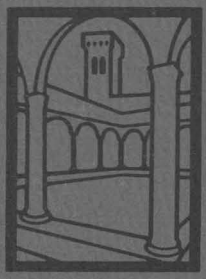

EUI WORKING PAPERS IN LAW

CHRISTIAN JOERGES (ED.)

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

Volume 5

EUI Working Paper **LAW** No. 91/14

Internal Market
and Product Safety Policy
by
Christian Joerges and Hans-W. Micklitz

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DEPARTMENT OF LAW

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BADIA FIESOLANA, SAN DOMENICO (FI)

Editorial note

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

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

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

Volume 4 (Chapters III and IV) analyses the development of the "traditional" policy of approximation of law and of efforts at a "horizontal" European product safety policy. In both policy areas it proved impossible to realise the Community's programmatic

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

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

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

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Summary and conclusions

Chapter V:

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

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

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1 Chapter IV, 3.2 supra.

2 Chapter IV, 3.3.2 supra.

3 Chapter IV, 3.3 and 3.6 supra.

4 Chapter IV, 4.1 supra.

5 That the Commission is itself in principle aware of these implications is documented by the Commission communication of 23 July 1985, "A new impetus for consumer policy", COM (85) 314 final, point 19 et seq., Commissioner Varfis' answer to EP question N° 2778/85, OJ C

1. Product safety obligations

Wherever it harmonises areas of law that also involve the safety of products, the Community must lay down a binding or optional European safety level. Here, the "traditional" method of approximation of laws has led to a many-faceted range of product safety duties. The Low Voltage Directive[6] provides for protection only given "proper use". The medicaments Directive[7] uses the same standard. By contrast, the consumer policy programmes of 1975 and 1981 used the terms "normal" or "foreseeable"[8]. This formulation was taken up both in the preamble to the Directive on cosmetics[9] and in the decision on the exchange of information on product hazards[10], whereas the "new impetus for consumer protection policy" speaks only in general terms of the "need" to set "safety requirements at the Community level"[11]. The Product Liability Directive[12], finally, refers to the justified safety expectations of users "taking all circumstances into account", in particular the "reasonably" foreseeable use. The relevant formulations in the model Directive of 4 May 1985[13] are kept vague: ". . . products . . . may be placed on the market only if they do not en-

277 of 3 November 1986 and the Commission communication to the Council on "Inclusion of consumer policy in the other common policies" of 24 October 1986, COM (86) 540 final, 5 et seq.; and the ensuing Council resolution of 15 December 1986, OJ C 3, 7 January 1987, 1.

6 OJ L 77 of 26 March 1973, 29 (Art. 2); cf. Chapter IV, 2 supra.

7 OJ L 147 of 9 June 1975, 1.

8 Chapter III, 3.1 supra.

9 OJ L 262, 27 September 1976, 169.

10 OJ L 70, 13 March 1984, 6; cf. Chapter, 3.4 supra.

11 Commission communication to the Council (note 5 supra), COM (85) 314 final, point 21.

12 OJ L 210, 7 August 1985, 29 (Art. 6); cf. for more details Chapter III, 3.5 supra.

danger the safety of persons, domestic animals or goods when properly installed and maintained and used for the purposes for which they are intended". Furthermore, "in certain cases, in particular with regard to the protection of workers and consumers, the conditions set out in this clause may be strengthened (foreseeable use)". The vagueness of this text seems striking; first, "intended" use is introduced as the normal criterion, but then the rule-exception relationship is reversed again because the reference to protection of workers and consumers applies to almost all conceivable goods; furthermore the tightening up of safety obligations in the areas mentioned is only a prospective possibility, and finally inevitable differentiations such as those of users' age are lacking. In any case the structure of the Model Directive shows the Community's general tendency to orient the level of protection in consumer goods to "foreseeable" use. Furthermore, even the first two directives or proposals for directives submitted on the basis of the Model Directive introduced an unavoidable differentiation. While the Directive on simple pressure vessels seeks to guarantee the safety of persons, domestic animals and goods only given "proper use"[14], toy manufacturers have to take "foreseeable" use into account, bearing in mind the "normal behaviour of children", and also take differences in children's ages into account[15]. The framework of the Model Directive is of fundamental importance in other respects too. It takes account of the fact that the reference method leaves the Community legislator's responsibilities for product safety unaffected and that harmonisation covering broad groups of products presupposes the laying down of appropriate safety duties. We will later return to the question whether this insight - still expressed in the Model Directive in relatively open, and above all non-mandatory, for-

13 OJ C 136, 4 June 1985, 1, Section B II.

14 OJ L 220, 8 August 1987, (Art. 2 (1)), 148.

15 Cf. Art. 2 (1) and Annex II to the proposal for a directive on safety of toys, OJ C 282, 8 November 1986, 4.

mulations - is to lead to the positive introduction of a Community general clause on product safety[16].

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

The list of "criteria for choosing priority areas", attached to the Model Directive of 7 May 1985 and aimed at explaining its intended scope[17], mentions mainly regulatory criteria. In principle, the new approach will be appropriate only where it is genuinely possible to distinguish between "essential requirements" and "manufacturing specifications" where the requirements for protecting safety make "inclusion of large numbers of manufacturing specifications" unnecessary[18], and where, as with many "engineering products and building materials" not yet covered by Community regulations, essential safety requirements can be defined for a "wide range of products". The Commission White Paper[19] sets the rather legislative criteria of the Model Directive in a more ambitious integration policy context. The legislative technique of reference to standards is assigned far-reaching functions: it is to enable the Community to create an expanding and flexible internal market, to increase the competitivity and innovative capacity of European industry and promote the introduction of new technologies. If the regulatory technique of the new approach is to be understood from the viewpoint of the ambitious policy perspectives of the White Paper, then law approximation projects brought in will be oriented towards industrial policy priorities.

16 Chapter VI, 3.3 infra.

17 Op. cit. (note 13), 8-9.

18 In this connection see the Commission communication to the Council and the European Parliament "Completing the internal market: Community foodstuffs law", COM (85) 603 final of 8 November 1985, 2.

But even where the practice of harmonisation policy is pragmatically oriented towards the chances of implementing harmonisation measures, tensions between internal market policy and product safety policy priorities can be foreseen. For product safety policy, the Community has with the "demonstration project on a Community accident information system"[20] created a mechanism which can, by collecting and assessing data on the number and severity of accidents, supply (among other things) knowledge about hazards arising from consumer goods and therefore contribute to clarifying where safety policy action is needed[21]. The discrepancies between internal market priorities and product safety policy priorities again bring up a conflict of objectives that already marked "traditional" approximation of laws[22]. The sixth recital and Art. 1 (2) of the decision on the demonstration project, at the same time show a way that would at least allow this conflict of objectives to be dealt with: findings of accident research should be used in defining safety objectives and drawing up standards. This might be done by, for instance, carrying out in-depth studies on product risks preferentially in areas where the Commission has ordered a new standard or in which it has been presented with objections regarding the safety conformity of standards or certifications. This kind of feedback would of course assume that the Commission and the Standing Committee already set up by the Information Directive of 28 March 1983[23], and now entrusted also with the co-ordination tasks connected with the

19 Completing the internal market, Luxembourg 1985, point 60 et seq.

20 OJ L 109, 26 April 1986, 23; cf. Chapter IV, 3.3 supra.

21 Cf. Chapter I, 1, and Chapter II, 4.2.

22 Cf. Chapter III, 1.1 supra.

23 OJ L 109, 26 April 1983, 8 (Art. 5).

new standardisation policy[24], would co-operate with the committees active in the area of product safety policy[25].

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

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

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24 Cf. Chapter IV, 3.6 supra.

25 Cf. apart from the Advisory Committee pursuant to Art. 7 of the decision on a demonstration project (note 20) also Art. 7 of the decision of 2 March 1984 on the exchange of information on hazards arising with the use products (note 10).

26 Cf. Chapter IV, 5 supra.

27 This has been shown frequently and in detail: cf. only Eiden, Rechtsangleichung 1984, 76 et seq.

28 Note 13 supra; cf. also Chapter III, 1.1 supra.

3.1 Conflict potential

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

29 Cf. Chapter IV, 2.

30 Cf. Section B II 1 of the Model Directive (note 13).

31 Cf. e.g. ECJ Case 9/70, Judgment of 6 October 1970, ECR [1970], 825/Traunstein Finance Office; Case 33/70, Judgment of 17 December 1970, ECR [1970] 1213/Italian Ministry of Finance; Case 41/74, Judgment of 4 December 1974, ECR [1974] 1337/Home Office; Case 102/79, Judgment of 6 May 1980, ECR [1980] 1473/Commission v. Belgium. A full description of the case law up to 1982 can be found in Oldenbourg, 1984, 50 et seq.; on the interpretation of the doctrine of direct effect taken as a basis here, see also Karoff, 1984, 659 et seq.

32 According to the formula in Case 148/78, Judgment of 4 May 1979, ECR [1979] 162 at 1642 Ratti; on the more generous tendencies in earlier judgments see Karoff, 1984, 663.

crease; on the other hand, precise specification of safety objectives makes it harder to secure consensus when adopting new directives, and weakens the attractiveness of the regulatory technique to standardisation organisations.

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

33 Cf. Chapter IV, 3.2.

34 Section B III 1 of the Model Directive (note 13).

35 Case 148/78, op. cit. (note 31), 1644.

36 Case 815/79, Judgment of 2 December 1980, 3583.

37 On the procedure see Chapter IV, 3.4 supra, and on the similar situation with the Low Voltage Directive Chapter IV, 2.3.3 supra. On recourse to Art. 36 EEC see also Chapter IV, 1.2 supra.

primarily on specific contradictions between the content of directives and Member States' legal provisions, and the ban on legislative action in an area dealt with by the Community assumes that the Community has also actually pursued its policy[40]. This again raises the question whether the Community ought not, in the interest of applicability of the new approach, to develop a more comprehensive product safety policy.

3.2 Functions of the safeguard clause procedure

All situations of dispute mentioned ultimately come down to the same point, namely whether the regulatory technique of reference to standards can establish itself not only as a strategy for internal market policy but also as a safety policy concept. The procedural provisions in the Model Directive guarantee that disputes about the European level of product safety can be brought in not only "preventively" in determining safety objectives and recognising standards and conformity certificates, but also "responsively" through subsequent objections to decisions taken at the Community level, via the safeguard clause procedure.

The safeguard clause procedure, introduced by the Model Directive, had to go beyond the usual type of safeguard clause, given the merely presumptive effects of recognition of standards and of conformity certifications. Its function is, though the typical wording of the safeguard clause may not make this explicit, to give Member States possibilities for action in the event of hazards not yet recognised when a Community standard was

38 Op. cit. (note 32).

39 Case 88/79, Judgment of 12 June 1980, ECR [1980] 1827.

adopted[41]. The practice has become that Member States, through their representatives on the administrative or regulatory committees, are being allowed decision-making powers in safeguard clause procedures[42]. The Model Directive departs from these examples in both respects: not only new objections can be considered in the safeguard clause procedure, but also all findings already arrived at can be questioned, and the Commission is left alone to decide as to the justifiability of any objections[43]. This means that the very difficulties in reaching agreement, the Council was to free itself of according to the new approach, must under the safeguard clause procedure be solved by the Commission, which must undertake the actual fine tuning of product safety policy differences among Member States. Even setting aside legal reservations regarding such broad delegation of decision-making powers to the Commission[44], it seems scarcely conceivable that the safeguard clause procedure in the Model Directive can be developed into a routine measure with short periods of decision and that Member States will rely on its possibilities for protecting their rights. These considerations concern both follow-up market controls[45] and co-operation between the Standing Committee and committees at the Community level in the area of product safety policy[46].

