

# Consumer Rights

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## I. General Remarks

Consumer protection is a relatively young field of public policy.<sup>1</sup> It has developed with the 'ascendancy' of the 'activist' state, and has undergone substantial changes on its decline. Consumer protection today, however, belongs to a set of well-established policies and has even reached the constitutional level.<sup>2</sup>

### A. Approaches to Protection

There are three approaches which determine the debate on consumer protection. These approaches remain the same notwithstanding the level of protection, and regardless of its national, European or international socio-legal context. They help to structure the debate on the pros and cons of a constitutional right to consumer protection.

#### 1. Rights

Proclaiming rights in order to shape the normative structure of consumer protection encounters problems which are common to all 'social' rights. The endangering of rights stems to a large extent from the activities of

\* The author wishes to express his thanks and appreciation to Christian Joerges for his stimulating criticism and constructive suggestions.

<sup>1</sup> E. v. Hippel, *Verbraucherschutz*, 3rd edition (1986); N. Reich (ed.) of a series of reports on Consumer Law in the Member States of the European Community; Th. Bourgoignie, D. Trubek, *Consumer law, common markets and federalism in Europe and the United States* (1987).

<sup>2</sup> In Spain, Portugal, Brazil and Uruguay.

private actors and organizations. The state can only be blamed for facilitating such activities. A right must, therefore, be understood as a right to protection by the state which expresses itself through an imposition of duties on private actors. It is common to differentiate two areas of consumer protection, namely the protection of economic interests and the protection of health and safety. Whereas the need to protect economic interests often remains controversial, according to widely held views, one should conceive of human integrity as a basic right underlying pertinent protective measures.

## 2. State objectives

The alternative to proclaiming fundamental rights is to lay down protectionist objectives (*Staatsziele*). This technique may be considered as a means of avoiding the difficulties in relating legitimate objectives of protection to fundamental subjective rights. At the same time it may be a more adequate means of expressing public concern for protectionist objectives which do not seem to deserve the dignity of a fundamental right (e.g. economic interests of consumers).

## 3. Procedural rights

One common aspect of consumer and environmental protection deserves particular mention. Irrespective of the technique employed, the delineation of protectionist measures will always have to be weighed against other concerns. The consumer's right to safety may be in conflict with his own economic interests. Granting rights or codifying state objectives will have an impact on the assessment of such conflicts, but cannot dispose of them. Because of this difficulty, one must question the degree to which rights should be shaped as 'procedural' rights (i.e. access to information, participation in decision-making procedures, consumer remedies and other forms of judiciary mechanisms). The three approaches to protection should not be understood as mutually exclusive. Each of them has its merits and its disadvantages. The final conclusion will assemble the different approaches and recommend use of each according to the various protectionist concerns.

## B. Method of Presenting the Issue

From the outset, the discussion on legal protection has been an international one. It is therefore possible to identify topics of international interest. The Community, however, stepped into the field of consumer protection relatively late.<sup>3</sup> Its task has concerned the further development of pre-existing protection mechanisms and their adaptation to the specific needs of the Community. For an evaluation of the legal techniques employed thorough analysis, not only of the pertinent texts but also of their implementation, would be extremely helpful.<sup>4</sup> However, for present purposes, it suffices to describe the approaches used at the international, national and Community level and to evaluate the pros and cons of the various regulatory techniques. A close examination of the state of community policy and community law will form the core of our presentation.

## II. Protection of Economic Interests and the Right to Safety

### A. EEC Consumer Policy Programmes

The notion of consumer protection in the Community has been shaped by the Commission in two Consumer Policy Programmes of 1976<sup>5</sup> and 1981<sup>6</sup> and was recently confirmed in the 'New Impulse for Consumer Protection' (1985).<sup>7</sup> According to these programmes, consumer protection covers two broad areas of concern: (1) protection against economic 'risks' as a consequence of unfair marketing practices, unbalanced rights and duties in contract terms, etc; (2) protection against risks issuing from dangerous products such as unsafe consumer goods, useless and insufficiently tested

<sup>3</sup> L. Krämer, *EWG-Verbraucherrecht* (1985); N. Reich, *Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften* (1987).

<sup>4</sup> The analysis of consumer law is restricted to presentation of the regulatory techniques. There has never been an attempt to investigate the implementation of the different laws, at least not in a comprehensive way and not in a comparative and European perspective.

<sup>5</sup> OJ (1975) C 92, 1 seq.

<sup>6</sup> OJ (1981) C 133, 1 seq.

<sup>7</sup> COM (85) 314 final, 23.7.1983.

drugs, contaminated food, etc. The distinction drawn between economic interests and the protection of safety interests seems intuitively plausible. It has never been questioned and may be called the hard core of consumer protection. The two Programmes as well as the 'New Impulse' require the Community to develop appropriate legal means for realizing both goals. Certainly, consumers are presented within the Programmes as parties enjoying 'rights': the right to protection against economic risks and the right to safety. The two Consumer Programmes and the New Impulse connect these basic rights of protection with the necessary procedural rights. These attempts guarantee their implementation through Community action by proclaiming both a right to be heard and a right to consumer redress. Although the Programmes do not articulate precise details for the structure which consumer policies should adopt, they nevertheless reflect those difficulties which hamper the debate on consumer protection, i.e. whether it amounts to either 'human rights' and/or 'state objectives', together with its' relevance for 'procedural rights.'

While the development of consumer protection was a response to the activist state,<sup>8</sup> its decline during the last decade reflects a general anti-regulatory tendency.<sup>9</sup> The first Consumer Programme of 1976 was adopted during the halcyon days of consumer protection. It is based on the hypothesis that strong public action is needed to impose duties on private actors. The second Consumer Programme of 1981, however, sets aside the classical model of the activist state. It relies rather on incentives for cooperation, on the corporate responsibility of undertakings and finally on 'soft law' techniques substituting public interest intervention.<sup>10</sup> A Third Consumer Programme has not been adopted. The New Impulse simply repeats the main issues and further develops the approach chosen in 1981. Consumer protection thus seems to have lost its priority. However this

<sup>8</sup> Cf. N. Reich, *Markt und Recht* (1977).

<sup>9</sup> H.-D. Assmann *et al.*, *Wirtschaftsrecht als Kritik des Privatrechts* (1980); and in a European perspective the controversy between Ch. Joerges, *Zielsetzungen und Instrumentarien der europäischen Verbraucherrechtspolitik: eine Analyse von Entwicklungen im Bereich des Zivilrechts*, *Zeitschrift für Verbraucherpolitik* (1977) 213 seq. and Krämer, 'Zielsetzungen und Instrumentarien der europäischen Verbraucherrechtspolitik: Eine Entgegnung zu dem Beitrag von Joerges' *Zeitschrift für Verbraucherpolitik* (1977) 228 seq.

<sup>10</sup> With respect to the changing regulatory patterns cf. Ch. Joerges *et al.*, *Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft* (1988) 282 seq.; with respect to the role and importance of soft law, Reich, Smith, 'Consumer Supplier Dialogue' 7 *JCP* (1984) 111 seq.

decline nowhere lead to a complete abandonment of consumer protection policies, and it hardly affected the political commitment to protection of safety interests.

The adoption of the Single European Act is very much in line with these general observations.<sup>11</sup> The new Article 100 A paragraph III explicitly recognizes consumer protection as a Community policy. Consumer protection has been introduced in the Treaty together with environmental protection. It has not been put on an equal footing with environmental protection. Environmental protection has become a state objective (*Staatszielbestimmung*) of the Community, *per* Article 130 R. Consumer protection, although mentioned in Article 100 A paragraph III, suffers from a double restriction: its realization is bound to regulatory activities by the Community aiming at the completion of the Internal Market (Article 100 A paragraph D), and, according to the wording of Article 100 A paragraph III, the primary addressee of consumer protection is the Commission and not the Community as a whole.<sup>12</sup> Despite these weaknesses, it is no longer possible to question the competence of the Community in this field, at least not in the context of completing the Internal Market.

Furthermore, the core of consumer protection borders on environmental protection. Article 130 R paragraph 1 explicitly states that one objective of environmental policy should be the protection of human health. Therefore, the right to safety can be incorporated into health protection through environmental policy, and may also be brought under the expansive and protective wing of environmental law as a constitutional objective of the EEC. In practice, Article 130 R must be made compatible with Article 100 A and a distinction has to be drawn between health regulations relating to the completion of the Internal Market and those health regulations relating to environmental protection.<sup>13</sup> Legal writers seem to agree that safety regulations relating to the achievement of the

<sup>11</sup> Cf. for an analysis of the Single European Act under a consumer protection perspective, Consumer Law Group, *Consumer Protection in the EEC after the Ratification of the Single Act* 10 *JCP* 3 (1987) 319 seq.; N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), 296 seq.

<sup>12</sup> N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), para. 176, 297 seq.

<sup>13</sup> Krämer, 'The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law' *CMLR* (1987) 659 seq.; Pernice, 'Kompetenzzuordnung und Handlungsbefugnisse der Europäischen Gemeinschaft auf dem Gebiet des Umwelt- und Technikrechts', *Die Verwaltung* (1989) 1 seq.; D.H. Scheuing, *Umweltschutz auf der Grundlage der Einheitlichen Akte* (1989) 152 seq.

Internal Market should be placed under the auspices of Article 100 A, and that Article 130 R should be referred to only in the case of genuine safety policy objectives.<sup>14</sup> The choice to be taken is not so much determined by legal arguments as by strategic considerations. The Commission seems convinced that it is far easier to realize a 'high level of protection' under Article 100 A. This can be attributed to practical reasons, Article 100 A calls for majority decisions, whereas Article 130 requires, in principle, unanimity. Although a potential conflict based on different concepts of the right to safety under Article 100 A (consumer protection) and under Article 130 R (environmental protection) is far from finding a solution, one conclusion may be safely drawn: in legal terms the Single Act has strengthened the role and importance of consumer protection in Community law, especially in the field of consumer safety.

## B. A Constitutional Right to Protection Against Economic Risks?

We began from the hypothesis that economic protection need *not* to be based upon some fundamental right. The primary responsibility for the protection of economic interests would then rest with the Member States. European law would primarily be concerned with the abuse of national legislation for protectionist purposes (Article 30 of the Treaty).<sup>15</sup> Pertinent secondary Community law could then be understood as providing a minimum level of protection (a European *ordre public*). The case-law of the ECJ confirms the perspective that neither the Commission nor the Council are entitled to deprive the Member States of the discretion to shape the degree of economic protection within the limits of Article 30.<sup>16</sup> Furthermore, the case-law of the ECJ regards consumers not only as passive beneficiaries of the Internal Market, it also envisages an active role for the European consumer in the completion of the Internal Market. The role is in principle

<sup>14</sup> Cf. L. Krämer, *op. cit.* (note 3); against N. Reich, *op. cit.* (note 3).

<sup>15</sup> Following the case-law of the ECJ on Article 30.

<sup>16</sup> Cf. especially Case 205/84, [1986] ECR 3755 at 3803 n. 30 where the Court has recognized the necessity of supervising mass, or respectively consumer insurance as a 'particular sensitive matter'; Case 382/87 [16.5.1989] where the Court has confirmed the Member States right to prohibit door-step-selling practices with pedagogic material.

equivalent to the freedom of undertakings to engage in European-wide activities.<sup>17</sup>

Despite the emergence of such rights for the European consumer, it may in the long run be unsatisfactory to have the primary responsibility for the protection of economic interests lie with the Member States. Within the limits of Article 30, the different levels of protection would continue to subsist throughout the Internal Market. The 'state of origin' doctrine (the principle of mutual recognition or 'home regulation') is not capable – and not intended – to rule out such differences. All one could envisage would be an adaptation of choice of law rules to the basic rules of the Treaty<sup>18</sup> and the European Convention of Human Rights.<sup>19</sup>

Under a constitutional perspective, however, one might be able to take a further step and explicitly recognize the Community's commitment to protecting the economic interests of European consumers (*Staatszielbestimmung*). This step would be in line with the European Parliament's recent declaration.<sup>20</sup> Such a provision in the Treaty could serve as a yardstick for enforcing the 'best level'<sup>21</sup> of protection through the market and eliminate the risk of downgrading consumer protection in the Community to the lowest common denominator.<sup>22</sup>

<sup>17</sup> N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), para. 14, 52, with reference to Steindorff, 148 *ZHR* (1984) 338 seq. and Donner *SEW* (1982) 362 seq.

<sup>18</sup> Cf. Steindorff, 'Europäisches Gemeinschaftsrecht und deutsches Internationales Privatrecht – Ein Beitrag zum *ordre public* und zur Sonderanknüpfung zwingenden Rechts' *EuR* (1981) 426 seq.; Zweigert, 'Einige Auswirkungen des Gemeinsamen Marktes auf das internationale Privatrecht der Mitgliedstaaten', in *Festschrift für W. Hallstein zu seinem 65. Geburtstag*; E. v. Caemmerer, H.-J. Schlochauer, E. Steindorff (eds), *Probleme des Europäischen Rechts* (1966) 555 seq.; Koch, 'Internationales Produkthaftungsrecht und Grenzen der Rechtsangleichung durch die EG-Richtlinie' 152 *ZHR* (1988) 537 seq.

<sup>19</sup> Cf. Meesen, 'Kollisionsrecht als Bestandteil des Allgemeinen Völkerrechts: Völkerrechtliches Minimum und Kollisionsrechtliches Optimum', in *Festschrift für F.A. Mann* (1977) 227 seq.; Neuhaus, 'Der Beitrag des Völkerrechts zum internationalen Privatrecht' 21 *GYIL* (1978) 60 seq.; Engel, 'Ausstrahlungen der Europäischen Menschenrechtskonvention auf das Kollisionsrecht' 53 *RabelsZ* (1989) 3 seq.

<sup>20</sup> Art. 24 of the Declaration of Fundamental Rights and Freedoms PE 132.563=*EuGRZ* (1989) 204 seq. Cf. Beutler, 'Die Erklärung des Europäischen Parlaments über Grundrechte und Grundfreiheiten vom 12.4.1989' *EuGRZ* (1989) 185 seq.

<sup>21</sup> Cf. in this context Zuleeg, 'Vorbehaltene Kompetenzen der Mitgliedstaaten auf dem Gebiet des Umweltschutzes' *NVwZ* (1987) 280 seq.

<sup>22</sup> What actually seems to happen in the field of financial services, see BEUC's analysis 'Die Verbraucher und der Gemeinsame Markt für Finanzdienstleistungen', working document of BEUC, BEUC/AGV/222/88 23.12.1988, Verbraucherforum Berlin, 30-31 January 1989.

