopted at the time by the national standards organisations. These draft standards have since been developed into mandatory European standards. Article 5 of the new proposal can therefore now refer to the very regulations that previous drafts sought to make legally binding[174].

The Commission's most recent project to date[175], the proposal for a directive on construction products[176], is likewise the resumption of a long-discussed project[177]. The development is very easy to follow, because the original draft provided for wide-ranging "implementing powers" for the Commission pursuant to Art. 155, fourth indent, and provoked considerable resistance from business circles involved. On the other hand, the circumstances that had at the time induced the Commission to take advantage of these regulatory powers have not changed: there are still hardly any European or international standards for construction materials, and the multiplicity of existing national standards referring to them relates to differing national statutory provisions on buildings[178]. In these circumstances, the Commission's proposal cannot apply the new approach in the way the Model Directive assumes. The safety requirements in the Directive on construction materials contain essential requirements to which construction works, i.e. buildings and civil engineering works, have to conform, and which may influence the specific characteristics for products relating to such points as stability, safety in case of fires, hygiene, health, the environment, safety in use, durability, protection against noise and energy saving[179]. The Commission explicitly stresses that it would not, in general, be possible on the basis of these requirements "to directly establish a presumption of conformity with the essential requirements by means of a type-examination carried out by an approved body"[180]. Since the regulatory lacunae between the "essential requirements" and actual construction products will not in the foreseeable future be closed by European standards either, the Commission proposal provides for "European technical approval". Approval bodies authorised by Member States should, "on the basis of common approval guidelines for the product", in co-ordination with approval bodies in other States issue "European technical approval" on the legal basis of this directive (Annex II, (3) (1) and (6)).

The multiplicity of regulatory proposals through which the Commission has sought to apply the new approach confirm the doubts of earlier commentators on the feasibility in practice of the Model Directive[181]. It also corresponds to the pragmatically sibylline statements by its leading supporters[182]. These were to the effect that, when delimiting "essential safety requirements" in need of harmonisation from mere specifications of those requirements which need not to be uniform, the ideas of the Model Directive could obviously not be taken over without review; instead, this delimitation would in each case have to be oriented according to the state of national and international standardisation, the range and objects of provisions in force, the nature of the risks concerned and the likely product users.

It should be noted that these internal differentiations inevitably affect a further area already mentioned in the preparatory document to the new approach[183] and now specifically stressed in the proposal for a directive on construction products[184]: the abandonment of detailed design specifications in favour of "performance" standards. The distinction between "performance" and design is evidently intended not merely to paraphrase the difference between "safety objectives" and their "specifications", but at the same time to refer to a more general competition-policy dimension of the debates on the regulatory technique of product safety law. The preferability of performance standards is because as repeatedly asserted in the

U.S., such provisions leave room for technical innovation and make it harder to turn the standard-setting process into a way of warding off competition[185].

The theoretically clear distinction between performance and design standards in the practice of standard setting has repeatedly lead to wellnigh unsolvable problems of demarcation. It may, moreover, prove questionable from a safety policy viewpoint where and in so far as alternative design solutions are not conceivable[186]. Accordingly, the Draft Toy Directive, to the extent that it deals with chemical properties of toys, contains threshold values for particular substances and references to relevant prohibitions in Community law[187]. The explanatory statement on the proposal for the Directive on simple pressure vessels points out, in connection with restrictions relating to materials, a further problem with performance standards[188]: the development of suitable certification procedures and mutual recognition of conformity certifications becomes more urgent and at the same time more difficult as the manufacturer's leeway is broadened.

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1. Cf. esp. the Commission's White Paper to the European Council on "Completion of the Internal Market", COM (85) 310 final of 14 June 1985.
2. Chapter III, 2.
3. Chapter III, 2.5.
4. Chapter III, 2.6.
5. Chapter III, 2.4.3 end.
6. Chapter III, 3.
7. For more details see Chapter III, 2.7, and references.
8. Op. cit. (note 1), 14 et seq.
9. OJ L 77 of 26 March 1973, 29.
10. From the already enormous literature, mention should be made especially of Gormley, 1985 and Oliver, Free Movement, 1982. See also the commentaries on Art. 30-37 EEC by Colliard/Herzog, Matthies and Wägenbaur. A review of individual groups of cases is given also by Dauses, 1984, 201-206; Masclet, 1986, 253-267; Mattera, 1983; *idem*, 1984; Moench, 1982 and Rabe, 1984. On the connection between the case law on Art. 30 et seq. EEC and consumer protection see Reich, 1987, Nos. 11-26; Bourgoignie, 1987, 159-172; Stuyck, Free Movement, 1984; Grabitz/Borchardt/Klippstein, 1983.
11. Case 8/74, Judgment of 11 July 1974, ECR [1974] 837 - Dassonville. On this see the note by Willinghausen, EuR 1975, 322 et seq.
12. Case 8/74, Judgement of 11 July 1974, ECR [1974] 837 at 852 - Dassonville.
13. OJ L 13, 19 January 1970, 29. For details on the concept of measures having equivalent effect and a comparison of the Dassonville judgment with Directive

70/50/EEC see Veelken, 1977; Ehlermann, 1977; Timmermans, 1981, 285-290, Wägenbaur, Art. 30, Nos. 5-31.

14. In the elastic formulation of Steindorff, 1986, 697.
15. Continuing case law: cf. Case 7/61, Judgment of 19 December 1961, ECR [1961] 695 at 720 - Commission v. Italy; Case 13/68, Judgment of 19 December 1968, ECR [1968] 679 at 694 - Salgoil; Case 113/80, Judgment of 17 June 1981, ECR [1981] 1625 at 1637 - Commission v. Ireland.
16. Ehlermann, 1977, 589.
17. Case 120/78, Judgment of 20 February 1979, ECR [1979], 649 - Cassis de Dijon. Cf. on this judgment also Barents, 1981, 271 at 291-299; Capelli, 1981; Masclet, 1980; Mattera, 1980; Micklitz, 1983, 485-487; Millarg, 1979; Oliver, CMLR 19 (1982), 227-237; Rabe, 1984; Seidel, 1984; VerLoren van Themaat, 1982; Wägenbaur, 1983; *idem*, Art. 30, Nos. 32-41.
18. Case 120/78, Judgment of 20 February 1979, ECR [1979] 649 at 662 - Cassis de Dijon.
19. Explicitly clarified in Case 113/80, Judgment of 17 June 1981, ECR [1981], 1625 at 1638 - Commission v. Ireland; Case 220/81, Judgment of 22 June 1982, ECR [1982] 2349 at 2360 - Robertson.
20. Cf. answer to written question No. 749/81, OJ C 309, 30 November 1981, 7.
21. Cf. Reich 1982, 455; *idem* 1987, Nos. 25. Two particularly instructive examples are Case 120/78, Judgment of 20 February 1979, ECR [1979], 649 at 662 - Cassis de Dijon, and Case 178/84, Judgment of 12 March 1987, published in NJW 1987, 1133 et seq. - Beer purity law. This last judgment provides a clear statement that the law of a Member State must not be used to "fix existing consumer habits in order to maintain an advantage acquired by the domestic industry involved in satisfying them" (op. cit., Nos. 32). On this judgment see Dauses, 1987, 256-263; Funck-Brentano, 1987; Moench, 1987; Rabe, 1987; Zipfel, 1987.
22. Cf. Steindorff, 1984, 346; Wägenbaur, Art. 36, Nos. 68-72; Case 104/75, Judgment of 20 May 1976, ECR [1976] 613 at 635-36 - de Peijper; Case 35/76, Judgment of 15 December 1976, ECR [1976] 1871 at 1885 et seq. - Simmenthal.
23. Case 120/78, Judgment of 20 February 1979, ECR [1979]649 at 664 - Cassis de Dijon; Case 788/79, Judgment of 26 June 1980, ECR [1980] 2071 at 2078 - Gilli & Andres; Case 27/80, Judgment of 16 December 1980, ECR [1980] 3839 at 3854 - Fietje; Case 130/80, Judgment of 19 February 1981, ECR [1981] 527 at 536 - Kelderman; Case 261/81, Judgment of 10 November 1982, ECR [1982] 3961 at 3973 - Rau - De Smedt; Case 178/84, Judgment of 12 March 1987, Para. 35 and 36, published in NJW 1987, 1133 et seq. - Beer purity law.
24. Cf. Reich, 1987, No. 25; *idem*, 1982, 454.
25. Commission communication on the implications of the ECJ Judgment of 20 February 1979 in Case 120/78 ("Cassis de Dijon"), OJ C 256, 3 October 1980, 2-3. See Barents, 1981, 296-299; Gormley, 1981; Mattera, 1980; Oliver, CMLR 19 (1982), 234 et seq.; Welch, 1983, 63-68; Micklitz, 1983, 486-87.
26. OJ C 256, 3 October 1980, 2-3.

27. The corresponding proposal was submitted to the Council on 25 August 1980, OJ C 253, 1 October 1980, 2 et seq.
28. OJ C 256, 3 October 1980, 3. For the new approach in Community foodstuffs law the Commission draws the conclusion that in future it should only contain provisions based on considerations of the protection of essential general interests, namely the protection of public health, consumer needs for information and protection in areas other than health, fair competition, need for government supervision. See the Commission communication to Council and European Parliament on "Completing the Internal Market: Community Foodstuffs Law", COM (85) 603 final of 8 November 1985, points 8 and 9. Cf. the critical opinions from the ESC, OJ C 328, 22 December 1986, 23, and the European Parliament, OJ C 99, 13 April 1987, 45, and Sedemund 1987, 51-53.
29. Cf. Steindorff, 1986, 689-699.
30. Cf. Mattera, 1980, 511 et seq.
31. See the opinion of the Consumer Advisory Committee on the consequences of the ECJ's Cassis de Dijon Judgment, CCC/29/81 Rev. ENV 159/81, 16 October 1981; Seidel, 1984, 87; Micklitz, 1983, 483.
32. Case 120/78, Judgment of 20 February 1979, ECR [1979], 649 at 656 - Cassis de Dijon.
33. See Stuyck, Free Movement, 1984, 95-96.
34. See Matthies, Art. 30, No. 24; Welch, 1983, 66.
35. This will become clear from the analysis of individual cases in Chapter IV, 1.2.
36. Micklitz, 1983, 487; and with particular clarity Barents, 1981, 298. On the tendency in the Commission communication to overshoot, see also Bourgoignie, 1987, 171 f.; Welch, 1983, 64; Reich, 1987, No. 25; Steindorff, 1984, 347.
37. On the new approach to approximation of laws see New Roads for Harmonisation of Legislation?, CMLR 17 (1980), 463 et seq.; Masclet, 1980, 622-630; Mattera, 1980, 510 f.; Sedemund, 1987; Wägenbaur, Art. 30, No. 41.
38. See Rabe, 1983, 63.
39. Wägenbaur, 1983, 906-7.
40. Seidel, 1984, 81.
41. See the preliminary remark on the new approach to technical harmonisation and standards, COM (85), 19 final, 31 January 1985, 5.
42. Case 193/80, Judgment of 9 December 1981, ECR [1981] 3019 at 3033 - Commission v. Italy.
43. Roth, 1977, 24-30; Dauses, 1984, 206; Wägenbaur, preliminary observation on Arts. 30-37, Nos. 68-73; Matthies, Art. 30, No. 25.
44. Cf. in Table 1 supra the numerical relation between actions for breach of treaty brought by the Commission and preliminary ruling procedures, which often go back ultimately to actions brought by citizens of the Common Market.
45. See answer to Written Question No. 835/82, OJ C 93, 7 April 1983, 1-2. - Buy Irish; and Mattera, 1984, 286-87.
46. Case 249/81 Judgment of 24 November 1982, ECR [1982] 4005 at 4021-4023. See the note by Rabe, EuR 1983, 341-343.

47. For details on the relationship between technical standards and Art. 30 EEC cf. Lecrenier, 1985, 12-23. Cf. also Röhling 1972, 33-55.
48. Case 7/61, Judgment of 19 December 1961, ECR [1961] 695 - Commission v. Italy.
49. Continuing case law: Case 35/76, Judgment 15 December 1976, ECR [1976] 1871 at 1886 - Simmenthal; Case 5/77, Judgment 5 October 1977, ECR [1977] 1555 at 1576 - Tedeschi; Case 153/78, Judgment 12 July 1979, ECR [1979] 2555 at 2564 - Commission v. Germany.
50. Case 5/77, Judgment of 5 October 1977, ECR [1977] 1555 at 157 - Tedeschi; Case 251/78, Judgment of 8 November 1979, ECR [1979] 3369 at 3388 - Denkavit; Case 227/82, Judgment of 30 November 1983, ECR [3883 at 3904 - van Bennekom; Case 28/84, Judgment of 3 October 1985, ECR [1985] 3097 at 3123 - Mischfuttermittel; Case 247/84, Judgment of 10 December 1985, ECR [1985] 3887 at 3903-04 - Léon Motte. See also Wägenbaur, Art. 36, Nos. 12-17.
51. As in Case 4/75, Judgment of 8 July 1975, ECR [1975] 843 at 859 - Rewe-Zentralfinanz.
52. Very instructive on this is Case 251/78, Judgment of 8 November 1979, ECR [1979] 3369 at 3389-90 - Denkavit, which also contains an indication that the Council should in harmonisation use the method of gradual advance covering individual points.
53. Case 272/80 Judgment of 17 December 1981, ECR [1981] 327 at 3291 - Biologische Producten. Cf. answer to the Written Question No. 1928/84, OJ C 233, 12 September 1985, 5.
54. For details cf. Gormley, 1985, 154-174.
55. Cf. Case 73/84, Judgment of 27 March 1985, ECR [1985] 1013 at 1025 - Mischfuttermittel.
56. Case 104/75, Judgment of 20 May 1976, ECR [1976] 613 at 634-35 - de Peijper.
57. Cf. Kommers/Waelbroeck, 1986, 203-206; Gormley, 1985, 139-181; Dauses, 1987, 252-256.
58. Case 53/80, Judgment of 5 February 1981, ECR [1981] 409 at 422 - Eyssen (Nisin).
59. Case 272/80, Judgment of 17 December 1981, ECR [1981] 3277 at 3290 - Biologische Produkten; Case 174/82, Judgment of 14 July 1983, ECR [1983] 2445 at 2463 - Sandoz; Case 227/82, Judgment of 30 November 1983, ECR [1983] 3883 at 3905 - van Bennekom; Case 97/83, Judgment of 6 June 1984, ECR [1984] 2367 at 2386 - Melkunie; Case 247/84, Judgment of 10 December 1985, ECR [1985] 3887 at 3904 - Léon Motte; Case 54/85, Judgment of 13 March 1986, published in NJW 1987, 565-66, para. 15 - Maleinsäurehydrazid; Case 304/84, Judgment of 6 May 1986, published in RIW 1986, 1002-03, para. 21 - Muller. In general on the alleviation of the requirement of proof in favour of a State acting against previously and recognised hazardous situations, see Skordas, 1986, 122-127.
60. Case 174/82, Judgment of 14 July 1983, ECR [1983] 24445 at 2460-2464 - Sandoz. In an observation on this judgment, Meier, RIW 1983, 866, suggests the presumptive rule that in all cases where national provisions on marketability allow exceptions for goods intended for export, there is a presumption that the consumer protection provisions involved are not necessary.
61. Case 97/83, Judgment of 6 June 1984, ECR [1984] 2367 at 2386 - Melkunie.

62. Case 94/83, Judgment of 10 September 1984, ECR [1984] 3263 at 3280 - Heijn. Cf. answer to Written Question No. 1581/84, OJ C 176, 15 July 1985, 4-5. Cf. also Case 54/85, Judgment of 13 March 1986, published in NJW 1987, 565 f., para. 15 - Maleinsäurehydrazid.
63. Case 247/84, Judgment of 10 December 1985, ECR [1985] 3887 at 3904 - Léon Motte. Cf. also Case 304/84, Judgment of 6 May 1986, published in RIW 1986, 1002-03, para. 24 - Muller; Case 178/84, Judgment of 12 March 1987, para. 44, published in NJW 1987, 1133 et seq. - Beer Purity Law.
64. Cf. Case 174/82, Judgment of 14 July 1983, ECR [1983] 2445 at 2463-64 - Sandoz; Case 247/84, Judgment of 10 December 1985, ECR [1985] 3887 at 3905-06 - Léon Motte; Case 304/84, Judgment of 6 May 1986, published in RIW 1986, 1002-03, paras. 23-26 - Muller.
65. Case 178/84, Judgment of 12 March 1987, paras. 47-53, published in NJW 1987, 1133 et seq. - Beer Purity Law.
66. Loc. cit., para. 48. Cf. also the corresponding submission by the Federal Republic of Germany in Case 53/80, Judgment of 5 February 1981, ECR [1981] 409 at 414-416 - Eyssen (Nisin).
67. Case 188/84, Judgment of 28 January 1986, ECR [1986] 419 - Woodworking machines. On this Judgment see also Chapter II, 1.10.1 supra and Sedemund/Montag, 1987, 548.
68. Decree 80-543 of 15 July 1980 on the labour code, Art. R. 233-85 (1).
69. Case 188/84, Judgment of 28 January 1986 ECR [1986] 419 para. 10 - Woodworking machines.
70. Loc. cit., paras. 16-17.
71. Loc. cit., paras. 17-22.
72. OJ L 77, 26 March 1973, 29. Cf. Winckler/Cassassolles/ Verdiani, 1974; Orth, 1984; Tronnier, 1986.
73. Cf. Garvey, 1984, 46; Braun, 1985, 182; Bruha, 1986, 9. See also the Commission communication on the application of the Low Voltage Directive, OJ C 59, 9 March 1982, 2 et seq. (3), which announces the transference of this model to other branches of industry.
74. Cf. Winckler, 1985, 34; Schloesser, 1976, 27.
75. Cf. the communication on the application of the Low Voltage Directive (op. cit., note 73), 2.
76. On this see Leber/Oehms/Winckler/Orth, 1983.
77. Also skeptical is Mertens, 1985, 616-17.
78. Accordingly, in view of a manifest overlap of interests, the statement (Leber/Oehms/Winckler/Orth, 1983, 827) that electrical standards are as a rule neutral as regards interests, since organised expert knowledge can be found not only in the manufacturing industry but also among energy supply undertakings, telecommunications agencies and installers, is by contrast, not very convincing.
79. OJ L 43, 20 February 1979, 20. This Directive works with the technique of rigid reference to standards.
80. Cf. Winckler/Cassassolles/Verdiani, 1974, 29.

81. A detailed comparison of the GSG and First Ordinance under the Act on technical work materials, whereby the Low Voltage Directive was transported into German law, can be found in Zimmermann, Gerätesicherheitsgesetz, 146-161.
82. Op. cit., 149. Schmatz/Nöthlichs, Kennz. 1610, 9.
83. Cf. Winckler/Cassassolles/Verdiani, 1974, 28.
84. Communication on the application of the Low Voltage Directive (loc. cit., note 73), point 3.3.
85. The list of centres is published in OJ C 184, 23 July 1979, 1.
86. Case 815/79, Judgment of 2 December 1980, ECR [1980] 3583 - Cremonini v. Vrankovich. Cf. Hartley, 1982. Also illuminating is Case 123/76, Judgment of 14 July 1977, ECR [1977] 1449 - Commission v. Italy.
87. Communication on the application of the Low Voltage Directive, (op. cit., note 73).
88. COM/III/1412/83 - Rev. 3.
89. After the judgment in the Cremonini v. Vrankovich case, CENELEC took the decision henceforth to publish only European Standards in the area of the Low Voltage Directive, instead of the hitherto usual harmonisation documents; see CENELEC memorandum No. 10 on publication of CENELEC work results in the area of the Low Voltage Directive as European Standards.
90. Otherwise it would be even more disastrous that publication has so far been affected only with very considerable delay. This is complained of by Winckler, 1985, 36.
91. OJ C 235, 5 September 1984, 2 et seq. The previous three lists are published in OJ C 184, 23 July 1979, 5 et seq., OJ C 107, 30 April 1980, 2-3, OJ C 199, 5 August 1980, 2-3.
92. This does not take the numerous amendments to harmonised standards into account.
93. As with Art. 148 EEC, the votes for each country are weighted. The blocking minority is three members, or 16 weighted Noes. In other respects, the procedure is so arranged that on the one hand, agreement among the Community partners cannot be prevented by non-Member States, and on the other, as a rule as far as possible, a comprehensive regional result even going beyond the Community is secured; for details see the CENELEC rules of procedure, last amended in September 1985.
94. On this see the Communication on application of the Low Voltage Directive (op. cit., note 73), point 4.2.1; COM/ III/1412/83 - Rev. 3, point 2.3.2; Advocate General J.-P. Warnke in his closing speech in Case 123/76, ECR [1977] 1449 at 1466-1468.
95. Cf. CENELEC Memorandum No. 5, "Document of principle for national departures from harmonisation documents, with particular reference to the Low Voltage Directive" and COM III/1412/83 - Rev. 3, point 2.3.3. In 1983, according to expert estimates, about one third of harmonised standards were affected by departures of type A because of differing statutorily prescribed requirements regarding the extent of safety.
96. Cf. the Communication on application of the Low Voltage Directive (loc. cit., note 73), point 6.2.1; COM III/1412/83 - Rev. 3, point 2.3.3.; CENELEC Memorandum No. 10 (loc. cit., note 89), points 3.3 to 3.5.
97. Cf. COM III/1412/83 - Rev. 3, point 2.3.3 end.
98. Loc. cit., point 2.3.1.