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40 Cf. Waelbroeck, 1982, 548 et seq.; Weiler, 1982, 79 et seq.; Rehbinder/Stewart, 1985, 40 et seq. On the corresponding interpretation of Art. 36 EEC by the ECJ cf. Chapter IV, 1.2 supra.

41 Cf. Chapter III, 2.5 supra and Krämer, 1985, para. 246, who describes and criticises the contrary practice in the case of the Directive on cosmetics (note 9).

42 Cf. for more Krämer, 1985, para. 236 and Chapter IV, 5.2.

43 On the more restrictive shape given to the Commission's powers in the safeguard clause procedure in the Low Voltage Directive see Chapter IV, 2.3.3 supra.

44 On the objections see Chapter IV, 5.1.

45 See 4 infra.

46 Cf. Chapter VI, 3.1.

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

As a preliminary test of the applicability of the reference technique of the new approach to Member States' product safety law, we may take the power given to Member States, following ratification of the Single European Act[47], by Art. 100 a (4) to apply their own safety law as apposed to harmonisation measures adopted only by qualified majority. The Commission can presume "arbitrary discrimination" or "disguised restraint of trade" pursuant to Art. 100 (4), second sentence, and the ECJ establish misuse of the rights under Art. 100 a (4), first sentence, pursuant to Art. 100 a (4), third sentence, only where the Community regulations in fact take account of Member States' interests in protection. Harmonisation measures decided by qualified majority must therefore apply the relatively highest standard if the unity of the Common Market is not to be endangered. The Single European Act's provisions on environmental protection may have the same effect, in so far as product regulations simultaneously take account of environmental and consumer policy interests. By Art. 130 t, Member States may take more stringent protective measures even where the Council has decided unanimously, as long as the measures are "compatible with the Treaty".

Controversies as to the meaning of Art. 100 a (4) will seem hypothetical only when assuming that only outvoted Member States may assert their rights arising out of this provision[48], and that at any rate, in the case of directives laying down only essential safety requirements, the unanimity principle will *de facto* not be deviated from. Irrespective of this, however, it is possible to link systematic conclusions with Art. 100 a (4). If even qualified

47 Bull. EEC, Suppl. 2/86; cf. Chapter IV, 4 supra.

48 However, see Chapter IV, 4.1 supra.

majority decisions of the Council do not bind Member States, or only to a very limited extent, how are the Commission's sole rights of decision under the safeguard clause procedure to be justified? Such objections can be refuted only with the argument that Art. 100 a (4) is a special arrangement, not in itself compatible with the supranational structures of Community law, which does not change the binding effect of directives adopted pursuant to Art. 100 (1) EEC, and leaves the Council's powers of delegation pursuant to Art. 155, fourth indent, EEC unaffected. In its decision-making practice, the Commission will nevertheless not be able to avoid taking account of the sensitivity of Member States to interventions in their safety law on grounds of internal market policy, expressed in Art. 100 a (4).

3.4 Compliance with standards

Probably the most problematic aspects of the reference to standards, favoured by the Model Directive as a regulatory instrument for safety policy, arise from the difficulties of imposing standards that are not legally binding. A comparison with the move from mandatory to voluntary standards in the US is instructive. The American Consumer Product Safety Commission plays an active part in developing voluntary safety standards; it pays attention to their effects on competition, to the involvement of consumer organisations in standardisation procedures, and verifies the content of standards produced and compliance with them[49]. The Model Directive and the agreement between the Commission and the European standards organisations admittedly contain a number of procedural guarantees (in part still in need of precise specification)[50]. But the only preventive control

49 Cf. Chapter II, 4.4.

50 Cf. Chapter IV, 3.5 supra and Section 6 infra.

mechanisms the Commission can use to affect actual compliance with standards are the recognition procedures for standards and for conformity certificates; it can affect the practice of national certification centres only indirectly through the provisions contained in the directives or proposals for directives on simple pressure vessels, toys and construction products[51]. These limited possibilities of influence are in line with the internal market policy perspectives of the new approach, according to which the point is to ensure free movement of goods in the Community, so that what matters is only the equivalence of standards and conformity certificates recognised by the Community. But this internal market policy perspective neglects the decisive question from the product safety policy viewpoint, namely how a move to voluntary standards can be combined with actual guarantees of safety interests.

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

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

51 For more details see Chapter IV, 3.3.2 supra. Furthermore, on the lacunae in protection that may result from diverging certification practices, see the opinion of the Consumer Advisory Committee of 22 March 1985, STO/7/85, 5.

sion's possibility of imposing measures it finds justified Europe-wide on the Member States.

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

The Model Directive's laconic formulation that the Commission has to "remind" such Member States of their duty to act[53] in no way guarantees, even if taken over into individual directives[54], a uniform application of follow-up market controls within the Community. In the case of such controls, Member States apply administrative powers that the Community can influence only indirectly[55]. As with mutual recognition of administrative acts in general and of national conformity certificates in particular[56], the Community must seek to bring about uniform practice by Member States in follow-up market control.

The more recent relevant directives or proposals for directives have in principle taken account of this perception. The proposal for a Directive on "products which, appearing to be other

52 For details see Chapter IV, 3.4 supra.

53 Section B VII 2 of the Model Directive (note 13).

54 In the Directive on simple pressure vessels (note 14, Art. 7) not even this was done; cf. Chapter IV, 3.4.

55 Specifically on technical safety law see Seidel, 1971, 753 et seq. and in general Rengeling, 1977, 19 et seq. 25 et seq.

than they are, endanger the health or safety of consumers"[57] had provided for implementation of a Community-wide prohibition (Art. 2), obligations on Member States to apply such bans (Art. 3) and provisions for Europeanising nationally decided bans (Arts. 4 and 6). However, the since adopted directive[58] lacks these provisions, as does the Directive on simple pressure vessels[59]. The Directive of 1 December 1986 on airborne noise emitted by household appliances[60] differentiates in the monitoring of national decisions between objections by Member States to European standards and disputes as to national standards and regulations (Art. 9); this differentiation shows what resistance the Europeanisation of control measures has to reckon with even when "only" the enforcement of Community provisions is involved[61]. The proposal for a Directive on toys[62], finally, must, in addition to provisions on bans and recalls (Art. 7 (1), first sentence) and on Europeanisation of such decisions by Member States (Art. 7 (1), second sentence, (2) — (4)), contain criteria for the recognition of national test centres (Annex III). The danger of "subsequent" splitting of the common market through single-handed administrative action in implementation of Community regulations can be opposed by the Commission only if it moves to bring about intensive co-operation among competent centres in Member States and in the Community.

From all this, the recall issue provides the plainest proof that realisation of the European internal market must involve Europeanisation of product safety law. The more decisively the Com-

56 Cf. Chapter IV, 3.3 supra.

57 OJ C 272, 28 October 1986, 10.

58 Op. cit. (note 14), Art. 4.

59 Cf. note 53.

60 OJ L 344, 6 December 1986, 24.

61 On the question of the differentiations in Art. 9 see Chapter IV, 5.3.

munity applies the conditions for the free marketability of products by making product safety obligations uniform, the more pressing becomes the need to harmonise control measures whereby Member States comply with these duties. We shall return to the practical consequences of these connections[63].

5. Reference to standards and product liability

For product liability in accordance with the Directive of 25 July 1985[64], the new harmonisation policy is not of direct legal importance. The legal liability duty of product safety in Art. 6 of the Directive is to be interpreted autonomously by the civil courts. It will neither be tightened up nor slackened off through the product safety obligations of new directives. The European or national standards a manufacturer must comply with in order to market his products do not exclude liability in civil law pursuant to Art. 7 d of the Directive. Nor is this "state of science and technology" which by Art. 7 e limits manufacturer liability, identical with the state of European and national standards[65].

The legal independence of product liability and product regulation does not, however, in any way rule out *de facto* mutual influence, which can indirectly have considerable legal effects. American law provides the clearest example of this, as being the furthest developed both in the area of product liability and in that of standard setting by federal agencies. Thus, detailed concepts for taking safety aspects into account in product planning have been extrapolated from the exhaustive case law on design

62 Note 15 supra.

63 Chapter VI, 3.4.

64 OJ L 210, 7 August 1985, 29.

faults[66]. It is indisputable that product liability procedures offer information of relevance not only legally but also technically, which can be used by Government agencies[67], standardisation organisations and individual firms. Admittedly, empirical studies have shown that while firms react to the excessive damages imposed under American law, these reactions concentrate often on developing strategies to deal with damage suits[68]. Standardisation organisations seem neither ready nor able to make use of the dynamic development of product liability systematically in their work[69]. Conversely, both the standards set by federal agencies and voluntary standards of the standardisation organisations play a considerable part in product liability actions, both to establish the state of the art and to demonstrate technically feasible alternatives[70]. Comparably intensive interactions between product liability law and product safety law are unknown in Community Member States[71] and cannot be expected even after the Product Liability Directive is converted into national law[72]. Nevertheless, directed measures to increase the degree of effectiveness of the Product Liability Directive for European product safety policy are entirely conceivable. Thus, systematic exploitation of the case law and of documents of relevant actions in Member States could clarify whether the safety law demonstrated by European conformity certifications is accepted or whether the case law is ques-

65 Cf. Chapter III, 3.5.

66 Weinstein/Twerski/Piehler/Donaher, 1978, esp. 136 et seq.

67 Cf. Chapter II, 4.2 in note 57.

68 Eads/Reuter, 1983, VIII et seq., 21 et seq., 24 et seq., 69 et seq., 92 et seq., cf. Chapter I, 3.

69 Cf. Johnson, 1982.

70 For a systematic evaluation of the American case law in this connection see Hoffman/Hoffman, 1980-81, 283 et seq.; cf. also Chapter II, 4.4.3.

71 The German debate, still the relatively the most fruitful, is confined to legal and normative considerations (cf. Chapter II, 3.5; about France cf. Chapter II, 1.6, and England Chapter II, 2.7).

tioning the integrative objectives of the new approach through autonomous and/or divergent safety requirements. It is, however, equally conceivable to use them in the Europeanisation of standards, in the procedures for recognition of standards and conformity certificates and finally in the carrying out of recall actions.