### C. Procedural Rights

Strengthening the consumers' market position through participatory or procedural rights, might be conceivable and important for the protection both of economic and safety interests. Despite the recognition of procedural rights in the Community's Consumer Programmes, no consistent approach has been developed for implementing the right to participation and the right to consumer redress.<sup>23</sup> Surprisingly enough, procedural rights are more developed in the area of economic protection than in the field of product safety. This may be attributed to the settled tradition of protecting individual rights for consumers against overcharging, whereas procedural rights have only recently been detected as legal means for protecting safety interests.<sup>24</sup>

Information policy measures are an essential requirement for active participation by the consumer in the market process and the development of market integration. This implies that a duty to provide information is imposed on manufacturers. Article 30 could probably be interpreted as guaranteeing a 'right' to information as a prerequisite for rational choice by consumers. ECJ case-law on the control of Member States legislation seems to correspond to this view.

The inclusion of procedural rights in secondary Community law is almost non-existent. Article 4 of the Advertising Directive<sup>25</sup> contains procedural stipulations to be followed by national authorities or jurisdictions. The pre-draft Directive on Unfair Contract Terms provides for an equivalent regulatory mechanism.<sup>26</sup> It imposes a duty on Member States to take appropriate procedural action without specifying in any detail the potential role of the consumer. Consumers may be entitled to take a joint (class) action as in the FRG, but they may be excluded from participation in the control of unfair contract terms where such control is left to the authorities.<sup>27</sup>

Beyond these two areas, Community policy seems confined to in-

<sup>23</sup> Overview on the state of development in L. Krämer, *op. cit.* (note 3) 389 seq.

<sup>24</sup> We will return to procedural rights in the field of consumer safety in more detail, *infra* III.

<sup>25</sup> OJ (1984) L 250, 17 seq.

<sup>26</sup> Cf. GD XI/124/87 Further Draft Articles For Discussion on Unfair Terms of Contracts, June 1987 and COM (84) 55, final 9.2.1985. Proposal for a Commune Directive on consumer contracts COM (90) 322-SYN 285, 23.7.1990.

<sup>27</sup> Cf. for more details the CCC/176/85, COM (90) 322-SYN 285.



vestigation of access to justice mechanisms in the Member States,<sup>28</sup> to the financing of pilot projects on consumer advice in selected EEC countries<sup>29</sup> and to evaluating conciliation procedures.<sup>30</sup>

In the field of consumer safety legislation and its implementation, consumers' procedural rights are more relevant by far.<sup>31</sup> Any 'right to safety' can only lay down general principles, e.g. 'essential safety requirements' which must then be specified by threshold values or safety standards. A right to participate in decision-making procedures would have considerable implications. The same holds true for the implementation of pertinent legislation. Here again, the decisions to be taken require complex value judgements. It goes without saying that granting access to relevant information and participation in the assessment of risks would be extremely important. One might even go a step further and raise the question of the extent to which consumers as individuals or consumer organizations should be entitled to bring safety issues before the courts, in order to guarantee that value judgments, safety standards, as well as regulatory actions to be taken, might become the subject of judicial control.

### III. Community Policy Protecting the Safety of Consumers

The overwhelming importance of a consistent Community-wide safety policy seems self-evident: an estimated 45 million people suffer from accidents at home, and 80 000 of these accidents are fatal.<sup>32</sup> Even more alarming, 25 000 children die each year in the Community due to accidents

<sup>28</sup> *Bull. EC*, Supplement, 2/85 Consumer Redress, Commission of the European Communities, Memorandum to the Council transmitted on 4th January 1985 (based on COM (84) 692 final).

<sup>29</sup> U. Reifner, M. Volkmer, *Neue Formen der Verbraucherrechtsberatung* (1988).

<sup>30</sup> Such a project is presently being undertaken by Th. Bourgoignie, Université Catholique de Louvain, Centre de Droit de la Consommation, 2, Place Montesquieu, B-1348 Louvain-la-Neuve.

<sup>31</sup> Cf. my paper, 'Considerations Shaping Future Consumer Participation in European Product Safety Law', in Ch. Joerges (ed.), 'Workshop on Product Liability and Product Safety in the European Community', EUI Working Paper, Florence (1989) 182 seq.

<sup>32</sup> Data taken from the EHLASS System, the European Accident Surveillance System, OJ L 109, 26.4.1986, 23 seq.; cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 3) 289 seq.

at home. Most of these accidents result from suffocation, poisoning and burning. This section gives a survey of the Community's efforts to cope with consumer safety problems, and tries to illuminate the consequences of the Community's involvement in the regulation of product safety, with due regard to the Member States competence under Article 36.

### A. Safety as the Main Field of Recent Consumer Policy<sup>33</sup>

Since President Kennedy's message to consumers in 1962,<sup>34</sup> the right to safety has been neatly dovetailed into the mainstream of consumer policy objectives. Likewise the European Community in its two Consumer Policy Programmes of 1976 and 1981 has committed itself to 'an effective protection from dangers in the interest of health and safety of consumers.' However the implementation of the two objectives turned out to be extremely cumbersome. The first decade of the Community's safety policy may be described as incrementalistic and problem-oriented.<sup>35</sup> The Community intervened whenever it seemed necessary to react to specific challenges. Quite a number of directives have been adopted, mostly related to pharmaceuticals, food and specific categories of consumer goods.

Since the the mid-eighties the situation has changed dramatically. The programmatic objectives of the two Consumer Programmes became extremely important. 'The New Impulse for Consumer Protection Policy' of 1985 clearly demonstrates the shift in priorities. The Commission's White Paper<sup>36</sup> seems to have paved the way for a new link between the completion of the Internal Market and the necessity to impose a general safety duty on manufacturers. The 'New Impulse' served as the basis for quite a number of initiatives and activities on behalf of the Community. The approach chosen might be characterized by four regulatory mechanisms: establishing a Community-wide accident surveillance system, imposing a general safety duty on manufacturers and dealers, developing appropriate

<sup>33</sup> The following is largely based on the study commissioned by the European Community, Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), cf. also Ch. Joerges, 'Product Safety Law, Internal Market Policy and the Proposal for a Directive on General Product Safety', EUI Working Paper, EPU n. 90/3, 1990.

<sup>34</sup> Reprinted in v. Hippel, *Verbraucherschutz*, *op. cit.* (note 1) 281 seq.

<sup>35</sup> Cf. Krämer, 'EEC Action in regard to consumer safety, particularly in the food sector' *JCP* (1984) 473 seq.

<sup>36</sup> Cf. COM (85) 310 final.

control mechanisms to withdraw unsafe products from the market and, last but not least, imposing strict liability for defective products on manufacturers, dealers and importers.<sup>37</sup>

The corner stone of the new consumer safety policy turned out to be the elaboration of a general safety duty. It cannot be explained without adoption of the so-called 'New Approach to Technical Harmonization and Standards'.<sup>38</sup> The New Approach substituted the former Programme on the Removal of Technical Barriers to Trade of 1969,<sup>39</sup> as amended in 1973.<sup>40</sup> This Programme departed from the idea that barriers to trade resulting from divergent technical provisions might be removed by way of adopting vertical, product-related directives. These directives should, according to the concept, lay down all the technical details manufacturers have to comply with in order to obtain access to the European market. But it was the necessity to come to an agreement on technical specifications that finally led to a deadlock. The Community organs, especially the Council, were all too often unable to agree upon the technical specifications. Proposals were discussed for more than ten years and the progress in harmonization was slow.<sup>41</sup> Therefore the Community had to reconsider its policy and finally adopted the New Approach in 1985. Its basic idea is to discharge the legislative machinery of the Community from the necessity to agree upon technical specifications.<sup>42</sup>

The Community organs may now concentrate on laying down so-called 'basic safety requirements' which will then be specified by technical standards developed by the European standardization institutions, CEN and CENELEC. The general pattern of the New Approach has been agreed upon in a model directive, which does not have direct legal effect but obliges Member States to adhere to its principles. Quite a number of directives and

<sup>37</sup> Cf. Micklitz, 'Perspectives on a European Directive on Safety of Technical Consumer Goods' 23 *CMLR* (1986) 617 seq.; Falke, 'Elements of an Horizontal Product Safety Policy of the European Communities' 12 *JCP* (1989) 207 seq.

<sup>38</sup> OJ C 136, 4.6.1985, 1 seq.; cf. Joerges, 'The New Approach to Technical Harmonization and the Interests of Consumers: Reflections on the Requirements and Difficulties of a Europeanization of Product Safety Policy', in R. Bieber *et al.* (eds), 1992: *One European Market? A Critical Analysis of the Commission's Internal Market Strategy* (1988) 175 seq.

<sup>39</sup> OJ C 76, 17.6.1969 1 seq.; cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 250 seq.

<sup>40</sup> OJ C 38, 5.6.1973 1 seq.

<sup>41</sup> Cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 272 seq.

<sup>42</sup> The regulatory technique of the New Approach is explained in more detail in Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 341 seq.

proposals have since then been enacted.<sup>43</sup> Even at its initiation, it was already apparent that the policy of the New Approach needs to be supplemented by a specific consumer safety policy. A general safety duty and the establishment of appropriate post-market control mechanisms at the Community level seem to be indispensable supplements to the new policies. This may be attributed to two reasons: (1) The new directives are shaped according to the needs of the specific product categories and specific requirements of the markets concerned. They are not based on a common safety concept; (2) Post-market control mechanisms are needed to avoid distortions to the Internal Market caused by measures taken by the Member States in order to protect their citizens against risks associated with dangerous products.<sup>44</sup>

The consumer department of the Commission succeeded in preparing a communication entitled 'The Safety of Consumers' which the Council acknowledged and approved on 25 June 1987.<sup>45</sup> It charged the Commission with the mandate of setting out a draft directive on a general safety duty. It took another two years before the Commission published its first proposal. On 31 July 1989,<sup>46</sup> a draft directive concerning general product safety was published. The draft as revised on 27 June 1990 stipulates in Article 3 that:

Suppliers are under an obligation to place only safe products on the market Member States shall take in their legislation all necessary measures to ensure that suppliers meet this obligation.

Article 2 defines what might be understood as a 'safe product' or a 'dangerous product'.

<sup>43</sup> Cf. for a closer analysis Falke, 'Normungspolitik der Europäischen Gemeinschaften und Schutz von Verbrauchern und Arbeitnehmern', in Th. Ellwein *et al.* (eds), *Jahrbuch für Staats- und Verwaltungswissenschaften* (1989) 217 seq..

<sup>44</sup> Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), 451; the lack of appropriate means of post-market control mechanisms has been the starting point for a follow-up study also commissioned by the Commission of the European Community, H.-W. Micklitz (ed.), *Post-Market Control of Consumer Goods* (1990).

<sup>45</sup> OJ C 176, 4.7.1987.

<sup>46</sup> OJ C 193, 31.7.1989, 1 seq.; COM (89) 162 final – SYN 192, 7.6.1989, Proposal for a Council Directive concerning General Product Safety; as amended OJ C 156, 27.6.1990, 8 seq.; see for an analysis Ch. Joerges (note 33); D. Hoffmann, paper presented at the EUI, Florence, Seminar 30.11. – 1.12.1989 on International efficiency of control decisions, adopted in order to ensure the respect of economic regulations by private parties in the EC.

'Safe product' shall mean any product which, during its foreseeable time of use, does not present any risk or only those reduced to such a level, taking account of the products use, considered as acceptable and consistent with a high standard of protection for the safety and health of persons

– given its composition, execution, wrapping, presentation and labelling, conditions of assembly, maintenance or disposal, instructions for handling and use and its direct or indirect effect upon or in combination with other products,

– when used for its intended use or in a manner which may reasonably be foreseen, having regard, *inter alia*, to any specific statement made by its supplier or on his behalf in that respect and, in particular, to the normal behaviour of children.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be 'not safe' or 'dangerous'.

'Dangerous product' shall mean any product which does not meet the definition of 'safe product' according to point (b) of the present Article.

It is not yet clear and certainly premature to predict the further destiny of the draft directive. One thing, however, seems definite: the draft will meet with strong opposition from some Member States, most notably the Federal Republic of Germany.

## B. Mechanisms for Safety Regulation at the European Level

The programmatic policy objectives of the two Consumer Programmes and especially the New Impulse have led to a 'juridification' of consumer safety. The legal rules chosen by the Community recognize, in principle, public responsibility for protecting the consumer against health hazards. As a matter of regulatory technique, this is brought about through special directives, graded according to the hazard potential, for medicines, pesticides, chemicals and other consumer goods.<sup>47</sup> Access to markets therefore

<sup>47</sup> For more details cf. L. Krämer, *op. cit.* (note 3), 215 seq. with reference to the different product categories 234 seq.; cf. N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), 219 seq.

depends on quite different prerequisites. Medicines are subject to a prior approval procedure.<sup>48</sup> They may be brought into circulation only after a sophisticated statutory examination. Chemicals may be marketed throughout the Community once they have been registered with one of the Member States' competent authorities. The statutory authorities do not exercise any direct control, they are merely obliged to register the new chemicals and file the documents presented by the producers.<sup>49</sup> Consumer goods must undergo neither a prior approval nor a prior registration procedure. Market access is guaranteed once the manufacturers have ensured that their products comply with the basic safety requirements.<sup>50</sup> According to the New Approach this might be done by reference to European, or, where these European standards are not yet in existence, national standards. The Community is considering the possibility of extending the New Approach to food<sup>51</sup> and cosmetics.

The procedure of setting protection standards differs according to the intensity of market access control. Member States authorities decide on the efficiency and safety of medicines. They have to rely on documents presented by the manufacturers, but they are entitled to undertake investigations on the specific properties of the medicines if this appears necessary.<sup>52</sup> The situation is quite different with other consumer goods. The New Approach delegates governmental responsibility for protecting consumers against health hazards to private standard-setting bodies, namely CEN and CENELEC. Operating from the basic safety requirements, CEN and CENELEC have to develop the technical standards which then guarantee manufacturers' access to the European market. Privatization of consumer safety is somewhat compensated for by democratizing the standard-setting

<sup>48</sup> For more details cf. N. Reich (ed.), *The Europeanisation of the Pharmaceutical Market – Chances and Risks* (1988); D. Hart *et al.*, *Das Recht des Arzneimittelmarktes* (1988); N. Reich, *Arzneimittelregelung in Frankreich* (1988).

<sup>49</sup> Cf. L. Krämer, *op. cit.* (note 3), 245 seq.; N. Reich, *Diffuse Interessen*, *op. cit.* (note 3) 242 seq.

<sup>50</sup> Cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), with reports on product safety law in the Federal Republic of Germany, France, the United Kingdom and the United States.