99. Fitting, 1976, 87.
100. Cf. Chapter IV, 3.3 infra.
101. CENELEC Memorandum No. 10 (loc. cit., note 89), point 3.3.
102. Winckler/Cassassolles/Verdiani, 1974, 16.
103. Cf. Winckler, Europäische Normung in CENELEC, 1983; Leber, 1976, 65.
104. According to industry figures, harmonised standards already existed for over 90% of turnover in equipment covered by the Low Voltage Directive; cf. COM III/1412/83 - Rev. 3, para. 2.4.1.
105. On the foregoing cf. the closing speech by Advocate-General J.-P. Warner in Case 815/79, ECR [1980] 3583 at 3624-25; cf. also Hartley 1982, 59.
106. Communication on application of the Low Voltage Directive (loc. cit., note 73), point 6.3.
107. COM III/1412/83 - Rev. 3, para. 2.5.2.2.
108. Which replaces similar agreements of 2 May 1968, 1 April 1971 and 11 September 1973.
109. For details see Warner, 1983, 87-88; *idem*, 1984, 36-37. For instance, the VDE test centre has in recent years given some 140 tests annually in the form of CENELEC communications of test results, to German manufacturers that had presented them to the various foreign CENELEC test centres to secure their test marks.
110. COM III/1412.83 - Rev. 3, points 2.6.2 and 2.6.3.
111. Details in Warner, 1983, 87-88; *idem*, 1984, 37-38, 50-51.
112. For more details see Bier, 1983.
113. Details in Warner, 1983, 88-9; *idem*, 1984, 38, 46-7.
114. CEE - International Commission for rules on approval of electrical products.
115. CB - Certification Body - In the period from 1963 to 1984 some 6,500 CB certificates were issued.
116. Cf. COM III/1412/83 - Rev. 3, point 2.6.4.
117. Case 123/76, Judgment of 14 July 1977, ECR [1977] 1449 - Commission v. Italy; Case 815/79, Judgment of 2 December 1980, ECR [1980] 3583 - Cremonini v. Vrankovich.
118. Röhling, 1972, 122-127. Reservations are also expressed by Grabitz, 1980, 78-79.
119. Cf. Chapter IV, 5.
120. See COM III/1412/83 - Rev. 3, point 2.3.1 and Winckler/Cassassolles/Verdiani, 1974, 31 on the Low Voltage Directive. On the new approach cf. the four basic principles in the Council resolution of 7 May 1985, OJ C 136, 4 June 1985, 1 (at 2-3). The legal conception was early worked out in basic outline by Starkowski, 1973, 143-160.
121. Cf. in the Commission's White Paper on Completion of the Internal Market (note 1) in particular points 63 and 77, and for qualifications to this principle cf. supra 1., esp. 1.2.3.
122. The White Paper (loc. cit., note 1), point 63, is able to point in this connection to the Council Resolution on conclusions regarding standardisation of 16 July 1984 (OJ C 136, 4 June 1985, 2); see also the Commission communication "Technical

Harmonisation and Standards: a new approach", COM (85) 19 final of 31 January 1985, 6.

123. Cf. Chapter III, 2.3 (c).

124. OJ C 108, 19 October 1968, 39-40.

125. OJ C 132, 6 December 1968, 1, 4-5.

126. The ESC's opinion (op. cit.) reads like a downright anticipation of the new approach: "Thus, it would be conceivable for the Community directives first to list the safety objectives to be secured, and then to indicate that these would be taken as achieved as long as a particular standard, initially harmonised at the level of the Member States, is complied with. This would give a chance to bring proof that the safety objectives have been met even without compliance with the standard concerned".

127. Cf. esp. Starkowski, 1973, 104 et seq., 143 et seq.; more recently, also Grabitz, 1980, 82-91 and earlier Seidel, 1969, 960 et seq. and *idem*, 1971, 745-46.

128. Cf. Grabitz, 1980, 82 et seq.

129. Starkowski, 1973, 151.

130. Starkowski, 1973, 115-16; Grabitz, 1980, 88.

131. Röhling, 1972, 114 et seq.

132. See 2.4 supra, as well as 5.1 infra.

133. Röhling, 1972, 132 et seq.; on this more at 5.2 infra.

134. On this cf. 5 infra.

135. OJ L 109, 26 April 1983, 8.

136. Cf. Macmillan, 1985; Lecrenier, 1985.

137. The information from national standards organisations is collected by the European standards organisations CEN/CENELEC and passed on to the Commission; see Anselman, 1986, 937.

138. Cf. Rehbinder/Stewart, 1985, 331.

139. OJ C 76, 17 June 1969, 9.

140. On the general context, see Chapter III, 1.2.2.

141. "First report from the Commission to the Council and the European Parliament on the implementation of the Commission's White Paper on completion of the internal market", COM (86) 300 final of 26 May 1986, 14; also the answer to written question No. 1376/86 OJ C 143, 1 June 1987, 12-13. In its second report on the implementation of the White Paper the Commission reported on 294 drafts notified, on 124 of which it had formally asked for a change, COM (87) 203 final of 19 May 1987, 13.

142. Commission communication on non-compliance with particular provisions of Directive 83/189 EEC, OJ C 245, 1 October 1986, 4; see also the answers by Lord Cockfield to question No. 39/86 in the European Parliament, OJ C 270, 27 October 1986, 23 and EP question No. 1376/86, OJ C 143, 1 June 1987, 13, and Anselmann 1986, 937, on the adoption of national standards.

143. Cf. also Pelkmans, 1985, 69 et seq.

144. Cf. Art. 1 (1) of the proposal for a Council directive amending Directive 83/189 EEC on an information procedure in the area of technical regulations and

standards, OJ C 71, 19 March 1987, 12; on agricultural products see the supplementary proposal in OJ C 71, 19 March 1987, 13.

145. COM (87) 52 final, point 9.

146. A fourth road is so-called optional harmonisation (Chapter III, 2.3 (b) supra), which is however not mentioned in the White Paper and is critically commented on in the explanatory memorandum on the new approach (op. cit., note 122, 4).

147. Cf. 1.1.2 supra, text on note 26.

148. Case 120/78, Judgment of 20 February 1979, ECR [1979] 649.

149. See point 65 in the White Paper (note 1).

150. See 1.2.3 supra and point 64 in the White Paper (note 1).

151. Cf. the proposal for a directive on construction products, OJ C 308, 23 December 1978, 3 and Chapter III, 2.6 supra, and the ESC's opinion on problems of barriers to trade and the harmonisation of relevant legal provisions, OJ C 72, 24 March 1980, 8.

152. Op. cit. (note 1), point 70.

153. Cf. Chapter III, 2.6.

154. OJ L 77, 26 March 1973, 29.

155. Op. cit. (note 1), points 65, 68.

156. Op. cit. (note 1), 5.

157. Cf. 2.2 supra.

158. Schmatz/Nöthlichs, Nos. 1610, 11, 13, cf. 17-18.

159. Op. cit. (note 1), 11.

160. Council Resolution of 7 May 1985, OJ C 136, 4 June 1985, 2.

161. Pelkmans, 1985, 115, says that this is "de dood in de pot" (see also Pelkmans, 1987, 265 et seq.). See further Hartlieb/Krieg, 1987, 127 as well as the interesting opinion in Dey, EG-Richtlinie, 1987, 234 on the planned directive on safety of machines: that it is appropriate "to continue . . . efforts at a general, comprehensive standard on the safety of machines and not wait for the appearance of a directive". In any case, a few months later the Commission presented its proposal for a Council directive harmonising the legal provisions of Member States for machines, OJ C 29, 3 February 1988,1.

162. Cf. 3.3 infra.

163. PE Doc. A 2-54/86, 16 June 1986, point 7.

164. OJ C 19, 26 January 1987, 5.

165. Op. cit., 5.

166. OJ L 220, 8 August 1987,48; the Directive of 27 June 1976 harmonising Member States' provisions via common provisions for pressure vessels and on procedures for testing them, OJ L 262, 27 September 1976, 153 and the three individual directives subsequently adopted remain unaffected.

167. In the explanatory statement to the "proposal for a Council directive harmonising the legal provisions of Member States for simple pressure vessels", COM (86) 112 final of 14 March 1986, 9, the possibility of rapidly amending these provisions is pointed out; the possibilities of Art. 155, fourth indent, EEC were, however, not fully utilised.

168. Op. cit., 6; by contrast, the EP Committee for Economic and Monetary Affairs and Industrial Policy, loc. cit. (note 163), 11, finds that the proposal for a directive bears the traces of the "old . . . now outdated method"; the EP resolution of 19 June 1987 goes in the same direction ; OJ C 190, 20 July 1987, 173.
169. Proposal for a Council directive harmonising the legal provisions of Member States on the safety of toys, OJ C 282, 8 November 1986, 4. On this the amended proposal of 2 October 1987 is now available, COM (87) 467 final.
170. The quality of the German version of the draft directive is such that the meaning of the text can often be deduced only by considering the versions in other languages.
171. OJ C 228, 8 September 1980, Annex III, and IV.
172. OJ C 203, 29 July 1983, 1, Annex II and III; cf. Chapter III, 3.2 supra.
173. OJ C 203, 29 July 1983, 12 (mechanical and physical properties); OJ C 203, 29 July 1983, 1 (flammability).
174. On the role of national standards and of conformity certificates for toys not conforming to standards see point 3.3 infra.
175. April 1987; intensive preparation was done in particular on the Directive on the safety of machines, the potential scope of which seems to be so comprehensively set out that it could be seen as a supplement to the Low Voltage Directive and at the same time as an appendix to the GSG (see references in Dey, 1987, EG-Richtlinie 233 et seq.). How the relationship here between legally binding safety objectives and legally non-binding standardisation principles is to be arranged is not yet clear; it can be expected, though, that the working out of "basic safety objectives" will also have to be shifted more to the standardisation organisations, the more comprehensive the scope of a machine directive is supposed to be - this is decidedly the view of Dey, Status Europäischer Normen, 392-93. The proposal since submitted for a directive on machines, OJ C 29, 3 February 1988, contains an extensive catalogue of basic safety requirements.
176. Proposal for a Council directive harmonising the legal and administrative provisions of Member States on construction products, OJ C 93, 6 April 1987, 1.
177. Cf. Chapter III, 2.6; this stagnation is supposed to be overcome by reshaping it in accordance with the new approach.
178. See the references in Commission document COM (86) 756 final of 8 January 1987, point 11, which explains the new draft.
179. According to the list in Annex I.
180. Loc. cit. (note 178), point 10.
181. See Joerges, 1986, Section III 1 b.
182. See note 165 supra and accompanying text.
183. Loc. cit. (note 122), 5.
184. Loc. cit. (note 176), Art. 5 (2).
185. See Klayman, 1982, 104 et seq.
186. Op. cit., 105 et seq.
187. Loc. cit. (note 169), Annex II (3).
188. Loc. cit. (note 167), 9.

Chapter V

The need to supplement the new approach to technical harmonisation and standards with a coherent European product safety policy

The declared primary objective of the new approach to technical harmonisation and standards is to overcome the stagnation in law approximation policy and thus promote the realisation of the European internal market. Our survey of the most important aspects of the new approach has, however, already shown that the regulatory technique of reference to standards continually comes up against problems of product safety policy. Let us mention only the controversies about the degree of perception of the "basic safety requirements"[1], the unsolved problems of recognition of national certification[2], the decision-making powers of Member States under the safeguard clause procedure[3]and the endangerment of internal market policy through the reservations in Art. 100 a (4) SEA[4]. The following sections will go beyond these already visible points of contact to systematically consider the effects of the new approach on the beginnings of a European safety policy. It will not question the principle of the regulatory aspects of the new approach, but instead seek to bring out the ensuing problems the Community will have to solve if it is to push through its new harmonisation policy[5].

1. Product safety obligations

Wherever it harmonises areas of law that also involve the safety of products, the Community must lay down a binding or optional European safety level. Here, the "traditional" method of approximation of laws has led to a many-faceted range of product safety duties. The Low Voltage Directive[6] provides for protection only given "proper use". The medicaments Directive[7] uses the same standard. By contrast, the consumer policy programmes of 1975 and 1981 used the terms "normal" or "foreseeable"[8]. This formulation was taken up both in the preamble to the Directive on cosmetics[9] and in the decision on the exchange of information on product hazards[10], whereas the "new impetus for consumer protection policy" speaks only in general terms of the "need" to set "safety requirements at the Community level"[11]. The Product Liability Directive[12], finally, refers to the justified safety expectations of users "taking all circumstances into account", in particular the "reasonably" foreseeable use. The relevant formulations in the model Directive of 4 May 1985[13] are kept vague: ". . . products . . . 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". Furthermore, "in certain cases, in particular with regard to the protection of workers and consumers, the conditions set out in this clause may be strengthened (foreseeable use)". The vagueness of this text seems striking; first, "intended" use is introduced as the normal criterion, but then the rule-exception relationship is reversed again because the reference to protection of workers and consumers applies to almost all conceivable goods; furthermore the tightening up of safety obligations in the areas mentioned is only a prospective possibility, and finally inevitable differentiations such as those of users' age are lacking. In any case the structure of the Model Directive shows the Community's

general tendency to orient the level of protection in consumer goods to "foreseeable" use. Furthermore, even the first two directives or proposals for directives submitted on the basis of the Model Directive introduced an unavoidable differentiation. While the Directive on simple pressure vessels seeks to guarantee the safety of persons, domestic animals and goods only given "proper use"[14], toy manufacturers have to take "foreseeable" use into account, bearing in mind the "normal behaviour of children", and also take differences in children's ages into account[15]. The framework of the Model Directive is of fundamental importance in other respects too. It takes account of the fact that the reference method leaves the Community legislator's responsibilities for product safety unaffected and that harmonisation covering broad groups of products presupposes the laying down of appropriate safety duties. We will later return to the question whether this insight - still expressed in the Model Directive in relatively open, and above all non-mandatory, formulations - is to lead to the positive introduction of a Community general clause on product safety[16].

2. Internal market policy priorities and the demonstration project on accident information systems

The list of "criteria for choosing priority areas", attached to the Model Directive of 7 May 1985 and aimed at explaining its intended scope[17], mentions mainly regulatory criteria. In principle, the new approach will be appropriate only where it is genuinely possible to distinguish between "essential requirements" and "manufacturing specifications" where the requirements for protecting safety make "inclusion of large numbers of manufacturing specifications" unnecessary[18], and where, as with many "engineering products and building materials" not yet covered by Community regulations, essential safety requirements can be defined for a "wide range of products". The Commission White Paper[19] sets the rather legislative criteria of the Model Directive in a more ambitious integration policy context. The legislative technique of reference to standards is assigned far-reaching functions: it is to enable the Community to create an expanding and flexible internal market, to increase the competitivity and innovative capacity of European industry and promote the introduction of new technologies. If the regulatory technique of the new approach is to be understood from the viewpoint of the ambitious policy perspectives of the White Paper, then law approximation projects brought in will be oriented towards industrial policy priorities. But even where the practice of harmonisation policy is pragmatically oriented towards the chances of implementing harmonisation measures, tensions between internal market policy and product safety policy priorities can be foreseen. For product safety policy, the Community has with the "demonstration project on a Community accident information system"[20] created a mechanism which can, by collecting and assessing data on the number and severity of accidents, supply (among other things) knowledge about hazards arising from consumer goods and therefore contribute to clarifying where safety policy action is needed[21]. The discrepancies between internal market priorities and product safety policy priorities again bring up a conflict of objectives that already marked "traditional" approximation of laws[22]. The sixth recital and Art. 1 (2) of the decision on the demonstration project, at the same time show a way that would at least allow this conflict of objectives to be dealt with:

findings of accident research should be used in defining safety objectives and drawing up standards. This might be done by, for instance, carrying out in-depth studies on product risks preferentially in areas where the Commission has ordered a new standard or in which it has been presented with objections regarding the safety conformity of standards or certifications. This kind of feedback would of course assume that the Commission and the Standing Committee already set up by the Information Directive of 28 March 1983[23], and now entrusted also with the co-ordination tasks connected with the new standardisation policy[24], would co-operate with the committees active in the area of product safety policy[25].

3. The primacy claim in the new approach and Member States' safety interests

Even assuming the admissibility in Community law of reference to standards[26], this does not mean that applicability of this regulatory technique is guaranteed. Experience shows that transposing directives into national law is a thorny process that has at all stages, from incorporation of the directives into national legislative acts up to judicial and administrative practice in Member States, to come to grips with varied resistance[27]. In the case of the new approach to technical harmonisation and standards, a regulatory technique justified on internal market policy considerations and unfamiliar to many Member States is to be additionally pushed through against other legal traditions and political demands[28]. Even now, a whole range of lines of resistance on safety grounds can be discerned.

3.1 Conflict potential

Following the model of the Low Voltage Directive of 19 February 1973[29], directives adopted on the basis of the new approach are to secure full harmonisation of the areas and types of risks covered[30]. They are therefore to be "directly effective", have primacy over contrary national law and "block" legislative activity. But all these doctrines on the effects of European directives, though recognised in principle, may cause considerable difficulties of application in practice. Extension of the doctrine of direct effect to directives is a reflection of the shortcomings of transposition in Member States; the doctrine therefore merely states that individuals may appeal against application of national law to the anti-Community conduct of the national legislator[31]. But the ECJ has now linked direct effect in favour of individuals with the conviction that "the relevant obligation (on the Member States) is unconditional and adequately precise"[32]. Accordingly, in the case of the new approach, controversy over the functions of the "essential safety requirements"[33] can affect the applicability of the new directives. If in the future, the Community makes the safety objectives sufficiently precise "as to enable the certification bodies straight away to certify products as being in conformity, having regard to those requirements in the absence of standards"[34], the chances for the application of European law increase; on the other hand, precise specification of safety objectives makes it harder to secure consensus when adopting new directives, and weakens the attractiveness of the regulatory technique to standardisation organisations.

In applying the doctrine of primacy and blocking effect and also in connection with actions for breach of treaty brought by the Commission under Arts. 169 and 30 EEC, similar difficulties are foreseeable. The ECJ has given to understand that primacy of European law cannot depend on whether the primary motivation was internal market policy or safety policy[35], and it follows from the judgment in the Cremonini v. Vrankovich case[36] that Member States must, if they wish to assert their interests, keep to the procedures provided in the directives. These directives can and should, however, provide only a presumption of safety conformity of products bearing the relevant certifications. Controversy on the appropriate level of safety of products is therefore ultimately to be decided on the basis of the criteria laid down in the directives[37]. The wider the leeway for interpreting objectives left in the new directives, the greater the chance for Member States to secure their safety policy positions in the new procedures, even once they have formally transposed a directive. Explosive problems can continue to arise where a Member State takes additional measures to protect safety interests and decisions therefore have to be taken on the "blocking effect" of the new approach. The ECJ decisions *in rebus* Ratti[38] and Grunert[39] indicate that the Court wishes to base the "blocking effect" of Community law primarily on specific contradictions between the content of directives and Member States' legal provisions, and the ban on legislative action in an area dealt with by the Community assumes that the Community has also actually pursued its policy[40]. This again raises the question whether the Community ought not, in the interest of applicability of the new approach, to develop a more comprehensive product safety policy.

3.2 Functions of the safeguard clause procedure

All situations of dispute mentioned ultimately come down to the same point, namely whether the regulatory technique of reference to standards can establish itself not only as a strategy for internal market policy but also as a safety policy concept. The procedural provisions in the Model Directive guarantee that disputes about the European level of product safety can be brought in not only "preventively" in determining safety objectives and recognising standards and conformity certificates, but also "responsively" through subsequent objections to decisions taken at the Community level, via the safeguard clause procedure.
The safeguard clause procedure, introduced by the Model Directive, had to go beyond the usual type of safeguard clause, given the merely presumptive effects of recognition of standards and of conformity certifications. Its function is, though the typical wording of the safeguard clause may not make this explicit, to give Member States possibilities for action in the event of hazards not yet recognised when a Community standard was adopted[41]. The practice has become that Member States, through their representatives on the administrative or regulatory committees, are being allowed decision-making powers in safeguard clause procedures[42]. The Model Directive departs from these examples in both respects: not only new objections can be considered in the safeguard clause procedure, but also all findings already arrived at can be questioned, and the Commission is left alone to decide as to the justifiability of any objections[43]. This means that the very difficulties in reaching agreement, the Council was to free itself of according to the new approach, must under the safeguard

clause procedure be solved by the Commission, which must undertake the actual fine tuning of product safety policy differences among Member States. Even setting aside legal reservations regarding such broad delegation of decision-making powers to the Commission[44], it seems scarcely conceivable that the safeguard clause procedure in the Model Directive can be developed into a routine measure with short periods of decision and that Member States will rely on its possibilities for protecting their rights. These considerations concern both follow-up market controls[45] and co-operation between the Standing Committee and committees at the Community level in the area of product safety policy[46].