6. Involvement of consumers in technical standardisation

The new approach to technical standardisation confers on the European standardisation organisations CEN/CENELEC the task of defining the European safety standards, or *de facto* "the European level of safety", on the basis of defined safety objectives which have to be converted into specific mandates. The privatisation of the law-making process goes hand in hand with the opening up of the standardisation procedure for interested circles, including consumers. Consumer involvement is aimed at providing democratic legitimacy for the new regulatory approach[73]. Participation can only succeed where the consumer interest is brought in to actual standardisation. The organisation of this involvement thus stands in the centre of interest. However, conceptual and organisational weaknesses of consumer involvement suggest a rather pessimistic view regarding the attainment of the ambitious goal. Conversely, it would be false to draw the conclusion from foreseeable difficulties, which are perhaps removable only conditionally, that consumer involvement at the Community level should be rejected. For the possibilities that have been opened up offer chances to influence the standard-setting process

72 Cf. Chapter III, 3.5.

73 Micklitz, Produktsicherheit 1986, 109 et seq. The question was discussed on 4/5 June 1987 at a meeting of the Community's "European Forum on Consumer and European Standardisation", cf. Bosserhoff, 1987, Europäisches Forum.

that did not previously exist. Consumer involvement has to live with the constant dilemma of on the one hand, being measured against expectations it can perhaps never meet, and therefore always with an alibi at hand, and on the other, of grasping the opportunities offered, however limited the resources might be.

6.1 Basic questions of consumer involvement

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

74 Survey in Lukes, 1979, 48 et seq. (France), 123 et seq. (Great Britain); see also Reich/Micklitz, 1981, 99 et seq.; Bosma, 1984, 34 et seq.

75 In France, consumers were included following the first major restructuring of standardisation during the Second World War, see Chapter II, 1 supra; specifically on consumer involvement, Art. 5 of the decree of 24 May 1941, printed in Germon/Marano, 1982, 111. In Britain the Advisory Committee was set up in 1946; see Bosma, 1984, 41. On consumer involvement in DIN see Brinkmann, 1976, and Chapter II, 3.4.5 supra.

76 On the work of the Consumer Council see Bosserhoff, 1980, 670 et seq.; *idem*, 1984, 1 et seq.; cf. also Chapter II, 3.4.5 supra.

77 See Schatz, 1984, 178 et seq.

standardisation — industry, government and consumers — indicated a basically positive self-image. The consumer involvement was felt to have led to a change in the content of standards. Nevertheless, the authors diagnose structural defects that must be removed.

6.1.1 Privatisation and participation

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

78 Printed in DIN-Mitt. 64 (1985), 78 et seq.

79 Micklitz, Perspectives, 1984, published in a revised version in CMLR 23 (1986), 617 (621 et seq.).

80 Printed in DIN-Mitt. 63 (1984), 681.

81 See Chapter II, 2.6 supra.

about through national contributions in the CEN/CENELEC standardisation committees or at the European level, through the already existing European consumer organisations.

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

What the new forms of co-operation at the national and European level have in common is not only that the functional delegation of legislative powers is bound up with the decision not to set substantive regulations[85], here in connection with consumer safety and health, but that the opening up of the procedure to particular interested circles (consumers) is not bound up with any formally guaranteed rights[86]. The "suitable arrangements" mentioned in the general guidelines are worked out in a procedure

82 On the prospects for this sort of restructuring see Reihlen, 1984, 7.

83 Printed in DIN-Normenheft 10, Grundlagen der Normungsarbeit des DIN, 1982, 49 et seq.; for more details in the agreement between DIN and the Federal Government of Germany see Chapter II, 3.4.2 supra.

84 Grundlagen der Normungsarbeit des DIN (op. cit. note 80), 54.

85 On the function of reference to standards in the GSG see Chapter II, 3 supra and on safety objectives under the new approach Chapter IV, 3.2 supra.

86 In the Federal Republic of Germany procedural rights were laid down following the standards agreement when setting up the DIN Consumer Council, which leads Bopp-Schmehl/ Heibült/Kypke, 1983, 172 et seq. to make the following statement: "The demonstration that this function has been carried out did not follow substantive criteria of assessment of standards, but compliance with particular procedural rules . . . " Conversely it should be borne in mind that the standards agreement could

that involves only the Community administration and the standards organisations (CEN/CENELEC). Those whose right to speak is at stake may be heard, to be sure, but have a weak position in the negotiating process. What requirements can be deduced from "real involvement" and from support from the Commission "as appropriate" for the establishment of "suitable arrangements"? That sequence of phrases shows the openness of a process, the object of which is no less than the legitimisation of the new approach.

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

Involvement understood in this way, without substantive provisions and without procedural guarantees, cannot remain

not have been concluded before the parties had agreed on consumer involvement.

87 COM(87)617 final, 11 December 1987.

without consequences for the consumer input to standards. For if the conditions of consumer involvement are partly determined by the standards organisations, the obvious thing to do is channel the consumer interests in standardisation in accordance with the criteria set by business of the proportionality of consumer representatives, the technical relevance of their contributions and feasibility[89], in order to exclude alternative (non-professional as being lay, non-technical as being sociological, and non-feasible as being economically expensive) product concepts from standardisation[90]. The whole of consumer protection thus becomes subordinated to the existing goals of standardisation and can be brought about only in a piggyback procedure unless other vehicles can be found, in other words, unless the goal is necessary for other reasons than those of health or safety protection. In this way, safety policy becomes integrated into internal market policy. Alternative product concepts, humanised technology as the object of product safety law, are placed institutionally under a constraint to provide justification. Safety objectives that go beyond the "generally accepted state of the art" will be accepted only where consumers can show that existing practice has led to severe accidents. This sets the framework for consumer involvement in private standardisation. Privatisation does by no means ensure true participation.

6.1.2 The consumer interest in standardisation[91]

Consumers want better products, safer products. Consumer demands regularly lengthen the manufacturer's proceedings. They call for a little "more" than the manufacturers are prepared to

88 OJ No. C 293, 1, 17 November 1988.

89 Convincingly, Kypke, 1983, 213.

90 See Brüggemeier/Falke/Holch-Treu/Joerges/Micklitz, 1984, 8 et seq.

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

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

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

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

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

In order to arrive at an answer on the basis of these three questions, Bosma splits consumer interest into three categories[94]: consumer interest and marketing, consumer interest and product technology, consumer

91 See Bosma, 1984, 16 et seq.

92 Chapter II, 4.1.2.2 supra.

93 As well as Bosma, 1984, 16 et seq., see Bosma, 1985, 9 et seq.

interest and product information. Bosma includes under marketing, among other things, requirements on consideration of foreseeable misuse in design, but also for possible recall or else liability in the event of product defectiveness[95]. Consumer requirements on product technology would be expressed through the requirement for a technology assessment (especially with new technologies), an estimate of the social consequences of the introduction of new or modified products and a quality assessment by the relevant testing agencies[96]. The interest in adequate product information is stated to require provision of special safety marks[97].
This ambitious concept of determination of the consumer interest is, in Bosma's view, demanding too much from the individual consumer[98]. The latter, often unsure or even unaware of their wishes, far less being in a position to set priorities, would have to be represented on the relevant bodies by experts. Bosma does not fail to see the problems facing realisation of this kind of concept, but feels that an intensive process of scientific study (processing of surveys, etc.)[99] could permit adequate establishment of a consumer interest in standardisation.

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

94 Bosma, 1984, 17, 19, 22.

95 Op. cit., 18.

96 Op. cit., 20-21; similar considerations by Venables, 1982.

97 Bosma, 1984, 23.

98 Op. cit., 25.

99 Bosma, 1985, 9.

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

Another thing that seems problematic from the European viewpoint is the scientific presentation of consumer participation favoured by Bosma. In a European organisation of consumer involvement this would lead to a predominance of the industrial countries, Germany, France, and Britain, while southern European countries, with their experiences of handling technology, would be excluded[102]. The opening up of the prospect reveals the internal contradictoriness of the idea of making consumer involvement scientific. Consumer organisations have to meet the requirements on professionality in standardisation bodies; this is the only way they can stand up to argument. At the same time, this necessity cuts them off from their rank and file, since con-

100 Bosma, 1984, 12.

101 On this see 6.3.3 infra.

sumer organisations in developed industrial countries also derive their body of experience from sources that do not meet scientific demand, or do so only in part. The tendency to emphasise the scientific aspects of consumer imvolvement may in the long term affect the very foundations of consumer work, and lead in Germany, France and Britain to more technology-oriented consumer advice, but at the European level the differences are liable to continue for quite some time. What should be done therefore is to develop a model that does not rule out non-professional experience, particularly in the southern European countries, in handling technology, but includes it in an integrated concept of involvement in standardisation.

6.1.3 Chances of consumer involvement

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

102 At the same time the non-inclusion of southern European countries in the decision-making process was used as an argument against the admission of consumer observers; see 6.3.1 infra.

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

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

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

103 Bosma, 1984, 34 et seq. carried out a survey of those involved in stardardisation and continually came to the same findings.

104 On such considerations see Micklitz, 1985, 177 et seq.

105 Printed in Bosserhoff, 1984, 7 et seq.

106 See Chapter VI, 3.3 infra.

very decision that the scarcity of resources comes into play.

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

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

Experience in DIN confirms the need to utilise the procedural rights formally allowed to the full. The DIN manual could act as a model for working out procedural guarantees at the European level.

Experience with consumer involvement at a national level and the structural problems of consumer involvement pointed out by the DIN Consumer Council suggest the conclusion that the chances for European consumer involvement should be regarded rather skeptically. If experts are lacking even at a national level, where are they to be found at a European level? The financial problems are considerably increased by high travel costs. The structural problems of consumer involvement diagnosed in the DIN manual must each be increased by the dimension of co-ordinating consumer interests Europe-wide so that at every level — reason for standardisation, person, object of standardisation, strategies to follow — mechanisms have to be provided to ensure that national consumer interests are reconciled. Nevertheless, it would be over-hasty to deny consumer involvement in European standardisation work any prospect of success *a priori*. European involvement at the same time offers consumers chances to assert their interests that cannot be found in the same way at a national level. A decisive step in this direction would be to break into the organisational structure of CEN/CENELEC by involving *European* consumer organisations in the standardisation process. This kind of direct influence from the European angle would give consumers something of an edge over business, which must first co-ordinate its interests through national organisations. Moreover, consumer involvement ought not to be incorporated in the organisational structure CEN/CENELEC but just the contrary: it should be established independently of standardisation organisations. This very trend has been emerging recently[107].

But the institutional advantages can be fully utilised by consumer representatives at the European level only if they divide up tasks and capacities and concentrate their forces on putting the resources of the twelve Member States to their best advantage.

107 See 6.2 infra.

This means setting up a "professional organisation" of consumer representatives at European level, since this is the only way to guarantee an adequate definition of the consumer interest in the sense of Bosma's idea. This kind of professionally organised consumer involvement should include specific measures in behalf of consumers from Southern Europe.

6.1.4 Consumer access to public information

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

108 OJ L 109, 26 April 1983, 8 et seq.

109 On the chances for the information project see Micklitz, Perspectives, 1984, 33 et seq.

110 OJ L 70, 13 March 1984, 16 et seq.

111 OJ L 109, 26 April 1986, 23 et seq.

for bringing statistically supported information into the standardisation process.

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

112 Note 108 supra, Art. 8 (4).

113 Note 110 supra, Art. 6.

114 Note 111 supra, Art. 8.

6.2 The existing organisational structure of consumer involvement[115]

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

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115 The following statements are based on two reports drawn up by the BEUC for DG XI (now the Consumer Policy Service), to give an account of the utilisation of contributions: report on the involvement of European consumers in European standardisation, BEUC/2111/84, 26 October 84 (cited as BEUC, 1984) and report on standardisation, STD/20/85, 31 December 1985 (cited as BEUC, 1985, Report).