<sup>51</sup> COM (85) 603 final, 8.11.1985; the Community has not yet developed any proposal to implement that policy. The most recently published Directive on Food Additives relies on prior approval to guarantee access to the European market, OJ L 40, 11.2.1989, 27 seq.

<sup>52</sup> Cf. for the situation in the FRG, D. Hart *et al.*, *op. cit.* (note 48) 41 seq.; on France, cf. N. Reich, *op. cit.* (note 48) 25 seq.

procedure.<sup>53</sup> The collaboration agreement between the Commission and CEN/CENELEC includes a provision on the participation of interests working in that field.<sup>54</sup> The Commission furthermore agreed to 'contribute to the ascertainment of suitable arrangements according to the circumstances.' This acknowledges a right to participation, which is not a feature of the prior approval procedure for medicines, and the prior registration procedure for chemicals. Redress does exist, but only for the manufacturers as addressees of the statutory regulatory activities. Consumers have no opportunity to bring a prior approval decision or a specific technical safety standard before the courts.

The Community departs from the idea of shared powers between it and the Member States. Secondary Community law aims at harmonizing market access rules and at developing appropriate control activities. The task of enforcing harmonized rules lies with the competent Member States' national authorities. Implementation of a Community-wide safety policy therefore depends on cooperation between the different Member States' authorities with the Community. This is implemented in the form of different committees which are set up along the line of the adoption of specific product-related directives.<sup>55</sup> These committees, consultative in nature, might be understood as a first step to the final setting-up of an EEC administration in the field of product safety.<sup>56</sup> In the long run it may be indispensable for delegating administrative powers from the Member States to the Community.

<sup>53</sup> Cf. Micklitz, 'Produktsicherheit und technische Normung in der Europäischen Gemeinschaft', in K. Tonner, H. Paetow (eds), *Wirtschaftsregulierung in der Krise, Jahrbuch für Sozialökonomie und Gesellschaftstheorie* (1986) 109 seq.

<sup>54</sup> Reprinted in 64 *DfN-Mitt.* (1985) 78 seq.; cf. Ch. Joerges et al., *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 403 seq.

<sup>55</sup> Cf. Meng, 'Die Neuregelung der EG-Verwaltungsausschüsse - Streit um die Comitologie' 48 *ZaöRV* (1988) 208 seq.

<sup>56</sup> Cf. J. Schwarze, *Europäisches Verwaltungsrecht, Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaften*, 2 Volumes (1988), the Commission indicates in the recitals of the amended draft directive on product safety (note 46) that it is willing to explore the possibility of setting up a non-statutory advisory committee, under its own authority, to represent the various interested parties.

### C. The Community's Involvement in Product Safety

There is no escaping the reality that wherever the Community harmonizes provisions on product safety in the interests of achieving the Internal Market, it is thereby taking on powers in the field of product safety.<sup>57</sup> The preemption doctrine ensures the Community's prominence wherever and whenever it adopts secondary Community safety regulation. The political consequences of the ever-broadening consumer safety policy were hardly noticed while the Community's approach to safety regulation remained product-related and incremental. A possible adoption of the Product Safety Directive<sup>58</sup> would intensify the conflict between the Member States and the Community's regulatory competence in the field of safety. The division of power thereby gains a new quality. Does public responsibility for product safety lie primarily with the Community once the Directive is adopted?

#### 1. The Draft Directive on Product Safety and Article 36

Article 36 recognizes public responsibility for consumer protection against health hazards as a possible defence for Member States against the predominantly Internal Market objectives of the Commission.<sup>59</sup> Once the Member States have agreed to delegate specific powers to the Community through adopting product-related directives, they can no longer invoke Article 36. The scope of the Community's power will then depend on the character of the directive concerned, that is, whether the harmonization of product safety in the specific field is total or restricted.<sup>60</sup>

Unlike its provisions on environmental protection, the Single Act does not entitle the Member States to introduce more stringent protective measures once the Community has acquired competence. Article 100 A paragraph IV provides only for a specific safeguard procedure which the Member States might make use of, if they feel that the Community rules do not sufficiently protect their citizens. Despite the lack of a specific provision

<sup>57</sup> Cf. Ch. Joerges, *op. cit.* (note 38) 179 seq.

<sup>58</sup> *Op. cit.* (note 46).

<sup>59</sup> Cf. N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), paras. 120, 227-229 and paras. 176, 301.

<sup>60</sup> At this point the whole body of the ECJ on the relationship between Articles 30 and 36 needs to be considered; cf. N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), 224 seq.; Ch. Joerges, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), 318 seq.; L. Oliver, *Free Movement of Goods in the ECC under Articles 30 and 36 of the Rome Treaty* (1982).



corresponding to Article 130 T, the safeguard procedure under Article 100 A paragraph IV constitutes a challenge to the classical preemption doctrine. It strengthens the Member States' responsibility for the protection of their citizens and considers their reservations against a Community which concentrates too much on the achievement of the Internal Market.<sup>61</sup> Within the limits of Article 100 A paragraph IV the Community cannot realize an EEC consumer safety policy without the cooperation of the Member States. It is true that the Community may initiate an infringement procedure under Article 169 as a last resort. But this applies only to those violations of the Treaty which might be classified as constituting an 'abuse' of the Member States' powers under Article 36, in connection with Article 100 A paragraph IV. Legal doctrine already discusses the extent to which an understanding of the Community's and the Member States' power as joint or parallel competence might be feasible.<sup>62</sup> This interpretation would indicate that the preemption doctrine cannot be applied *stricto sensu* to Article 36. It might facilitate the adoption of the Draft Directive on Product Safety<sup>63</sup> under Article 100 A, whilst retaining the Member States' competence under Article 36.

## 2. Harmonization of product safety and the function of the safeguard procedures already provided for in virtually all product-related directives

The inclusion of a safeguard procedure in specific product-related directives alters the character of the public responsibility for protection of consumers against health hazards. It transforms the right to safety from a right to defence by Member States against predominantly Internal Market objectives, to a positive obligation of the Member States to safeguard the interests of their citizens in the underlying procedure.<sup>64</sup> Specific safeguard

<sup>61</sup> Cf. N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), paras. 176, 301 and Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 394 seq.

<sup>62</sup> Reich, 'Schutzpolitik in der Europäischen Gemeinschaft im Spannungsfeld von Rechtsschutznormen und institutioneller Integration' 17 *Schriftenreihe der Juristischen Studiengesellschaft* (1988); Timmermanns, 'Common Commercial Policy (Article 113) and International Trade in Services', in F. Capotorti *et al.*, (eds), *Du droit international au droit de l'intégration – Liber Amicorum Pierre Pescatore* (1987) 675 seq.; Zuleeg, *op. cit.* (note 21); D.H. Scheuing, *op. cit.* (note 13) 170 seq.; much more restrictively, Langeheine, 'Rechtsangleichung unter Article 100a EWGV – Harmonisierung vs. nationale Schutzinteressen' *EuR* (1988) 235 seq.

<sup>63</sup> *Op.cit.* (note 46).

<sup>64</sup> Cf. Ch. Joerges, *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 394 seq. and Hoffmann, 'La directive sécurité générale des produits et les articles 30/30 du traité', Internal Document of DG XI (1989).

procedures belong to the core of regulatory mechanisms in safety-related directives. They follow more or less the same scheme and pursue the very same function. Safeguard procedures are set up in order to respond to objections from Member States against Community safety policy and to adapt the different national safety provisions to a common Community standard. It is a common characteristic of all safeguard procedures that the Commission claims the ultimate right to decide on emerging conflicts between the Member States concerning product safety, or between the Member States and the Community. This perception still goes hand in hand with the overall concept of the preemption doctrine. It ignores, however, that the preemption doctrine does not apply in safeguard procedures provided for under secondary Community law. Here, consensus between the Commission and the Member States is needed, otherwise the Council will have to resolve the conflict.

The retreat from the preemption doctrine at issue, does not constitute the real problem with safeguard procedures. The question is much more, whether the safeguard procedure by its very nature can fulfill its twofold function, especially as it is increasingly overcharged with quite heterogeneous tasks. This is especially true of the New Approach, where overcharging is the result of the Community's new concept in tackling the problem of product safety. The New Approach provides for the possibility of invoking the safeguard procedure, not only in order to debate existing safety standards but also to renew and upgrade European standards already agreed upon. The safeguard procedure also contains the elements of a second, and increasingly significant development – the so-called post market control mechanisms.

Public access to experience with the safeguard procedures is limited,<sup>65</sup> but the policy of the Community is quite clear. It relies on the safeguard procedure to solve all conflicts which are not yet clarified in the Directive itself. Then, however, the safeguard procedures become the true organs which administer product safety at the Community level. The consequences are far-reaching: they determine the degree to which the Community is involved in Community-wide product safety regulation. The criteria laid down in the specific directives then decide on the existence of a Community responsibility for the protection of consumers against health hazards. Finally, one might raise the question whether, and to what extent,

<sup>65</sup> Reports of the activities are published, but not systematically and rather delayed; cf. L. Krämer, *op. cit.* (note 3).

such basic procedures need additional 'public control.' It is conceivable that important issues of European product safety are being dealt with in procedures which are not subject to any kind of democratic control.<sup>66</sup>

### 3. Harmonization of product safety and the growing importance of post market control mechanisms at the EEC level

The Community's consumer product safety policy tends to split up competences under the safeguard procedure. The task of co-ordinating the withdrawal of unsafe products from the market is removed from the safeguard procedure and placed under the auspices of specific institutional bodies. This development directly results from the harmonization of market access rules within the Community. Free circulation of goods can only be maintained if there are some kinds of mechanisms available, which allow the Member States and the Community to agree on a common approach for withdrawing unsafe products from the EEC market. This task definitely falls outside the scope of the classical safeguard procedure. The Community is making efforts to build up post market control mechanisms in the field of medicines and consumer goods which, though differing in substance go beyond the Rapid Exchange System as adopted in 1984.<sup>67</sup> Whereas the Community intends to establish a Community Food and Drug Administration,<sup>68</sup> it shows more reluctance in the field of other ordinary consumer goods. The Draft Directive on Product Safety would empower the Commission as the final and sole arbiter to take action if it has knowledge of 'a grave and immediate risk related, directly or indirectly, to the safety properties of a product.'<sup>69</sup> To date, two mechanisms are to be found in existing safety directives, yet the overall objective of the Community seems clear. Post market control mechanisms need to become a subject of Community law. The scope of Community power to regulate product safety would then depend on, firstly, the criteria under which the Commission would be

<sup>66</sup> Cf. my 'Considerations...', *op. cit.* (note 31), which explicitly aim at discussing participation of public interests groups in the post market control procedure.

<sup>67</sup> OJ L 70, 13.3.1984, 16 seq.; cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), 293; and with specific regard to the deficiencies, Falke, 'What should be the Content of an E.E.C. Directive on the Safety of Technical Consumer Goods?' 16 *BEUC Legal News* (Nov./Dec.) 16 seq.

<sup>68</sup> Mémorandum sur le système futur d'autorisation des médicaments dans la Communauté européenne, III/B/6, Avril 1989.

<sup>69</sup> Article 8 of the proposal for a Council Directive concerning Product Safety, *op. cit.* (note 46), as amended.

entitled to take action at the Community level and, secondly, the Member States' willingness to cooperate with the Community, or respectively the Commission to enforce the measures taken by the latter.

#### IV. Fundamental Right to Safety – State of Development

The concept of a consistent European consumer safety *policyis* in the offing. Consumer *law*, however, falls far behind the policy objectives. The following chapter deals with the state of development of a right to safety within the Community, within the Member States and at the international level.

##### A. The State of Community Law on a Right to Safety

The Treaty of Rome clearly shapes the distribution of competence between the Member States and the Community in the regulation of product safety. The Single European Act has not amended the distribution of competence. Safety remains a public responsibility in the hands of the Member States as long as the Member States have not decided to transfer their regulatory power to Community level. That being so, it does not suffice to look merely at the provisions of the Treaty. ECJ case-law is the main indicator in a preliminary assessment of the present state of a safety-right development.

##### 1. Right to safety

The main consideration is whether, and to what extent, a 'right to safety' enjoyed by European consumers, corresponds to present governmental responsibility for protecting consumers against health hazards. One might see the ECJ, in its case-law on the relationship between Articles 30 and 36 and the principle of proportionality, as being on the way to framing a positive obligation for the Member States to protect consumers against health hazards.<sup>70</sup> Such a perspective would *de facto* anticipate the consequence of the safeguard procedure. Article 36 would no longer be merely a right to defence for Member States against Community action

<sup>70</sup> This was first conceived by N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), paras. 120, 227-229.

neglecting or violating their safety interests. The result would border the constitutions in most of the Member States, where the governments' obligation to protect their citizens against health hazards could be understood as a constitutional responsibility. But we would like to go even a step further, and raise the question of the extent to which, under more extensively developed Community law, consumers might refer to a right to safety and require appropriate action from 'their' Member State. Such a Community right to safety would and should lead to common safety standards all over the Community. This perspective could essentially be based on the transfer of principles developed by the ECJ under Articles 30 to 36. Article 30 already gives manufacturers the right to require access to the European market, a right which is enforceable before the European Court of Justice. The consumers' right to choose is the counterpart of the manufacturers' right to market access.<sup>71</sup> Here, one finds the elements which could provide a basis for the development of a right to safety under Article 36. Article 30 is directly applicable, its addressees are manufacturers and consumers all over the Community. Article 36, however, would mainly constitute a positive obligation for Member State governments to undertake appropriate means to protect their citizens. The primary addressees of Article 36 are the Member States and not the individual citizen.

A Community obligation imposed on the Member States to protect their citizens against health hazards, cannot be comprehensive. It covers only those subjects of consumer concern in which the Community has become involved by the adoption of secondary Community law. The actual scope of the Community responsibility on product safety depends therefore on the content of the different directives related to product safety. Today, the scope is widely scattered and mainly product-related. It is bound to quite differing pre-requisites in the safeguard procedures and in the proposed post market control procedures. The scattered power of the Community has manifold consequences: it ultimately means that the recognition of a specific Community power in the field of product safety might be measured against the criteria set out by the ECJ in its case-law on the relationship between Articles 30 and 36.<sup>72</sup>

<sup>71</sup> Cf. *supra* note 68.

<sup>72</sup> Cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), 318 seq.; L. Oliver *op. cit.* (note 60).