3.3 Majority decisions pursuant to Art. 100 a (4)

As a preliminary test of the applicability of the reference technique of the new approach to Member States' product safety law, we may take the power given to Member States, following ratification of the Single European Act[47], by Art. 100 a (4) to apply their own safety law as apposed to harmonisation measures adopted only by qualified majority. The Commission can presume "arbitrary discrimination" or "disguised restraint of trade" pursuant to Art. 100 (4), second sentence, and the ECJ establish misuse of the rights under Art. 100 a (4), first sentence, pursuant to Art. 100 a (4), third sentence, only where the Community regulations in fact take account of Member States' interests in protection. Harmonisation measures decided by qualified majority must therefore apply the relatively highest standard if the unity of the Common Market is not to be endangered. The Single European Act's provisions on environmental protection may have the same effect, in so far as product regulations simultaneously take account of environmental and consumer policy interests. By Art. 130 t, Member States may take more stringent protective measures even where the Council has decided unanimously, as long as the measures are "compatible with the Treaty". Controversies as to the meaning of Art. 100 a (4) will seem hypothetical only when assuming that only outvoted Member States may assert their rights arising out of this provision[48], and that at any rate, in the case of directives laying down only essential safety requirements, the unanimity principle will *de facto* not be deviated from. Irrespective of this, however, it is possible to link systematic conclusions with Art. 100 a (4). If even qualified majority decisions of the Council do not bind Member States, or only to a very limited extent, how are the Commission's sole rights of decision under the safeguard clause procedure to be justified? Such objections can be refuted only with the argument that Art. 100 a (4) is a special arrangement, not in itself compatible with the supranational structures of Community law, which does not change the binding effect of directives adopted pursuant to Art. 100 (1) EEC, and leaves the Council's powers of delegation pursuant to Art. 155, fourth indent, EEC unaffected. In its decision-making practice, the Commission will nevertheless not be able to avoid taking account of the sensitivity of Member States to interventions in their safety law on grounds of internal market policy, expressed in Art. 100 a (4).

3.4 Compliance with standards

Probably the most problematic aspects of the reference to standards, favoured by the Model Directive as a regulatory instrument for safety policy, arise from the difficulties of imposing standards that are not legally binding. A comparison with the move from mandatory to voluntary standards in the US is instructive. The American Consumer Product Safety Commission plays an active part in developing voluntary safety standards; it pays attention to their effects on competition, to the involvement of consumer organisations in standardisation procedures, and verifies the content of standards produced and compliance with them[49]. The Model Directive and the agreement between the Commission and the European standards organisations admittedly contain a number of procedural guarantees (in part still in need of precise specification)[50]. But the only preventive control mechanisms the Commission can use to affect actual compliance with standards are the recognition procedures for standards and for conformity certificates; it can affect the practice of national certification centres only indirectly through the provisions contained in the directives or proposals for directives on simple pressure vessels, toys and construction products[51]. These limited possibilities of influence are in line with the internal market policy perspectives of the new approach, according to which the point is to ensure free movement of goods in the Community, so that what matters is only the equivalence of standards and conformity certificates recognised by the Community. But this internal market policy perspective neglects the decisive question from the product safety policy viewpoint, namely how a move to voluntary standards can be combined with actual guarantees of safety interests.

4. Regulatory lacunae in the Model Directive in the case of emergency measures and follow-up market controls

The Model directives and the directives or proposals for directives on simple pressure vessels, toys and construction products explicitly recognise Member States' power to take directly effective measures in the interests of protecting safety[52]. A Member State that takes advantage of this possibility has to have recourse to the safeguard clause procedure. But the legally critical cases are not those where a Member State loses, since then it must accept the Commission decision, but instead the Commission's possibility of imposing measures it finds justified Europe-wide on the Member States.

The pressure for action arising in such cases is irresistible, for both economic and legal policy reasons. Unilateral measures by a Member State encroach on the unity of the internal market which is the very point of the new harmonisation policy. Unilateral measures are, moreover, admissible only in accordance with the safety objectives of directives. Where the Commission has found such measures to be legally justified, this implicitly means that Member States that do not share the Commission's interpretation and do not follow the measures it recommends are disregarding the product safety duty under Community law.

The Model Directive's laconic formulation that the Commission has to "remind" such Member States of their duty to act[53] in no way guarantees, even if taken over into individual directives[54], a uniform application of follow-up market controls within the Community. In the case of such controls, Member States apply administrative powers that the Community can influence only indirectly[55]. As with mutual recognition of administrative acts in general and

of national conformity certificates in particular[56], the Community must seek to bring about uniform practice by Member States in follow-up market control.
The more recent relevant directives or proposals for directives have in principle taken account of this perception. The proposal for a Directive on "products which, appearing to be other than they are, endanger the health or safety of consumers"[57] had provided for implementation of a Community-wide prohibition (Art. 2), obligations on Member States to apply such bans (Art. 3) and provisions for Europeanising nationally decided bans (Arts. 4 and 6). However, the since adopted directive[58] lacks these provisions, as does the Directive on simple pressure vessels[59]. The Directive of 1 December 1986 on airborne noise emitted by household appliances[60] differentiates in the monitoring of national decisions between objections by Member States to European standards and disputes as to national standards and regulations (Art. 9); this differentiation shows what resistance the Europeanisation of control measures has to reckon with even when "only" the enforcement of Community provisions is involved[61]. The proposal for a Directive on toys[62], finally, must, in addition to provisions on bans and recalls (Art. 7 (1), first sentence) and on Europeanisation of such decisions by Member States (Art. 7 (1), second sentence, (2) - (4)), contain criteria for the recognition of national test centres (Annex III). The danger of "subsequent" splitting of the common market through single-handed administrative action in implementation of Community regulations can be opposed by the Commission only if it moves to bring about intensive co-operation among competent centres in Member States and in the Community.
From all this, the recall issue provides the plainest proof that realisation of the European internal market must involve Europeanisation of product safety law. The more decisively the Community applies the conditions for the free marketability of products by making product safety obligations uniform, the more pressing becomes the need to harmonise control measures whereby Member States comply with these duties. We shall return to the practical consequences of these connections[63].

5. Reference to standards and product liability

For product liability in accordance with the Directive of 25 July 1985[64], the new harmonisation policy is not of direct legal importance. The legal liability duty of product safety in Art. 6 of the Directive is to be interpreted autonomously by the civil courts. It will neither be tightened up nor slackened off through the product safety obligations of new directives. The European or national standards a manufacturer must comply with in order to market his products do not exclude liability in civil law pursuant to Art. 7 d of the Directive. Nor is this "state of science and technology" which by Art. 7 e limits manufacturer liability, identical with the state of European and national standards[65].
The legal independence of product liability and product regulation does not, however, in any way rule out *de facto* mutual influence, which can indirectly have considerable legal effects. American law provides the clearest example of this, as being the furthest developed both in the area of product liability and in that of standard setting by federal agencies. Thus, detailed concepts for taking safety aspects into account in product planning have been extrapolated from the exhaustive case law on design faults[66]. It is indisputable that product liability

procedures offer information of relevance not only legally but also technically, which can be used by Government agencies[67], standardisation organisations and individual firms. Admittedly, empirical studies have shown that while firms react to the excessive damages imposed under American law, these reactions concentrate often on developing strategies to deal with damage suits[68]. Standardisation organisations seem neither ready nor able to make use of the dynamic development of product liability systematically in their work[69]. Conversely, both the standards set by federal agencies and voluntary standards of the standardisation organisations play a considerable part in product liability actions, both to establish the state of the art and to demonstrate technically feasible alternatives[70]. Comparably intensive interactions between product liability law and product safety law are unknown in Community Member States[71] and cannot be expected even after the Product Liability Directive is converted into national law[72]. Nevertheless, directed measures to increase the degree of effectiveness of the Product Liability Directive for European product safety policy are entirely conceivable. Thus, systematic exploitation of the case law and of documents of relevant actions in Member States could clarify whether the safety law demonstrated by European conformity certifications is accepted or whether the case law is questioning the integrative objectives of the new approach through autonomous and/or divergent safety requirements. It is, however, equally conceivable to use them in the Europeanisation of standards, in the procedures for recognition of standards and conformity certificates and finally in the carrying out of recall actions.

6. Involvement of consumers in technical standardisation

The new approach to technical standardisation confers on the European standardisation organisations CEN/CENELEC the task of defining the European safety standards, or *de facto* "the European level of safety", on the basis of defined safety objectives which have to be converted into specific mandates. The privatisation of the law-making process goes hand in hand with the opening up of the standardisation procedure for interested circles, including consumers. Consumer involvement is aimed at providing democratic legitimacy for the new regulatory approach[73]. Participation can only succeed where the consumer interest is brought in to actual standardisation. The organisation of this involvement thus stands in the centre of interest. However, conceptual and organisational weaknesses of consumer involvement suggest a rather pessimistic view regarding the attainment of the ambitious goal. Conversely, it would be false to draw the conclusion from foreseeable difficulties, which are perhaps removable only conditionally, that consumer involvement at the Community level should be rejected. For the possibilities that have been opened up offer chances to influence the standard-setting process that did not previously exist. Consumer involvement has to live with the constant dilemma of on the one hand, being measured against expectations it can perhaps never meet, and therefore always with an alibi at hand, and on the other, of grasping the opportunities offered, however limited the resources might be.

6.1 Basic questions of consumer involvement

Consumer involvement in standardisation has existed in some Member States, such as the Federal Republic of Germany, France and Britain for several decades[74]. Without seeking to define the exact starting point for consumer involvement[75], all three countries have points in common which take on importance in assessing consumer involvement under the new approach. All three have in the course of the consumers' movement, intensified involvement in the 1970's, and all three are at the same time, the only countries in the European Community that have "organised" involvement, namely the DIN Consumer Council[76], the AFNOR Consultative Committee and the Consumer Advisory Committee. Studies on whether the opening up of the procedure to consumers has led to different contents for standards are not available. The only study on consumer involvement so far was done in the Federal Republic of Germany[77]. Questions to groups involved in standardisation - industry, government and consumers - indicated a basically positive self-image. The consumer involvement was felt to have led to a change in the content of standards. Nevertheless, the authors diagnose structural defects that must be removed.

6.1.1 Privatisation and participation

In its agreement on co-operation with CEN/CENELEC[78], the Commission transferred the co-operation between State and business begun with the agreement between DIN and the German Government, to a European level[79]. Since the Community is not a State and since CEN/CENELEC merely brings together the national standards organisations, specific Community problems arise about which there is no experience at the national level. While the Commission is by Council Decision of 16 July 1984[80] formally legitimated to reach agreement with standardisation organisations, it cannot conclude any legally binding agreements providing for delegation of Community powers to private standardisation organisations, since this is not provided for by the Rome treaties. The "general guidelines on co-operation" were therefore arrived at, and could *de facto* develop the same legal quality as an international treaty or a "memorandum of agreement"[81]. CEN/CENELEC are being asked to do too much in applying the general guidelines, since the representatives of the European economy in fact are not members[82]. Specifically, the question arises whether consumer involvement should be brought about through national contributions in the CEN/CENELEC standardisation committees or at the European level, through the already existing European consumer organisations.

The general guidelines contain no specifications in this regard. All that is stated is that "the Commission will, when appropriate, contribute to the establishment of suitable arrangements". But the agreement between the German Government and DIN[83] does not contain any provisions on involvement of interested circles either. In para. 1 (2) DIN merely undertakes to take the public interest into account. It is only the notes that make it clear that this provisions is among other things aimed at an increase of consumer protection in standardisation[84].

What the new forms of co-operation at the national and European level have in common is not only that the functional delegation of legislative powers is bound up with the decision not to set substantive regulations[85], here in connection with consumer safety and health, but that

the opening up of the procedure to particular interested circles (consumers) is not bound up with any formally guaranteed rights[86]. The "suitable arrangements" mentioned in the general guidelines are worked out in a procedure that involves only the Community administration and the standards organisations (CEN/CENELEC). Those whose right to speak is at stake may be heard, to be sure, but have a weak position in the negotiating process. What requirements can be deduced from "real involvement" and from support from the Commission "as appropriate" for the establishment of "suitable arrangements"? That sequence of phrases shows the openness of a process, the object of which is no less than the legitimisation of the new approach.

On 11 December 1987, the Commission took an official position on consumer involvement in standardisation[87]. It pressed for strengthening of consumer participation at the national level, in order to ensure that consumer interests could be input into the position of national representations on CEN/CENELEC. What the way forward is to be at a European level, is on the other hand left open. The Commission wishes to arrive at "an agreement with CEN/CENELEC on a new way of working". Whatever this may mean, institutionally solid consumer participation does not at any rate seem to be within immediate grasp. One year later on 4 November 1988, the Council confirmed the Commission's position by enhancing the necessity to push for an effective consumer participation at the Member States level and by weakening consumer participation at the Community level[88]. The conclusion of an "agreement" is no longer mentioned; instead reference is made to a priority programme for consumer fairs and to seminars that should be held to increase the consumer input in standardisation.

Involvement understood in this way, without substantive provisions and without procedural guarantees, cannot remain without consequences for the consumer input to standards. For if the conditions of consumer involvement are partly determined by the standards organisations, the obvious thing to do is channel the consumer interests in standardisation in accordance with the criteria set by business of the proportionality of consumer representatives, the technical relevance of their contributions and feasibility[89], in order to exclude alternative (non-professional as being lay, non-technical as being sociological, and non-feasible as being economically expensive) product concepts from standardisation[90]. The whole of consumer protection thus becomes subordinated to the existing goals of standardisation and can be brought about only in a piggyback procedure unless other vehicles can be found, in other words, unless the goal is necessary for other reasons than those of health or safety protection. In this way, safety policy becomes integrated into internal market policy. Alternative product concepts, humanised technology as the object of product safety law, are placed institutionally under a constraint to provide justification. Safety objectives that go beyond the "generally accepted state of the art" will be accepted only where consumers can show that existing practice has led to severe accidents. This sets the framework for consumer involvement in private standardisation. Privatisation does by no means ensure true participation.

6.1.2 The consumer interest in standardisation[91]

Consumers want better products, safer products. Consumer demands regularly lengthen the manufacturer's proceedings. They call for a little "more" than the manufacturers are prepared to give. This is in line with the institutional framework for consumer involvement. Separate product concepts, in order to avoid the word "alternative", could be brought about only in an offeror process[92], but not as an appendix to standardisation oriented towards the needs of business. The slight experience with the American offeror process has at any rate shown that consumers can if given the chance, arrive at their own conceptions of product safety. In Community Member States, there have not been many attempts as yet to develop technical standards from the consumer's "own" point of view. Even differentiated models of the determination of the consumer interest concentrate on the manufacturer's perspectives and seek to load their position with consumer policy significance.

Bosma[93] has dealt comprehensively with the issue. She demands that an adequate consumer orientation in standards answer three questions:

(1) Should the final consumer be directly involved in standardisation, and if so, how can such a commitment effectively be organised? Who can adequately represent the consumer, or also, who speaks "for" the consumer in the relevant bodies?

(2) Where is the necessary scientific background to come from for choosing priorities that take account of individual households or society as a whole?

(3) Where is the necessary scientific mechanism to come from in order to analyse the needs, wishes and behaviour of individual consumers?

In order to arrive at an answer on the basis of these three questions, Bosma splits consumer interest into three categories[94]: consumer interest and marketing, consumer interest and product technology, consumer interest and product information. Bosma includes under marketing, among other things, requirements on consideration of foreseeable misuse in design, but also for possible recall or else liability in the event of product defectiveness[95]. Consumer requirements on product technology would be expressed through the requirement for a technology assessment (especially with new technologies), an estimate of the social consequences of the introduction of new or modified products and a quality assessment by the relevant testing agencies[96]. The interest in adequate product information is stated to require provision of special safety marks[97].

This ambitious concept of determination of the consumer interest is, in Bosma's view, demanding too much from the individual consumer[98]. The latter, often unsure or even unaware of their wishes, far less being in a position to set priorities, would have to be represented on the relevant bodies by experts. Bosma does not fail to see the problems facing realisation of this kind of concept, but feels that an intensive process of scientific study (processing of surveys, etc.)[99] could permit adequate establishment of a consumer interest in standardisation.

It would be attractive to differentiate the model proposed still further or even develop it towards an alternative consumer concept of consumers themselves. It is attractive because the proposed categories for including sociological findings as to the behaviour of consumers, the acceptance of environmental technologies, etc. are very inviting. The job is valuable and necessary and should be done, but there are a number of structural problems that should be borne in mind. The concept does not so far take account of the specific conditions for determining the consumer interest at a European level. At a national level it is hard to

determine "the" consumer interest. At the European level differences in familiarity with technical dangers also enter in to complicate the matter further, as well as differences in technical solutions to deal with the danger. These social and technical differences have led to different safety philosophies in the Community which now have to be combined within the standards organisations. Consumers are afraid, and can cite examples, that standardisation oriented towards creation of an internal market will lead to a reduction in the level of safety[100]. Though effective consumer involvement might help to avert this risk, there should still be consideration of whether it is all desirable to make the various safety philosophies in the Member States uniform. Thinking by both political and technical bodies is only at its outset. Already, however, it can be seen that work in standardisation bodies does not aim at levelling out differing safety philosophies and regulatory approaches, but wishes to let them continue to co-exist[101].

Another thing that seems problematic from the European viewpoint is the scientific presentation of consumer participation favoured by Bosma. In a European organisation of consumer involvement this would lead to a predominance of the industrial countries, Germany, France, and Britain, while southern European countries, with their experiences of handling technology, would be excluded[102]. The opening up of the prospect reveals the internal contradictoriness of the idea of making consumer involvement scientific. Consumer organisations have to meet the requirements on professionality in standardisation bodies; this is the only way they can stand up to argument. At the same time, this necessity cuts them off from their rank and file, since consumer organisations in developed industrial countries also derive their body of experience from sources that do not meet scientific demand, or do so only in part. The tendency to emphasise the scientific aspects of consumer imvolvement may in the long term affect the very foundations of consumer work, and lead in Germany, France and Britain to more technology-oriented consumer advice, but at the European level the differences are liable to continue for quite some time. What should be done therefore is to develop a model that does not rule out non-professional experience, particularly in the southern European countries, in handling technology, but includes it in an integrated concept of involvement in standardisation.

6.1.3 Chances of consumer involvement

In view of the multiplicity of tasks assigned to European consumer involvement in standardisation, the question arises as to where consumer are to gain the ability to do the job in substantive terms. Questionnaires to national consumer representations in standardisation organisations in European Community Member States have recently confirmed what was no surprise: even at national levels, there is a shortage of experts and of the requisite financial resources[103]. Experts are likely to be available in significant quantity only if consumer organisations have more recourse to technicians in their field work. But this would lead to a fundamental restructuring of the direct contact between organisations and consumers. Consumer organisations are traditionally concerned with personal product consultancy. The use of new media promises a considerable lightening of the burden, but at the same time tends to lead to conflicts among organisations. Ecotrophologists would be replaced by

technicians who not only handle media control product consultancy, but also a wide of complaints[104].Only such a step can create the conditions for gradually increasing the number of experts, yet even this kind of restructuring cannot solve the financial problems of consumer organisations. Effective consumer involvement in standardisation will always remain dependent on governmental subsidies.

The present standardisation problems arising from consumer involvement have been summarised by the DIN Consumer Advisory Council's office in a manual[105]. Honorary work on behalf of consumers in standardisation committees continually impinges on the recurrent structural pattern of "reasons for standardisation - person - object of standardisation - asserting of interest". In detail:

"Whether there are *grounds* for standardisation is decided ultimately by the manufacturers. Consumers are therefore dependent on the goodwill of the other side if they wish to encourage standardisation of a particular product. The situation looks somewhat brighter in the area of safety standards, since the Appliances Safety Act has given consumers the necessary impetus to push safety standardisation forward. For this very reason, there is a need to press at the European level for stronger obligations on manufacturers, importers and traders to market only safe products[106]. Even inside safety standards, consumer representatives ought to take priority decisions in order to make it possible to find a standardisation project that will pay. It is in this very decision that the scarcity of resources comes into play.

The manual then sets out clearly the compromises that the DIN Consumer Council has to engage in so as even to find *consumer representatives* that would commit themselves to standardisation work. Accordingly, the DIN Consumer Council has even accepted people not employed in a consumer institution. The principle applied is that people must have sufficient technical knowledge, which is not to be understood as actual specialisation, be motivated, be legitimated to speak on behalf of consumers and be able to defend their position in DIN working committees.

The requirements for the person in each case depend quite largely on the *object of standardisation*. However, consumer representatives rarely get beyond the position of "informed laymen", measured by the standards of the other side. In order to meet the requirements on the professionality of contributions, the manual provides methodological indications for working out a consumer standpoint. If the problem is localised (safety, health), consumer protection objectives have to be defined in detail. Consumer representatives should have recourse here to complaints, accident statistics, tests of goods, etc. Particular difficulties face consumers when it comes to determining the actual level of safety. This is where the shortcomings of making things scientific become particularly clear. For empirical studies and scientific assessments are often replaced by mere exchange of experience, reference to test reports or comparable standards from other countries. If the grounds for standardisation are present, the right people found and the object for standardisation specified, the question still arises as to how the consumer side is to assert its position in the relevant committees. Experience in DIN confirms the need to utilise the procedural rights formally allowed to the full. The DIN manual could act as a model for working out procedural guarantees at the European level.