116 Printed in BEUC, 1984, Annex I.

6.2.1 Consumer Advisory Committee, working group on standards and secretariat for co-ordination

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

To give a closer definition of the tasks of the co-ordination secretariat, it seems helpful to keep the three organisations involved, BEUC (as the contractual partner of the Commission), the CCC and the co-ordination secretariat separate. The BEUC has taken over merely formal competence. It was mandated to: co-ordinate the positions of European national standardisation organisations in the area of standardisation; secure information on standardisation from European and national consumer organisations and pass it on; pay travel expenses for experts taking part in CEN/CENELEC meetings; hold co-ordination meetings on standardisation in order to arrive at a common position for European consumers on standardisation questions; provide for contacts between Commission offices, the standardisation organisations and consumer organisations in order to secure active and effective co-operation of European consumers on questions of European standardisation; take other measures suitable for contributing to the efficiency of consumer involvement in the work of CEN and CENELEC. Similarly, BEUC is obliged to bring interim reports and annual reports before the Commission. *De facto*, however, this work is done not by BEUC, but by an employee paid by the Commission who directs the co-ordination secretariat.

The CCC's interest is to draw as clear a demarcation line as possible between the area of work of the European co-ordination secretariat and the work of the CCC working group on standards[117]. The co-ordination secretariat is to co-ordinate participation by consumer representatives in CEN/CENELEC (selection, appointment, reimbursement of expenses, training, co-ordination) and in national standardisation bodies, to give technical support to the CCC in its discussions and supply technical reports on specific topic at the request of Commission offices. The work of the working group on standards is to examine the following three fields: verification of new Commission initiatives in the area of standardisation policy; verification of proposals for directives in the area of standardisation and any setting of minimal requirements in the area of consumer protection; evaluating the annual report of the co-ordination secretariat. In other terms, the CCC working group on standards formulates policy and the co-ordination secretariat (BEUC) implements it. The working group on standards would thus as hitherto, and like the other CCC working groups, also prepare opinions for subsequent adoption by the plenary sessions. In addition to policy formulation, the working group on standards also wishes to exercise a supervisory function over the co-ordination secretariat, which cannot necessary be reconciled with the CCC's range of tasks to date.

6.2.2 Consumer observers on technical committees

Only representatives of test institutes or members of independent research institutes act as consumer observers on the technical committees of CEN/CENELEC. Although unofficial, it seems to be clear inside the CCC that representatives of consumer committees in national standards organisations can at any

117 See XI/371/86, 22 May 1986, ccc/17/86 "Beteiligung der Verbraucher

rate not act as observers[118]. This does not rule out their inclusion as experts in co-ordination meetings. However, this prior decision by the CCC illustrates a certain skepticism regarding the independence of consumer representations institutionally involved in national standardisation organisations. The differing perspectives of testing and scientific institutions may be decisive here. For while consumer representatives on national standardisation organisations are supposed to find generally accepted solutions together with the manufacturers, the testing and scientific institutes may take the product standardised into consideration, relatively free from such economic pressures. The number of consumer observers on CEN/CENELEC technical committees has steadily risen since work began[119]. In 1984 European consumer representatives were sending 4 observers to 9 technical committees. In 1985 it was 8 observers to 9 committees. Of these, however, only four committees were really active in 1985. Of the 58 committees in CEN, 8 do not work, 7 involve consumers, while 34 would be of interest to them. Of the 34 committees in CENELEC, 3 involve consumers, while 7 would be of interest. This assessment is based in a selection according to the following criteria[120]: safety considerations, influence of standards on competition, consumer information, performance criteria, energy aspects. In fact the possibilities for European consumer associations to send observers are considerably restricted. First of all, one has to find an observer prepared to take the job on. This observer has to provide information on the state of work on a particular CEN/CENELEC committee, name the most important points for discussion, reflect the various standpoints of manufacturers and the national stan-

an den Normungsarbeiten".

118 BEUC, 1984, 9 and Annex II (minutes of the meeting on problems of consumer involvement in European standardisation work of the Consumer Advisory Council, BEUC 162/83, 15 November 1983, 6(g)).

119 As well as the BEUC report (note 115 supra) see Consumer Participation in Standards Work, STD/17/86, 15 May 1986.

120 BEUC, 1984, Annex II (note 118 supra), 6 (f).

dardisation organisations, form an opinion of his own and above all send a report to the co-ordination secretariat after each meeting[121].

To avoid misunderstandings, it would seem appropriate to give some further explanations of the number of committees set up by CEN/CENELEC. Behind each technical committee there is a whole range of products. When European consumer associations send an observer to TC 61 (safety of household appliances), he has to cover the whole product range of electrical appliances to be found in the home. The gamut runs from washing machines, dryers, electric cookers, toasters, refrigerators, freezers, coffee mills, clocks and irons to massage appliances, sun-ray lamps and sewing machines. And this list is by no means complete. A comparison with national sets of standards might lead to the conclusion that European standards are much broader in content than differentiated national standards.

6.2.3 Observers' co-ordination meetings

One of the most important tasks of the Co-ordination Secretariat is to hold co-ordination meeting with consumer observers and national consumer experts on the individual committees[122]. Since it is incumbent on the consumer observer to represent the interests of consumers in individual Member States, he must be informed and advised by national consumer experts in order to be able to intervene appropriately in CEN/CENELEC meetings. Accordingly, the co-ordination meetings are the core of European consumer participation. Theoretically, there is an entitlement to raise new projects for CEN/CENELEC standardisation through the co-ordination meetings. In practice, the co-ordination meet-

121 Op. cit., 3.

ings serve mainly to tackle problems "brought back" by the observer from meetings of the technical committees. The Co-ordination Secretariat then has the task of drawing up an agenda, inviting the experts from the various Member States and distributing the necessary papers in advance. Since the national experts' work is honorary, the success of the co-ordination meetings depends largely on voluntary commitment by the experts. At the same time, the greatest commitment is useless if the information flow among national consumer experts is not adequately organised.

6.3 Practice to date with consumer participation in CEN/CENELEC

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

6.3.1 Procedural questions

Observers on CEN/CENELEC technical committees meet a number of procedural obstacles at the start of their work that do not yet seem to have been removed. This annoyance can ultimately be removed only by written procedural guarantees, a con-

122 BEUC, 1984, 4 et seq.; BEUC, 1985, Report, 14 et seq.

clusion that can be confirmed from experience with the DIN Consumer Council[123].

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

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

> The commitment of the consumer representatives on the CENELEC Committee on Safety of Household Appliances (TC 61) very quickly brought out the need to think about the extent to which technical standards ought to consider that children are not always under supervision (the so-called exclusion clause)[125]. At the co-ordination meeting in May 1984, the decision was taken to set a debate going in TC 61. At the next TC 61 meeting in June 1984, the Co-ordination Secretariat's request was however rejected. Observers had according to the Committee Chairman, no possibility of bringing forward a paper in the Technical Committee. According to CENELEC procedural rules this was open only to the Secretariat and to national delegations. An exception might be made for consumer observers if the

123 6.1.3 supra.

124 BEUC, 1984, Annex II (note 118 supra), 2.

125 For details on the substantive issue see 5.3.3 (2).

Commission asked CENELEC to consider a corresponding proposal[126]. Despite this unpromising beginning, the Co-ordination Secretariat, at the request of the observer, went further into the question. At the January 1985 co-ordination meeting a letter to the Chairman of TC 61 was drafted. The next meeting of TC 61 in May 1985 showed, however, that the paper had not been distributed[127]. The Co-ordination Secretariat thereupon decided to approach the President of TC 61 and urge that the letter be distributed. This letter was distributed to Committee members, with the agreement of the CENELEC Executive Secretary. At the next meeting of TC 61 in October 1985, the President then made it clear that henceforth be written comments of the consumer observer would automatically passed on to TC 61 members[128]. Altogether it took more than a year to merely secure formal access to the debating forum, without a single substantive word having been spent on the actual issue.

More fundamental in nature are the problems arising from the weak participation by consumer observers, from only four Member States. The committees ask observers for legitimation of their claim to speak on behalf of the European consumer when only four, or even three, consumer delegations out of twelve Member States are involved in co-ordinating a consumer standpoint[129]. The structural weaknesses are imputed to the consumers themselves and additionally the task is imposed on them of specifically ensuring inclusion of Southern European countries. This position may be used positively as an argument for asking

126 BEUC, 1984, Annex VIII: Protocol of the meeting of CENELEC, Oslo, 18-22 June 1984.

127 BEUC, 1985, Report, Annex 1 d: Co-ordination Meeting on Electrical Household Appliances TC 61, Brussels, 12 September 1985.

128 BEUC, 1985, Report, Annex II b: Minutes of the Meeting of CENELEC TC 61, Athens, 1-3 October 1985.

129 CCC's observers report on meeting of CEN TC 62 — Gas Convector Heaters, London 12-13 March 1986.

the Commission for suitable financial contributions in order to organise this process.

The remaining point is the difficulties that have arisen in the case of contracts issued to CEN/CENELEC by the Commission. With one exception[130], consumers have not been included in the terms of the contract. And even this one Community measure happened more or less by chance, because the European consumer organisations had been informed of the Commission's intention in time. Practical problems with the technical committees arose particularly because the remit given by the Commission was often so imprecisely worded that the Technical Committee saw itself compelled to turn it again[131]. It should be noted in passing that the Commission is giving contracts to CEN/CENELEC before safety objectives under the new approach have yet been specified.

6.3.2 Information and co-ordination

Since consumers are cut off at the European level from Community information sources, the need to build up an internal information network and co-ordinate incoming information Community-wide takes on even greater importance. The importance of this task was just as clear to the CCC working group on standards as it was to BEUC when it set up the Co-ordination

130 BEUC, 1985, Report, 19; what is meant is TC 48 Safety of Gas Water Heaters, on which see Note for file, op. cit., Annex III a.

131 BEUC, 1985, Report, 11; op. cit., Annex II f: Report by Mr. Bosserhoff on CEN/TC Gas Water Heaters, which seeks to specify the requirements on the wording of terms of reference; Bosserhoff put his criticism into practice and drew up a proposal of his own for giving a Community remit to CEN/TC 48; op. cit., Annex III b: Resolutions taken at the 1st Meeting of CEN/TC 52/WG in Berlin, 1985-09-25/27, which lists the shortcomings of the terms of reference in specific form.

Secretariat. But the Co-ordination Secretariat has neither the financial nor staff resources to build up this information and co-ordination network itself. Instead, it is dependent on co-operation by national experts on co-ordination committees and on their information sources in their home organisations.

> A clear tendency to professionalisation[132] has emerged, which pursues more or less the following course: if an observer has been found for a technical committee of importance to European consumers, the Co-ordination Secretariat assembles the necessary information for an evaluation of the committee's work. This is the only guarantee that the observer can recognise his possibilities of influencing the ongoing procedure[133]. If problems arise in the technical committee, the observer approaches the Co-ordination Secretariat and asks for the calling of a co-ordination meeting. The Co-ordination Secretariat prepares the meeting, distributes all necessary material and/or asks for it from members of the co-ordination meeting. While in the initial stages, the members of the co-ordination meeting sought to assess the problems arising on the basis of their experience, a procedure has now been developed in which one of the members undertakes to produce a background paper which, according to the topic, assesses either specific scientific research or ad hoc studies within national consumer organisations[134]. This background paper is used by the observer, following decision in the co-ordination meeting, for submission to the technical committee.