## 2. Content of a right to safety

When one contemplates the emergence of a right to safety corresponding to protection against health hazards by the authorities, it logically follows that the substance of the term 'safety' requires clarification. Neither the Treaty nor the Single European Act provides any assistance for a definition of 'safety.' The Draft Directive on Product Safety might introduce a definition which will come close to the one given under the Product Liability Directive.<sup>73</sup> The Treaty however, does not remain silent as to the possible perspectives of a Community responsibility on product safety. It requires the Commission to pursue a 'high level' of consumer protection. Article 100 A paragraph III could become the legal corner-stone of consumer policy within the Internal Market philosophy, if one succeeds in deducing from Article 100 A paragraph III. a rule which obliges the Commission to implement a 'high' or even the 'best possible' level of consumer protection.<sup>74</sup> Such an interpretation might be backed by the case-law of the ECJ. It allows Member States to claim a high level of protection for their citizens and even a higher one than in the EEC exporting country.<sup>75</sup> The development of such a rule is strongly linked with the understanding of Article 100 A paragraph III. One might argue that it addresses the Commission only and that the 'high level' or even a 'best level' of protection cannot be submitted to the jurisdiction of the ECJ.<sup>76</sup> The Treaty does not, however, prevent the choice of a quite different approach. One could well read Article 100 A paragraph III not only as an obligation for the Commission to pursue a high level of protection, but also understand it as a basic rule which is open for judicial control initiated by the European Parliament.<sup>77</sup> This reading would open up the possibility of taking the Member State with the best developed consumer safety law as a yardstick for the whole Community.

<sup>73</sup> OJ L 210, 7.8.1985, 29 seq. Article 6 reads as follows: 'A product is defective when it does not provide the safety which a person is entitled to expect'. Art. 2 b)c) of the Proposal concerning Product Safety gives a definition which in its essence comes near to the general clause of the Product Liability Directive.

<sup>74</sup> Cf. Zuleeg, *op. cit.* (note 21).

<sup>75</sup> 28.1.1986, Case 188/84, [1986], ECR 419; cf. Ch.Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10) 425.

<sup>76</sup> Cf. N. Reich, *Diffuse Interessen*, *op. cit.* (note 3), paras. 176, 297 seq.

<sup>77</sup> Cf. L. Krämer, *op. cit.* (note 13), 679 with reference to the European Parliament's Resolution of 9 Oct. 1986 on the admissibility of action by the Parliament under Article 173 EEC Treaty, OJ (1986) C 283/85 seq., see IV.3 below.

Neither the character of Article 100 A paragraph III nor the meaning of a 'high level of protection' have yet been clarified. Any propositions therefore remain at the level of policy proposals or wishful thinking.

### 3. Procedural aspects of a right to safety

Rights to protection are worthless without the guarantee of appropriate procedures defining threshold values, safety standards and post market control mechanisms. The analysis of the consumer safety policy has made it clear that the Community has not yet developed a policy on procedural rights in the context of regulating product safety. The question might be raised on the extent to which it is at all conceivable that a system be developed, which shapes and defines Community responsibility on product safety, without integrating public interest groups and without providing for some kind of judicial review.

There is one exception to be reported. The so-called New Approach<sup>78</sup> of the Commission recognizes in principle the right to participation. The rules chosen might serve as an example for other fields of product regulation. The New Approach relies on participation by 'interested parties' where the privatization of the governmental responsibility requires democratization of the standard-setting procedure. The details are laid down in the Commission's official communication of 11 December 1987.<sup>79</sup> It concretizes general principles. The legal quality is therefore tied to the estimation of its worth. The Commission is urging for increased consumer participation at the national level, to ensure that consumer interests are injected into the CEN/CENELEC in the form of national representation. Taking this as a principle, it would be possible to institute consumer participation in all fields of consumer safety regulation wherever and whenever private standard-setting bodies are involved in the definition of product safety.

The New Approach recognizes the necessity to develop European safety standards. It is therefore logical that the Communication deals with the participation of consumers at the European level. But the way in which participation is to be realized remains open to speculation. The Commission seeks new discussions with CEN/CENELEC concerning the modes of cooperation. The Commission is theoretically free to take the initiative. In accordance with the Council decision, it has a political mandate which it is

<sup>78</sup> OJ C 136, 4.6.1985, 1 seq., the rules are specified in the Agreement concluded between the Commission and CEN/CENELEC cf. *supra* (note 54).

<sup>79</sup> COM (87) 617 final, 11.12.1987.

carrying out only very hesitantly. The policy developed under the New Approach never considered necessary participation of consumers in the Standing Committee. In these Committees, Member States' officials are coming together to discuss all matters concerning the implementation of the New Approach. Participation of consumers would then be limited to standard-setting procedure in CEN/CENELEC and excluded whenever the competent authorities discuss the adequacy of such standards or post market control measures. Indeed, consumers are not included in the vast majority of Committees,<sup>80</sup> which in fact pave the way for the formation of the EEC's own administration, be it in the form of pre or post market control. There are no exceptions to the rule that consumers/third parties have no access to proceedings negotiated there nor to information exchange. The only information, given to them or to the general public, is often delayed and incomplete.

One might summarize that secondary Community law points towards the existence of a right to participation in private standard-setting procedures, both at the national and the European level, but leaves its form undisclosed. We therefore return to primary Community law, to consider the questions which can possibly be resolved there, that is, whether or not concrete requirements on procedural form can be deduced from the case-law of the ECJ. Renewed statements on procedural developments can be found in the decisions of the ECJ based on Article 30.<sup>81</sup> The consequences of the consumer's role as a market citizen under Community law are still open for a controversial debate. The trends, however, are becoming clear already. Consumers, it should be recalled, can only exercise their right to choose and their right to freedom of choice if they have alternatives and if they are informed of their rights. Alternatives create obligations, which, in turn, means the retaining of a competitive market and absence of restrictions on the consumer. Information about alternatives implies demands on the producer or possibly the 'State', which have the goal of assisting the consumer in finding his way about the market. In the broadest sense, a process of dissemination of information must be found. The right to an

<sup>80</sup> Cf. L. Krämer, *op. cit.* (note 3), paras. 63, 48.

<sup>81</sup> Cf. for an overall presentation of the case-law Grabitz, 'Europäisches Verwaltungsrecht - Gemeinschaftsrechtliche Grundsätze des Verwaltungsverfahrens' *NJW* (1989) 1776 seq.; more specifically with reference to Article 30: Meier, 'Zur lebensmittelrechtlichen Integration der nationalen Märkte in den Gemeinsamen Markt' 149 *ZHR* (1985) 651 seq.; Rabe, 'Gegenseitige Anerkennung nationalen Lebensmittelrechts in der Gemeinschaft' 3 *ZLR* (1989) 363 seq.



informed decision could not only offer the consumer the opportunity to actively participate in market processes, it would also burden him with the responsibility of participation or of mere passivity. In this perspective, Article 30 might engender a right to participation or a right for participants, from which concrete requirements could be developed. Thus it would follow: (1) Article 30 is not only aiming at Member States and producers. Rather, it provides the consumer with a legally guaranteed position in relation to the movement of goods; (2) a role which the consumer can only fill if producers and Member States take the necessary precautions. To this end, the decisions of the ECJ, based on Article 30, show tendencies comparable to those in constitutional court decisions,<sup>82</sup> by setting up a procedure for basic rights flowing from Article 30 and guaranteeing the exercise of rights. Since the *Cattenom* decision<sup>83</sup> it should have become clear that the ECJ considers formal competence to be a minimal requirement for procedural rights. However, one problem remains to be solved: the conclusion drawn under Article 30 cannot be transferred as such to Article 36 since it is the Member States, and not consumers, who are the addressees.

Procedural rights cover or should cover participation and redress. There is not much case-law at hand shaping the consumer's position before the ECJ.<sup>84</sup> Redress is not possible against Community directives and Community regulations. Consumers are regarded as not being directly and individually concerned by Community action, per Article 173.<sup>85</sup> Directives and regulations are orientated towards the Member States only. The situation is somewhat different in competition law.<sup>86</sup> Article 3(2b) of Regulation 17<sup>87</sup> entitles all persons and groups of persons to require action from the Commission against infringements of Articles 85 and 86. Neither individual consumers nor national or consumer organisations have ever tried to

<sup>82</sup> BVerfGE 53, 30 seq.; cf. *infra* B.1.

<sup>83</sup> Decision of the ECJ, 22.9.1988, Case 187/87 [1988] ECR 5013 et seq.

<sup>84</sup> Cf. the analysis in L. Krämer, *op. cit.* (note 3) 393 seq., reference should be made to the results of the conference to be held in Louvain-la-Neuve, 22/23.10.1990 on group actions and the defence of the consumer interest in the European Community.

<sup>85</sup> Wenig in E. Grabitz, *Kommentar zum EWG-Vertrag, Article 173, Rdnr. 54-58*, with reference to Case 246/81, [1982] ECR 2277 at 2291, n. 16 – Lord Bethell, denying *locus standi* to user's organization.

<sup>86</sup> Cf. L. Krämer, *op. cit.* (note 3) 395 seq. and Crossick, 'Consumer participation in the E.C. Competition Decision-Making Process', in M. Goyens (ed.), *EC Competition Policy and the Consumer Interest* (1985) 341 seq.

<sup>87</sup> OJ (1962) 204 seq, a comment on this fundamental regulation can be found by Koch in Grabitz (note 85) after Art. 87.

enforce this right to take action before the ECJ. Only in two instances have consumers become involved before the ECJ. Both concerned the capacity of all persons to join in litigation before the ECJ if they have a legitimate interest in the decision of the Court. Both cases concern infringements of Article 85. In 1973 an Italian consumer organization joined the litigation between the Italian producers of sugar and the Commission, arguing that the anti-competitive behaviour of the Italian manufacturers concerned Italian consumers.<sup>88</sup> The ECJ accepted the consumer complaint and formulated as a basic principle that the competition rules are not only aiming at a well-functioning of the Internal Market, but also that they benefit the consumer. The second case dealt with attempts by the Ford Motor Company to prevent parallel imports from Belgium to the UK.<sup>89</sup> BEUC, the European consumer association joined the litigation on the Commission's side. Here again the ECJ followed the reasoning presented by BEUC that the restrictions affected consumers. One might assume that the ECJ has accepted the right of consumer organisations to represent European consumers before the ECJ. They are legitimated to participate in litigations before the Court. The rule cannot be transposed as such to the field of consumer safety. It is possible, however, to derive principles from the case-law which could serve as a basis for a European policy on the role of consumer organisations in controlling European product safety regulations before the ECJ.<sup>90</sup>

## B. Constitutional Developments in the Member States

From the constitutional law viewpoint trends are emerging which recognize a 'right to safety' either as (1) a state objective in the case of Member States within new constitutions or as (2) a human right in the case of Member States with old constitutions.<sup>91</sup> The problem today seems no

<sup>88</sup> Case 41, 43-48, 50, 111, 113 and 114, 11.12.1973 not published, reported in L. Krämer, *op. cit.* (note 3), 398 seq.

<sup>89</sup> 28.2.1984, Case 228 and 229/82, [1984] ECR at 1129

<sup>90</sup> Cf. *supra* IV. 3.

<sup>91</sup> *Bull. EC*, Supplement 5/1976, 'Der Schutz der Grundrechte bei der Schaffung und Fortentwicklung des Gemeinschaftsrechts' - Bericht der Kommission vom 4.2.1976, dem Europäischen Parlament und dem Rat übermittelt - Probleme eines Grundrechtskataloges für die Europäischen Gemeinschaften - Studie im Auftrag der Kommission erstellt von Prof. Dr. Bernhardt, Direktor des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht, Heidelberg; see also Starck, 'Europas Grundrechte im neuesten Gewand in Recht als Prozeß und Gefüge', in *Festschrift für H. Huber* (1981) 481 seq.

longer to concern recognition of a regulatory need for 'protection against health risks' by the State, but rather how to meet these regulatory needs. In particular, how a right to safety of this nature should be framed if it is to contribute to an improvement of the level of protection. The functional *protective aspects of the right to safety* are in the forefront of our analysis. This makes it possible to ignore the status of the relationship between the right to safety and the right to health or physical integrity.<sup>92</sup> Protection against risks covers all possible dangers, irrespective of their cause. A protective right to safety, whatever its constitutional form might be, can be concretized only through a procedure.

The national consumer policy programmes of the 1970s presented minimum requirements thereto: they advocated an opening up of administrative procedures, and a democratization of the internal decision-making process.<sup>93</sup> This demand was widely met in the area of process regulation.<sup>94</sup> Traditional product regulation of consumer safety relied instead on the legitimatory lead of national administrative activity, in part newly introduced. Both concepts, however, turned out to be insufficient. An administrative legitimation deficit has emerged, irrespective of whether or not consumers were involved in the administration procedure. Consequently, consumer policy shifted away from the level of administrative procedure, to the level of protection of rights. Legal redress in the form of guaranteeing subjective rights before the courts is now supposed to guarantee a review of the right to safety as found and made specific in administrative procedure.

The unresolved tension between democratized administrative procedures or those still in need of democratization, and the building up of protection of rights, spilled over onto the level of constitutional law. The issue presents two alternatives. Ought the concretization of protected rights be brought about through an administrative procedure defined in the constitution which would grant the citizen constitutionally-based rights of participation? Alternatively, may the affirmation of rights remain in the hands of the administration whose decision, in turn, would be subject to

<sup>92</sup> G. Robbers, *Sicherheit als Menschenrecht* (1987) 15.

<sup>93</sup> Cf. overview in N. Reich/H.-W. Micklitz, *Consumer Legislation in the EEC - A Comparative Analysis* (1980) 1 seq.

<sup>94</sup> Cf. for the distinction between process and product regulation, Brüggemeier *et al.*, *Sicherheitsregulierung und EG-Integration*, ZERP DP-3/84. Installations have to undergo a specific approval procedure=process regulation. Products are subject to a prior approval, prior registration or reference to standards procedure=product regulation.

constitutional review? The latter would require a corresponding right to legal redress and an organizational structure which would guarantee a right to be heard before the Courts for consumers. Constitutionally, this constitutes the option between democratizing the procedure or expanding legal redress, between securing the rule of law (*Rechtsstaats-prinzip*) by developing democracy or developing the rule of law in order to guarantee democracy.<sup>95</sup>

The widespread administrative legitimation-deficit points in the direction of expanded legal redress, with the citizen's subjective rights correcting the errors of the administrative procedure. But the constitutional dimension of the procedure is inherent in all protective rights. Especially in the case of the right to safety,<sup>96</sup> the alternative between expanding democracy through opening up the procedure or expanding protection of rights by bringing the consumer into court proceedings, can be seen as illusory. Looked at properly, it can be not so much an either/or as a both/and, the opening up of administrative procedure to the public may have occurred in a way which did not, in fact, correspond with the requirements deriving (and still to be derived) from the constitution. Nevertheless, the paradigm of democratization of a procedure versus expansion of protection of rights does seem helpful, because it clearly brings out the constitutional implications of procedural concretization of the right to safety.