Experience with consumer involvement at a national level and the structural problems of consumer involvement pointed out by the DIN Consumer Council suggest the conclusion that the chances for European consumer involvement should be regarded rather skeptically. If experts are lacking even at a national level, where are they to be found at a European level? The financial problems are considerably increased by high travel costs. The structural problems of consumer involvement diagnosed in the DIN manual must each be increased by the dimension of co-ordinating consumer interests Europe-wide so that at every level - reason for standardisation, person, object of standardisation, strategies to follow - mechanisms have to be provided to ensure that national consumer interests are reconciled. Nevertheless, it would be over-hasty to deny consumer involvement in European standardisation work any prospect of success *a priori*. European involvement at the same time offers consumers chances to assert their interests that cannot be found in the same way at a national level. A decisive step in this direction would be to break into the organisational structure of CEN/CENELEC by involving *European* consumer organisations in the standardisation process. This kind of direct influence from the European angle would give consumers something of an edge over business, which must first co-ordinate its interests through national organisations. Moreover, consumer involvement ought not to be incorporated in the organisational structure CEN/CENELEC but just the contrary: it should be established independently of standardisation organisations. This very trend has been emerging recently[107].
But the institutional advantages can be fully utilised by consumer representatives at the European level only if they divide up tasks and capacities and concentrate their forces on putting the resources of the twelve Member States to their best advantage. This means setting up a "professional organisation" of consumer representatives at European level, since this is the only way to guarantee an adequate definition of the consumer interest in the sense of Bosma's idea. This kind of professionally organised consumer involvement should include specific measures in behalf of consumers from Southern Europe.

6.1.4 Consumer access to public information

The chances for effective consumer involvement depend largely on the capability of consumer representatives to provide and sutain relevant information to their committees. As well as mobilising sources of their own, they will have to depend here on access to information compiled either nationally or by Community institutions. The Commission has now considerably expanded its information policy in product safety standardisation, so that direct access by consumer representatives is here of considerable importance. The information procedure in the field of technical standards and regulations[108] might provide consumer representatives in the area of safety standardisation with an overview of national differences and at the same time give them ideas as to which national safety standard should be favoured as the European solution[109]. The Community system for rapid exchange of information on hazards arising from consumer products[110] and the Community information system on accidents caused by consumer goods[111] theoretically create the conditions for bringing statistically supported information into the standardisation process.

In fact, all three projects hinder consumer access to information. The information procedure in the field of technical standards and regulations treats information received as confidential[112]. The European consumer representatives have no access to the CEN/CENELEC database. At most they can secure information from the national consumer representatives on the standardisation organisations. The Community system for rapid exchange of information on dangers arising in using consumer goods excludes the consumer a priori. Where a national authority so desires, information is treated confidentially in justified cases[113]. The accident information system, which is perhaps even more important, did not provide for any possibility of using accident statistics in standardisation procedures before the end of the model project in 1989[114]. This may change, especially if sources of danger that suddenly arise call for Community-wide measures. It is, though, very striking that all three projects bar consumers from access to information.

6.2 The existing organisational structure of consumer involvement[115]

Since December 1982 and April 1983 respectively, the four organisations represented on the Consumer Consultative Committee (CCC) (BEUC, the European Trade Union Conference, the Association of Community Family Organisations and the European Community of Consumer Cooperatives) have been sending observers to various technical committees of the European standardisation bodies CEN and CENELEC. This started with thorough discussions between the Commission, CEN and CENELEC and the European consumer organisations, concerning the form of possible involvement by European consumers. Ultimately, those involved agreed to direct collaboration of European consumers in standardisation, although it long seemed as if CEN/CENELEC would not be prepared to accept direct involvement since this would mean a break in CEN/CENELEC's organisational structure. Without pressure from the Commission it would not have come to direct involvement of European consumer representatives in standardisation. The Commission pays some of the expenses: its contribution was 60,000 ECU in 1984, 40,000 in 1985 and 90,000 in 1986. In October 1983 the Commission (DG XI) and BEUC signed an agreement on the involvement of European consumers in European standardisation[116].

6.2.1 Consumer Advisory Committee, working group on standards and secretariat for co-ordination</P>

The Consumer Consultative Committee (CCC) has for many years had a working group on standards that was brought into negotiations between the Commission and CEN/CENELEC. The way towards a financing of European consumer involvement by the Commission was finally cleared when the four members of the CCC agreed to entrust BEUC with the task of co-ordinating European consumer involvement. The co-ordination secretariat is formally independent, with BEUC merely providing the institutional framework.

To give a closer definition of the tasks of the co-ordination secretariat, it seems helpful to keep the three organisations involved, BEUC (as the contractual partner of the Commission), the CCC and the co-ordination secretariat separate. The BEUC has taken over merely formal

competence. It was mandated to: co-ordinate the positions of European national standardisation organisations in the area of standardisation; secure information on standardisation from European and national consumer organisations and pass it on; pay travel expenses for experts taking part in CEN/CENELEC meetings; hold co-ordination meetings on standardisation in order to arrive at a common position for European consumers on standardisation questions; provide for contacts between Commission offices, the standardisation organisations and consumer organisations in order to secure active and effective co-operation of European consumers on questions of European standardisation; take other measures suitable for contributing to the efficiency of consumer involvement in the work of CEN and CENELEC. Similarly, BEUC is obliged to bring interim reports and annual reports before the Commission. *De facto*, however, this work is done not by BEUC, but by an employee paid by the Commission who directs the co-ordination secretariat.
The CCC's interest is to draw as clear a demarcation line as possible between the area of work of the European co-ordination secretariat and the work of the CCC working group on standards[117]. The co-ordination secretariat is to co-ordinate participation by consumer representatives in CEN/CENELEC (selection, appointment, reimbursement of expenses, training, co-ordination) and in national standardisation bodies, to give technical support to the CCC in its discussions and supply technical reports on specific topic at the request of Commission offices. The work of the working group on standards is to examine the following three fields: verification of new Commission initiatives in the area of standardisation policy; verification of proposals for directives in the area of standardisation and any setting of minimal requirements in the area of consumer protection; evaluating the annual report of the co-ordination secretariat. In other terms, the CCC working group on standards formulates policy and the co-ordination secretariat (BEUC) implements it. The working group on standards would thus as hitherto, and like the other CCC working groups, also prepare opinions for subsequent adoption by the plenary sessions. In addition to policy formulation, the working group on standards also wishes to exercise a supervisory function over the co-ordination secretariat, which cannot necessary be reconciled with the CCC's range of tasks to date.

6.2.2 Consumer observers on technical committees

Only representatives of test institutes or members of independent research institutes act as consumer observers on the technical committees of CEN/CENELEC. Although unofficial, it seems to be clear inside the CCC that representatives of consumer committees in national standards organisations can at any rate not act as observers[118]. This does not rule out their inclusion as experts in co-ordination meetings. However, this prior decision by the CCC illustrates a certain skepticism regarding the independence of consumer representations institutionally involved in national standardisation organisations. The differing perspectives of testing and scientific institutions may be decisive here. For while consumer representatives on national standardisation organisations are supposed to find generally accepted solutions together with the manufacturers, the testing and scientific institutes may take the product standardised into consideration, relatively free from such economic pressures. The number of

consumer observers on CEN/CENELEC technical committees has steadily risen since work began[119]. In 1984 European consumer representatives were sending 4 observers to 9 technical committees. In 1985 it was 8 observers to 9 committees. Of these, however, only four committees were really active in 1985. Of the 58 committees in CEN, 8 do not work, 7 involve consumers, while 34 would be of interest to them. Of the 34 committees in CENELEC, 3 involve consumers, while 7 would be of interest. This assessment is based in a selection according to the following criteria[120]: safety considerations, influence of standards on competition, consumer information, performance criteria, energy aspects. In fact the possibilities for European consumer associations to send observers are considerably restricted. First of all, one has to find an observer prepared to take the job on. This observer has to provide information on the state of work on a particular CEN/CENELEC committee, name the most important points for discussion, reflect the various standpoints of manufacturers and the national standardisation organisations, form an opinion of his own and above all send a report to the co-ordination secretariat after each meeting[121].
To avoid misunderstandings, it would seem appropriate to give some further explanations of the number of committees set up by CEN/CENELEC. Behind each technical committee there is a whole range of products. When European consumer associations send an observer to TC 61 (safety of household appliances), he has to cover the whole product range of electrical appliances to be found in the home. The gamut runs from washing machines, dryers, electric cookers, toasters, refrigerators, freezers, coffee mills, clocks and irons to massage appliances, sun-ray lamps and sewing machines. And this list is by no means complete. A comparison with national sets of standards might lead to the conclusion that European standards are much broader in content than differentiated national standards.

6.2.3 Observers' co-ordination meetings

One of the most important tasks of the Co-ordination Secretariat is to hold co-ordination meeting with consumer observers and national consumer experts on the individual committees[122]. Since it is incumbent on the consumer observer to represent the interests of consumers in individual Member States, he must be informed and advised by national consumer experts in order to be able to intervene appropriately in CEN/CENELEC meetings. Accordingly, the co-ordination meetings are the core of European consumer participation. Theoretically, there is an entitlement to raise new projects for CEN/CENELEC standardisation through the co-ordination meetings. In practice, the co-ordination meetings serve mainly to tackle problems "brought back" by the observer from meetings of the technical committees. The Co-ordination Secretariat then has the task of drawing up an agenda, inviting the experts from the various Member States and distributing the necessary papers in advance. Since the national experts' work is honorary, the success of the co-ordination meetings depends largely on voluntary commitment by the experts. At the same time, the greatest commitment is useless if the information flow among national consumer experts is not adequately organised.

6.3 Practice to date with consumer participation in CEN/CENELEC

European consumer representatives can now look back on two and a half years of practical experience. The reporting duty placed upon BEUC by the Commission offers a good basis for making an initial analysis from an internal viewpoint. This seems all the more important because thinking is at present going on in DG XI about how consumer involvement is to be organised in the future.

6.3.1 Procedural questions

Observers on CEN/CENELEC technical committees meet a number of procedural obstacles at the start of their work that do not yet seem to have been removed. This annoyance can ultimately be removed only by written procedural guarantees, a conclusion that can be confirmed from experience with the DIN Consumer Council[123].

The first appearance of consumer observers on the technical committees regularly led to the question of what status the observer ought to have on the technical committes[124]. This was even though CEN/CENELEC had informed the relevant committees of the inclusion of consumers in standardisation through a circular. *De facto*, the consumer representatives faced the burden of justifying why they wanted to take part in the work.

While these problems were more or less rapidly solved in the course of time, much more complex obstacles faced consumer representatives when it came to putting forward their position in discussion. Two areas proved particularly important: involvement in drawing up the agenda and inclusion of consumer positions set down in writing in the organised information flow within CEN/CENELEC. An example may illustrate this.

The commitment of the consumer representatives on the CENELEC Committee on Safety of Household Appliances (TC 61) very quickly brought out the need to think about the extent to which technical standards ought to consider that children are not always under supervision (the so-called exclusion clause)[125]. At the co-ordination meeting in May 1984, the decision was taken to set a debate going in TC 61. At the next TC 61 meeting in June 1984, the Co-ordination Secretariat's request was however rejected. Observers had according to the Committee Chairman, no possibility of bringing forward a paper in the Technical Committee. According to CENELEC procedural rules this was open only to the Secretariat and to national delegations. An exception might be made for consumer observers if the Commission asked CENELEC to consider a corresponding proposal[126]. Despite this unpromising beginning, the Co-ordination Secretariat, at the request of the observer, went further into the question. At the January 1985 co-ordination meeting a letter to the Chairman of TC 61 was drafted. The next meeting of TC 61 in May 1985 showed, however, that the paper had not been distributed[127]. The Co-ordination Secretariat thereupon decided to approach the President of TC 61 and urge that the letter be distributed. This letter was distributed to Committee members, with the agreement of the CENELEC Executive Secretary. At the next meeting of TC 61 in October 1985, the President then made it clear that henceforth be written comments of the consumer observer would automatically passed on to TC 61 members[128].

Altogether it took more than a year to merely secure formal access to the debating forum, without a single substantive word having been spent on the actual issue.
More fundamental in nature are the problems arising from the weak participation by consumer observers, from only four Member States. The committees ask observers for legitimation of their claim to speak on behalf of the European consumer when only four, or even three, consumer delegations out of twelve Member States are involved in co-ordinating a consumer standpoint[129]. The structural weaknesses are imputed to the consumers themselves and additionally the task is imposed on them of specifically ensuring inclusion of Southern European countries. This position may be used positively as an argument for asking the Commission for suitable financial contributions in order to organise this process.
The remaining point is the difficulties that have arisen in the case of contracts issued to CEN/CENELEC by the Commission. With one exception[130], consumers have not been included in the terms of the contract. And even this one Community measure happened more or less by chance, because the European consumer organisations had been informed of the Commission's intention in time. Practical problems with the technical committees arose particularly because the remit given by the Commission was often so imprecisely worded that the Technical Committee saw itself compelled to turn it again[131]. It should be noted in passing that the Commission is giving contracts to CEN/CENELEC before safety objectives under the new approach have yet been specified.

6.3.2 Information and co-ordination

Since consumers are cut off at the European level from Community information sources, the need to build up an internal information network and co-ordinate incoming information Community-wide takes on even greater importance. The importance of this task was just as clear to the CCC working group on standards as it was to BEUC when it set up the Co-ordination Secretariat. But the Co-ordination Secretariat has neither the financial nor staff resources to build up this information and co-ordination network itself. Instead, it is dependent on co-operation by national experts on co-ordination committees and on their information sources in their home organisations.
A clear tendency to professionalisation[132] has emerged, which pursues more or less the following course: if an observer has been found for a technical committee of importance to European consumers, the Co-ordination Secretariat assembles the necessary information for an evaluation of the committee's work. This is the only guarantee that the observer can recognise his possibilities of influencing the ongoing procedure[133]. If problems arise in the technical committee, the observer approaches the Co-ordination Secretariat and asks for the calling of a co-ordination meeting. The Co-ordination Secretariat prepares the meeting, distributes all necessary material and/or asks for it from members of the co-ordination meeting. While in the initial stages, the members of the co-ordination meeting sought to assess the problems arising on the basis of their experience, a procedure has now been developed in which one of the members undertakes to produce a background paper which, according to the topic, assesses either specific scientific research or ad hoc studies within national consumer organisations[134]. This background paper is used by the observer, following

decision in the co-ordination meeting, for submission to the technical committee.
The intensity of information exchange between the observer and the national representatives or experts in the co-ordination committee depends strongly on the activities of the technical committee. In other terms, CEN/CENELEC determines the rate of the consumer work.
Besides current information and co-ordination needs, the Co-ordination Secretariat has begun a number of in-depth studies. These serve, on the one hand, the objective of proceeding in product-related fashion, as was the case with the study by the Consumer Association on the "bicycle market in the Community"[135], but also through work directed at making up for shortcomings in knowledge on consumer participation, particularly in Southern European countries[136]. Attempts were also made to provide regular information through a newsletter on the state of standardisation work[137]. However, this proved difficult for two reasons. Firstly, due to the small circle of interest, it seemd advantagous to incorporate this newsletter into the general BEUC journal[138], and secondly, this path was blocked because the CCC insisted on independence of the Co-ordination Secretariat.
Despite all the tendencies towards professionalisation, so far there is no infrastructure intact to which the Secretariat can have recourse. Accident studies are not recorded centrally, nor can the Secretariat have access to the specific knowledge of safety standards accumulated particularly in test institutions. The only internal information network available to date - BEUC Interpol[139] - is not included in the work[140], which would in any case be possible only if an overall concept for building up an information and co-ordination network were available.

6.3.3 Material questions

The intention is not to provide a stock-taking[141] of work to date, but merely to illustrate the points at dispute in the individual technical committees.
(1) The starting point for the CEN TC 100 working group is a remit from the Commission to CEN[142]:
"Initially, to determine the requirements for tactile hazard indications on packages intended as containers for substances and preparations classed as hazardous by national authorities; further, to work out standards for means to permit the perception of hazards by touching, in order, in particular, to comply with Art. 15 (2) and (3) of Directives 79/831 and 78/63".
These terms of reference from the Community are aimed at combating accident risks from chemicals in the household using the safety technique of instruction, specifically through a tactile indication of hazard. But this safety philosophy was opposed not only by the consumer side, but also by some national standards organisations that called for special protective devices - child resistant closures[143]. This conflict was resolved when the members of the technical committee agreed to treat special protective devices as separate from tactile hazard indication systems, thereby requiring separate standardisation[144]. This compromise was facilitated by the need to develop a marking system as rapidly as possible in the specific interest of the poorly sighted. Ultimately, however, no agreement could be reached on the basis of this compromise either. It proved impossible from an industrial standpoint to develop a uniform method[145], which had always been the priority goal of the consumer organisations. The latter had carried out a survey through the CCC that had brought out the interest in a

uniform method guaranteeing the unambiguous nature of the information[146]. The working group temporarily suspended its work and asked the Commission to lay down the requirements for standardisation in precisely worded terms of reference. The consumer side drew the conclusion from the failure of TC 100 that technical committees themselves were not in a position to secure compromises as to safety philosophy (safety technique of instruction versus protective devices). Only a suitably precisely worded remit that the consumer side would play a part in drawing up could prevent safety policy from failing to advance because "commercial circles involved" cannot agree[147].

(2) One of the important points at dispute in Technical Committee 61 (safety of electrical household appliances) is the so-called exclusion clause[148]. This states that electrical safety standards do not take account of the special hazards arising in children's rooms, kindergartens, etc. in which small children or the aged and infirm people are present without supervision. In such cases additional requirements are necessary:[149]

"Except in so far as this standard deals with electric toys, it does not take into account the special hazards which exist in nurseries and other places where there are young children or aged or infirm persons without supervision; in such cases additional requirements may be necessary".

The consumer side has now raised the question of the extent to which safety standards meet additional requirements, or whether the protection of children or elderly people is no longer guaranteed when they are left unsupervised in kitchens or other rooms of the home where there are electrical appliances[150]. The suppliers' side sought to downplay the accusation by referring to standardisation practices, in which safety is guaranteed even without such supervision[151]. Consumers again found themselves in a position of having to offer proof that the level of safety was not sufficient. In fact the consumer representatives managed to find that the exclusion clause had been adduced in a number of cases as an argument against the introduction of comprehensive protection measures[152]. Thus, protection against access to current carrying parts is tested with the "standard test finger", based on an "average" adult finger. This test may well not constitute adequate protection for many adults, but certainly does exclude children. This leads to considerable hazards from ventilator heaters or other flow heaters accessible to children. Nevertheless, CEN/CENELEC continues to reject the introduction of a child-sized test finger. No special child resistant closure is provided for in the case of spin-dryers and washing machines. Sockets on the front of electric cookers likewise have no protection for children, though this is already prescribed in the case of gas cookers. Surface temperatures of electrical appliances are another problem area. A large number of appliances provide no protection even against severe burns. The consumer side is not claiming that all appliances ought to be so hazard free that no parental supervision is necessary. However, avoidable hazards ought to be removed and electrical safety standards ought to take foreseeable conditions of use (not merely proper use) of particular appliances into account. On the basis of these considerations, the consumer observer, following consultation with national consumer experts in several co-ordination meetings, proposed a revision that positively asks for foreseeable misuse to be covered in the design of electrical appliances that might present a danger to children and elderly persons:[153]

"This standard takes account of foreseeable misuse (other than gross misuse) of equipment by users of all ages and also, so far as is reasonable, of the fact that the equipment covered by the standard may be used where there are young children and elderly persons".
The suppliers' side rejected this proposal, but at the same time had to admit that the present text of the exclusion clause did not at any rate reflect practice in safety standardisation. It therefore seems to be possible that the consumer side may at least partly succeed with its move. At present, the wording proposed by the British Consumer Advisory Committee is before TC 61 for debate:[154]
"So far is practicable, this standard deals with the common hazards presented by appliances which are encountered by all persons in and around the home. However, except in so far as this standard deals with electric toys, it does not in general take into account the use of appliances by young children or infirm persons without supervision; for such use additional requirements may be necessary".
It is not yet clear whether the compromise proposal will be adopted. At any rate, the compromise formula, also supported by the IOCU Testing Committee[155], means a considerable step back from the original position. For the consumer side gives up the inclusion of foreseeable misuse and contents itself with the much less specific formulation "common hazards", which is in turn in need of interpretation. On the positive side, there is now a much clearer formulation of the circumstances in which safety standards provide *no* protection for unsupervised persons. The scope has been reduced to children only, to avoid discrimination of elderly people.
The arguments over the exclusion clarify the need for a safety philosophy along the lines of DIN 31000 at a European level. This project, which has been worked on since April 1985, has involved European consumer representatives since June 1986[156].
(3) Often, however, difficulties arise even among national consumer representatives in agreeing on a uniform safety philosophy. Thus, the consumer's protection against electric shock must be weighed against his interest in being able to do repair and maintenance work himself[157]. Even if one supports a right of access by consumers in principle, it remains to be decided whether consumers are to be explicitly encouraged to do work themselves and what protective measures are at all possible if consumers are to be allowed to do repairs or maintenance. Likewise, the question of the protective level for surface temperatures of household electrical appliances remains open. The British consumer representatives want the maximum limit brought below 50 degrees, while the German side does not even agree to a maximum of 80 degrees[158]. The list of examples could be extended, though the conclusion ought not to be drawn from these disagreements, that the consumer side is unable to develop a uniform European safety philosophy.