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

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

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

The intensity of information exchange between the observer and the national representatives or experts in the co-ordination committee depends strongly on the activities of the technical committee. In other terms, CEN/CENELEC determines the rate of the consumer work. Besides current information and co-ordination needs, the Co-ordination Secretariat has begun a number of in-depth studies. These serve, on the one hand, the objective of proceeding in product-related fashion, as was the case with the study by the Consumer Association on the "bicycle market in the Community"[135], but also through work directed at making up for shortcomings in knowledge on consumer participation, particularly in Southern European countries[136]. Attempts were also made to provide regular information through a newsletter on the state of standardisation work[137]. However, this proved difficult for two reasons. Firstly, due to the small circle of interest, it seemd advantagous to incorporate this newsletter into the general BEUC journal[138], and secondly, this path was blocked because the CCC insisted on independence of the Co-ordination Secretariat.

Despite all the tendencies towards professionalisation, so far there is no infrastructure intact to which the Secretariat can have recourse. Accident studies are not recorded centrally, nor can the Secretariat have access to the specific knowledge of safety standards accumulated particularly in test institutions. The only internal information network available to date — BEUC Interpol[139] — is not included in the work[140], which would in any case be possi-

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

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

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

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

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

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

ble only if an overall concept for building up an information and co-ordination network were available.

6.3.3 Material questions

The intention is not to provide a stock-taking[141] of work to date, but merely to illustrate the points at dispute in the individual technical committees.

(1) The starting point for the CEN TC 100 working group is a remit from the Commission to CEN[142]:

> "Initially, to determine the requirements for tactile hazard indications on packages intended as containers for substances and preparations classed as hazardous by national authorities; further, to work out standards for means to permit the perception of hazards by touching, in order, in particular, to comply with Art. 15 (2) and (3) of Directives 79/831 and 78/63".

These terms of reference from the Community are aimed at combating accident risks from chemicals in the household using the safety technique of instruction, specifically through a tactile indication of hazard. But this safety philosophy was opposed not only by the consumer side, but also by some national standards organisations that called for special protective devices — child resistant closures[143]. This conflict was resolved when the mem-

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

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

bers of the technical committee agreed to treat special protective devices as separate from tactile hazard indication systems, thereby requiring separate standardisation[144]. This compromise was facilitated by the need to develop a marking system as rapidly as possible in the specific interest of the poorly sighted. Ultimately, however, no agreement could be reached on the basis of this compromise either. It proved impossible from an industrial standpoint to develop a uniform method[145], which had always been the priority goal of the consumer organisations. The latter had carried out a survey through the CCC that had brought out the interest in a uniform method guaranteeing the unambiguous nature of the information[146]. The working group temporarily suspended its work and asked the Commission to lay down the requirements for standardisation in precisely worded terms of reference. The consumer side drew the conclusion from the failure of TC 100 that technical committees themselves were not in a position to secure compromises as to safety philosophy (safety technique of instruction versus protective devices). Only a suitably precisely worded remit that the consumer side would play a part in drawing up could prevent safety policy from failing to advance because "commercial circles involved" cannot agree[147].

(2) One of the important points at dispute in Technical Committee 61 (safety of electrical household appliances) is the so-called exclusion clause[148]. This states that electrical safety standards do not take account of the special hazards arising in

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

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

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

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

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

children's rooms, kindergartens, etc. in which small children or the aged and infirm people are present without supervision. In such cases additional requirements are necessary:[149]

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

The consumer side has now raised the question of the extent to which safety standards meet additional requirements, or whether the protection of children or elderly people is no longer guaranteed when they are left unsupervised in kitchens or other rooms of the home where there are electrical appliances[150]. The suppliers' side sought to downplay the accusation by referring to standardisation practices, in which safety is guaranteed even without such supervision[151]. Consumers again found themselves in a position of having to offer proof that the level of safety was not sufficient. In fact the consumer representatives managed to find that the exclusion clause had been adduced in a number of cases as an argument against the introduction of comprehensive protection measures[152]. Thus, protection against access to current carrying parts is tested with the "standard test finger", based on an "average" adult finger. This test may well not constitute adequate protection for many adults, but certainly does exclude chil-

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

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

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

151 BEUC, 1985, Report, Annex II a: Report of the Meeting of CENELEC 61, Copenhagen, 7-9 May 1985. The representative of the DIN Consumer Council adopted the German industrial standpoint, BEUC, 1984, Annex IX (74), 3.

dren. This leads to considerable hazards from ventilator heaters or other flow heaters accessible to children. Nevertheless, CEN/CENELEC continues to reject the introduction of a child-sized test finger. No special child resistant closure is provided for in the case of spin-dryers and washing machines. Sockets on the front of electric cookers likewise have no protection for children, though this is already prescribed in the case of gas cookers. Surface temperatures of electrical appliances are another problem area. A large number of appliances provide no protection even against severe burns. The consumer side is not claiming that all appliances ought to be so hazard free that no parental supervision is necessary. However, avoidable hazards ought to be removed and electrical safety standards ought to take foreseeable conditions of use (not merely proper use) of particular appliances into account. On the basis of these considerations, the consumer observer, following consultation with national consumer experts in several co-ordination meetings, proposed a revision that positively asks for foreseeable misuse to be covered in the design of electrical appliances that might present a danger to children and elderly persons:[153]

> "This standard takes account of foreseeable misuse (other than gross misuse) of equipment by users of all ages and also, so far as is reasonable, of the fact that the equipment covered by the standard may be used where there are young children and elderly persons".

The suppliers' side rejected this proposal, but at the same time had to admit that the present text of the exclusion clause did not at any rate reflect practice in safety standardisation. It therefore seems to be possible that the consumer side may at least partly succeed with its move. At present, the wording proposed

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152 BEUC, 1984, Annex X, 5-7, from which the examples are taken.

153 BEUC, 1985, Report, Annex V (note 144 supra).

by the British Consumer Advisory Committee is before TC 61 for debate:[154]

> "So far is practicable, this standard deals with the common hazards presented by appliances which are encountered by all persons in and around the home. However, except in so far as this standard deals with electric toys, it does not in general take into account the use of appliances by young children or infirm persons without supervision; for such use additional requirements may be necessary".

It is not yet clear whether the compromise proposal will be adopted. At any rate, the compromise formula, also supported by the IOCU Testing Committee[155], means a considerable step back from the original position. For the consumer side gives up the inclusion of foreseeable misuse and contents itself with the much less specific formulation "common hazards", which is in turn in need of interpretation. On the positive side, there is now a much clearer formulation of the circumstances in which safety standards provide *no* protection for unsupervised persons. The scope has been reduced to children only, to avoid discrimination of elderly people.

The arguments over the exclusion clarify the need for a safety philosophy along the lines of DIN 31000 at a European level. This project, which has been worked on since April 1985, has involved European consumer representatives since June 1986[156].

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154 BSI Technical Committee LEL/161 Safety of electrical appliances, STD 18/86.

155 See its letter of 21 July 1987 to the Chairman of the working group IEC TC 61.

156 However, since June 1986 an observer has been sitting on CEN TC 144, Minutes of the CCC Co-ordination Meeting, 19 June 1986, STD/28/86, 3 July 1986.

(3) Often, however, difficulties arise even among national consumer representatives in agreeing on a uniform safety philosophy. Thus, the consumer's protection against electric shock must be weighed against his interest in being able to do repair and maintenance work himself[157]. Even if one supports a right of access by consumers in principle, it remains to be decided whether consumers are to be explicitly encouraged to do work themselves and what protective measures are at all possible if consumers are to be allowed to do repairs or maintenance. Likewise, the question of the protective level for surface temperatures of household electrical appliances remains open. The British consumer representatives want the maximum limit brought below 50 degrees, while the German side does not even agree to a maximum of 80 degrees[158]. The list of examples could be extended, though the conclusion ought not to be drawn from these disagreements, that the consumer side is unable to develop a uniform European safety philosophy.

6.4 Proposals for extending consumer involvement in standardisation

The present organisation of technical standardisation is regarded by all those involved, the Commission, CEN/CENELEC, the Consumer Consultative Committee and the Co-ordination Secretariat, as a transitional stage. The policy of the new ap-

157 BEUC, 1985, Report, Annex I d: Co-ordination Meeting 12 September 1985 (note 127 supra), 2 and Annex II b: Minutes of the meeting of CENELEC, Athens 1-3 October 1985, STD/40/85, 23 October 1985, 6.

158 See the background paper by D. Grose, BEUC, 1985, Report, Annex VI (note 134 supra) and the letter from the German Consumers Association to the co-ordination meeting in London, 16/17 1985, 10 January 1985, BEUC, 1985, Report, Annex I d: Co-ordination Meeting 12 September 1985 (note 124 supra), 2 and Annex II b: Minutes of the meeting of CENELEC, Athens 1-3 October 1985, STD/40/85, 23 October 1985, 6.

proach seems to have led to the insight by all those involved that in the long term, consumer involvement in standardisation must be institutionalised. It is not yet foreseeable, however, what the outcome will be. Several proposals are available, but discussions have barely begun.

6.4.1 The Bosma proposal[159]

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

159 See Bosma, 1984, 60 et seq.; and esp. Bosma, 1985, 22 et seq., especially the organigram, 29.

160 Bosma, 1985, 23.

161 Op. cit., 23 et seq.

— To point out to the Standing Committee, developments of special interest to the consumer, and make the necessary expertise available to the Standing Committee in order to assert consumer interests;

— To develop consumer priorities in European standardisation;

— To formulate a consumer safety policy, taking particular account of technical standards;

— To list special research studies needed for consumer desires and needs to be recognised in standardisation;

— To make contacts with consumer representations on national and international standards organisations.

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

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

162 Op. cit., 25 et seq.

technical committees of CEN/CENELEC and to maintain contacts with the Standing Committee.

Bosma wishes to locate the Secretariat of the Consumer Advisory Committee on standardisation in DG XI. At the same time, she advocates formalisation of the consultative relationships between the Standing Committee and the Consumer Advisory Committee on Technical Standardisation.

6.4.2 The thinking in DG XI[164]

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

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163 Op. cit., 27.

164 Annex to the Minutes of the Meeting of the CCC Working Group on Standardisation, June 30, STD/27/86, 3 July 1986.

165 See note 117 supra.

6.4.3 Assessment

It is striking that neither proposal takes account of the outstanding importance of safety standards at the European level. Consumer safety problems appear as only *one* conceivable case of technical standardisation, although experience over the last two years shows that consumer observers on the technical committees overwhelmingly concentrate on safety questions. Bosma's model allows the importance of product safety to be accommodated, since it would be possible to set up a technical subcommittee on product safety that might also possibly involve manufacturers. This way out would not be possible in the DG XI proposal.