The different developmental trends within the Western European constitutions should be studied by comparing the constitution of the Federal Republic of Germany with the constitution of Spain, each of which exemplifies a specific approach. The Federal Republic of Germany, though quite a young democracy, might be associated with a human rights approach to safety. Protection against health hazards is guaranteed by distinguishing the right to safety from individual defensive rights against government interference. Procedural implementation of such a right is brought about through redress. The German approach might be significant because there are common trends in the development of the German constitution and in the development of the case-law of the ECJ.<sup>97</sup>

Spain, alternatively, provides in its constitution for the protection of the

<sup>95</sup> Preuß, 'Perpektiven von Rechtsstaat und Demokratie' *KJ*(1989) 1 seq., 12; also 'Sicherheit durch Recht—Rationalitätsgrenzen eines Konzepts' *KritV*(1989) 3 seq.

<sup>96</sup> Cf. recently Klein, 'Grundrechtliche Schutzpflichten des Staates' *NJW*(1989) 1633 seq.

<sup>97</sup> *Op.cit. infra* IV. A. 1.

consumer as a 'state objective'.<sup>98</sup> This state objective needs to be concretized within the legislative machinery. Attention must be paid to the process of shaping consumer safety law, based on the constitutional state objective and whether consumers have a chance to influence the process of defining consumer safety. One might associate the Spanish approach with the choice made by the European Parliament.<sup>99</sup> Here too, consumer protection is formulated as a state objective only, which needs to be concretized by the Community organs.

### 1. Protective and defensive rights to safety – German constitutional law as an example

The debate on the right to safety used to be dominated by the concept of an individual defensive right against government interference. Seen this way, the right to safety is oriented above all towards the criminal law and the law of criminal procedure.<sup>100</sup> Security 'against the state' is a characteristic of the German constitution, following the experience of National Socialism. The state, including the judiciary, is bound by the fundamental rights, compliance with which is supervised by the Federal Constitutional Court. This concept is not typical for constitutions of European Community Member States.<sup>101</sup>

The German constitution explicitly recognizes a right to safety, but only as a right to physical integrity. A departure from the traditional formulation of a right to safety makes it possible to see not only protection against the state (security), but also protection of physical and personal integrity (safety) by the state, as being covered by the fundamental right. Glancing at the constitutions of Member States, one may consider that the authors of the German constitution, perhaps unintentionally,<sup>102</sup> formulated a concept of the right to safety which points the way to the future.

Although there is much consensus that protective rights differ from

<sup>98</sup> Article 51 of the Spanish Constitution.

<sup>99</sup> Declaration on Fundamental Rights and Freedoms, *op. cit.* (note 20).

<sup>100</sup> This is still the prevailing interpretation of the French Constitution; cf. G. Robbers, *op. cit.* (note 92) 19.

<sup>101</sup> *Bull. EC*, *op. cit.* (note 91).

<sup>102</sup> The parliamentary Council had considered including a right to safety in the Basic Law, but the drafting committee ultimately introduced protection of physical integrity, without being guided thereto by a viewpoint of protective objectives in the sense of today's debate; on this see (exhaustively) G. Robbers, *op. cit.* (note 92) 15 seq. and G. Hermes, *Das Grundrecht auf Schutz von Leben und Gesundheit* (1987) 190 seq.

defensive rights, the possible content of protective rights remains unsettled. R. Alexy defines rights to protection as 'constitutional rights to have the State shape and handle the legal order in relation to the conduct of equally placed legal subjects among themselves in a particular fashion'.<sup>103</sup> This definition clearly brings out the problem-laden triangular structure of constitutional protective rights.<sup>104</sup> For the area of the protective rights to safety, two models are conceivable:<sup>105</sup>

(1) the (defensive) preventive action of the state against interference by third parties and;

(2) measures of active shaping, financial provision and censure of governmental institutions etc.<sup>106</sup>

The first type has been developed in a landmark decision concerning the punishability of abortion. The Federal Constitutional Court postulated a duty of the state to protect unborn life.<sup>107</sup> This type of protection has been invoked again in the question whether the victim of a political kidnapping is entitled to demand action protecting his life.<sup>108</sup> But the most important area of concern today involves environmental hazards resulting from installations like nuclear power plants, threats to health from noise, air pollution, radioactivity and other radiations.<sup>109</sup> This quest for a defensive-preventive activity of the state presupposes that it is possible to identify a third party who may be responsible for the hazard. Cases in point are judgements of the Federal Constitutional Court affecting the operators of nuclear plants or airports.<sup>110</sup> These cases belong to the core of a protective right to safety.

The approach taken cannot cope with environmental damages, attributable to a multiplicity of causes, such as the much-debated damage to forests (*Waldschäden*) or the less famous complaints of chest illness in

<sup>103</sup> *Theorie der Grundrechte* (1985) 411 seq.

<sup>104</sup> Cf. G. Robbers, *op. cit.* (note 92) 124.

<sup>105</sup> A survey of conceivable protective conflicts is offered by G. Hermes, *op. cit.* (note 102) 5-36, he distinguishes between specific interferences by private persons, dangers associated with legal and social contacts, environmental hazards and international hazardous situations. This last aspect has still to be examined when it comes to seeing how far non-Germans, or non-EEC citizens, should be able to invoke European human rights.

<sup>106</sup> Thus, G. Hermes, *op. cit.* (note 102) 65 with reference to the present state of debate.

<sup>107</sup> BVerfGE 39, 1 seq., cf. G. Hermes, *op. cit.* (note 102) 44 seq.

<sup>108</sup> BVerfGE 46, 160 seq., cf. G. Hermes, *op. cit.* (note 102) 46 seq.

<sup>109</sup> Thus G. Hermes, *op. cit.* (note 102) 17 seq.

<sup>110</sup> BVerfGE 53, 30 seq. and BVerfGE 56, 54 seq.

children, (so-called 'croup coughs'), in particularly polluted districts.<sup>111</sup> Parents involved had brought, on behalf of their children, a constitutional complaint, alleging that the Federal Government, *Bundesrat* and *Bundestag* had omitted to take adequate measures against health-threatening air pollution. This was claimed to have infringed their fundamental right to physical integrity. The Federal Constitutional Court's Prior Review Committee (*Vorprüfungsausschuss*) did not accept the constitutional complaint for decision.<sup>112</sup> Accordingly, German law has not yet decided the conditions under which the citizen may defend himself against diffuse impairments of the environment for which a responsible party cannot be identified. But the situation should be of particular interest to us, since it seems to touch upon a number of unsolved problems.<sup>113</sup>

German constitutional law provides two different options for deriving the essential form of administrative procedure, in order to concretize the protective obligation. The first reference point is the democratic order serving as a basis for development of requirements for the concretization of administrative procedure. This is the road to democratization of the law-making procedure. It implicitly presupposes an analogy between the legislative process and the administrative procedure, which seeks opportunities to make the necessary concretization process transparent from the viewpoint of a democratic co-existence. The decision on procedural requirements is, therefore, always one on participatory rights for citizens in this process of concretization. The other alternative considers the need to concretize the protective right from the viewpoint of the individual citizen affected by a decision. The assertion of his fundamental rights, his entitlement to protection, is at the centre. If the fundamental right is concretized only through administrative procedure, this must have such a form that the rights do not suffer. The formulation of constitutional requirements on administrative procedure, comes about with an eye to securing and extending protection of the right on the basis of the constitutional right itself.

The Federal Constitutional Court has taken the second option. It expanded protection of fundamental rights through a procedural component whereby the substantive content of fundamental rights protection is concretized only through administrative procedure. This carried the issue of the

<sup>111</sup> G. Hermes, *op. cit.* (note 102) 46 seq.

<sup>112</sup> BVerfGE (*Vorprüfungsausschuss*) NJW (1983) 2931 seq.

<sup>113</sup> G. Hermes, *op. cit.* (note 102) 118-120 even wishes to confine protection to this situation; cf. G. Lübke-Wolff, *Die Grundrechte als Eingriffsabwehrrechte – Struktur und Reichweite der Eingriffsdogmatik im Bereich der Leistungen* (1988).

protective right to safety onto the level of constitutional law, bringing it *via* the Court into the debate on fundamental rights. The *Mülheim-Kärlich*<sup>114</sup> decision on Article 2 paragraph 2 of the Basic Law formulated two important principles: provisions of administrative procedural law – in this specific case the licensing procedure for a nuclear power plant – may be of constitutional relevance; if they are relevant, they confer to the bearer of the fundamental right an actionable entitlement.<sup>115</sup> This overlap between procedure and rights may be a typical German approach<sup>116</sup> to be understood against the background of the jurisprudence of the German Administrative Courts. In particular the Federal Administrative Court which does not ascribe any importance to citizen participation in administrative procedure which goes beyond mere informational assistance. The hearing procedure serves, we are told, exclusively to examine general views and is thus a means prescribed for administration in order to inform itself as fully

<sup>114</sup> BVerfGE 53, 30 seq. In the *Mülheim-Kärlich* decision the German Constitutional Court demonstrated an idea which can claim considerable plausibility as a middle range explanatory concept, suitable for generalization beyond the narrow German territory. The state's obligation to protect and therefore also the principal existence of the protective right, is said to follow from the state's co-responsibility for the posited cause of danger. Co-responsibility institutes the emergence of enforceable subjective rights to safety. The question then is where the state's area of responsibility begins and where it ends, or to take an example, whether every governmental permit for an industrial plant is simultaneously an assumption of responsibility. There remains, finally, the issue of product safety regulation where a statutory responsibility might be derived from the regulation of market access. Statutory responsibility follows from statutory function, from which it would be clear that assumption of statutory responsibility is to be verified separately in every individual case, unless a specific definition of a state objective delegates to the state responsibility for protecting safety as a field of action. Definition of a state objective might fill an important lacuna here, since it provides the normative framework for an assumption of responsibility. Without this separate state objective of protecting safety, it is hard to deny the force of the argument which proposes that the state is not responsible for everything. The limits to the idea of responsibility can be demonstrated by the different force of the argument for the defensive and the protective situation. As long as a specific third party can be identified, allowing the state to posit a cause of danger, the idea of responsibility can stand up. But in the purely protective situation, no responsibility can be assigned to a third party. The action by parents of children with throat complaints should perhaps have been differently decided if a state objective of safety protection had existed.

<sup>115</sup> Laubinger, 'Grundrechtsschutz durch Gestaltung des Verwaltungsverfahrens', 73 *Verwaltungsarchiv* (1982) 60 seq., 73.

<sup>116</sup> Cf. Winter, 'Die Angst des Richters bei der Technikbewertung' *ZRP* (1987) 425 seq., 427 (n. 31), referring to F. Neumann in *Demokratischer und autoritärer Staat* (1957) 20 seq.



as possible, on the factual situation necessary for a decision.<sup>117</sup> From this viewpoint, then, it is only consistent to deny protection of individual rights. The Federal Constitutional Court's case-law corrects this one-sided view of the Federal Administrative Court, but this probably does not mean that citizen involvement in the procedure is constitutionally conceivable only as participation in protecting a right.<sup>118</sup>

At the same time the Federal Constitutional Court has left a whole number of legal questions unresolved:

– It is unsettled which procedural provisions may be of constitutional relevance. The only consequence to be drawn from the wording of the decision would be that the licensing procedure itself, and also citizen involvement in the hearing procedure, is no longer at the disposal of the ordinary legislator.<sup>119</sup> The licensing procedure in nuclear law would then be proof against a fundamental right.<sup>120</sup> But can it be deduced from the verdict that the prior approval procedure for the control of medicines and pesticides or even the rules on the marketing of consumer goods are indispensable for constitutional reasons? If that would be the case, ought there not to be a call on the basis of the constitution for inclusion of citizens in the acceptance procedure?<sup>121</sup>

– It is also unclear, apart from the narrow context of the judgment, whether detailed procedural provisions are at all derivable from the individual's fundamental rights. This is not even asserted by Judges Simon and Häusler in their dissenting opinions;<sup>122</sup>

– the Federal Constitutional Court does not provide any criteria indicating the procedural errors which give rise to legal redress, or in other words, which provisions are 'of relevance to fundamental rights.'

Legal doctrine overwhelmingly accepts the Federal Constitutional

<sup>117</sup> Cf. Schmitt Glaeser, 'Die Position der Bürger als Beteiligte im Entscheidungsverfahren gestaltender Verwaltung', in P. Lerche, *Verfahren als staats- und verwaltungsrechtliche Kategorie* (1984) 35 seq., 48 with reference to the case-law in n. 31.

<sup>118</sup> Cf. accordingly one has to agree with Schmitt Glaeser, *op. cit.* (note 117), 52, referring to Ossenbühl in *Festschrift für K. Eichenberger* (1982) 183 seq.

<sup>119</sup> Cf. Laubinger, *op. cit.* (note 115) 74.

<sup>120</sup> Cf. Lübke-Wolff, 'Stufen des Grundrechtsschutzes gegen Verfahrensverstöße', in J. Schwarze/W. Graf Vitzum (eds), *Grundrechtsschutz im nationalen und internationalen Recht* (1983) 137 seq., 141.

<sup>121</sup> For pesticides cf. E. Gurlit, *Die Verwaltungsöffentlichkeit im Umweltrecht* (1989) 106 seq., asserting that this consequence arises from the provisions of the Administrative Procedure Act.

<sup>122</sup> BVerfGE 53, 66 seq., concordantly Laubinger, *op. cit.* (note 115) 69.

Court's premise that the State's duties to protect and the citizen's entitlement to protection may diverge. The need exists, however, to itemize possible solutions independently of each other, and in terms of their interdependency.

## 2. Protection of safety interests as a new 'state function': the Spanish approach

Member States with new constitutions like Spain and Portugal, have adopted the state objective perspective, and defined it as a national goal.<sup>123</sup> This is true even where the wording of the pertinent rules seems to grant a right to protection. The inclusion of environment and consumer protection in the Spanish Constitution must be understood in the overall context of a formerly non-democratic social order. Whether protection should be secured solely through definition of a national objective or whether the individual should also have an actual entitlement to protection, is therefore not at the centre of the debate. The constitutional guarantee of protective rights allows the citizen to demand the democratization of society. It is against this background that the Spanish Constitution should be examined in some detail.<sup>124</sup>

Article 51 of the Spanish Constitution reads as follows:

1. Los poderes públicos garantizarán la defensa de los consumidores y usuarios, protegiendo, mediante procedimientos eficaces, la seguridad, la salud y los legítimos intereses económicos de los mismos.
2. Los poderes públicos promoverán la información y la educación de los consumidores y usuarios, fomentarán sus organizaciones y oirán a éstas en las cuestiones que puedan afectar a aquéllos, en los términos que la ley establezca.
3. En el marco de lo dispuesto por los apartados anteriores, la ley regulará el comercio interior y el régimen de autorización de productos comerciales.