6.4 Proposals for extending consumer involvement in standardisation

The present organisation of technical standardisation is regarded by all those involved, the Commission, CEN/CENELEC, the Consumer Consultative Committee and the Co-ordination Secretariat, as a transitional stage. The policy of the new approach seems to have led to the insight by all those involved that in the long term, consumer involvement in standardisation

must be institutionalised. It is not yet foreseeable, however, what the outcome will be. Several proposals are available, but discussions have barely begun.

6.4.1 The Bosma proposal[159]

In her report for DG XI, Bosma proposed the setting up of a consumer advisory committee for technical standardisation, to be attached to the Standing Committee. The object is to guarantee access to European standardisation activities by consumer interests, through institutional collaboration between the Consumer Advisory Committee for Technical Standardisation and the Standing Committee. The committee is to be made up of representatives of European consumer organisations (though it is not said, this probably means CCC members) and European consumer research institutions such as Swoka, INC, Stiftung Warentest, Husholdningsrad, CRIOC[160]. While European consumer organisations should provide the *political* input, Bosman assigns to the research institutions listed the task of making the necessary technical know-how available. Accordingly, the Consumer Advisory Committee on Technical Standardisation would in this conception represent the collective European political and technical expertise of the consumer side. It should among other things have the following tasks:[161]

- To point out to the Standing Committee, developments of special interest to the consumer, and make the necessary expertise available to the Standing Committee in order to assert consumer interests;
- To develop consumer priorities in European standardisation;
- To formulate a consumer safety policy, taking particular account of technical standards;
- To list special research studies needed for consumer desires and needs to be recognised in standardisation;
- To make contacts with consumer representations on national and international standards organisations.

To be able to cope with the multiplicity of tasks, the Advisory Committee would in Bosma's view[162] have to have special technical committees assigned to it: (1) food and nutrition; (2) household chemicals; (3) transport, in particular cars; (4) house and building materials including furniture; (5) electrical and electronic products. These technical committees are to provide the Advisory Committee with the necessary technical information, draw up background reports and develop specific proposals, in other words, do the complicated technical work.

Correspondingly, these technical committees should also include experts with relevant experience in those areas. Bosma[163] is thinking above all, apart from test institutions, of independent research institutes dealing with specific aspects of a product (ergonomics, safety). She then raises the question whether it would not be also advisable to include specialists from industry in the work of the technical committees. Though she does not ultimately answer the question, she is clearly thinking of an "ideology-free discussion" since the technical committees are only to have the task of supporting the Advisory Committee on standardisation in its work. It would be incumbent on the Advisory Committee for

standardisation to delegate observers to the technical committees of CEN/CENELEC and to maintain contacts with the Standing Committee.
Bosma wishes to locate the Secretariat of the Consumer Advisory Committee on standardisation in DG XI. At the same time, she advocates formalisation of the consultative relationships between the Standing Committee and the Consumer Advisory Committee on Technical Standardisation.

6.4.2 The thinking in DG XI[164]

DG XI has put forward a proposal of its own for the organisation of consumer participation in standardisation. It is similarly contemplating setting up a special consumer advisory committee for technical standardisation. This is, however, to consist of CCC members, and no subdivision into special technical committees is contemplated. As before, actual administrative work is to be done by a secretariat to be located outside DG XI. "Political control" of the Consumer Advisory Committee for technical standardisation is to be handled by the CCC working group on standards. DG XI is thinking of a division of tasks as already similarly proposed by the CCC[165]. This would give the CCC working group on standards the task of formulating policy, while the Consumer Advisory Committee for technical standardisation would specify these outlines with technical content, with assistance from the Secretariat. There are no plans for formalising the relationships between the Standing Committee and the CCC.

6.4.3 Assessment

It is striking that neither proposal takes account of the outstanding importance of safety standards at the European level. Consumer safety problems appear as only *one* conceivable case of technical standardisation, although experience over the last two years shows that consumer observers on the technical committees overwhelmingly concentrate on safety questions. Bosma's model allows the importance of product safety to be accommodated, since it would be possible to set up a technical subcommittee on product safety that might also possibly involve manufacturers. This way out would not be possible in the DG XI proposal. Structural problems of consumer involvement arise in each proposal. Firstly, it is unclear why Bosma is so insistent on having the secretariat located in DG XI. This skepticism is all the more important since DG XI evidently has no interest in accommodating the secretariat. Bosma's concept completely lacks any discussion of the CCC as such and its working group on standards. Yet there is an important field here for conflict in the future shaping of consumer participation. DG XI seeks to take account of the institutional framework for consumer participation by seeking to bring the Consumer Advisory Committee on technical standardisation under the political control of the CAC working group on standards. But this division of tasks means that the Commission is opening up the possibility of potential conflict between the working group on standards and the new committee. Moreover, the DG XI proposal would ultimately lead to duplication of the work of the CCC, since the Consumer

Advisory Committee for technical standardisation would have the same expert representatives of the four consumer organisations sitting on it to deal with standardisation questions. In the long term, transferral of standardisation issues from the CCC's range of tasks might lead to its weakening. Accordingly, Bosma's proposal seems more convincing: the Consumer Advisory Committee on technical standardisation should, alongside the four consumer organisations, also have a place for institutions with years of experience in the area of technical standardisation. A final striking point is that neither Bosma nor DG XI in their proposals, provide for procedural rules to be laid down in writing concerning either the Standing Committee's relationship to the Consumer Advisory Committee for technical standardisation or the Consumer Advisory Committee on technical standardisation's relationship to CEN/CENELEC. But this would be one of the major pillars of a formal structure ensuring consumer participation in European standardisation.

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1. Chapter IV, 3.2 supra.
2. Chapter IV, 3.3.2 supra.
3. Chapter IV, 3.3 and 3.6 supra.
4. Chapter IV, 4.1 supra.
5. That the Commission is itself in principle aware of these implications is documented by the Commission communication of 23 July 1985, "A new impetus for consumer policy", COM (85) 314 final, point 19 et seq., Commissioner Varfis' answer to EP question N° 2778/85, OJ C 277 of 3 November 1986 and the Commission communication to the Council on "Inclusion of consumer policy in the other common policies" of 24 October 1986, COM (86) 540 final, 5 et seq.; and the ensuing Council resolution of 15 December 1986, OJ C 3, 7 January 1987, 1.
6. OJ L 77 of 26 March 1973, 29 (Art. 2); cf. Chapter IV, 2 supra.
7. OJ L 147 of 9 June 1975, 1.
8. Chapter III, 3.1 supra.
9. OJ L 262, 27 September 1976, 169.
10. OJ L 70, 13 March 1984, 6; cf. Chapter, 3.4 supra.
11. Commission communication to the Council (note 5 supra), COM (85) 314 final, point 21.
12. OJ L 210, 7 August 1985, 29 (Art. 6); cf. for more details Chapter III, 3.5 supra.
13. OJ C 136, 4 June 1985, 1, Section B II.
14. OJ L 220, 8 August 1987, (Art. 2 (1)), 148.
15. Cf. Art. 2 (1) and Annex II to the proposal for a directive on safety of toys, OJ C 282, 8 November 1986, 4.
16. Chapter VI, 3.3 infra.
17. Op. cit. (note 13), 8-9.
18. In this connection see the Commission communication to the Council and the European Parliament "Completing the internal market: Community foodstuffs law", COM (85) 603 final of 8 November 1985, 2.

19. Completing the internal market, Luxembourg 1985, point 60 et seq.
20. OJ L 109, 26 April 1986, 23; cf. Chapter IV, 3.3 supra.
21. Cf. Chapter I, 1, and Chapter II, 4.2.
22. Cf. Chapter III, 1.1 supra.
23. OJ L 109, 26 April 1983, 8 (Art. 5).
24. Cf. Chapter IV, 3.6 supra.
25. Cf. apart from the Advisory Committee pursuant to Art. 7 of the decision on a demonstration project (note 20) also Art. 7 of the decision of 2 March 1984 on the exchange of information on hazards arising with the use products (note 10).
26. Cf. Chapter IV, 5 supra.
27. This has been shown frequently and in detail: cf. only Eiden, Rechtsangleichung 1984, 76 et seq.
28. Note 13 supra; cf. also Chapter III, 1.1 supra.
29. Cf. Chapter IV, 2.
30. Cf. Section B II 1 of the Model Directive (note 13).
31. Cf. e.g. ECJ Case 9/70, Judgment of 6 October 1970, ECR [1970], 825/Traunstein Finance Office; Case 33/70, Judgment of 17 December 1970, ECR [1970] 1213/Italian Ministry of Finance; Case 41/74, Judgment of 4 December 1974, ECR [1974] 1337/Home Office; Case 102/79, Judgment of 6 May 1980, ECR [1980] 1473/Commission v. Belgium. A full description of the case law up to 1982 can be found in Oldenbourg, 1984, 50 et seq.; on the interpretation of the doctrine of direct effect taken as a basis here, see also Karoff, 1984, 659 et seq.
32. According to the formula in Case 148/78, Judgment of 4 May 1979, ECR [1979] 162 at 1642 Ratti; on the more generous tendencies in earlier judgments see Karoff, 1984, 663.
33. Cf. Chapter IV, 3.2.
34. Section B III 1 of the Model Directive (note 13).
35. Case 148/78, op. cit. (note 31), 1644.
36. Case 815/79, Judgment of 2 December 1980, 3583.
37. On the procedure see Chapter IV, 3.4 supra, and on the similar situation with the Low Voltage Directive Chapter IV, 2.3.3 supra. On recourse to Art. 36 EEC see also Chapter IV, 1.2 supra.
38. Op. cit. (note 32).
39. Case 88/79, Judgment of 12 June 1980, ECR [1980] 1827.
40. Cf. Waelbroeck, 1982, 548 et seq.; Weiler, 1982, 79 et seq.; Rehbinder/Stewart, 1985, 40 et seq. On the corresponding interpretation of Art. 36 EEC by the ECJ cf. Chapter IV, 1.2 supra.
41. Cf. Chapter III, 2.5 supra and Krämer, 1985, para. 246, who describes and criticises the contrary practice in the case of the Directive on cosmetics (note 9).
42. Cf. for more Krämer, 1985, para. 236 and Chapter IV, 5.2.
43. On the more restrictive shape given to the Commission's powers in the safeguard clause procedure in the Low Voltage Directive see Chapter IV, 2.3.3 supra.
44. On the objections see Chapter IV, 5.1.
45. See 4 infra.

46. Cf. Chapter VI, 3.1.
47. Bull. EEC, Suppl. 2/86; cf. Chapter IV, 4 supra.
48. However, see Chapter IV, 4.1 supra.
49. Cf. Chapter II, 4.4.
50. Cf. Chapter IV, 3.5 supra and Section 6 infra.
51. For more details see Chapter IV, 3.3.2 supra. Furthermore, on the lacunae in protection that may result from diverging certification practices, see the opinion of the Consumer Advisory Committee of 22 March 1985, STO/7/85, 5.
52. For details see Chapter IV, 3.4 supra.
53. Section B VII 2 of the Model Directive (note 13).
54. In the Directive on simple pressure vessels (note 14, Art. 7) not even this was done; cf. Chapter IV, 3.4.
55. Specifically on technical safety law see Seidel, 1971, 753 et seq. and in general Rengeling, 1977, 19 et seq. 25 et seq.
56. Cf. Chapter IV, 3.3 supra.
57. OJ C 272, 28 October 1986, 10.
58. Op. cit. (note 14), Art. 4.
59. Cf. note 53.
60. OJ L 344, 6 December 1986, 24.
61. On the question of the differentiations in Art. 9 see Chapter IV, 5.3.
62. Note 15 supra.
63. Chapter VI, 3.4.
64. OJ L 210, 7 August 1985, 29.
65. Cf. Chapter III, 3.5.
66. Weinstein/Twerski/Piehler/Donaher, 1978, esp. 136 et seq.
67. Cf. Chapter II, 4.2 in note 57.
68. Eads/Reuter, 1983, VIII et seq., 21 et seq., 24 et seq., 69 et seq., 92 et seq., cf. Chapter I, 3.
69. Cf. Johnson, 1982.
70. For a systematic evaluation of the American case law in this connection see Hoffman/Hoffman, 1980-81, 283 et seq.; cf. also Chapter II, 4.4.3.
71. The German debate, still the relatively the most fruitful, is confined to legal and normative considerations (cf. Chapter II, 3.5; about France cf. Chapter II, 1.6, and England Chapter II, 2.7).
72. Cf. Chapter III, 3.5.
73. Micklitz, Produktsicherheit 1986, 109 et seq. The question was discussed on 4/5 June 1987 at a meeting of the Community's "European Forum on Consumer and European Standardisation", cf. Bosserhoff, 1987, Europäisches Forum.
74. Survey in Lukes, 1979, 48 et seq. (France), 123 et seq. (Great Britain); see also Reich/Micklitz, 1981, 99 et seq.; Bosma, 1984, 34 et seq.
75. In France, consumers were included following the first major restructuring of standardisation during the Second World War, see Chapter II, 1 supra; specifically on consumer involvement, Art. 5 of the decree of 24 May 1941, printed in Germon/Marano, 1982, 111. In Britain the Advisory Committee was set up in 1946;

see Bosma, 1984, 41. On consumer involvement in DIN see Brinkmann, 1976, and Chapter II, 3.4.5 supra.

76. On the work of the Consumer Council see Bosserhoff, 1980, 670 et seq.; idem, 1984, 1 et seq.; cf. also Chapter II, 3.4.5 supra.
77. See Schatz, 1984, 178 et seq.
78. Printed in DIN-Mitt. 64 (1985), 78 et seq.
79. Micklitz, Perspectives, 1984, published in a revised version in CMLR 23 (1986), 617 (621 et seq.).
80. Printed in DIN-Mitt. 63 (1984), 681.
81. See Chapter II, 2.6 supra.
82. On the prospects for this sort of restructuring see Reihlen, 1984, 7.
83. Printed in DIN-Normenheft 10, Grundlagen der Normungsarbeit des DIN, 1982, 49 et seq.; for more details in the agreement between DIN and the Federal Government of Germany see Chapter II, 3.4.2 supra.
84. Grundlagen der Normungsarbeit des DIN (op. cit. note 80), 54.
85. On the function of reference to standards in the GSG see Chapter II, 3 supra and on safety objectives under the new approach Chapter IV, 3.2 supra.
86. In the Federal Republic of Germany procedural rights were laid down following the standards agreement when setting up the DIN Consumer Council, which leads Bopp-Schmehl/ Heibült/Kypke, 1983, 172 et seq. to make the following statement: "The demonstration that this function has been carried out did not follow substantive criteria of assessment of standards, but compliance with particular procedural rules . . . " Conversely it should be borne in mind that the standards agreement could not have been concluded before the parties had agreed on consumer involvement.
87. COM(87)617 final, 11 December 1987.
88. OJ No. C 293, 1, 17 November 1988.
89. Convincingly, Kypke, 1983, 213.
90. See Brüggemeier/Falke/Holch-Treu/Joerges/Micklitz, 1984, 8 et seq.
91. See Bosma, 1984, 16 et seq.
92. Chapter II, 4.1.2.2 supra.
93. As well as Bosma, 1984, 16 et seq., see Bosma, 1985, 9 et seq.
94. Bosma, 1984, 17, 19, 22.
95. Op. cit., 18.
96. Op. cit., 20-21; similar considerations by Venables, 1982.
97. Bosma, 1984, 23.
98. Op. cit., 25.
99. Bosma, 1985, 9.
100. Bosma, 1984, 12.
101. On this see 6.3.3 infra.
102. At the same time the non-inclusion of southern European countries in the decision-making process was used as an argument against the admission of consumer observers; see 6.3.1 infra.
103. Bosma, 1984, 34 et seq. carried out a survey of those involved in stardardisation and continually came to the same findings.

104. On such considerations see Micklitz, 1985, 177 et seq.
105. Printed in Bosserhoff, 1984, 7 et seq.
106. See Chapter VI, 3.3 infra.
107. See 6.2 infra.
108. OJ L 109, 26 April 1983, 8 et seq.
109. On the chances for the information project see Micklitz, Perspectives, 1984, 33 et seq.
110. OJ L 70, 13 March 1984, 16 et seq.
111. OJ L 109, 26 April 1986, 23 et seq.
112. Note 108 supra, Art. 8 (4).
113. Note 110 supra, Art. 6.
114. Note 111 supra, Art. 8.
115. The following statements are based on two reports drawn up by the BEUC for DG XI (now the Consumer Policy Service), to give an account of the utilisation of contributions: report on the involvement of European consumers in European standardisation, BEUC/2111/84, 26 October 84 (cited as BEUC, 1984) and report on standardisation, STD/20/85, 31 December 1985 (cited as BEUC, 1985, Report).
116. Printed in BEUC, 1984, Annex I.
117. See XI/371/86, 22 May 1986, ccc/17/86 "Beteiligung der Verbraucher an den Normungsarbeiten".
118. BEUC, 1984, 9 and Annex II (minutes of the meeting on problems of consumer involvement in European standardisation work of the Consumer Advisory Council, BEUC 162/83, 15 November 1983, 6(g)).
119. As well as the BEUC report (note 115 supra) see Consumer Participation in Standards Work, STD/17/86, 15 May 1986.
120. BEUC, 1984, Annex II (note 118 supra), 6 (f).
121. Op. cit., 3.
122. BEUC, 1984, 4 et seq.; BEUC, 1985, Report, 14 et seq.
123. 6.1.3 supra.
124. BEUC, 1984, Annex II (note 118 supra), 2.
125. For details on the substantive issue see 5.3.3 (2).
126. BEUC, 1984, Annex VIII: Protocol of the meeting of CENELEC, Oslo, 18-22 June 1984.
127. BEUC, 1985, Report, Annex 1 d: Co-ordination Meeting on Electrical Household Appliances TC 61, Brussels, 12 September 1985.
128. BEUC, 1985, Report, Annex II b: Minutes of the Meeting of CENELEC TC 61, Athens, 1-3 October 1985.
129. CCC's observers report on meeting of CEN TC 62 - Gas Convector Heaters, London 12-13 March 1986.
130. BEUC, 1985, Report, 19; what is meant is TC 48 Safety of Gas Water Heaters, on which see Note for file, op. cit., Annex III a.
131. BEUC, 1985, Report, 11; op. cit., Annex II f: Report by Mr. Bosserhoff on CEN/TC Gas Water Heaters, which seeks to specify the requirements on the wording of terms of reference; Bosserhoff put his criticism into practice and drew up a

proposal of his own for giving a Community remit to CEN/TC 48; op. cit., Annex III b: Resolutions taken at the 1st Meeting of CEN/TC 52/WG in Berlin, 1985-09-25/27, which lists the shortcomings of the terms of reference in specific form.

132. Cf. e.g. the minutes of the first co-ordination meeting, BEUC, 1984, Annex II (note 118 supra) and of the meeting of 10 June 1986: Minutes of the CCC Co-ordination Meeting June 10, 1986. In both meetings a number of problem areas were touched on; the later minutes demonstrate, that consumer viewpoints were voiced with growing self-confidence.

133. This had at the outset proved a great obstacle, BEUC, 1984, Annex II (note 114 supra) 2.

134. BEUC, 1985, Report, Annex VI: STD/12/85, Maximum Surface Temperatures of Heating Appliances by D. Grose, Consumer Association, June 1985 and BEUC, 1985, Report, Annex VII: STD/33/85 Analysis of a Survey concerning Electrical Functional Toys by A. Lange - Stümpfig, DIN-Verbraucherrat, 1985.

135. AGV, Der Fahrradmarkt in der Europäischen Gemeinschaft, 1986.

136. So far, reports are available on consumer participation in Italy and Greece.

137. The first edition is printed in BEUC, 1984 as Annex XI.

138. Due to scarce resources, BEUC stayed away from the further publication of the journal.

139. See the description of the system by Domzalski, 1984.

140. Interestingly enough, this has on several occasions been called for by the Germans, BEUC, 1984, Annex II (note 114 supra), 3 (a) on the part of the AGV.

141. This attempt is made indirectly by Bosserhoff, who presented a strategy paper to the working group on standards of the Consumer Advisory Council: "Consumer-orientated proposal for a priority programme for the drawing-up of European Standards within the competence of CEN/CENELEC, printed in BEUC, 1985, Annex VIII a, STD/22/85. Bosserhoff presented his ideas in a revised version at the European Forum on consumer standardisation (op. cit., note 70), cf. Bosserhoff, 1987, Prioritätenprogramm.