Structural problems of consumer involvement arise in each proposal. Firstly, it is unclear why Bosma is so insistent on having the secretariat located in DG XI. This skepticism is all the more important since DG XI evidently has no interest in accommodating the secretariat. Bosma's concept completely lacks any discussion of the CCC as such and its working group on standards. Yet there is an important field here for conflict in the future shaping of consumer participation. DG XI seeks to take account of the institutional framework for consumer participation by seeking to bring the Consumer Advisory Committee on technical standardisation under the political control of the CAC working group on standards. But this division of tasks means that the Commission is opening up the possibility of potential conflict between the working group on standards and the new committee. Moreover, the DG XI proposal would ultimately lead to duplication of the work of the CCC, since the Consumer Advisory Committee for technical standardisation would have the same expert representatives of the four consumer organisations sitting on it to deal with standardisation questions. In the long term, trans-

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

CHAPTER VI:
Summary and conclusions

Central to all the analyses in the foregoing chapters was the question of how the connections between the Community's efforts to establish a common market, with their inevitable influence on product safety law, would eventually affect integration. So far, the answers to this question have been anything but encouraging. Although "traditional" harmonisation policy has succeeded in individual sectors, the legislative tasks involved in continuing with such a policy exceed the legislative capacity of the Community; this is due to the broad scale of products concerned and the need to continuously update European directives[1]. This realisation explains the move towards a legal approximation policy that relieves the burden on Community legislators and delegates technical questions relating to safety law to the standards organisations. However, analysis of the Council resolution on a "new approach to technical harmonisation and standards"[2] has shown that a retreat by Community legislators to fixing just "essential safety requirements" involves considerable difficulties. It is above all safety policy considerations that have led to ambivalent and unclear points in the programme of the Model Directive[3], putting at risk the realisation of its internal market objectives[4]. Thus, the theme of the following arguments should already be apparent: if the Community is forced to deal with the effects of its new harmonisation policy on product safety law in the Member States, it has to supplement the new approach. For the moment, however, this statement describes merely a need for ac-

1 Cf. Chapter III, 2.7.

2 OJ C 136, 4 June 1985, 1. See further Chapter IV, 3.

3 Cf. in particular Chapter IV, 3.2.

tion, without defining the objectives and instruments with which the Community can counter the danger of internal market policy being frustrated by product safety policy.

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

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

4 Cf. Chapter V, 3.1.

5 OJ C 76, 17 June 1969, 1; cf. Chapter III, 2.

6 Cf. Chapter III, 2.3 and 2.5.

safety[8], but rather presupposes that the new harmonisation policy should be compatible with the safety interests of Member States.

1.1 Convergences

The comparative survey of the law in the economically most important Member States of the Community and the USA reveals an astonishing convergence of regulatory approaches, which will contribute towards acceptance of the new harmonisation policy. An essentially positive attitude was to be expected from the Federal Republic of Germany, because co-operation between government bodies and self-governing industrial organisations in the field of technical safety law has been part of German legal tradition since the 19th century[9], and because the Federal Republic also played a major part in implementing the "model" for the Model Directive, i.e. the Low-Voltage Directive of 1973[10]. However, for the United Kingdom and France, the adoption of a regulatory system for product safety law based on the method of reference to standards is anything but obvious. With the CPA 1961, safety legislation in the United Kingdom opted for a government-administered approach to regulation. This approach was already modified by the 1978 Consumer Safety Act[11]. But it was not until 1984 that the White Paper "The safety of goods"[12] made the first move toward a rapprochement with German law, with its proposal for a general product safety obligation to be defined with reference to "sound modern standards of safety". This conver-

7 Cf. supra III, 2.6. and 2.7.

8 Cf. the principles in part A of the Model Directive (note 2).

9 Cf. Chapter II, 3.2.

10 Cf. Chapter IV, 2.

11 Cf. Chapter II, 2.3.

gence is even more obvious in the efforts to strengthen the British standards organisations and ensure their formal recognition by government[13]. In France the development is less clear, if only because standardisation is closely linked, legally speaking as well, with the government administration, and because product standardisation and the protection of safety interests are regarded as two separate government functions[14]. Furthermore, the Consumer Safety Law of 21 July 1983[15] and its new instruments are as yet virtually untested in practice[16]. The argument that developments in France are moving towards the legislative approach of the Model Directive thus rests on the assumption that in France, too, the preventive protection of safety interests is increasingly being approached through co-operation between government administration and AFNOR, whereby the administrative controls provided for in the 1983 Consumer Safety Law are not being fully exploited to regulate the development of safety law. The Commission can be confident that this convergence of developments in the economically most important Member States will influence the Community as a whole, and it can point to the fact that important non-member countries are also increasingly favouring the use of voluntary standards in their product safety policies[17].

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12 Cmnd. 9302, HMSO, London, July 1984.

13 Cf. Chapter II, 2.4 and 2.6.2.

14 Cf. Chapter II, 1.1, 1.4 and 1.7.

15 JO 115 No. 168, 2261, 22 July 1983.

16 Cf. Chapter II, 1.2-1.5.

17 Cf. e.g. the USA, Chapter II, 4.4, and the OECD Report "Development and Implementation of Product Safety Measures", Paris 1986 (as yet unpublished), Chapter II, 3.

1.2 Divergences

However, the trend towards encouraging voluntary standards does not in itself guarantee the smooth harmonisation of their function as regards safety policy. The stable co-operation between government and standards organisations in Germany, which has led to the wide acceptance of the reference method as a means of safety regulation, is the outcome of a long historical process. This process cannot simply be copied, and the role of government administration in co-operation with standards organisations will continue to vary from country to country[18]. In particular, the concrete results of standardisation will in all probability differ. Before the House of Lords Select Committee on European Community Consumer Policy, the BSI representative emphasised that, particularly where safety standards were concerned, differing national conditions played a considerable role and, moreover, there were substantial differences in the standard of safety within the Community[19].

In addition, there are significant differences in national standardisation procedures, particularly with regard to the participation of consumer organisations[20], the coverage of standards work and the actual use of standards in industrial production. Finally, it remains to be seen whether the national standards organisations can develop a common "safety philosophy", and what effect differences in their general attitude to safety policy will have, for example in their assessment of the functions of accident in-

18 The example of the shift from compulsory to voluntary standards as the primary means of regulation in the USA is instructive; the functions of the Consumer Product Safety Commission in monitoring or participating in standardisation projects appear to extend considerably beyond the influence exerted by government on the DIN institute (cf. supra Chapter II, 4.4).

19 House of Lords, Select Committee on the European Communities, Consumer Policy (Session 1985-85, 15th Report, HL 192), London 1986, 158-59.

formation systems[21]. It goes without saying that all these difficulties in ensuring an equal standard of safety in the Community are compounded when the countries "below the olive line"[22] and their industrial and administrative infrastructures are taken into account[23]. Accordingly, the importance of the parallels between the traditions of German technical safety law and the strengthening of the standards organisations in the United Kingdom and France should not be exaggerated. The convergences observed are — like the Community's new harmonisation policy — essentially motivated by industrial policy. The linking of standardisation and safety policy could once again be called into question in changed political circumstances.

It would be hazardous to assume that the German approach to product safety will automatically provide a model for others, if only because product safety issues repeatedly attract public attention in all Member States in cycles that are difficult to predict, and then prompt widely differing reactions[24]. Individual Member States are therefore always likely to resort to special measures to counter certain product risks, to question the appropriateness of the reference method as far as safety law is concerned (or at least to wish to strengthen their control over private standards organi-

20 On the position in France see Chapter II, 1.7.2; on the UK Chapter II, 2.2.1, 2.3.2 and 2.6.1; for German Law, see Chapter II, 3.4.5.

21 The decidedly positive attitude of the BSI to the HASS System (loc. cit., note 19, 160) corresponds to the recognition accorded to NEISS in the USA (see supra, Chapter II, 4.4.2, note 125). DIN evidently thinks differently.

22 This formulation was used by a representative of the UK National Consumer Council, loc. cit. (note 19), 60; all interest groups agreed on this point (cf. for the assessment of the BSI, loc. cit., 159).

23 It is doubtful whether experience with the Low Voltage Directive will permit opposite conclusions to be drawn because (a) international standardisation is particularly well developed in the field of electrical engineering and (b) there are no empirical surveys of the standard of safety even in the electrical appliances sector (for an anecdotal example of the differences between Italy and the United Kingdom, cf. the hearings of the Select Committee, loc. cit., note 19, 96-97).

sations) and to augment their range of instruments for product safety policy. Finally, the different situations of "manufacturing" and "importing" countries should also be recalled[25]. Since "importing countries" have no influence on the fixing of national standards and can be bypassed at the European level as regards both standardisation and the recognition procedure[26], and as they need to consider only price effects and safety interests when deciding on the level of product safety, they would not necessarily be committed to either the forms or the result of the new regulatory method[27].

Consequently, the Community must assume that product safety policy will remain a critical issue within Member States, that the search for appropriate regulatory instruments will continue and that not the issue of legal protection as such, but at most the forms this will take, will be subject to political negotiation. If this diagnosis is correct, there is no real alternative for the Community, either, but to carry on with *both* elements of its integration policy — internal market policy *and* product safety policy.

2. Integration policy options

The finding that the integrative force of the new regulatory system in the Model Directive will hardly suffice to overcome impediments to the free movement of goods, due to differing product safety requirements, simply means that the Community has to exert even stronger influence on legal controversies as to

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24 Cf. Chapter I before 1. and 4.

25 Cf. the remarks on the attitude of Canada in the OECD report cited in note 17 supra (Chapter II, 3, para. 69).

26 Cf. Chapter IV, 3.3-3.6.

27 Cf. Chapter III, 1.2.1, text accompanying notes 19 et seq.

the content and form of product safety law, than it has already done with its new approach to technical harmonisation and standards.

However, this still leaves open the form to be taken by such influence; the Community can either seek to reduce national powers of intervention, or extend its attempts to move towards a "positive" integration of product safety policy.

2.1 Internal market policy as a deregulation strategy

The results of the Community's endeavours to implement its consumer policy programmes have been modest[28]. This suggests that a Community strategy for the "deregulation" of product safety law in the Member States will have more chance of success than a fresh attempt at "positive" integration. The new harmonisation policy has hence been interpreted as heralding such a deregulation strategy.

Probably the most prominent advocate of such an interpretation, or at any rate the most forceful, is the Wissenschaftlicher Beirat (Scientific Advisory Council) of the German Federal Ministry of Economic Affairs[29]. It bases its interpretation of the new approach on the statement contained in the Cassis de Dijon judgment[30], and taken up by the Commission in its communication of 3 October 1980[31], to the effect that any product lawfully produced and marketed in one Member State must be admitted to

28 Cf. Chapter III, 3.

29 Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt, Bonn 1986; see also Joerges, 1988, 199-200.

30 Case 120/78, Judgment of 20 February 1979, ECR [1979] 649, para. 14.

the market of any other Member State[32]. In the view of the Beirat, the mutual recognition of safety standards is the consequence of this principle, so the harmonisation of safety requirements is not necessary for the establishment of the internal market except in exceptional cases[33]. However, the Beirat bases its thesis not only on the text of the Commission's White Paper but also on independent arguments relating to the competition policy and regulative functions of the principle of the free movement of goods: in principle (it argues) it is up to the European consumer (not the individual Member State) to decide the standard of quality and safety of products. Therefore it concludes that where governments cannot agree on the harmonisation of product standards, competition between products manufactured according to different standards is reasonable and, in the long term, the price-performance ratio (or range of products) that best meets consumer demands will prevail[34].