The objectives laid down in Article 51 are not open to individual complaint. These are limited to the classical defensive rights against interference by the state, Article 53, paragraph 2. The legal quality of Article 51 is far from

<sup>123</sup> Starck, *op. cit.* (note 91).

<sup>124</sup> Cf. Gerlach, 'Die moderne Entwicklung der Privatrechtsordnung in Spanien' 85 *ZVglRWiss* (1986) 247 seq., 252 seq.

clear. The question might be raised whether the consumer policy as defined under Article 51 constitutes a mere programme, or whether it should be understood as a state objective (*Staatsziel*) which binds parliament, the legislator and the administration. Article 51 paragraph 3 would support an interpretation giving Article 51 the character of a state objective. Spanish legal doctrine draws conclusions from the legal character of Article 51 which come close to what is understood under German constitutional law as '*Staatszielbestimmung*'.<sup>125</sup> Therefore the state objective of 'consumer protection' serves as a barrier to any effort by public powers to amend existing law, to the detriment of the consumer. The public authorities are bound by the state objective, which implies that existing law must be interpreted so as to comply with the overall state objective of consumer protection. It likewise entitles the public powers to institute democratic control, wherever it is deemed to be necessary. The limits and restraints of the state objective 'consumer protection' are found in the Spanish Constitution itself which provides for a democratic and social society, as defined under Article 1 of the constitution.<sup>126</sup>

Possible conflicts arising from differing state objectives, have gained importance in a field which highlights the specific political function of consumer protection in the new democracies.<sup>127</sup> Both the central government and the newly-established regions in Spain claim to have competence to regulate consumer protection, pursuant to the state objective of Article 51. The conflict was brought before the Spanish Constitutional Court, which laid down basic rules on the division of power between the central government and the regions, in the field of consumer protection. These rules border the case-law of the European Court of Justice and of the Interstate Commerce Clause as interpreted by the American Supreme Court.<sup>128</sup> The central government is entitled to legitimately claim the competence to regulate consumer protection, as far as the rules concern commerce within Spain as a whole. The legislative competence on civil law lies in the hands of central government, the competence to regulate hazardous products such as medicines, pesticides, chemicals and con-

<sup>125</sup> Cf. Sanchez, 'La tutela del Consumatore in Spagna', *Rivista Trimestriale Di Diritto e Procedura Civile* (1986) 960 seq., 962 seq.

<sup>126</sup> Gerlach, *op. cit.* (note 124, 251.

<sup>127</sup> Sanchez, *op. cit.* (note 125) 964; Gerlach, *op. cit.* (note 124) 256 seq.

<sup>128</sup> Cf. Jacobs/Karst, 'The "Federal" Legal Order: The USA and Europe Compared - A Juridicial Perspective', in M. Cappelletti *et al.*, *Integration Through Law*, 1, *Methods, Tools and Institutions* (1986) 169 seq.

sumer goods, is divided. Market access rules must be similar all over Spain. Therefore the central government holds competence. The implementation of public law, however, is conferred to the regions. It is all the more astonishing that consumer policy leads to such a far-reaching conflict between the central government and the regions. This decision on regulatory competence seems to confirm the political sensitivity of the regions to any interference by central government in matters which have been, or should have been, entrusted to the regions, under the constitution in order to strengthen their autonomy.

It took eight years before Spain implemented the state objective of 'consumer protection.' The first proposal dated back to 1979, but a real need for consumer policy was felt in Spain only after the scandal concerning poisonous olive oil, which led to the death or serious bodily injury of many consumers. The 1984 Act on consumer protection differs considerably from all consumer regulation in the established Western democracies.<sup>129</sup> The Act covers the whole field of consumer policy, economic protection as well as protection against health hazards, consumer participation and consumer redress. It is much more a programmatic Act than a piece of legislation in the classical sense. The Act not only imposes clear legal obligations on manufacturers, but it codifies, at the same time, basic principles which cannot be implemented in their original form. That is why the legal quality of the 1984 Act has been challenged, and the conflict on the nature and character of Article 51 of the Spanish Constitution seemed to reappear in the consumer legislation which implemented that Article. It seems impossible to give a definitive answer as to the legal character of the Consumer Act.

Consumer safety, though explicitly mentioned in the constitution and covered by the 1984 Consumer Act, is not comprehensively regulated. The law constitutes at its best, a legal obligation imposed on manufacturers to bring only safe products onto the Spanish market.<sup>130</sup> This rule is similar to the Community's Draft Directive.<sup>131</sup> All the other safety-related provisions under the Consumer Act constitute a mandate given to the central government of what should be done to protect consumers against health hazards, rather than establishing rights and duties. This is all the more true when it comes to examine the role of consumers in the administrative procedure

<sup>129</sup> Cf. Uriarte, 'The Spanish Act on the Protection of the Rights of Consumers and Users' 8 *JCP* (1985) 169 seq.

<sup>130</sup> *Id.*, 173.

<sup>131</sup> *Op.cit.* (note 46).

and their capacity to challenge public decisions before the courts. Article 51 paragraph 2 recognizes the right of consumers to be heard whenever a matter concerns them. A state objective in this way, should be understood as an obligation imposed on the Spanish legislator to install an appropriate mechanism of participation, in all measures taken to implement the policy objective. The rules on consumer representation, consumer consultation and consumer participation under the 1984 Act, remain incremental and do not seem to comply with the constitutional mandate. They have been criticized for their symbolic character and they do not, to any degree, link the concretization of product safety to a specific administrative procedure in which consumers are integrated.<sup>132</sup> One might finally summarize that the state objective of 'consumer protection' allows a legitimate claim for installment of consumer product safety legislation and appropriate means to concretize the content of consumer safety, with the participation and consultation of consumers. The constitution, it should be reiterated, does not provide, however, for a specific consumer redress mechanism. This might be granted under legislation implementing the policy objective. The constitution itself limits individual complaints to defensive rights against state interference.

The different approaches of the German and the Spanish constitutions on the right to safety might enlighten the European Court of Justice's reluctance to recognize of fundamental European rights based on a comparison of the Member States' constitutions.<sup>133</sup>

### C. International Conventions and International 'Soft Law' on Product Safety

The development of international conventions demonstrates the same phenomenon as the development of constitutions in the Western industrialized countries. With one major difference, however. The procedural concretization of a right to safety pales into insignificance.

– On the one hand there are the 'old' international conventions on human rights in the classical sense. Rights granted to individuals appear as defensive rights only. The right to safety, if any, emerged only as conse-

<sup>132</sup> Cf. Uriarte, *op. cit.* (note 129) 176 seq.

<sup>133</sup> Cf. Bleckmann, 'Die Rechtsprechung des Europäischen Gerichtshofes zur Gemeinschaftstreue' *RIW* (1981) 653 seq., 654.

quence of development of case-law at the European Court of Human Rights;

– on the other hand there are the ‘new’ approaches, programmes and recommendations, which often do not obtain the quality of a legal convention but remain in the form of international soft law recommended for application only and providing for statutory responsibility to protect citizens against health hazards.

Seen under an EEC perspective, two types of problems must be kept in mind: (1) whether and to what extent the Community is bound by the Human Rights Convention,<sup>134</sup> and (2) whether and to what extent international soft law might be integrated into Community law.<sup>135</sup>

1. Protective and defensive rights to safety the ‘old international conventions’ and the jurisprudence of the European Court of Human Rights

The European Convention on Human Rights does not provide for a right to safety. Article 2 paragraph 1 mentions the right to life only.<sup>136</sup> Recent developments in the case-law of the European Court of Human Rights, however, seem to indicate that the Court is willing to accept the existence of protective rights.<sup>137</sup> Two cases have been reported in which the Court finally accepted the statutory obligation to take appropriate action, in order to protect the freedom of assembly and to respect privacy.<sup>138</sup> The Court did not refer to Article 1 but grounded its decision on a further development of

<sup>134</sup> Cf. Weiler, ‘The European Court at a Crossroads: Community Human Rights and Member State Action’, in F. Capotorti *et al.*, (eds), *Du droit international au droit de l’intégration – Liber Amicorum Pierre Pescatore* (1987) 821 seq.; Weiler, ‘Eurocracy or Distrust: Some Questions Concerning The Role Of The European Court Of Justice In The Protection Of Fundamental Human Rights Within The Legal Order Of The European Communities’ *Washington Law Review* (1986) 1103 seq.

<sup>135</sup> Cf. *inter alia*, Bothe, ‘“Soft Law” in den Europäischen Gemeinschaften’, in *Festschrift für H.-J. Schlochbauer* (1981) 761 seq.; Everling, ‘Probleme atypischer Rechts- und Handlungsformen bei der Auslegung des Europäischen Gemeinschaftsrechts’, in R. Bieber, G. Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts* (1987) 417 seq.; Wellers and Borchardt, ‘Soft Law in European Community Law’, *European Law Review* (1989) 267 seq.

<sup>136</sup> Cf. Doehring, ‘Zum “Recht auf Leben” aus nationaler und internationaler Sicht’, in *Festschrift für H. Mosler Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit und Menschenrechte* (1983) 145 seq.

<sup>137</sup> Cf. G. Robbers, *op. cit.* (note 92), 25 seq.

<sup>138</sup> EGMR 13.8.1981, *EuGRZ* (1981) 559 seq. and decision n. 16/1983/110, 16.3.1985 *EuGRZ* 1985, 297 seq.

the specific rights as shaped and defined in Articles 8 and 11. One might understand the approach of the Court as an attempt to deviate protective statutory obligations in specific cases, as far as individual rights granted under the Convention might be interpreted in such a far-reaching sense. The Court, however, seems to refute any idea of accepting a general statutory responsibility to protect the citizens of its' signatory states.

It seems possible that the European Court of Human Rights might accept a right to safety if it becomes involved in a specific and appropriate case. Legal doctrine discusses the possibility of derogating from the Human Rights Convention an overall state obligation to protect individuals against third party intervention.<sup>139</sup> Such a right to protection might be grounded in Article 5, the right to freedom and to security (safety). This interpretation of Article 5 presupposes the possibility of transforming the classical defensive right of Article 5 into a protective right, in the sense of securing safety against health hazards. This possibility has been voiced by legal doctrine. The overall majority, however, rejects such an interpretation of Article 5.<sup>140</sup> It restricts the right to protection to those situations in which individuals claim protection against interference with their physical integrity by the state.

Accepting protective rights necessitates the closer definition of conditions under which protection may be claimed. The European Court of Human Rights remains quite reluctant, in its two decisions on the shaping of appropriate procedures, to define the core of the statutory obligation granting the right of assembly and the right of privacy. The Court underlines that states, though under an obligation to take measures, are free to choose between appropriate actions. The measures taken, however, must be effective so as to guarantee the respect of privacy.<sup>141</sup> The decision of the European Court of Human Rights was based on an individual complaint. The linkage between the statutory obligation to protect privacy and the individual complaint is striking: the individual right to claim protection corresponds to the statutory obligation. Taking into consideration the development of the German case-law on the emerging right to safety, the

<sup>139</sup> Cf. Murswiek, 'Die Pflicht des Staates zum Schutz vor Eingriffen Dritter nach der Europäischen Menschenrechtskonvention', in H.-J. Konrad (ed.) *Grundrechtsschutz und Verwaltungsverfahren unter besonderer Berücksichtigung des Asylrechts – Internationaler Menschenrechtsschutz*, Referate der 23. Tagung der wissenschaftlichen Mitarbeiter der Fachrichtung 'Öffentliches Recht' 22-26 Februar 1983 in Berlin, Schriften zum öffentlichen Recht, Band 484, 213 seq.

<sup>140</sup> *Id.*, 227 with references in note 29.

<sup>141</sup> Cf. G. Robbers, *op. cit.* (note 92) 25 seq.

European Court of Human Rights need go only one step further and it would confirm the position taken by the German Constitutional Court in its *Mülheim-Kärlich* decision.<sup>142</sup>

## 2. State objective and 'right to safety in international conventions

A possible development of the Human Rights Convention might be more successful. More definite answers on the existence of a right to safety can be found in the 'new' international conventions.<sup>143</sup> Here, finely-tuned objectives are formulated, although their finer details, however, are cumbersome. The International Covenant on Economic, Social and Cultural Rights recognizes in Article 12 the right to physical and mental health:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environment and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The wording of Article 12 makes clear that the so-called 'right to physical and mental health' constitutes an obligation on the part of the signatory States to take appropriate action in the interests of individual citizens. The reading of Article 12 and the general obligation laid down in Article 2 paragraph 1,

to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all

<sup>142</sup> BVerfGE 53, 30 seq.

<sup>143</sup> Particular value in this respect; Rauschnig, 'Ein internationales Recht auf Schutz der Umwelt?' in *Festschrift für W. Weber* (1974) 719 seq.



appropriate means, including particularly the adoption of legislative measures.

leave no doubt that the Convention is not self-executing and that it does not grant individual rights to citizens.<sup>144</sup> That is why the Convention, though in existence since 1976, cannot substantially contribute to the formulation of a right to safety.

The same holds true with respect to the European Social Charter.<sup>145</sup> Part 1 underlines the signatory parties' willingness to employ all appropriate means of statutory and bilateral policy in order to attain the prerequisites from which it is possible to make use of the right to, *inter alia*, 'benefit from any measures enabling him to enjoy the highest standard of health attainable.'

In a somewhat stronger and or much more concrete vein, Article 11 then formulates a right to the protection of health:

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Party undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*,

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases.

The legal quality of the different rights shaped under the Social Charter is subject to a controversial debate in legal doctrine.<sup>146</sup> Some deny the self-executing character of the Social Charter with reference to Part III. Here, quite concealed in the Charter, it is made clear that the signatory States agree on the Charter's pure international character, whose performance is subject only to the implementation and monitoring procedure as provided for in Part IV. Others do not take this argument for granted and try to solve the problem of the binding nature by drawing a distinction between those rights which are specific enough to constitute legal rights for individuals,

<sup>144</sup> *Id.*, note 143, 722.

<sup>145</sup> *Id.*, note 143, 722-723.

<sup>146</sup> Cf. Zuleeg, 'Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der Europäischen Sozialcharta' *ZaöRV*(1975) 341 seq., 344 seq.

and those which provide a mandate for the signatory States only. Even the latter approach, however, would not help upgrade Article 11, as it clearly constitutes a state objective only, and not a right for individuals.