142. BEUC, 1984, Annex VI: Reports of meetings of CEN TC 100, Doc. IV; Report Brussels, 25-27 June 1984, 1.2.

143. BEUC, 1984, Annex VI (note 118 supra), Doc. I: Report Paris, 26-28 January 1983 (without naming the countries).

144. BEUC, 1984, Annex VI (note 118 supra), Doc. III: Report of the fifth meeting of CEN TC 100 (without figures).

145. BEUC, 1984, Annex VI (note 118 supra), Doc. III, 2.3.

146. BEUC, 1984, Annex VI (note 118 supra), Doc. III, 3.3.

147. BEUC, 1984, 11 et seq. and Op. cit., Annex IV: CEN TC 100 - Tactile danger warning systems STD/17/85, 1 August 1985.

148. BEUC, 1984, Annex IX: Minutes of the Co-ordination Meeting of Consumer Experts on CENELEC TC 61 - 8 May 1984, 122/84, 3.

149. Scope of HD 254:S:3, printed in: Draft letter from the CCC observer to CENELEC TC 61 to the Chairman of CENELEC TC 61, in: BEUC, 1985, Annex V.

150. Entwurf eines Briefes, BEUC, 1984, Annex X 2.

151. BEUC, 1985, Report, Annex II a: Report of the Meeting of CENELEC 61, Copenhagen, 7-9 May 1985. The representative of the DIN Consumer Council adopted the German industrial standpoint, BEUC, 1984, Annex IX (74), 3.
152. BEUC, 1984, Annex X, 5-7, from which the examples are taken.
153. BEUC, 1985, Report, Annex V (note 144 supra).
154. BSI Technical Committee LEL/161 Safety of electrical appliances, STD 18/86.
155. See its letter of 21 July 1987 to the Chairman of the working group IEC TC 61.
156. However, since June 1986 an observer has been sitting on CEN TC 144, Minutes of the CCC Co-ordination Meeting, 19 June 1986, STD/28/86, 3 July 1986.
157. BEUC, 1985, Report, Annex I d: Co-ordination Meeting 12 September 1985 (note 127 supra), 2 and Annex II b: Minutes of the meeting of CENELEC, Athens 1-3 October 1985, STD/40/85, 23 October 1985, 6.
158. See the background paper by D. Grose, BEUC, 1985, Report, Annex VI (note 134 supra) and the letter from the German Consumers Association to the co-ordination meeting in London, 16/17 1985, 10 January 1985, BEUC, 1985, Report, Annex I d: Co-ordination Meeting 12 September 1985 (note 124 supra), 2 and Annex II b: Minutes of the meeting of CENELEC, Athens 1-3 October 1985, STD/40/85, 23 October 1985, 6.
159. See Bosma, 1984, 60 et seq.; and esp. Bosma, 1985, 22 et seq., especially the organigram, 29.
160. Bosma, 1985, 23.
161. Op. cit., 23 et seq.
162. Op. cit., 25 et seq.
163. Op. cit., 27.
164. Annex to the Minutes of the Meeting of the CCC Working Group on Standardisation, June 30, STD/27/86, 3 July 1986.
165. See note 117 supra.

CHAPTER VI

Summary and conclusions

Central to all the analyses in the foregoing chapters was the question of how the connections between the Community's efforts to establish a common market, with their inevitable influence on product safety law, would eventually affect integration. So far, the answers to this question have been anything but encouraging. Although "traditional" harmonisation policy has succeeded in individual sectors, the legislative tasks involved in continuing with such a policy exceed the legislative capacity of the Community; this is due to the broad scale of products concerned and the need to continuously update European directives[1]. This realisation explains the move towards a legal approximation policy that relieves the burden on Community legislators and delegates technical questions relating to safety law to the standards organisations. However, analysis of the Council resolution on a "new approach to technical harmonisation and standards"[2] has shown that a retreat by Community legislators to fixing just "essential safety requirements" involves considerable difficulties. It is above all safety policy considerations that have led to ambivalent and unclear points in the programme of the Model Directive[3], putting at risk the realisation of its internal market objectives[4]. Thus, the theme of the following arguments should already be apparent: if the Community is forced to deal with the effects of its new harmonisation policy on product safety law in the Member States, it has to supplement the new approach. For the moment, however, this statement describes merely a need for action, without defining the objectives and instruments with which the Community can counter the danger of internal market policy being frustrated by product safety policy.

1. Product safety policy and product safety law in Member States

The need for coordination of internal market and product safety policy is ultimately the consequence of safety matters being taken up in the respective legislations of the Member States. The General Programme of 28 May 1969 for eliminating technical barriers to trade regarding the movement of goods[5] was an early response to the "discovery" that the achievement of a common market is hindered not only by tariffs and quantitative restrictions but also by differences in laws and administrative provisions in the Member States - not covered by the prohibition of Article 30 of the EEC Treaty. The differential application and limitation of the programme as a result of the provisions for optional harmonisation and the introduction of safeguard clauses were also concessions to the safety policy interests of Member States[6]. A further aim of these instruments, together with the introduction of the regulative and administrative committee procedure under Article 155, fourth indent[7], was to relieve the burden on the Community's legislative process. The new harmonisation policy, which confines itself to setting essential safety requirements, represents a continuation of these efforts. The reasoning behind the Model Directive does not, however, call into question in principle the legitimacy of government provisions for product safety[8], but rather

presupposes that the new harmonisation policy should be compatible with the safety interests of Member States.

1.1 Convergences

The comparative survey of the law in the economically most important Member States of the Community and the USA reveals an astonishing convergence of regulatory approaches, which will contribute towards acceptance of the new harmonisation policy. An essentially positive attitude was to be expected from the Federal Republic of Germany, because co-operation between government bodies and self-governing industrial organisations in the field of technical safety law has been part of German legal tradition since the 19th century[9], and because the Federal Republic also played a major part in implementing the "model" for the Model Directive, i.e. the Low-Voltage Directive of 1973[10]. However, for the United Kingdom and France, the adoption of a regulatory system for product safety law based on the method of reference to standards is anything but obvious. With the CPA 1961, safety legislation in the United Kingdom opted for a government-administered approach to regulation. This approach was already modified by the 1978 Consumer Safety Act[11]. But it was not until 1984 that the White Paper "The safety of goods"[12] made the first move toward a rapprochement with German law, with its proposal for a general product safety obligation to be defined with reference to "sound modern standards of safety". This convergence is even more obvious in the efforts to strengthen the British standards organisations and ensure their formal recognition by government[13]. In France the development is less clear, if only because standardisation is closely linked, legally speaking as well, with the government administration, and because product standardisation and the protection of safety interests are regarded as two separate government functions[14]. Furthermore, the Consumer Safety Law of 21 July 1983[15]and its new instruments are as yet virtually untested in practice[16]. The argument that developments in France are moving towards the legislative approach of the Model Directive thus rests on the assumption that in France, too, the preventive protection of safety interests is increasingly being approached through co-operation between government administration and AFNOR, whereby the administrative controls provided for in the 1983 Consumer Safety Law are not being fully exploited to regulate the development of safety law. The Commission can be confident that this convergence of developments in the economically most important Member States will influence the Community as a whole, and it can point to the fact that important non-member countries are also increasingly favouring the use of voluntary standards in their product safety policies[17].

1.2 Divergences

However, the trend towards encouraging voluntary standards does not in itself guarantee the smooth harmonisation of their function as regards safety policy. The stable co-operation between government and standards organisations in Germany, which has led to the wide

acceptance of the reference method as a means of safety regulation, is the outcome of a long historical process. This process cannot simply be copied, and the role of government administration in co-operation with standards organisations will continue to vary from country to country[18]. In particular, the concrete results of standardisation will in all probability differ. Before the House of Lords Select Committee on European Community Consumer Policy, the BSI representative emphasised that, particularly where safety standards were concerned, differing national conditions played a considerable role and, moreover, there were substantial differences in the standard of safety within the Community[19].
In addition, there are significant differences in national standardisation procedures, particularly with regard to the participation of consumer organisations[20], the coverage of standards work and the actual use of standards in industrial production. Finally, it remains to be seen whether the national standards organisations can develop a common "safety philosophy", and what effect differences in their general attitude to safety policy will have, for example in their assessment of the functions of accident information systems[21]. It goes without saying that all these difficulties in ensuring an equal standard of safety in the Community are compounded when the countries "below the olive line"[22] and their industrial and administrative infrastructures are taken into account[23]. Accordingly, the importance of the parallels between the traditions of German technical safety law and the strengthening of the standards organisations in the United Kingdom and France should not be exaggerated. The convergences observed are - like the Community's new harmonisation policy - essentially motivated by industrial policy. The linking of standardisation and safety policy could once again be called into question in changed political circumstances.
It would be hazardous to assume that the German approach to product safety will automatically provide a model for others, if only because product safety issues repeatedly attract public attention in all Member States in cycles that are difficult to predict, and then prompt widely differing reactions[24]. Individual Member States are therefore always likely to resort to special measures to counter certain product risks, to question the appropriateness of the reference method as far as safety law is concerned (or at least to wish to strengthen their control over private standards organisations) and to augment their range of instruments for product safety policy. Finally, the different situations of "manufacturing" and "importing" countries should also be recalled[25]. Since "importing countries" have no influence on the fixing of national standards and can be bypassed at the European level as regards both standardisation and the recognition procedure[26], and as they need to consider only price effects and safety interests when deciding on the level of product safety, they would not necessarily be committed to either the forms or the result of the new regulatory method[27].
Consequently, the Community must assume that product safety policy will remain a critical issue within Member States, that the search for appropriate regulatory instruments will continue and that not the issue of legal protection as such, but at most the forms this will take, will be subject to political negotiation. If this diagnosis is correct, there is no real alternative for the Community, either, but to carry on with *both* elements of its integration policy - internal market policy *and* product safety policy.

2. Integration policy options

The finding that the integrative force of the new regulatory system in the Model Directive will hardly suffice to overcome impediments to the free movement of goods, due to differing product safety requirements, simply means that the Community has to exert even stronger influence on legal controversies as to the content and form of product safety law, than it has already done with its new approach to technical harmonisation and standards.
However, this still leaves open the form to be taken by such influence; the Community can either seek to reduce national powers of intervention, or extend its attempts to move towards a "positive" integration of product safety policy.

2.1 Internal market policy as a deregulation strategy

The results of the Community's endeavours to implement its consumer policy programmes have been modest[28]. This suggests that a Community strategy for the "deregulation" of product safety law in the Member States will have more chance of success than a fresh attempt at "positive" integration. The new harmonisation policy has hence been interpreted as heralding such a deregulation strategy.
Probably the most prominent advocate of such an interpretation, or at any rate the most forceful, is the Wissenschaftlicher Beirat (Scientific Advisory Council) of the German Federal Ministry of Economic Affairs[29]. It bases its interpretation of the new approach on the statement contained in the Cassis de Dijon judgment[30], and taken up by the Commission in its communication of 3 October 1980[31], to the effect that any product lawfully produced and marketed in one Member State must be admitted to the market of any other Member State[32]. In the view of the Beirat, the mutual recognition of safety standards is the consequence of this principle, so the harmonisation of safety requirements is not necessary for the establishment of the internal market except in exceptional cases[33]. However, the Beirat bases its thesis not only on the text of the Commission's White Paper but also on independent arguments relating to the competition policy and regulative functions of the principle of the free movement of goods: in principle (it argues) it is up to the European consumer (not the individual Member State) to decide the standard of quality and safety of products. Therefore it concludes that where governments cannot agree on the harmonisation of product standards, competition between products manufactured according to different standards is reasonable and, in the long term, the price-performance ratio (or range of products) that best meets consumer demands will prevail[34].
However, this is not a valid interpretation of the Commission's White Paper or the case law of the European Court of Justice. The statement quoted by the Beirat from the White Paper is based, as is apparent from the
context, on the - albeit problematical[35] - assumption that provisions in Member States governing safety are generally equivalent; neither in its Cassis decision nor in any subsequent judgments has the European Court suspended safety requirements in the Member States pursuant to Article 30 of the EEC Treaty regarding imports[36]; an obligation as to "mutual recognition" of safety measures taken by the Member States presupposes the harmonisation of the preconditions for recognition[37].

The position of the Beirat is, however, questionable not just in exegetic and legal terms but also - and especially - in terms of legal policy and integration policy. The first point at issue is the initial normative premise that the decision as to the standard of protection provided by product regulations is in principle to be left to the end-user, whose protection is to be ensured primarily by means of information, obligatory labelling and "strict producer liability"[38]. The Beirat does not attempt to justify its regulatory principles vis-à-vis alternative views of product safety policy. If it had done so, it would have become clear first of all that influencing of the safety practice of consumers "in line with market principles" - the only approach envisaged by the Beirat - and obligatory or semi-governmental product regulation, which are the main targets of the removal of technical barriers to trade, have widely differing objectives and cannot simply be subsumed together as functionally equivalent measures[39]. The distinction between "market", "interventionist" and "self-regulating" regulatory instruments also shows that the standpoint of the Beirat on integration policy has no normative justification and is scarcely feasible in positive terms. 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 harmonisation of product regulations cannot be achieved, in fact means that enterprises in the "safety countries" will be forced to accept cost disadvantages in competition with enterprises in "risk countries"[40]. The disadvantaged enterprises may respond to these distortions of competition by exerting political pressure to ease domestic safety regulations or shifting their production to "risk countries" - whatever happens, the "safety countries" would be under pressure to adopt a deregulation policy. Such consequences pose a threat to regulatory measures that are justified in themselves, and are unacceptable, amongst other things because they remove the decision for or against safety regulations from the political decision-making process and place it at the mercy of the strategic calculations of individual countries and enterprises.

The views of the Beirat on integration policy moreover ignore an option that suggests itself, at any rate as a "normative" approach, particularly where there are differences in product regulation, an opinion that is furthermore constantly emphasised in the economic theory of federalism[41]: the performance or coordination of regulatory functions at European level may secure administrative cost benefits and also be "beneficial" where the positive "external effects" of a government measure cannot be confined to a single area of jurisdiction. However, an integration policy strategy that uses the principle of the free movement of goods as an instrument to deregulate product safety law in the Member States would be not only dubious as a "normative" approach but also scarcely feasible in positive terms. Any lowering of the standard of product safety does not *a priori* meet a genuine interest of "the" European economy.

On the contrary, enterprises in Member States with high standards may even secure competitive advantages from a general raising of the standard of safety. Furthermore, in view of the political sensitivity of safety issues, the Member States cannot call into question their own product regulations just like that. The history of the Single European Act[42] and also the discussion to date on the new approach point in the same direction. It was not the "risk countries" which insisted on the proviso of Article 100 (a) (4)[43], nor does agreement to the

"reference method" of the new approach indicate that the "safety countries" are prepared to accept a reduction in the level of safety provided by their standards[44].

2.2 Positive integration as an alternative

The "traditional" alternative to the deregulation of safety law in Member States has been the sectorial (vertical) harmonisation of their product regulations. This policy has failed because it both overtaxes the legislative capacity of the Community[45] and blocks the emergence of a coherent European safety policy[46]. However, the acceptance of these objections to the traditional policy of legal approximation itself raises the question of whether the New Approach in its present form does in fact inaugurate a new epoch in market integration. This skepticism ultimately derives from the fact that the new harmonisation policy does not eliminate all the causes of the difficulties in reaching agreement at a European level, but simply adopts a new procedure for tackling them: for example, the economic conflicts of interest between Member States remain in spite of the delegation of technical harmonisation to the standards organisations.

Although the involvement of technical experts and the majority-voting rules of the standards organisations may make it easier to reach decisions, the Member States can assert their interest when deciding on the implementation of individual directives, defining safety objectives and, in particular, when making subsequent use of the safeguard procedures - experience with the Low-Voltage Directive also shows that provisions for follow-up control are in fact exploited as preventive measures[47].

In addition, in view of the vagueness and non-binding nature of the provisions of the Model Directive concerning safety law[48], there are likely to be great problems identifying and preventing self-interested policies motivated by protectionism in negotiations on the implementation of new directives. In addition to economic conflicts of interest, political conflicts in the area of product safety policy continue to be disruptive factors. Because of its one-sided bias towards the free movement of goods and its neglect of the safety policy dimension of the integration process, the new standardisation policy will not be able to prevent Member States from continuing to develop instruments for product safety law independently and applying them in different ways[49].

3. Towards augmenting the new approach in terms of safety law

Internal market policy and consumer policy are handled by different Directorates-General; the original programmes in both policy areas have developed independently in terms of both content and timing.

This applies to the General Programme of 1969 for eliminating technical barriers to trade and the new approach of 1985, and likewise to the consumer policy programmes of 1975 and 1981. The safety issue links both areas, but in terms of internal market policy it has been seen primarily as a "barrier to trade", while in the context of consumer policy it has been proclaimed as a goal in itself, as the "right to the protection of health and safety". The

Commission document "A new impetus for consumer protection policy"[50] is the clearest expression so far of the endeavour to overcome the separation of internal market policy and consumer policy. The perspectives set out in this document accord with the results of our analyses: because the new harmonisation policy would not be viable as a mere deregulation strategy, because a return to "traditional" legal approximation policy is ruled out, the Community does indeed require a "comprehensive product safety policy"[51]. Coordination of internal market and consumer policies does not necessarily mean that their specific priorities will be ignored, yet it can improve the chances of success for both areas. With internal market policy, the aim is to counter any threat posed to the free movement of goods by divergent product safety policies in the Member States; consumer policy can take up this interest and hence at the same time meet the objections to the legitimacy of the Europeanisation of product safety law.

3.1 Co-ordination mechanisms

The coordination of internal market and product safety policies requires both internal synchronisation within the Commission and ongoing co-operation with the Member States. The analysis of the effects of the new approach on product safety law has already produced concrete proposals for internal coordination at the Community level. The main tasks are the development of safety objectives and the preparation of corresponding standards. With its "demonstration project" for accident information system[52], the Community has an instrument at its disposal for recording and analysing product hazards. All countries that have set up similar systems make use of the results for their product safety policies and for standardisation[53], and the Community's demonstration project also has these objectives[54]. Although it can hardly be expected that new harmonisation efforts will be oriented solely towards safety policy priorities dictated by the accident information system, the findings of the latter should be taken into account in decisions on the recognition of standards and attestation of conformity, in safeguard procedures and in the preparation of European standards. Conversely, the accident information system can help to settle doubts and controversies concerning the administration of the new standardisation policy, by concentrating resources for in-depth studies of accident risks on those areas in which Community decisions are pending and standardisation work has started.
Also worth recalling is the possibility of underpinning harmonisation policy by means of a systematic evaluation of product liability procedures in Member States[55].

With regard to the Member States, the task is to monitor implementation of the reference method, while taking safety policy requirements into account and endeavouring to ensure that safety law develops along lines compatible with the freedom of movement of goods. The Information Directive of 28 March 1983[56] already ensures that the Commission is provided with extensive information on relevant plans in Member States. However, the chances of exerting influence via the "standstill" arrangements in Articles 7 and 9 are limited and do not cover urgent measures motivated by safety policy (Article 9 (3))[57]. As the new harmonisation policy is implemented, the information available to the Community will improve, given the

recognition and safeguard procedures and as a result of co-operation with certification bodies in Member States. On the other hand, the concomitant decision-making tasks will become more complicated. These tasks can be approached only through a long-term process of exerting influence to coordinate national developments[58].
The solution that suggests itself is to establish a *Standing Committee on product safety law* for these tasks, to ensure the ongoing involvement of national bodies responsible for product safety in the Community policy-making process, covering the entire activities of the Community in the field of product safety policy - following the example of the Standing Committee set up under the 1983 Information Directive. This Committee could also contribute to the internal synchronisation referred to above between internal market policy and product safety policy, and coordinate the work of bodies charged by the Community with specific tasks in the field of product safety policy[59]. These tasks are described in more detail below. The decisive point is that Member States be represented on the proposed new committee by representatives and experts responsible nationally for the administration of product safety law. This would lead to the following general division of functions:
Table 1: Division of functions between the Standing Committee on technical standards and regulations and a Standing Committee on product safety.

Standing Committee on technical standards and regulations (Information Directive of 1983 and Model Directive of 1985)	Standing Committee on product safety (future Product Safety Directive)
- Co-operation with Member States	- Long-term coordination of product safety policy in Member States
- Participation in decision-making by the Commission	- Participation in decision-making
- Legal status: regulatory and/or administrative committee[60]	- Legal status: advisory committee[62]

Co-operation between the two Standing Committees should be provided for in a future Product Safety Directive, with the details to be regulated by their rules of procedure.

3.2 Standardisation procedures and consumer participation

A method of regulation such as reference to standards cannot be introduced in isolation. It requires adaptation on the part of the institutions concerned and furthermore a framework to meet objections to the legitimacy of this form of regulation. This has already become apparent from the need to ensure equivalence in the working of national certification bodies by means of Community rules[62]. However, this also applies to the legislative conditions required for the reference method itself. Significantly, the convergence in standardisation policies in the Federal Republic of Germany, the United Kingdom, France and at Community

level already extends to standardisation procedures. In these Member States, government influence on standardisation has been secured by agreements with the standards organisations, while consumer organisations have been given the opportunity to participate in the preparation of safety standards for consumer goods[63].
The Guidelines agreed on by the Commission and CEN/CENELEC on 13 November 1984 are analogous arrangements. The main principles of Community standardisation policy are thus: government influence on standardisation projects, consumer participation and legal control of standardisation results. All these principles still need to be worked out in detail and established as binding rules.