However, this is not a valid interpretation of the Commission's White Paper or the case law of the European Court of Justice. The statement quoted by the Beirat from the White Paper is based, as is apparent from the context, on the — albeit problematical[35] — assumption that provisions in Member States governing safety are generally equivalent; neither in its Cassis decision nor in any subsequent judgments has the European Court suspended safety requirements in the Member States pursuant to Article 30 of the EEC Treaty regarding imports[36]; an obligation as

31 OJ C 256, 3 October 1980, 2.

32 Loc. cit. (note 29), para. 3.

33 Loc. cit., paras. 4 and 3.

34 Loc. cit., para. 4.

35 "Completing the internal market", White Paper from the Commission to the European Council, COM (85) 310, 14 June 1985, para. 58: if safety regulations share the same objectives but differ in the means employed, this may well lead to real differences in the standard of safety.

to "mutual recognition" of safety measures taken by the Member States presupposes the harmonisation of the preconditions for recognition[37].

The position of the Beirat is, however, questionable not just in exegetic and legal terms but also — and especially — in terms of legal policy and integration policy. The first point at issue is the initial normative premise that the decision as to the standard of protection provided by product regulations is in principle to be left to the end-user, whose protection is to be ensured primarily by means of information, obligatory labelling and "strict producer liability"[38]. The Beirat does not attempt to justify its regulatory principles vis-à-vis alternative views of product safety policy. If it had done so, it would have become clear first of all that influencing of the safety practice of consumers "in line with market principles" — the only approach envisaged by the Beirat — and obligatory or semi-governmental product regulation, which are the main targets of the removal of technical barriers to trade, have widely differing objectives and cannot simply be subsumed together as functionally equivalent measures[39]. The distinction between "market", "interventionist" and "self-regulating" regulatory instruments also shows that the standpoint of the Beirat on integration policy has no normative justification and is scarcely feasible in positive terms.

The demand that the Community should at all times enforce the principle of the free movement of goods and promote "intra-Community competition between standards", even where harmonisation of product regulations cannot be achieved, in fact means that enterprises in the "safety countries" will be forced to

36 Cf. supra Chapter IV, 1.2.

37 Cf. Chapter III, 1.1, note 11, Chapter IV, 3.3.2.

38 Loc. cit. (note 29), para. 4.

accept cost disadvantages in competition with enterprises in "risk countries"[40]. The disadvantaged enterprises may respond to these distortions of competition by exerting political pressure to ease domestic safety regulations or shifting their production to "risk countries" — whatever happens, the "safety countries" would be under pressure to adopt a deregulation policy. Such consequences pose a threat to regulatory measures that are justified in themselves, and are unacceptable, amongst other things because they remove the decision for or against safety regulations from the political decision-making process and place it at the mercy of the strategic calculations of individual countries and enterprises.

The views of the Beirat on integration policy moreover ignore an option that suggests itself, at any rate as a "normative" approach, particularly where there are differences in product regulation, an opinion that is furthermore constantly emphasised in the economic theory of federalism[41]: the performance or coordination of regulatory functions at European level may secure administrative cost benefits and also be "beneficial" where the positive "external effects" of a government measure cannot be confined to a single area of jurisdiction.

However, an integration policy strategy that uses the principle of the free movement of goods as an instrument to deregulate product safety law in the Member States would be not only dubious as a "normative" approach but also scarcely feasible in positive terms. Any lowering of the standard of product safety does not *a priori* meet a genuine interest of "the" European economy.

On the contrary, enterprises in Member States with high standards may even secure competitive advantages from a gen-

39 Cf. Chapter I, 3. for details.

40 For terminology cf. Chapter III, 1.2.1, note 20.

eral raising of the standard of safety. Furthermore, in view of the political sensitivity of safety issues, the Member States cannot call into question their own product regulations just like that. The history of the Single European Act[42] and also the discussion to date on the new approach point in the same direction. It was not the "risk countries" which insisted on the proviso of Article 100 (a) (4)[43], nor does agreement to the "reference method" of the new approach indicate that the "safety countries" are prepared to accept a reduction in the level of safety provided by their standards[44].

2.2 Positive integration as an alternative

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

41 Cf. Chapter III, 1.2.1, note 14.

42 EC Bull., Annex 2/86.

43 Cf. analysis by Glaesner, L'acte unique européen, Revue du Marché Commun 1986, 307 et seq., 313 et seq.

44 Cf. opinion of the BSI in the hearings of the Select Committee, loc. cit. (note 19), 146 et seq., 157 et seq.

45 For details Chapter III, 2.7.

ling them: for example, the economic conflicts of interest between Member States remain in spite of the delegation of technical harmonisation to the standards organisations.

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

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

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46 Cf. supra Chapter III, 1.2.1, 2.4.

47 Cf. supra Chapter IV, 2.3.3.

48 Cf. Chapters IV, 3.2 and V, 1.1.

49 Cf. in particular Chapters IV, 3.4 and V, 4.

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

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

This applies to the General Programme of 1969 for eliminating technical barriers to trade and the new approach of 1985, and likewise to the consumer policy programmes of 1975 and 1981. The safety issue links both areas, but in terms of internal market policy it has been seen primarily as a "barrier to trade", while in the context of consumer policy it has been proclaimed as a goal in itself, as the "right to the protection of health and safety". The Commission document "A new impetus for consumer protection policy"[50] is the clearest expression so far of the endeavour to overcome the separation of internal market policy and consumer policy. The perspectives set out in this document accord with the results of our analyses: because the new harmonisation policy would not be viable as a mere deregulation strategy, because a return to "traditional" legal approximation policy is ruled out, the Community does indeed require a "comprehensive product safety policy"[51]. Coordination of internal market and consumer policies does not necessarily mean that their specific priorities will be ignored, yet it can improve the chances of success for both areas. With internal market policy, the aim is to counter any threat posed to the free movement of goods by divergent product safety policies in the Member States; consumer policy can take up this interest and hence at the same time meet

50 Communication from the Commission to the Council, 23 July 1985, COM (85) 314 final, in particular paras. 19 et seq.; see also the Communication from the Commission to the Council on "The integration of consumer policy in the other common policies", 24 October 1986, COM (86) 540 final, paras. 6 et seq.

the objections to the legitimacy of the Europeanisation of product safety law.

3.1 Coordination mechanisms

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

51 COM (85) 314 final, para. 19.

52 OJ L 109, 26 April 1986, 23; cf. Chapters III, 3.3 and V, 2.

53 For the USA cf. Chapter II, 4.2 and 4.4.2, for the United Kingdom cf. Chapter II, 2.5 and 2.8.1, for the Netherlands, cf. Rogmans, 1985, 73 et seq.

those areas in which Community decisions are pending and standardisation work has started.

Also worth recalling is the possibility of underpinning harmonisation policy by means of a systematic evaluation of product liability procedures in Member States[55].

With regard to the Member States, the task is to monitor implementation of the reference method, while taking safety policy requirements into account and endeavouring to ensure that safety law develops along lines compatible with the freedom of movement of goods. The Information Directive of 28 March 1983[56] already ensures that the Commission is provided with extensive information on relevant plans in Member States. However, the chances of exerting influence via the "standstill" arrangements in Articles 7 and 9 are limited and do not cover urgent measures motivated by safety policy (Article 9 (3))[57]. As the new harmonisation policy is implemented, the information available to the Community will improve, given the recognition and safeguard procedures and as a result of co-operation with certification bodies in Member States. On the other hand, the concomitant decision-making tasks will become more complicated. These tasks can be approached only through a long-term process of exerting influence to coordinate national developments[58].

The solution that suggests itself is to establish a *Standing Committee on product safety law* for these tasks, to ensure the ongoing involvement of national bodies responsible for product safety in the Community policy-making process, covering the

54 Loc. cit. (note 52), Article 1 (2).

55 Cf. Chapter V, 5.

56 OJ L 109, 26 April 1983, 8.

57 For the functioning of the Information Directive, see Chapter IV, 3.1.

entire activities of the Community in the field of product safety policy — following the example of the Standing Committee set up under the 1983 Information Directive. This Committee could also contribute to the internal synchronisation referred to above between internal market policy and product safety policy, and coordinate the work of bodies charged by the Community with specific tasks in the field of product safety policy[59]. These tasks are described in more detail below. The decisive point is that Member States be represented on the proposed new committee by representatives and experts responsible nationally for the administration of product safety law. This would lead to the following general division of functions:

Table 1: Division of functions between the Standing Committee on technical standards and regulations and a Standing Committee on product safety.

Standing Committee on technical standards and regulations (Information Directive of 1983 and Model Directive of 1985)	*Standing Committee on product safety (future Product Safety Directive)*
- Co-operation with Member States	- *Long-term coordination of product safety policy in Member States*
- Participation in decision-making by the Commission	- Participation in decision-making
- Legal status: regulatory and/or administrative committee[60]	- Legal status: advisory committee[61]

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

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58 Cf. Chapter V, 4.

59 Cf. 3.4.4.1 infra for details.

60 For reasons, cf. Chapter IV, 3.6 and 5.3 supra.

61 Cf. also 3.4.4.1 infra.

3.2 Standardisation procedures and consumer participation

A method of regulation such as reference to standards cannot be introduced in isolation. It requires adaptation on the part of the institutions concerned and furthermore a framework to meet objections to the legitimacy of this form of regulation. This has already become apparent from the need to ensure equivalence in the working of national certification bodies by means of Community rules[62]. However, this also applies to the legislative conditions required for the reference method itself. Significantly, the convergence in standardisation policies in the Federal Republic of Germany, the United Kingdom, France and at Community level already extends to standardisation procedures. In these Member States, government influence on standardisation has been secured by agreements with the standards organisations, while consumer organisations have been given the opportunity to participate in the preparation of safety standards for consumer goods[63].

The Guidelines agreed on by the Commission and CEN/CENELEC on 13 November 1984 are analogous arrangements. The main principles of Community standardisation policy are thus: government influence on standardisation projects, consumer participation and legal control of standardisation results. All these principles still need to be worked out in detail and established as binding rules.

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62 Cf. Chapter IV, 3.3.2 supra.

63 See references in note 20, and for the legal justification Chapter IV, 5.1.

3.2.1 Rights of participation

Particularly urgent with regard to enhancing the status of European standardisation[64] is clarification of the role of consumer participation[65]. The Community's standardisation policy takes a long-term approach. Under Article 6 of the Information Directive of 28 March 1983[66], the Commission consults with the Standing Committee on technical standards and regulations on the working of the Directive and on standardisation priorities. In accordance with Article 6 (7) of the Directive, these discussions are confidential. However, this does not rule out consultation of experts, and the General Guidelines of 13 November 1984 for co-operation between the Commission and CEN/CENELEC[67] indicate that participation by the European standardisation organisations is desirable at this early stage. Such early co-operation is useful in order to ensure mutual coordination of working programmes. The same applies to consumer participation, given that the establishment of priorities requires a trade-off between internal-market and safety policy interests. Consumer participation is particularly essential where the granting of standardisation mandates is concerned. In accordance with Annex II of the Council Decision of 7 May 1985[68], these mandates are intended to ensure the "quality of harmonised standards". They thus interpret and work out in detail the safety objectives of new directives and hence form an integral part of standardisation work, in which consumer participation is provided for by Section B (V) (4) of the Model Directive. However, the main work involved in preparing

64 Cf. Chapter IV, 3.5. and 5.

65 Cf. Chapter VI, 6.

66 OJ L 109, 26 April 1983, 8.

67 Reprinted in DIN-Mitteilungen 64 (1985), 48.

68 OJ C 136, 4 June 1985, 3; it should now be added that Article 1 (1) of the Commission's proposal for amending the information directive explicitly provides for involvement of the Standing Committee in preparing standardisation mandates (OJ C 71, 19 March 1987, 12; see also Chapter IV, 3.1, note 144 and 3.6, note 240).

safety standards will be carried out by the technical committees of CEN/CENELEC. The most important part of consumer participation is hence sitting on these committees.