Theoretically, a parallel could be drawn with the Spanish Constitution. Both International Conventions, however, have in common that they more or less set aside the question of how the different state objectives might be implemented and monitored. The Conventions escape far-reaching perspectives right from the beginning, by limiting the implementation and monitoring duties merely to the obligation of the signatory States to report on further progress.<sup>147</sup> They do not engage themselves in taking action to implement the mandates adopted under the Convention. Rather, they neatly restrict their duty to reporting on events occurring in their countries within the context of the Convention.<sup>148</sup>

### 3. State objective, right to safety guidelines and recommendations

Two international activities should be mentioned in the context of regulating product safety: the efforts of the OECD to shape a consistent consumer policy and the UN Guidelines on Consumer Protection. Both efforts are not directly linked to a right to safety within a constitutional perspective. They must be located at the level of consumer law in order to formulate concrete actions to be taken for protection of the consumer against health hazards. The OECD and UN are dealing with consumer safety policy rather than with consumer law. The link with the constitutional level is evident insofar as both international organizations recognize the existence of consumer safety as a statutory responsibility within the regulatory mechanisms.

The OECD has played a key role in the formulation of a consumer safety policy. In 1972, a Working Party on the safety of consumer products was set up to deal with questions concerning all consumer products with the exception of food and drugs. In the same year, US Congress adopted the Consumer Product Safety Act (CPSA) which has served as a model for safety legislation up to the present. The United States used the OECD as a forum to push international regulation on product safety. The working pro-

<sup>147</sup> *Id.*, note 143.

<sup>148</sup> Cf. in a broader context Schwarze, 'Rechtsschutz Privater bei völkerrechts-widrigem Handeln fremder Staaten' 24 *ArchVR* (1986) 408 seq. who underlines the necessity to develop remedies for individuals under the international public law.

gramme of the OECD Committee relied on harmonization of international regulation on product safety and information exchange on emerging national legislation as appropriate means for protecting consumers.<sup>149</sup> The informal notification procedure already established in 1973 must be understood as an attempt by the OECD's Committee to obtain an overview on the overall initiatives of Member countries for regulating product safety, without taking into account the implications on global trade. The development of diverging national standards has been the second major concern of the Committee's work. In a series of reports<sup>150</sup> on Data Collection Systems concerning product-related accidents, Severity Weighting of such Data, the Description of Principles and the Application of Product Safety Policy, Legislation in Member State Countries and of Development of Recall Procedures, the Committee tried to formulate a comprehensive concept of product safety regulation. These reports largely reflect the United States approach to safety regulation.<sup>151</sup> They still influence the actual shaping of the safety policy of the Community.

The OECD, however, has lost influence in the eighties due to the partial setback experienced by US policy in product safety. Recent activities of the OECD indicate a change in policy, namely a shift towards the Community approach on product safety, more specifically to the regulatory mechanisms developed by the so-called 'New Approach'. The OECD tried to extend the New Approach to all industrialized countries and to lay down the basis for an international safety policy.<sup>152</sup>

The UN-Guidelines on Consumer Protection were adopted in 1985 after a ten-year long debate. Health and safety is mentioned in the list of 'general principles'.<sup>153</sup> These contain essentially a restatement of basic consumer rights as set out in the well-known message from President Kennedy. Under 'general principles' it says: 'Governments should develop, strengthen

<sup>149</sup> Cf. Ringstedt, 'OECD, Safety and the Consumer' 9 *JCP* 57 seq.

<sup>150</sup> OECD (1978), 'Data Collection Systems related to Injuries involving Consumer Products'; OECD (1979), 'Severity Weighting of Data on Accidents involving Consumer Products'; OECD (1980), 'Safety of Consumer Products'; OECD (1981), 'Recall Procedures for unsafe Products sold to the public'.

<sup>151</sup> Cf. Ch. Joerges *et al.*, *Sicherheit von Konsumgütern*, *op. cit.* (note 10), 201 seq. (Report on the US Product Safety Law).

<sup>152</sup> OECD, Committee on Consumer Policy, 2 CCP (89) 31.3.1989, International Trade and The Consumer Interest, Possibilities for Harmonization of Product Safety Standards.

<sup>153</sup> Cf. for a general analysis Merciai, 'Consumer Protection and the United Nations' *Journal of World Trade Law* (1986) 206 seq.; Harland, 'The United Nations Guidelines for Consumer Protection' 10 *JCP* (1987) 245 seq.

or maintain a strong consumer protection policy.' The legitimate needs to meet are: 'the protection of consumers from hazards to their health and safety.' The International Organization of Consumer Unions has tried to give 'health and safety' priority over all the other principles enumerated and has proposed a rewording of 'general principles':<sup>154</sup> 'the right to physical safety of consumers in their protection from potential dangers, which all countries should recognize as a basic and fundamental human right.'

The International Organization of Consumer Unions failed and 'health and safety' was put on an equal footing with 'promotion and protection of the economic interests of consumers...'. The general principles are then broken down into 'guidelines' defining basic minimum standards for health, safety and environmental protection under two separate headings, 'physical safety' and 'measures relating to specific areas.' The scope of 'physical safety' can be defined against the more detailed section on 'measures relating to specific areas' which deals mainly with food, water and pharmaceuticals. It is designed particularly for assisting developing countries by giving 'priority' to areas of essential concern for the health of the consumer, such as food, water and pharmaceuticals. The section on 'physical safety' should be understood as laying down basic safety principles valid for every type of health and safety regulation, whereas the section of 'specific areas' formulates additional requirements for particular products.

According to the Guidelines,

governments should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.

Appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities, and, where appropriate, the public without delay. Governments should also consider ways of ensuring that consumers are properly informed of such hazards.

Governments should, where appropriate, adopt policies under which, if a product is found to be seriously defective and/or to constitute a

<sup>154</sup> IOCU, Comments by the International Organisation of Consumers Unions, United Nations Draft Guidelines on Consumer Protection (1985).

substantial or severe hazard even when properly used, manufacturers and /or distributors should recall it and replace or modify it, or substitute another product for it. If it is not possible to do this within a reasonable period of time the consumer should be adequately compensated.

Post market control covers the establishment of accident surveillance systems, the existence of compensation rules and mechanisms to guarantee that unsafe products are withdrawn from the market. Measured against the Guidelines, quite a number of the major trading nations should revise and tighten their safety regulations.<sup>155</sup> The reading and philosophy behind the Guidelines relating to product safety is strongly influenced by the regulatory philosophy of the OECD as formulated in the seventies under the influence of the United States.

The Guidelines and the OECD reports suffer from a major deficiency: they do not deal with problems of procedure. They more or less set aside questions of implementation and monitoring. Enforcement measures are only taken at an informal level, without a real mandate. The OECD initiates review investigations on the state of the legislative machinery within its Member countries, the UN is undertaking consultations for Latin America and the Caribbean to promote the application of the Guidelines.<sup>156</sup>

## V. The Structure of a European Protective Right to Safety

Our proposals are partly based on the existing law of Member States or the Community. They are partly prospective, policy-orientated and not always grounded on established doctrine. The intention is to introduce future-orientated ideas which might make a contribution to promoting the development of a fundamental right to consumer protection.

<sup>155</sup> In the same sense, cf. Merciai, *op. cit.* (note 153) 214-216; Harland, *op. cit.* (note 153) 252-252.

<sup>156</sup> IOCU-Newsletter 163 (1987) May, 1.

## A. Normative Consequences

The analysis has shown that there is a common tendency to establish the protection of consumer safety on a constitutional basis. There is, however, no agreement on the ways and means to be employed. The solutions proposed are bound to specific socio-cultural conditions which must be respected when one attempts to formulate a Community protection scheme on consumer safety.

### 1. Community responsibility for the protection of consumers against health hazards

In defining the Community's responsibility for the protection of consumers against health hazards three distinct options present themselves. Under these three alternatives all the solutions discussed so far may be summarized. The item 'responsibility' has been chosen to cover all these approaches as a form of collective heading:

- a non-binding consumer programme on product safety in the Treaty;
- a Community objective (*Staatsziel*) on protection of consumers against health hazards;
- a right to safety, entitling the individual to claim performance of the right from the Community, including the opportunity for requiring the adoption of secondary Community rules on product safety.

A Community responsibility on consumer safety must have binding effect. For this reason we would exclude the option of formulating a mere consumer safety programme under primary Community law. A binding obligation, however, can be instituted either by formulating a state objective (*Staatszielbestimmung*) or by recognizing a Community right to safety. Considering the pros and cons of both alternatives might assist in the path to finding the best European solution.

The state objective option and the rights option share a common element: public responsibility and individual enforcement do not correspond. Imposing a state objective on the Community which requires it to implement a consumer safety policy would primarily bind the Community organs. It does not necessarily lead to the guaranteeing of individual and enforceable rights. These rights might emerge under a state objective approach. Whether, and the extent to which, rights might be derogated from consumer safety as a state objective, depends to a large extent on the

precise form which the enumerated objectives take on, since it is this factor which determines the creation of a concrete and individual right. The rights option leads to the very same result. A consumer right to safety must not and cannot be automatically enforceable. There are additional criteria necessary before the overall broad right to safety can be reduced/ upgraded to an individual enforceable right. Just like the state objective option, the rights option, is primarily addressed to the public powers. Despite these similarities attention should be drawn to certain divergencies:

(a) State objectives might remain on paper, governments are not ready to take the proper measures. This is particularly true for state objectives formulated in international conventions and international 'soft law.' Although this danger is less severe in legally binding national state objectives, the problem remains whether the measures taken suffice to comply with the 'spirit' of the state objective;

(b) The institution of rights for consumers, which are contrary to the classical defensive rights lacking automatic enforceability, creates considerable uncertainty on the part of the rights-bearers. They are endowed with a constitutional right, but they are not told precisely under which circumstances they may claim the enforcement of this right to safety. What value does a right to safety carry which is not a right in the classical sense?

Taking the similarities and differences of the two options into consideration and accounting for the state of development at the national, international and the European level, *we are suggesting a constitutional concept under which consumer safety is guaranteed as a European right to safety.* This option seems to reveal more desirable and certainly more promising perspectives for European consumers than the state objective option. Experience shows that Courts are willing to transform classical defensive rights into protective rights, but they hesitate before treating state objectives as granting rights to individuals. A European right to safety imposes a public responsibility on the Community. It can *become* a remedy for consumers, but it does not correspond to an overall individual enforceable right.

The institution of a European right to safety suffers from a difficulty which might ultimately be an advantage. A European right cannot be comprehensive. It presupposes the delegation of competence from the Member States to the Community. But particularly *this restriction supplies* a strong argument in support of the proposition which construes public responsibility as a constitutional right. Once the Community becomes involved in consumer safety, it accepts public responsibility for the protection

of consumers against health hazards. The transfer of responsibility is seen to be constitutive for the emergence of individual rights. Experience drawn from analyses of constitutional law development in the Federal Republic of Germany, the state of safety law in the Community and the Convention on Human Rights, indicate the recognition of a statutory responsibility, only to the extent that the public powers have taken over responsibility for regulating product safety. The German Constitutional Court relies on the criterion of statutory intervention which triggers off the statutory responsibility; the International Court of Justice is willing to derive a statutory obligation from specific individual rights, but not as an overwhelming general duty.

The same phenomenon may be observed at the European level. The ECJ accepts Community responsibility only as far as the Community has been awarded competence on the regulatory issue. Having this experience in mind, it is clear that a European right to safety cannot be constituted as an all-embracing statutory responsibility for the Community to protect European consumers against health hazards. The emergence of the right is bound to the delegation of competence. Delegation yields responsibility and the adoption of responsibility indicates the existence of individual rights.

To summarize for the sake of clarity: grounding the institution of a European right to safety on the transfer of competence does not mean that the delegation of power necessarily leads to the emergence of individual enforceable rights. Such a conclusion has neither been drawn by the German Constitutional Court nor by the International Court of Justice. Criteria are needed to define the borderline between public responsibility and individual enforceable rights. This will be done when we discuss the possible remedies for implementing the right to safety.<sup>157</sup> As regards the further development of the right to safety, it suffices to keep in mind that the Community right to safety imposes a public responsibility on the Community itself.

A Community right to safety, whose emergence depends on the delegation of regulatory powers to the Community, requires that the responsibility granted is constituted in a way which guarantees that the level of Community protection does not lag behind that of the Member States.

## 2. Defining safety

A consumer right to safety obliging the Community to maintain a high level of protection or follow a maximization principle, might assist the provision

<sup>157</sup> Cf. *infra* C.



of a safety concept with an adequate weighting, in situations causing conflict with other fundamental rights. Nevertheless, this does not solve the difficulties of definition. The right to safety remains incomplete, and must by implication remain incomplete. It can be legally covered only by a general clause which defines requirements on the safety of products and installations, graded according to risks. The right can be concretized using the idea of spheres of responsibility, which may secure validity at the legal level. The institution of a right to safety presupposes a balance between the manufacturers' and the users' viewpoint. The formula found in the Product Liability Directive '(safety) the consumers are entitled to expect' reflects these types of interests.

### 3. Level of regulation

The right to safety must be laid down in the Treaty itself. But there still remains the issue of the extent to which it is possible and feasible to supply a definition of the concept at the constitutional level. The indefinite nature of consumer safety makes us somewhat reluctant to propose the integration of a specific product safety definition in the Treaty itself. The Spanish Constitution might serve as a blueprint for compelling the Community organs to depart from a maximization principle in the regulation of consumer safety, a duty which may, in turn, be incorporated into the Treaty.

## B. Procedural Consequences

The procedural consequences of the Community's responsibility on consumer safety remain the same whatever form the responsibility might take. This implies that even when one does not accept the institution of a right to safety, and instead prefer the state objective option, one must still consider the procedural consequences of the Community's responsibility.

### 1. Privatization of consumer safety and statutory responsibility

The delegation of regulatory power from statutory entities to private standard-setting institutions is constitutive for the regulation of product safety throughout the Community. The process is visible in the field of consumer goods, whereas it is less obvious whenever product regulation is subject to some kind of prior approval (medicines) or prior registration procedure (chemicals). The final responsibility remains, not in the hands

of the statutory authorities but rather in the hands of consultative committees, often private in nature, who pre-structure the market access decision. To put it simply, the public authorities do not have the capacity to define the level of protection themselves. They must make use of the competence collected in private standard-setting bodies, whatever their form, their legal mandate and their composition might be. The regulatory technique chosen by the Member States and the Community in product and process regulation may be characterized as a tendency towards privatization which is somewhat compensated for by a process of democratization. This means that regulatory powers are *de facto* transferred to private entities. The statutory authorities, however, maintain the capacity to influence the standard-setting procedure and force these bodies to integrate public interests into their decision-making machinery. This perspective, though realized in the field of consumer goods where standard-setting is officially placed in the hands of private entities, might well be expanded to administrative prior approval and prior registration procedures.