3.2.1 Rights of participation

Particularly urgent with regard to enhancing the status of European standardisation[64] is clarification of the role of consumer participation[65]. The Community's standardisation policy takes a long-term approach. Under Article 6 of the Information Directive of 28 March 1983[66], the Commission consults with the Standing Committee on technical standards and regulations on the working of the Directive and on standardisation priorities. In accordance with Article 6 (7) of the Directive, these discussions are confidential. However, this does not rule out consultation of experts, and the General Guidelines of 13 November 1984 for co-operation between the
Commission and CEN/CENELEC[67] indicate that participation by the European standardisation organisations is desirable at this early stage. Such early co-operation is useful in order to ensure mutual coordination of working programmes. The same applies to consumer participation, given that the establishment of priorities requires a trade-off between internal-market and safety policy interests. Consumer participation is particularly essential where the granting of standardisation mandates is concerned. In accordance with Annex II of the Council Decision of 7 May 1985[68], these mandates are intended to ensure the "quality of harmonised standards". They thus interpret and work out in detail the safety objectives of new directives and hence form an integral part of standardisation work, in which consumer participation is provided for by Section B (V) (4) of the Model Directive. However, the main work involved in preparing safety standards will be carried out by the technical committees of CEN/CENELEC. The most important part of consumer participation is hence sitting on these committees.
One of the functions of consumer involvement is to represent safety interests independently of the interests of enterprises, as the parties directly addressed by standards. The performance of this function requires not only participation in standardisation work but also access to information relevant to safety policy. The main source of information - the data from the demonstration project on accident information systems - is not public, pursuant to Article 7 (1) of the Council Decision of 22 April 1986[69]. The exchange of information on hazards arising from the use of consumer goods is also confined by the Council Decision of 2 March 1984 to communication between competent authorities[70]. These restrictions are not compatible with the requirements of meaningful consumer participation.

3.2.2 Organisational structures

Consumer participation at all stages of standardisation work stems from the realisation that informed involvement requires continuous collaboration throughout the standardisation process. Also essential for informed participation, however, is the establishment of suitable infrastructures. To this end, a forum should first of all be created for European consumers - a "Consumers' Consultative Committee on standardisation". The task of this committee would be to ensure that consumers have a say in negotiating standardisation mandates in the Standing Committee and to organise the input from the consumer side to CEN/CENELEC. This dual function requires political and technical expertise. In addition to the four member organisations of the Consumers' Consultative Committee (CCC), competent experts from national consumer testing institutes and scientific research establishments therefore need to be involved. The administration of the Consumers' Consultative Committee on standardisation should be in the hands of a secretariat, as heretofore. The exact division of tasks between the Committee and the secretariat would need to be set out in rules of procedure. It would be advisable to leave the secretariat in the hands of the BEUC (Bureau Européen des Unions des Consommateurs), as it already has a well-established network of information and contacts with national member organisations. The only legal basis required is for the existence of such a committee, its composition and the establishment of a secretariat.

This means that the scheme outlined above needs to be extended as follows:
Table 2: Involvement of private parties in the Standing Committees on technical standards and regulations and on product safety

Commission:	Standing Committee on technical standards	Standing Committee on product safety
Private parties:	CEN/CENELEC	Consumers' Consultative Committee

The General Guidelines of 13 November 1984 provide in principle for access by such a "Consumers' Consultative Committee on standardisation" to the work of CEN/CENELEC. The revision of CEN/CENELEC rules of procedure to this end could take national models as examples. The rules of procedure of the Standing Committee on technical standards and regulations should provide opportunities for participation.

3.3 General product safety obligation

The coordination of product safety law in Member States and the elimination of resistance motivated by safety policy considerations to implementation of the new harmonisation policy are aims that do not necessarily require the establishment of detailed safety requirements - they are more likely to succeed through a broader form of influence on product safety law in Community Member States. A step in this direction - and one that can be put into effect

immediately - has already been announced as part of the "New Impetus" for consumer policy: the introduction of a general product safety obligation[71]. A product safety obligation laid down in Community law would have limited but varied functions. Initially, it would contribute towards the cohesion of product safety and standardisation policy by establishing a universally binding fundamental principle.

The Model Directive, which implicitly presupposes a general product safety policy, is unable to perform this function, if only because it is formulated too vaguely and is not even legally binding[72]. By imposing a general product safety obligation, the Community would secure the harmonisation of existing product safety laws and planned legislation in Member States. However, such an obligation would in particular have an immediate practical impact in all those countries that do not yet have general product safety laws. In such cases, it would provide the competent authorities with grounds for intervention and hence promote adherence to directives and standards. At the same time, it would encourage standards organisations to step up work on safety standards.
Product safety obligations in the various national legislations differ in the way they are formulated. The German Appliances Safety Law (Gerätesicherheitsgesetz) refers to "generally recognised rules of the art" (allgemein anerkannte Regeln der Technik) and provides protection in the case of "proper use" (bestimmungsgemäße Verwendung) - although the basic standards DIN 820, Part 12 and DIN 31.000/VDE 1000 call for "foreseeable misuse" (voraussehbares Fehlverhalten)[73] to be taken into account. Article 1 of the French Consumer Safety Law[74] refers to "normal" use (condition normale) or use that can be reasonably foreseen by the manufacturer (condition raisonnablement prévisible), and "legitimate" consumer expectations. The US Consumer Product Safety Act uses the expressions "unreasonable risk of injury" (for product bans under § 8 CPSA) and "substantial risk of injury" (for recall procedures pursuant to § 15
CPSA), requiring that foreseeable misuse be taken into account[75]. § 3 (1) of the British Consumer Protection Act 1987[76] follows the model of the Product Liability Directive ("There is a defect in a product. . . if the safety of the product is not such as persons generally are entitled to expect. . ."); but the description of the product safety requirement for the purposes of the criminal law in § 10 (2) says: ". . .consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances. . .". Article 14 (a) in the Dutch bill amending the "Warenwet" (Goods Law) aims to provide protection against hazards arising from reasonably foreseeable use (overeenkomstig redelijkerwijze te verwachten gebruik)[77].
A decision in favour of a European general clause is made easier by the fundamental consensus on safety policy, which is evident in spite of the wide variation among the examples mentioned, and by the limited functions of such a general clause. There is a consensus that safety criteria should not be defined unilaterally by the manufacturer[78]. This principle, which is common to all modern product safety laws and which is set out, as far as the Federal Republic of Germany is concerned, in the basic safety standards DIN 820, Part 12 and DIN 31.000/VDE 1000, precludes the adoption of the expression "proper use" (bestimmungsgemäßer Gebrauch) employed in § 3 of the German Appliances Safety Law[79].

The general clause is intended to anticipate standardisation in individual sectors and help consolidate European legislation. It is also intended to provide for powers of intervention in those Member States that do not possess fully-fledged systems of national standards, and cover products for which there are no safety standards. It necessarily follows from the above that the general cause cannot refer to standards as such.
Finally, in view of the interest of the Community in a safety counterpart to the principle of the free movement of goods, the product safety obligation must extend explicitly to importers and dealers as well. No distinction should be made between importers and dealers in intra-Community trade, since the aim of the efforts to achieve the internal market is precisely to secure a common European standard of safety and mutual recognition of national control measures. On the other hand, the jurisdiction of the various administrations remains confined to their respective territories. The safety loopholes this entails can only be closed by extending the product safety obligation to cover the trade sector[80].
Accordingly, the question remains as to which alternative to "proper use" should be incorporated in the general clause. Reliable pointers exist for this decision as well. Firstly, the general clause must be formulated so broadly as to cover the safety needs of all consumer groups, particularly children. Consequently, it should take account of "foreseeable misuse"[81]. On the other hand, however, the criterion of foreseeable misuse cannot be assumed to apply to all products without taking their use and users into account. In particular, there is no question that, in addition to the definition of the responsibilities of manufacturers and users, a large number of additional factors are relevant for a normative assessment of risks: the usefulness of the product, the likelihood of harm being caused and the extent of potential hazards, the availability of suitable technical alternatives, and the cost of safety design requirements[82]. A formulation that provides for
distinctions to be made and for all factors relevant for assessing safety to be taken into account is contained in the Product Liability Directive[83], which refers to "the safety which a person is entitled to expect". There are pragmatic considerations in favour of such a criterion. Parallel development of product liability law and safety law would help consolidate Community law, while the Member States should find it easier to agree on a previously accepted standard than to consent to a new formulation. The choice of this criterion is, moreover, in line with the development of the law in the Member States. It accords with French law and the Dutch "Warenwet"[84], should be reconcilable with the likely application of the British Consumer Protection Act 1987[85], and is *de facto* compatible with the legal situation in the Federal Republic of Germany[86].

3.4 Follow-up market control

The main practical point of connection between the Community's internal market policy and its product safety policy is follow-up market control. The attitude of the Community to this tool represents the acid test of the quality of its new legal approximation policy. The following considerations are intended as suggestions for Community framework regulations on follow-up market control. They first of all explain why a bold harmonisation policy that goes beyond mere approximation of existing legal provisions is necessary in this area (3.4.1),

and go on to develop proposals that build on the beginnings already present in Community directives or draft directives, as well as on relevant national provisions.

3.4.1 Integration policy functions

As far as national product safety policy is concerned, follow-up market control essentially involves penalising breaches of product safety obligations, responding to newly identified risks and ensuring compensation for financial loss[87].
All these aspects are also relevant to a European product safety policy. The introduction of a general product safety obligation would be practically meaningless if breaches were not punishable - the legal need for provision for follow-up action is incontrovertible in view of the inevitable gaps in preventive control measures, and any elimination of product risks must, in order to be fair, also ensure compensation for any damage or injury caused.
However, these general safety policy tasks of follow-up market control, gain appreciably in importance in the context of the new harmonisation policy. The declared aim of the new approach is to improve the conditions for the marketability of products in the common market. This objective explains the provisions for the equivalence of European standards and national standards (where included in the standards list), the admissibility of attestations of conformity for "products for which the manufacturer has not applied any standard", and mutual recognition of attestations of conformity issued by national certification bodies[88].
However, these improvements to the conditions governing the marketability of products, which are motivated by competition and internal market policy considerations, inevitably reinforce the legal need for surveillance of their conformity to safety standards. Here too - as with the product safety obligation - the territorially restricted application of administrative measures means that Member States can react to identified product hazards only within their own territories. Each Member State has therefore to take such action on its own account. In addition to these functions, which are
primarily concerned with safety policy, follow-up market control also has genuine internal market functions, which too have been taken into account in the Model Directive: easing the burden on the Community's legislative procedures with the new reference method has its price in terms of integration policy - it allows only the substantiation of market access rights on the basis of "presumption of conformity", while conceding to Member States the power to check the justification of such presumptions. The dangers that these Member States' powers pose to the unity of the internal market can be countered only *ex post* in the safeguard clause procedure. However, this corrective function requires equivalent standards for follow-up market control[89] if it is to be effective.
The new harmonisation policy has thus produced a "regulatory gap" as far as follow-up market control is concerned. This term refers to the inadvertent creation of a need for positive intervention by a policy aimed at market integration[90]. Indeed, the Member States have neglected the development of follow-up market control as an instrument for product safety policy[91]; now they are under pressure from the "anti-interventionist" principle of the free movement of goods and the "anti-interventionist" reference method to introduce positive regulation. This consequence appears paradoxical only at first sight. It is in line with the logic

of an integration policy that does not allow the achievements of a single internal market to be jeopardised again by one-sided and uncoordinated safety policy measures of Member States.

3.4.2 Information sources

The intensity with which Member States seek to detect hazards is the essential determinant of the practical importance of their safety provisions, and the well-considered utilisation of information is one essential condition for rational use of administrative resources. To date, the Community has contributed to controlling the "information input" to follow-up market control essentially only through the decision on exchange of information on product hazards[92]. It has however begun to build on this pledge. By Articles 12 and 13 of the draft Toy Directive[93], Member States would be obliged to verify observance of toy safety requirements by export checks and inform the Commission on application of the test and supervision procedures[94]. Similar supervisory measures are provided for in the Directive on airborne noise emitted by household appliances[95]. Article 4 of the Directive on dangerous imitations of consumer goods[96], finally, provides that information on measures taken by a Member State may be communicated prior to an "exchange of views" on their justification.
The most obvious way of systematically advancing from these starting points is offered by the demonstration project on a Community accident information system[97]. Its data can, as American experience with NEISS shows[98], be utilised for follow-up market control. Data from the European accident information system are suitable as a primary information source. Since they are collected according to uniform criteria Community-wide, making use of them would help to harmonise administrative practices[99].
However, accident information systems cannot be the sole source of information. Member States must be free to make use of their existing administrative facilities and, for example, to evaluate studies carried out by test institutes. However, a range of information sources should be underpined by uniform principles: the admissibility of consumer complaints, the admissibility of input from consumer organisations, the obligation to take account of legal judgments concerning product liability, and an obligation of enterprises to provide notification whenever they possess knowledge from which it can be reasonably concluded that the products they market represent a significant hazard[100].
Consideration of legal judgments concerning product liability fulfils a function specifically related to integration policy, because it indirectly[101] contributes towards the harmonisation of safety law criteria. In contrast, the obligation on enterprises to provide notification primarily furthers safety policy. Especially where serious risks are involved, enterprises will move to eliminate them of their own accord, and for instance voluntarily make recalls[102]. It should not be assumed, however, that the willingness to do so exists throughout an entire industry or will (or even can) lead to corresponding action on export markets. Nevertheless, the obligation to provide notification would not only meet the safety requirements of consumers but also provide information on inadequacies of standards or deficiencies of national attestations of conformity.

3.4.3 Requirements for intervention and instruments for taking action

Public law product safety duties are intended to provide the competent authorities with possibilities of intervention to ward off product hazards. In legally specifying such intervention rights, general clauses are indispensable. This follows even from the fact that product safety duties in the form of "basic safety requirements" can in principle only set "performance requirements", but not prescribe definite design characteristics[103]. This is also in line with the regulatory functions of a general duty of product safety in the sense proposed above. While "legally" the general product safety obligation acts "preventively", it at the same time turns away in practice from the hopeless attempt to guarantee the safety of consumer goods preventively, by specifying particular design requirements. But just because specific prior binding instructions are not given, government must nevertheless remain in a position to meet its responsibilities for product safety by responding to dangers that do become evident. The embodiment of this power of intervention in the form of a general clause in safety law is thus the necessary consequence of abandoning specific governmental product regulations.

But even if Community law preconditions for the intervention powers of the competent authorities in Member States can thus be laid down only in general form, it is possible, and imperative, to adopt detailed regulations on the instruments of follow-up market control. The Directive on dangerous imitations of consumer goods[104] states that Member States should set up a body with powers to remove, or cause to be removed, products from the market (Article 3). The draft Toy Directive[105] says less specifically that Member States should "take all appropriate measures to withdraw" unsafe toys "from the market and prohibit their placing on the market" (Article 7 (1))[106].

It does indeed seem appropriate to leave Member States the freedom to use institutional solutions that are in line with their various legal traditions. For example, the obvious approach for the Federal Republic of Germany would be to entrust follow-up market control to the industrial inspectorate (Gewerbeaufsicht)[107], while France would do best to maintain the division of functions between the Commission for Consumer Safety and government administration[108], and the United Kingdom should retain the responsibility of local authorities[109]. Finally, the establishment of independent commissions is also conceivable[110]. However, as regards the legal instruments to be made available to these bodies, Community coordination would be advisable. The possibilities are bans, confiscations, recalls, warnings and compensation to consumers affected by recalls.

The type of action taken should depend on the nature and severity of the hazards. Bans or even confiscations are not always necessary, but may sometimes be insufficient. It may suffice to have the manufacturer rectify faults. However, it may also be necessary to have products replaced or recalled, with compensation for financial losses. The right to inform the public or demand that the manufacturer or importer provide appropriate information is essential, but the necessity and nature of the information will in turn depend on the seriousness of the product risk. For example, a public information campaign will not be required if the manufacturer is able to identify the customers concerned directly from its files

and contact them. This particular example illustrates that the appropriate control measures should best be agreed in conjunction with the manufacturer or importer. A commitment by the concerned enterprise to propose, in the event of significant product hazards, a catalogue of measures for preventing such dangers, would normally enable a settlement to be reached, as is shown by the example of US law[111].

3.4.4 The role of the Community in follow-up market control

The development of the law relating to follow-up market control is not an end in itself, but fulfils a dual function in terms of both safety policy and internal market policy. The aim of Europeanising follow-up market control is to reduce the potential for conflict in the field of safety policy resulting from the objectives of internal market policy[112], by Europeanising the practice of safety law.

3.4.4.1 Standing Committee on technical standards and regulations and a "committee on follow-up market control"

The Model Directive provides for all questions connected with the implementation of new directives to be handled by the Standing Committee on technical standards and regulations. However, the main task of this committee is to advise on new plans for directives and standards. In addition, the primary function of the safeguard procedure is to examine the quality of European and national standards and, when necessary, ensure that they are developed further. On the other hand, follow-up market control essentially involves executive tasks. The question of whether certain risks require intervention can be considered separately from the question of whether these risks require changes to European or national standards. This distinction could also be taken into account in the institutional arrangements: the Standing Committee on technical standards and regulations should be relieved of executive tasks to allow it to concentrate entirely on problems of legislation and standardisation.
The executive tasks are difficult enough. Harmonisation of informational sources, conditions for intervention and instruments of follow-up market control are necessary but not sufficient conditions for achieving an equal standard of safety throughout Europe. The Community thus requires a body through which differences of opinion between the competent bodies can be argued out and settled. With a view to harmonising practice in Member States, their inclusion on a "Committee on follow-up market control" is to be recommended here as well. However, since it will be concerned with executive questions, this committee does not need the legal status of an administrative or regulatory committee, but should be set up as a subcommittee of the Advisory Committee on product safety proposed above[113].
Making the administration of follow-up market control institutionally autonomous does not immediately seem to be in line with approaches in the Community's recent legal acts in the area. The Directive on airborne noise emitted by household appliances[114] explicitly refers all questions in connection with its implementation to the Standing Committee set up by Directive 83/189/EEC (Article 9 (1))[115]. The draft Toy Directive[116] takes the position that the

Commission alone will decide on questions of follow-up market control (Article 7 (4)), and where shortcomings in harmonised standards or gaps in the standards become apparent, will provide for consultation of the Standing Committee on technical standards and regulations (Articles 5 and 7 (2)). The Directive on dangerous imitations of consumer goods entrusted the Advisory Committee on information exchange on dangers arising from the use of consumer products, set up by Decision 84/133 of 2 March 1984, with the tasks of coordinating measures by individual States[117].

3.4.4.2 Decision-making powers of the Commission

The above-mentioned functions of the Europeanisation of follow-up market control entail requirements that cannot be met simply by an exchange of information restricted to the authorities concerned, which leaves any reaction to hazards at the discretion of Member States. The Community must therefore go well beyond the Council Decision of 2 March 1984[118]. It requires comprehensive information and considerable decision-making powers. Initially, it needs to be informed of decisions by the competent bodies in the Member States. However, the obligation on Member States to supply information should not be confined to cases where positive measures are ordered. It ought also to cover cases where a settlement was reached or where intervention was rejected, since such procedures are no less important for the harmonisation of administrative practice, and their justification can be just as questionable as the ordering of positive measures. Decision-making in the Commission and the Advisory Committee on follow-up market control proposed here can also be aided by the findings of the demonstration project on accident information systems, as well as by other own sources of information. Consumer organisations should be allowed to approach the Commission, and the "Consumers' Consultative Committee on standardisation"[119] should have access to Commission decisions.
Two types of decision in the area of follow-up market control can be distinguished: responses to urgent measures and definitive decisions on conflicts concerning the justification or necessity of measures. In cases of "serious and immediate risk", which already have to be notified "immediately" to the Commission under Article 1 (1) of the Council Decision of 2 March 1984, the safety policy function of follow-up market control calls for the Commission to have the authority to order other Member States to take provisional measures. However, such measures should then be discussed with the Advisory Committee on follow-up market control before the Commission takes a final decision. In all cases where no immediate action is required on the part of the Commission, the Committee should be consulted before a decision is taken. Its participation is essential for the development of common assessment criteria in the Community.

4. Institutional measures to coordinate internal market and product safety policy

The network of committees and co-operative relationships sketched out in the foregoing sections may look over-differentiated and too intricate. Nevertheless, all these proposals are

ultimately concerned only with the institutional consequences of two conceptual premises embodied in the Community's objectives for realising the internal market themselves. The first premise concerns the relationship between internal market and product safety policies. It states that the legal harmonisation essential in the interest of free movement of goods in the Community is inseparably linked with the elaboration of a European product safety policy, but that both elements of the integration process, that is, mutual interpenetration of economic sectors on the one hand, and the achievement of closer integration through a European product safety policy on the other, call for separate forward-looking policies and organisational structures. This premise is the basis for the proposals for giving the tasks in internal market policy and in product safety policy an independent organisational form in different ways, related to the historical separation of these policy areas in the Community.
The second premise concerns the Community's relationships with Member States, and states that both for its legal harmonisation policy and the Europeanisation of administrative tasks essential in connection with it, the Community is dependent on continuing co-operation with Member States. This need for co-operation is confirmed not only by theoretical analysis of the Community's political system and of specific features of European federalism[120], but also by the practice of Community politics, where decision-making processes are open at all levels to influence from the Member States. This development has gone hand in hand with the setting up of administrative, regulatory and advisory committees, something that started early in internal market policy, and is also indispensable in product safety policy.
A first conclusion drawn from these premises is the proposal to set up, alongside the Standing Committee on technical standards and regulations created by the Information Directive 83/189/EEC, a Standing Committee on product safety[121]. It is indubitable that, in drawing up directives and standardisation mandates, safety concerns belong among the most important tasks for the Standing Committee on technical standards and regulations. But whether at national or Community level, product safety policy is not confined to questions of law-making and standardisation. Instead, it belongs much more in the whole context of comprehensive, varied machinery for guaranteeing consumer safety. The Community must in the long term develop such a policy, and will in doing so, be dependent on co-operation with the competent bodies and institutions responsible for product safety policy in Member States. Equally, a legal harmonisation policy concerned with achieving the internal market has to concentrate on the steps necessary to that end, and thus set its priorities primarily from an economic viewpoint, on which it will seek the necessary agreements. Accordingly, organisational differentiation between internal market and product safety policy does not in any way promote competing political projects, but instead aims at easing the burden on both areas and promoting their co-operation.
A second organisational proposal, namely to set up a Consumers' Consultative Committee on standardisation[122], is connected with the differentiation between internal market and product safety policy and the Community's relationship with Member States, but is primarily a consequence of the technique of reference to standards favoured in the new harmonisation policy. This legal technique links up the European standardisation organisations on "functional" law-making tasks. Because of these *de facto* effects of the reference technique, the justification for calls for consumer participation is in principle indisputable. Our proposals for giving shape to this participation are meant to implement this concept, so as to

take account of the organisational and staff constraints on consumer organisations and formally guarantee them possibilities of collaboration.
The third proposal, namely to set up a separate committee on follow-up market control, is a direct consequence of the distinction between internal market and product safety policy, but is also connected with the peculiarities of the new legal harmonisation method. On our proposal, the tasks of verifying the substance of European and national standards and developing them further should remain with the Standing Committee on technical standards and regulations, since from a functional viewpoint this is a future oriented law-making activity. Follow-up market control is, instead, often concerned with urgent decisions to deal with acute dangers to consumer safety. In each case, where such decisions need to be implemented, the Community is *de facto* dependent on co-operation from the competent authorities in Member States. By its very nature, the case is one of nothing less than the Europeanisation of administrative tasks. In view of these far-reaching implications, it would seem appropriate to create the organisational prerequisites for setting administrative co-operation between Community and Member States on a permanent footing.
In conclusion, the institutional proposals in this section are set out below in an overview:
Table 3: Overview of Standing Committees in the area of internal market and product safety policies

Internal market policy Product safety policy

Involvement of Standing Committee on technical Standing Committee on product
Member States standards and regulations (1983 safety (future Product
Information Directive and 1985 Safety Directive)
Model Directive)

Subcommittees for individual Committee on accident
directives (e.g. for simple information systems
pressure vessels, toys, (Council Decision
construction materials) of 22 April 1986)

Committee on follow-up
market control (future
product safety Directive)

Involvement of CEN/CENELEC Consumers' Consultative
non-governmental Committee on standardisation
actors

1. Cf. Chapter III, 2.7.

2. OJ C 136, 4 June 1985, 1. See further Chapter IV, 3.
3. Cf. in particular Chapter IV, 3.2.
4. Cf. Chapter V, 3.1.
5. OJ C 76, 17 June 1969, 1; cf. Chapter III, 2.
6. Cf. Chapter III, 2.3 and 2.5.
7. Cf. supra III, 2.6. and 2.7.
8. Cf. the principles in part A of the Model Directive (note 2).
9. Cf. Chapter II, 3.2.
10. Cf. Chapter IV, 2.
11. Cf. Chapter II, 2.3.
12. Cmnd. 9302, HMSO, London, July 1984.
13. Cf. Chapter II, 2.4 and 2.6.2.
14. Cf. Chapter II, 1.1, 1.4 and 1.7.
15. JO 115 No. 168, 2261, 22 July 1983.
16. Cf. Chapter II, 1.2-1.5.
17. Cf. e.g. the USA, Chapter II, 4.4, and the OECD Report "Development and Implementation of Product Safety Measures", Paris 1986 (as yet unpublished), Chapter II, 3.
18. The example of the shift from compulsory to voluntary standards as the primary means of regulation in the USA is instructive; the functions of the Consumer Product Safety Commission in monitoring or participating in standardisation projects appear to extend considerably beyond the influence exerted by government on the DIN institute (cf. supra Chapter II, 4.4).
19. House of Lords, Select Committee on the European Communities, Consumer Policy (Session 1985-85, 15th Report, HL 192), London 1986, 158-59.
20. On the position in France see Chapter II, 1.7.2; on the UK Chapter II, 2.2.1, 2.3.2 and 2.6.1; for German Law, see Chapter II, 3.4.5.
21. The decidedly positive attitude of the BSI to the HASS System (loc. cit., note 19, 160) corresponds to the recognition accorded to NEISS in the USA (see supra, Chapter II, 4.4.2, note 125). DIN evidently thinks differently.
22. This formulation was used by a representative of the UK National Consumer Council, loc. cit. (note 19), 60; all interest groups agreed on this point (cf. for the assessment of the BSI, loc. cit., 159).
23. It is doubtful whether experience with the Low Voltage Directive will permit opposite conclusions to be drawn because (a) international standardisation is particularly well developed in the field of electrical engineering and (b) there are no empirical surveys of the standard of safety even in the electrical appliances sector (for an anecdotal example of the differences between Italy and the United Kingdom, cf. the hearings of the Select Committee, loc. cit., note 19, 96-97).
24. Cf. Chapter I before 1. and 4.
25. Cf. the remarks on the attitude of Canada in the OECD report cited in note 17 supra (Chapter II, 3, para. 69).
26. Cf. Chapter IV, 3.3-3.6.
27. Cf. Chapter III, 1.2.1, text accompanying notes 19 et seq.

28. Cf. Chapter III, 3.
29. Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt, Bonn 1986; see also Joerges, 1988, 199-200.
30. Case 120/78, Judgment of 20 February 1979, ECR [1979] 649, para. 14.
31. OJ C 256, 3 October 1980, 2.
32. Loc. cit. (note 29), para. 3.
33. Loc. cit., paras. 4 and 3.
34. Loc. cit., para. 4.
35. "Completing the internal market", White Paper from the Commission to the European Council, COM (85) 310, 14 June 1985, para. 58: if safety regulations share the same objectives but differ in the means employed, this may well lead to real differences in the standard of safety.
36. Cf. supra Chapter IV, 1.2.
37. Cf. Chapter III, 1.1, note 11, Chapter IV, 3.3.2.
38. Loc. cit. (note 29), para. 4.
39. Cf. Chapter I, 3. for details.
40. For terminology cf. Chapter III, 1.2.1, note 20.
41. Cf. Chapter III, 1.2.1, note 14.
42. EC Bull., Annex 2/86.
43. Cf. analysis by Glaesner, L'acte unique européen, Revue du Marché Commun 1986, 307 et seq., 313 et seq.
44. Cf. opinion of the BSI in the hearings of the Select Committee, loc. cit. (note 19), 146 et seq., 157 et seq.
45. For details Chapter III, 2.7.
46. Cf. supra Chapter III, 1.2.1, 2.4.
47. Cf. supra Chapter IV, 2.3.3.
48. Cf. Chapters IV, 3.2 and V, 1.1.
49. Cf. in particular Chapters IV, 3.4 and V, 4.
50. Communication from the Commission to the Council, 23 July 1985, COM (85) 314 final, in particular paras. 19 et seq.; see also the Communication from the Commission to the Council on "The integration of consumer policy in the other common policies", 24 October 1986, COM (86) 540 final, paras. 6 et seq.
51. COM (85) 314 final, para. 19.
52. OJ L 109, 26 April 1986, 23; cf. Chapters III, 3.3 and V, 2.
53. For the USA cf. Chapter II, 4.2 and 4.4.2, for the United Kingdom cf. Chapter II, 2.5 and 2.8.1, for the Netherlands, cf. Rogmans, 1985, 73 et seq.
54. Loc. cit. (note 52), Article 1 (2).
55. Cf. Chapter V, 5.
56. OJ L 109, 26 April 1983, 8.
57. For the functioning of the Information Directive, see Chapter IV, 3.1.
58. Cf. Chapter V, 4.
59. Cf. 3.4.4.1 infra for details.
60. For reasons, cf. Chapter IV, 3.6 and 5.3 supra.
61. Cf. also 3.4.4.1 infra.

62. Cf. Chapter IV, 3.3.2 supra.
63. See references in note 20, and for the legal justification Chapter IV, 5.1.
64. Cf. Chapter IV, 3.5. and 5.
65. Cf. Chapter VI, 6.
66. OJ L 109, 26 April 1983, 8.
67. Reprinted in DIN-Mitteilungen 64 (1985), 48.
68. OJ C 136, 4 June 1985, 3; it should now be added that Article 1 (1) of the Commission's proposal for amending the information directive explicitly provides for involvement of the Standing Committee in preparing standardisation mandates (OJ C 71, 19 March 1987, 12; see also Chapter IV, 3.1, note 144 and 3.6, note 240).
69. Note 52 supra; in contrast, Article 7 of the Commission proposal for a Community accident information system (COM (84) 735, 7 January 1985) provided for a publicly accessible documentation and information centre.
70. OJ L 70, 13 March 1984, 16.
71. Loc. cit. (note 50), para. 23. More recently, see in detail the Commission Communication on safety of consumers in relation to consumer products, 8 May 1987, COM (87) 209 final.
72. Cf. Chapter V, 1.
73. Cf. Chapter II, 3.5 for details.
74. J.O. No. 168, 2261, 22 July 1983; cf. Chapter II, 1.2.1 for details.
75. Cf. Chapter II, 4.3. and 4.5.1, for details.
76. Cf. Chapter II, 2.4.2.
77. Tweede Kamer, vergaderjaar 1985-1986, 17495 No. 18; on legal developments relating to liability see, comprehensively, Snijders, 1987, 147 et seq. and 152 et seq. (specifically on the safety obligation in liability law).
78. Cf. Chapter I, 2.1 for details.
79. Cf. for the restricted meaning of § 3 of the Gerätesicherheitsgesetz (GSG), Chapter II, 3.3.3.
80. This conclusion is anyway in line with the development of product safety and liability law; cf. for the unsatisfactory response by German law, Chapter II, 3.3.2 and 3.3.7 end.
81. Cf. Article 2 of the old proposal for a Directive on toy safety, OJ C 203, 29 July 1983, 1; the new draft Directive (OJ C 282, 8 November 1986, 4) has changed the formulation but the content remains the same (cf. Chapter V, 1, note 15).
82. Cf. Chapter I, 2.
83. OJ L 210, 7 August 1985, 29 (Article 6); cf. Chapter III, 3.5.
84. Notes 74 and 77.
85. Though the Act has loosened the originally intended linkage between liability and safety law (see Sections 3, 10 of the bill, reprinted in PHI 1987, 18).
86. Cf. Chapter II, 3.3.
87. Cf. Chapter I, 3.3.
88. Cf. Chapter IV, 3.3.
89. Cf. Chapter IV, 3.4 for details.
90. Cf. Bourgoignie/Trubek, 1987, 3-4, 12 et seq., 171-72.

91. Cf. Chapter I, 3.3 (end), and the description of the legal situation regarding follow-up market control in Member States in Chapter III, 3.4.
92. OJ L 70, 13 March 1984, 16; on the limited scope of this decision and the need for its reform, see Chapter III, 3.4.
93. OJ C 282, 8 November 1986, 4, amended proposal of 2 October 1987, COM (87) 467 final.
94. On the "Europeanisation" of positive decisions cf. 3.4.4 infra.
95. OJ L 344, 6 December 1986, 24 (Art. 5).
96. OJ L 192, 11 July 1987, 49.
97. Note 52 supra.
98. Cf. Chapter II, 4.2.
99. Though a prerequisite for this would be removal of the existing prohibitions on using the data (cf. 3.2.1 supra, and Chapter III, 3.3).
100. Cf. for US law as a model, Chapter II, 4.5.2.
101. Cf. 3.4.3 infra.
102. Cf. Chapter III, 3.4.
103. For this distinction, see Chapter IV, 3.2.
104. Note 96 supra.
105. Note 93 supra.
106. Cf. the corresponding provision of Article 7 of the Directive on airborne noise emitted by household appliances, note 95 supra.
107. Cf. Chapter II, 3.3.7.
108. Cf. Chapter II, 1.5.1.
109. Cf. Chapter II, 2.2.3, 2.3, 2.4.1.
110. Cf. for example the proposals by A. Pauli, 1985, 180 et seq.; in the Netherlands, a Parliamentary initiative to supplement the Government Bill amending the "Warenwet" (note 77) specifies that responsibility lies with the Minister of Welfare, Public Health and Culture (Tweede Kamer, vergaderjaar 1985-86, 17495 No. 22).
111. Cf. Chapter II, 4.5., note 154.
112. Cf. Chapter IV, 3.4, and Chapter V, 3. to 4.
113. 3.1 supra.
114. Note 95 supra.
115. On problems of the differential treatment of objections to European standards on the one hand and to national standards on the other, see Chapter IV, 5.3.
116. Note 93 supra.
117. The reference to the decision (note 92 supra) can be found in Article 4 of the new Directive (note 96 supra).
118. Note 92 supra.
119. 3.2.2 supra.
120. Cf. Chapter III, 1.2.
121. Cf. 3.1 supra.
122. Cf. 3.2.2 supra.

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Abbreviations

Francaise (2x)

A.C.	*Appeal Cases (Law Reports)*
AFAST	*Association Franco-Allemande pour la Science et la Technologie*
AFNOR	*Association Francaise de Normalisation*
AG	*Advocate General*
AgV	*Arbeitsgemeinschaft der Verbraucher*
AöR	*Archiv des öffentlichen Rechts*
Art.	*Article*
Arts.	*Articles*
Aufl.	*Auflage*
AVV	*Allgemeine Verwaltungsvorschrift*
BArbBl.	*Bundesarbeitsblatt*
BAU	*Bundesanstalt für Arbeitsschutz (und Unfallforschung)*
BB	*Betriebs-Berater*
BBA	*British Board of Agreement*
Bd., Bde.	*Band, Bände*
BEAB	*British Electrotechnical Approvals Board*
BEUC	*Bureau Européen des Unions des Consommateurs*
BGB	*Bürgerliches Gesetzbuch*
BGBl.	*Bundesgesetzblatt*
BGH	*Bundesgerichtshof*

BGHZ	*Entscheidungen des BGH in Zivilsachen*
BMA	*Bundesministerium für Arbeit und Sozialordnung*
BR-Drs.	*Bundesrats-Drucksache*
BS	*British Standard*
BSI	*British Standards Institution*
BT-Drs.	*Bundestags-Drucksache*
Bull. civ.	*Bulletin civil*
Bull. EC	*Bulletin of the EC*
BVA	*Beratender Verbraucherausschuß*
BVerfG	*Bundesverfassungsgericht*
BVerfGE	*Entscheidungen des BVerfG*
BVerwG	*Bundesverwaltungsricht*
Cal.	*Californian Reporter*
CCC	*Comité Consultatif des Consommateurs*
CEN	*Comité Européen de Normalisation*
CENELEC	*Comité Européen de Normalisation Electrotechnique*
cf.	*confer; compare*
CFR	*Code of Federal Regulations*
ch.	*chapter*
Cir.	*Circuit*
Cmd., Cmnd.	*Command Paper*
CMLR	*Common Market Law Review*
CPA	*Consumer Protection Act*

CPSC	*Consumer Product Safety Commission*
CSA	*Consumer Safety Act*
DAR	*Deutsches Autorecht*
DB	*Der Betrieb*
DCRF	*Direction Générale de la Consommation et de la Répression des Fraudes*
DG	*Directorate General*
DGWK	*Deutsche Geselslchaft für Warenkennzeichnung GmbH*
DIN	*Deutsches Institut für Normung, Deutsche Industrienorm*
DIN-Mitt.	*DIN-Mitteilungen*
DKE	*Deutsche Elektrotechnische Kommission*
DNA	*Deutscher Normenausschuß*
DR	*Deutsches Recht*
DTI	*Department of Trade and Industry*
DVB	*Deutsches Verwaltungsblatt*
DVGW	*Deutscher Verein des Gas- und Wasserfaches*
EC	*European Community(ies)*
ECJ	*European Court of Justice*
ECPSA	*European Consumer Product Safety Association*
ECRC	*Economic and Social Research Council*
ECSC	*European Coal and Steel Community*
ed.	*edited; edition; editor*
EEC	*European Economic Community*
EFTA	*European Free Trade Association*

EG	*Europäische Gemeinschaf(en)*
EGKSV	*Vertrag über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl vom 29.4.1952*
ELR	*European Law Review*
EnWG	*Energiewirtschaftsgesetz*
et seq.	*et sequens; and the following*
EuR	*Europarecht*
EWG	*Europäische Wirtschaftsgemeinschaft*
EWGV	*Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft*
F.R.	*Federal Reporter*
FR	*Frankfurter Rundschau*
FTC	*Federal Trade Commission*
GATT	*General Agreement on Tariffs and Trade*
GewA	*Gewerbearchiv*
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht*
GS	*Geprüfte Sicherheit*
GSG	*Gerätesicherheitsgesetz*
GtA	*Gesetz über technische Arbeitsmittel*
HADD	*Home Accident and Death Database*
HAI	*Health Action International*
HASS	*Home Accident Surveillance System*
Hg.	*Herausgeber*
HMSO	*Her(His) Majesty's Stationery Office*

HSWA	*Health and Safety at Work Act*
HUK	*Verband der Haftpflichtversicherer, Unfallversicherer, Autoversicherer und Rechtsschutzversicherer e.V.*
IEC	*International Electrotechnical Commission*
INC	*Institute National de la Consommation*
IOCU	*International Organization of Consumers' Unions*
ISO	*International Standardization Organization*
J.	*Journal*
J.O.	*Journal officiel*
JCMSt	*Journal of Common Market Studies*
JCP	*Journal of Consumer Policy*
JuS	*Juristische Schulung*
KOM	*Dokumente der Europäischen Kommission*
LG	*Landgericht*
LNE	*Laboratoire National d'Essais*
loc. cit.	*loco citato; at the place cited*
MD	*Mitteilungsdienst*
N.E.	*North Eastern Reporter*
N.Y.	*New York Reporter*
NF	*Norme Francaise*
NJW	*Neue Juristische Wochenschrift*
No., no.	*number, numéro*
Nos., nos.	*numbers*

NVwZ	*Neue Zeitschrift für Verwaltungsrecht*
O.J.	*Official Journal of the European Communities*
OECD	*Organisation for Economic Co-operation and Development*
OLG	*Oberlandsgericht*
op. cit.	*opere citato; in the work quoted*
OVG	*Oberverwaltungsgericht*
P.	*Pacific Reporter*
PAN	*Pesticide Action Network*
para.	*paragraph*
PHI	*Produkthaftpflicht International*
PORS	*Privé Ongevallen Registratie Systeem*
PVS	*Politische Vierteljahresschrift*
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
RdA	*Recht der Arbeit*
Rev.	*Review, Revue*
RG	*Reichsgericht*
RGZ	*Entscheidungen des Reichsgerichts in Zivilsachen*
RIW	*Recht der Internationalen Wirtschaft*
RMC	*Revue du Marché Commun*
RTDE	*Revue trimestrielle de droit européen*
RVO	*Reichsversicherungsordnung*
s.i.s.	*sicher ist sicher*
sec.	*section*

TC	*Technical Committee*
Tl.	*Teil*
U.S.C.	*United States Code*
UPR	*Umwelt- und Planungsrecht*
UVV	*Unfallverhütungsvorschriften*
v.	*versus; against; von*
VDE	*Verband Deutscher Elektrotechniker*
VDI	*Verein Deutscher Ingenieure*
VersR	*Versicherungsrecht*
VGB	*Vereinigung der Berufsgenossenschaften*
VO	*Verordnung*
vol.	*volume*
VuR	*Verbraucher und Recht*
VZ-NRW	*Verbraucherzentrale Nordhein-Westfalen*
WM	*Wertpapier-Mitteilungen*
WRP	*Wettbewerb in Recht und Praxis*
WSA	*Wirtschafts- und Soz8alausschuß*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*
ZHR	*Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*
ZLR	*Zeitschrift für das gesamte Lebensmittelrecht*
ZRP	*Zeitschrift für Rechtspolitik*
ZZP	*Zeitschrift für Zivilprozeß*