The functional delegation of regulatory power from the Community to private entities encounters quite a number of problems at the Community level. The ECJ has made it clear in the Fisheries case<sup>158</sup> that a redelegation of regulatory power from the Community back to the Member States is excluded, at least in the field of the Common Commercial Policy. Considering these dicta, one might argue that redelegation of power to private entities must also be excluded. The argument could be strengthened with reference to the preemption doctrine.<sup>159</sup>

We consider that it is neither legally possible nor politically sound to prohibit *a priori* the integration of private European standard-setting institutions into the Community regulatory activities or put in broader terms, to integrate expert knowledge in the process of defining the level of safety protection. *De facto* delegation of power must, however, respect two main conditions: (1) the Community must take all appropriate measures to secure its influence on the procedure and; (2) it must likewise impose on the private entities a duty to open up the standard-setting procedure for public interest groups.

<sup>158</sup> Case 30/70, [1970] ECR 1197 at 1206; Case 23/75, [1975] ECR 1279.

<sup>159</sup> Waelbroeck, 'The Emergent Doctrine of Community Preemption, Consent and Re-delegation', in T. Sandalow, E. Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (1982) 2, 548 seq.; more specifically, Lauwaars, 'The Model Directive on Technical Harmonization', in R. Bieber *et al.*, *op. cit.* (note 38) 151 seq.

## 2. The indefiniteness of safety requirements

Safety is not a static but rather a dynamic category. The appropriateness of precautions depends on the intensity of dangers and the category of the products concerned. Two types of consequences result from the quite specific character of product safety:

– There is a need to grant the legislator some leeway in choosing the appropriate regulatory technique. The narrowness or broadness of this margin, is determined by the context which allows functional comparison between the mechanisms developed for the regulation of installations and for the regulations of products. Even if licensing of the installations resists fundamental rights, the conclusion cannot be drawn that hazardous products must be made subject to some kind of prior control procedure for constitutional reasons. The Community might delegate its competence to shape safety standards to private entities. It remains, however, the institution ultimately responsible for the protection of consumers against health risks. The Community has to retain control over the regulation of hazardous products in its hands. This can be effected, according to the degree of potential risk, through licensing control, a registration procedure and /or follow-up market controls.

– The indefinite nature of the content calls for the provision of procedures to correct and particularly tighten the control mechanism. Therefore, the Community's responsibility to protect consumers against health hazards includes the duty to provide for means which allow a critical analysis of the mechanisms chosen, in order to be capable of enhancing regulatory control (sunset-rule). An obligation to shift from reference-to-standard legislation to the alternative of statutory control can arise where, for instance, the reference-to-standard approach has been proven insufficient. The Community's ultimate responsibility to conduct the process of privatization encompasses the corollary of providing and guaranteeing the existence of consistent post market control mechanisms which facilitate the taking of corrective action. There are constitutional grounds for the establishment of a Community-wide post market control mechanism.

## 3. Rights to participation and information

The indefiniteness and privatization requires an opening-up of the standard-setting procedure and in the final analysis, the administrative procedure as well. That is why the right to safety should include the right to participation. The citizen is not a mere information-provider for the

regulatory authorities but is involved in the process of defining the common good of 'product safety.' Citizen participation cannot remain limited to the procedure for licensing installations. Instead, participation must be guaranteed in all product control procedures, irrespective of the regulatory technique employed. Pleas for the constitutional introduction of a right to participation could be supported by reference to the Spanish Constitution. The Spanish Constitution expressly articulates the right to be heard.<sup>160</sup> This right has been the basis for the 1984 consumer safety legislation by which the financing of the national consumer organizations has been secured for the first time. The case-law of the German Constitutional Court derives the right to participation directly from the right to safety, although there is no constitutional objective to guarantee the integration of public interest groups in the regulatory process.

#### 4. Means of concretization

The Community right to safety must be formulated in such a way that it grants discretionary power to the Community to take appropriate action, graded by the risks concerned. It should clearly express a Community duty to provide for review mechanisms and participation of consumers; namely the right to participation. This Community right to safety should be coupled with a mandate to concretize it by way of taking appropriate measures to institute mechanisms for post market control and the review of existing safety legislation. It equally covers the necessity to develop appropriate measures for the standard-setting process by which consumers must be integrated, independently of the function of the standards in the process of regulation and independently of the level at which the standards are developed.

### C. Remedies for Guaranteeing Enforcement of the Right to Safety

The conferring of remedies on consumers or consumer organisations in order to implement a Community right to safety, is certainly the most sensitive issue of the whole debate on a fundamental right to consumer safety. Our analysis indicates the necessity of providing for some kind of a judicial control of the right to safety. Otherwise, the right to safety might

<sup>160</sup> Article 51.

remain merely theoretical. The potential bearers of such a right are difficult to determine. At the European level the European Parliament could play an important role.

### 1. Basis of operation: arguments and objectives

There are different arguments which mitigate the possibility of subjecting Community responsibility on consumer safety to judicial control, as called upon by individual consumers or consumer organisations:

- the overall tendency of privatizing product safety regulation makes it necessary to provide for an independent control of the safety standards defined and shaped within the process of standard-setting and within the administrative process. Expert knowledge must be open to judicial control;
- there are structural deficits in the concept of participation. Consumers as well as public interest groups can not compensate for the consequences of privatization, because the necessary resources are not at their disposal, a criterion which would be vital for compliance with the mandate given to them;
- as the scope of Community responsibility and the opportunities for individual redress will not necessarily correspond, there might be a chance of compensating the overlapping competence by entrusting public interest groups with the enforcement of the right.

The objective of making the right to safety enforceable must constitute an effort to oblige the Community to prevent possible dangers to consumers by taking appropriate action and compensating damages resulting from unsafe products and installations. Rules on the compensation for damages do not constitute the main problem in a right to safety. Member States' constitutions, as well the Treaty of Rome, provide for the possibility of suing governments as well as the Community organs, and thereby claim compensation. The real problems result from *insufficient* action and even more from statutory or Community *inaction*. The extent to which individual consumers or consumer organisations should be entitled (based on a European right to safety) to sue the Community for failure to act or for having taken insufficient action, remains unsettled. From a consumer perspective it would be desirable to submit all those decisions to control, which are taken under the safeguard procedures. Here, a transfer of responsibility from the Member States to the Community takes place. It is at this point that Community consumers should be entitled to review the outcome.

An enforceable right of this nature must be bound to specific prerequisites establishing the *locus standi* of the individuals or organisations. Member States law, if existent, binds the right and its enforcement to the individual bearer. He or she must be subject to the threat of public inaction or the insufficiency of action taken. Community law grants capacity to individuals and organisations to sue the Community for omission to act or for taking insufficient action, in Article 173 and Article 175. The 'direct and individual' concern of the claimants forms the basis for their *locus standi*. This in turn constitutes the foundation for the view that individual consumers and consumer organisations enjoy a right to be heard, which corresponds to the Community's duty to enforce the right to safety on their behalf.

## 2. Standing of individuals and consumer organisations

There is a comprehensive set of case-law on the standing of individuals and organisations.<sup>161</sup> However, it does not deal with consumers and consumer organisations directly. The ECJ is quite reluctant to accept individual or group complaints. It tries to avoid the emergence of a group action (*Popularklagen*). Legal capacity is bound to the prerequisite that those who claim action might be individualized and separated from those individuals or groups who are not concerned. This interpretation of 'individual and direct concern' is very much in line with the jurisprudence of the German Constitutional Court, which links the standing of individuals to the prerequisite that they are threatened by concrete dangers. It would give individuals and organisations capacity to sue if it is possible to separate them from the mass of consumers who are concerned by inaction or insufficient action.<sup>162</sup> Such an approach, however, would lead to the result that standing might be guaranteed in the field of process regulation, but denied in the field of product regulation. Decisions concerning installations always involve a limited number of consumers, namely those who are living or will live near the installations. Risks, resulting from unsafe products, concern all consumers – and in an Internal Market – all European consumers. That is why the

<sup>161</sup> Cf. Winterfeld, 'Möglichkeiten der Verbesserung des individuellen Rechtsschutzes im Europäischen Gemeinschaftsrecht, *NJW* (1988) 1409 seq.; Landsittel, Sack, 'Dumpingsachen vor dem EuGH' *NJW* (1987) 2105 seq.

<sup>162</sup> Cf. Wenig in E. Grabitz, *Kommentar zum EWG-Vertrag*, Article 173, Rdnr. 54–58.

mechanisms provided for under Articles 173 and 175 do not suffice to guarantee protection. Additional rules are needed to bridge the gap.

There are arguments at hand promoting such a step. Consumer organisations are already recognized as legitimately representing the consumer's interest at the European level. This has been stated by the ECJ where the consumer organisations' right to join competition law litigations was at issue.<sup>163</sup> Consumer organisations, however, are participating in the definition of the common good of 'product safety.' They have the right to bring the safety issue before the courts, if the solution found does not comply with the Community's responsibility.

Community competition law provides the regulatory mechanism which could serve as a model for the standing of the consumer organisations whenever the Commission is the correct addressee for taking action. This would be true whenever a specific decision has to be taken under the safeguard procedure. The finer details for the shaping of the procedure can be taken from Article 3(2)b of Regulation n. 17.<sup>164</sup> Consumer organisations would then be permitted to require action from the Commission and sue the latter in case of inaction. The lack of a regulation similar to the one on competition would be no argument against the standing of the organisations.<sup>165</sup> The parallel with competition law fails, however, in all cases where the action has to be taken by the Council as *de facto* legislator.

The Community's pre-existing competence to take action either through secondary Community law or where the Community is conferred with a mandate in the Treaty, might be questioned. The regulatory mechanisms can be taken from Article 175 i.e., the rules on the standing of consumers and consumer organisations – and therefore the problems – are the same.<sup>166</sup> They must be directly and individually concerned with the Community's inaction. That the addressee of the claim differs, (i.e. the Community's legislator), entails the necessity of examining the consumer's capacity even more carefully than in the case of consumer claims against the Commission. Though the problems are the same, their position appears in a different light. The procedure to be followed, however, is defined under Article 175 paragraph II.

<sup>163</sup> 11.12.1973, Case 41, 43 – 48, 50, 111, 113 and 114/73 unpublished, cf. Krämer, *op. cit.* (note 3) 398; and 28.1.1984, Case 228 and 229/82, [1984] ECR 1129.

<sup>164</sup> OJ (1962) 204; cf. Krämer, *op. cit.* (note 3), and Crossick, *op. cit.* (note 86).

<sup>165</sup> 28.1.1986, Case 169/84, – *Cofaz*.

<sup>166</sup> Cf. Wohlfahrt in E. Grabitz, *Kommentar zum EWG-Vertrag*, Article 175, Rdnr. 15.

### 3. Standing of the European Parliament

The ECJ has recognized the European Parliament's right to sue the other Community organs for *inaction* under Article 175.<sup>167</sup> One author has already raised the question whether the European Parliament should be entitled to sue the Commission, for not having respected its mandate of realizing a high level of consumer protection under Article 100A paragraph III. This newly-introduced provision of the Treaty might be interpreted in that way. It presupposes, however, that the Community has already taken action in some way or other. But this action cannot be considered as complying appropriately with the mandate of Article 100A paragraph III. The standing of the European Parliament is therefore bound to the existence of a clear mandate on the Community's task in implementing its responsibility on consumer safety.

The ECJ, on the other hand, has rejected the European Parliament's right to sue the Community organs for insufficient action:<sup>168</sup>

par ailleurs, toute personne physique ou morale peut, en cas de méconnaissance des prérogatives du Parlement européen, invoquer le moyen de violation des formes substantielles ou de violation du traité pour obtenir l'annulation de l'acte adopté ou une déclaration incidente d'inapplicabilité de cet acte sur la base de l'article 184 du traité. De même, l'illégalité d'un acte pour atteinte portée aux prérogatives du Parlement européen, peut être soulevée devant une juridiction nationale et l'acte en question faire l'objet d'un renvoi préjudiciel en appréciation de validité de la Cour.

The ECJ in the course of the litigation between the Parliament and the Council concerning the regulatory basis of the regulation on radioactive contamination has confirmed however the European Parliament's right to sue the Community organs for insufficient action in the course of the litigation between the Parliament and the Council concerning the regulatory basis of the regulation on radioactive contamination:<sup>169</sup>

Par conséquent, le Parlement est recevable à saisir la Cour du recours en annulation dirigé contre un acte du Conseil ou de la Commission, à la

<sup>167</sup> [1985] ECR 1515 – *Verkehrspolitik*

<sup>168</sup> 27.9.1989, Case 302/87, – *Comitologie*, not yet reported.

<sup>169</sup> Case 70/88, OJ C 90, 22.5.1990, n. 27, not yet reported.



condition que ce recours ne tende qu'à la sauvegarde de ses prérogatives et qu'il ne se fonde que sur des moyens tirés de la violation de celles-ci. Sans cette réserve, le recours en annulation du Parlement est soumis aux règles prévues par les traités pour le recours en annulation des autres institutions.

Despite the change, a different approach by the ECJ would still be conditional on the long term perspective of installing the Parliament as watch-dog for the activities of the Commission and the Council. No doubt this position could perhaps compensate for the Parliament's lack of power.

#### 4. Means of concretization

Within the framework of the Treaties, it should be possible to provide for a mandate which imposes on the Community the obligation to develop mechanisms for consumer remedies, thereby taking the competition rules as a model. Then consumer remedies should be delegated to the ECJ at first instance, just as in competition matters.<sup>170</sup> Such a mandate would make it necessary to reconsider the role of the individual and consumer organisations in the implementation of the Treaty. Effective consumer remedies could not be set up without amending Article 173 and its' inherent restriction on direct and individual concern. The same is true for the role of the Parliament. A solution, however, could be found by the ECJ. An amendment of the Treaty should be taken into account only if the Court denies the Parliament *locus standi* for complaints on insufficient action to protecting the health and safety of consumers. A step of this nature needs to be investigated in depth. This is not the proper place to examine the issue.

<sup>170</sup> Cf. Müller-Hruschke, 'Verbesserungen des Individualrechtsschutzes durch das neue Europäische Gericht Erster Instanz (EuGHI)' *EuGRZ* (1989) 231 seq.