One of the functions of consumer involvement is to represent safety interests independently of the interests of enterprises, as the parties directly addressed by standards. The performance of this function requires not only participation in standardisation work but also access to information relevant to safety policy. The main source of information — the data from the demonstration project on accident information systems — is not public, pursuant to Article 7 (1) of the Council Decision of 22 April 1986[69]. The exchange of information on hazards arising from the use of consumer goods is also confined by the Council Decision of 2 March 1984 to communication between competent authorities[70]. These restrictions are not compatible with the requirements of meaningful consumer participation.

3.2.2 Organisational structures

Consumer participation at all stages of standardisation work stems from the realisation that informed involvement requires continuous collaboration throughout the standardisation process. Also essential for informed participation, however, is the establishment of suitable infrastructures. To this end, a forum should first of all be created for European consumers — a "Consumers' Consultative Committee on standardisation". The task of this committee would be to ensure that consumers have a say in ne-

69 Note 52 supra; in contrast, Article 7 of the Commission proposal for a Community accident information system (COM (84) 735, 7 January 1985) provided for a publicly accessible documentation and information centre.

70 OJ L 70, 13 March 1984, 16.

gotiating standardisation mandates in the Standing Committee and to organise the input from the consumer side to CEN/CENELEC. This dual function requires political and technical expertise. In addition to the four member organisations of the Consumers' Consultative Committee (CCC), competent experts from national consumer testing institutes and scientific research establishments therefore need to be involved. The administration of the Consumers' Consultative Committee on standardisation should be in the hands of a secretariat, as heretofore. The exact division of tasks between the Committee and the secretariat would need to be set out in rules of procedure. It would be advisable to leave the secretariat in the hands of the BEUC (Bureau Européen des Unions des Consommateurs), as it already has a well-established network of information and contacts with national member organisations. The only legal basis required is for the existence of such a committee, its composition and the establishment of a secretariat.

This means that the scheme outlined above needs to be extended as follows:

Table 2: Involvement of private parties in the Standing Committees on technical standards and regulations and on product safety

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

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

3.3 General product safety obligation

The coordination of product safety law in Member States and the elimination of resistance motivated by safety policy considerations to implementation of the new harmonisation policy are aims that do not necessarily require the establishment of detailed safety requirements — they are more likely to succeed through a broader form of influence on product safety law in Community Member States. A step in this direction — and one that can be put into effect immediately — has already been announced as part of the "New Impetus" for consumer policy: the introduction of a general product safety obligation[71]. A product safety obligation laid down in Community law would have limited but varied functions. Initially, it would contribute towards the cohesion of product safety and standardisation policy by establishing a universally binding fundamental principle.

The Model Directive, which implicitly presupposes a general product safety policy, is unable to perform this function, if only because it is formulated too vaguely and is not even legally binding[72]. By imposing a general product safety obligation, the Community would secure the harmonisation of existing product safety laws and planned legislation in Member States. However, such an obligation would in particular have an immediate practical impact in all those countries that do not yet have general product safety laws. In such cases, it would provide the competent authorities with grounds for intervention and hence promote adherence to directives and standards. At the same time, it would

71 Loc. cit. (note 50), para. 23. More recently, see in detail the Commission Communication on safety of consumers in relation to consumer products, 8 May 1987, COM (87) 209 final.

72 Cf. Chapter V, 1.

encourage standards organisations to step up work on safety standards.

Product safety obligations in the various national legislations differ in the way they are formulated. The German Appliances Safety Law (Gerätesicherheitsgesetz) refers to "generally recognised rules of the art" (allgemein anerkannte Regeln der Technik) and provides protection in the case of "proper use" (bestimmungsgemäße Verwendung) — although the basic standards DIN 820, Part 12 and DIN 31.000/VDE 1000 call for "foreseeable misuse" (voraussehbares Fehlverhalten)[73] to be taken into account. Article 1 of the French Consumer Safety Law[74] refers to "normal" use (condition normale) or use that can be reasonably foreseen by the manufacturer (condition raisonnablement prévisible), and "legitimate" consumer expectations. The US Consumer Product Safety Act uses the expressions "unreasonable risk of injury" (for product bans under § 8 CPSA) and "substantial risk of injury" (for recall procedures pursuant to § 15 CPSA), requiring that foreseeable misuse be taken into account[75]. § 3 (1) of the British Consumer Protection Act 1987[76] follows the model of the Product Liability Directive ("There is a defect in a product. . . if the safety of the product is not such as persons generally are entitled to expect. . ."); but the description of the product safety requirement for the purposes of the criminal law in § 10 (2) says: ". . .consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances. . .". Article 14 (a) in the Dutch bill amending the "Warenwet" (Goods Law) aims to provide

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73 Cf. Chapter II, 3.5 for details.

74 J.O. No. 168, 2261, 22 July 1983; cf. Chapter II, 1.2.1 for details.

75 Cf. Chapter II, 4.3. and 4.5.1, for details.

76 Cf. Chapter II, 2.4.2.

protection against hazards arising from reasonably foreseeable use (overeenkomstig redelijkerwijze te verwachten gebruik)[77].

A decision in favour of a European general clause is made easier by the fundamental consensus on safety policy, which is evident in spite of the wide variation among the examples mentioned, and by the limited functions of such a general clause. There is a consensus that safety criteria should not be defined unilaterally by the manufacturer[78]. This principle, which is common to all modern product safety laws and which is set out, as far as the Federal Republic of Germany is concerned, in the basic safety standards DIN 820, Part 12 and DIN 31.000/VDE 1000, precludes the adoption of the expression "proper use" (bestimmungsgemäßer Gebrauch) employed in § 3 of the German Appliances Safety Law[79].

The general clause is intended to anticipate standardisation in individual sectors and help consolidate European legislation. It is also intended to provide for powers of intervention in those Member States that do not possess fully-fledged systems of national standards, and cover products for which there are no safety standards. It necessarily follows from the above that the general cause cannot refer to standards as such.

Finally, in view of the interest of the Community in a safety counterpart to the principle of the free movement of goods, the product safety obligation must extend explicitly to importers and dealers as well. No distinction should be made between importers and dealers in intra-Community trade, since the aim of the efforts

77 Tweede Kamer, vergaderjaar 1985-1986, 17495 No. 18; on legal developments relating to liability see, comprehensively, Snijders, 1987, 147 et seq. and 152 et seq. (specifically on the safety obligation in liability law).

78 Cf. Chapter I, 2.1 for details.

to achieve the internal market is precisely to secure a common European standard of safety and mutual recognition of national control measures. On the other hand, the jurisdiction of the various administrations remains confined to their respective territories. The safety loopholes this entails can only be closed by extending the product safety obligation to cover the trade sector[80].

Accordingly, the question remains as to which alternative to "proper use" should be incorporated in the general clause. Reliable pointers exist for this decision as well. Firstly, the general clause must be formulated so broadly as to cover the safety needs of all consumer groups, particularly children. Consequently, it should take account of "foreseeable misuse"[81]. On the other hand, however, the criterion of foreseeable misuse cannot be assumed to apply to all products without taking their use and users into account. In particular, there is no question that, in addition to the definition of the responsibilities of manufacturers and users, a large number of additional factors are relevant for a normative assessment of risks: the usefulness of the product, the likelihood of harm being caused and the extent of potential hazards, the availability of suitable technical alternatives, and the cost of safety design requirements[82]. A formulation that provides for distinctions to be made and for all factors relevant for assessing safety to be taken into account is contained in the Product Liability Directive[83], which refers to "the safety which a person is enti-

79 Cf. for the restricted meaning of § 3 of the Gerätesicherheitsgesetz (GSG), Chapter II, 3.3.3.

80 This conclusion is anyway in line with the development of product safety and liability law; cf. for the unsatisfactory response by German law, Chapter II, 3.3.2 and 3.3.7 end.

81 Cf. Article 2 of the old proposal for a Directive on toy safety, OJ C 203, 29 July 1983, 1; the new draft Directive (OJ C 282, 8 November 1986, 4) has changed the formulation but the content remains the same (cf. Chapter V, 1, note 15).

82 Cf. Chapter I, 2.

83 OJ L 210, 7 August 1985, 29 (Article 6); cf. Chapter III, 3.5.

tled to expect". There are pragmatic considerations in favour of such a criterion. Parallel development of product liability law and safety law would help consolidate Community law, while the Member States should find it easier to agree on a previously accepted standard than to consent to a new formulation. The choice of this criterion is, moreover, in line with the development of the law in the Member States. It accords with French law and the Dutch "Warenwet"[84], should be reconcilable with the likely application of the British Consumer Protection Act 1987[85], and is *de facto* compatible with the legal situation in the Federal Republic of Germany[86].

3.4 Follow-up market control

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

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84 Notes 74 and 77.

85 Though the Act has loosened the originally intended linkage between liability and safety law (see Sections 3, 10 of the bill, reprinted in PHI 1987, 18).

86 Cf. Chapter II, 3.3.

3.4.1 Integration policy functions

As far as national product safety policy is concerned, follow-up market control essentially involves penalising breaches of product safety obligations, responding to newly identified risks and ensuring compensation for financial loss[87].

All these aspects are also relevant to a European product safety policy. The introduction of a general product safety obligation would be practically meaningless if breaches were not punishable — the legal need for provision for follow-up action is incontrovertible in view of the inevitable gaps in preventive control measures, and any elimination of product risks must, in order to be fair, also ensure compensation for any damage or injury caused.

However, these general safety policy tasks of follow-up market control, gain appreciably in importance in the context of the new harmonisation policy. The declared aim of the new approach is to improve the conditions for the marketability of products in the common market. This objective explains the provisions for the equivalence of European standards and national standards (where included in the standards list), the admissibility of attestations of conformity for "products for which the manufacturer has not applied any standard", and mutual recognition of attestations of conformity issued by national certification bodies[88]. However, these improvements to the conditions governing the marketability of products, which are motivated by competition and internal market policy considerations, inevitably reinforce the legal need for surveillance of their conformity to safety standards. Here too — as with the product safety obligation — the

87 Cf. Chapter I, 3.3.

territorially restricted application of administrative measures means that Member States can react to identified product hazards only within their own territories. Each Member State has therefore to take such action on its own account. In addition to these functions, which are primarily concerned with safety policy, follow-up market control also has genuine internal market functions, which too have been taken into account in the Model Directive: easing the burden on the Community's legislative procedures with the new reference method has its price in terms of integration policy — it allows only the substantiation of market access rights on the basis of "presumption of conformity", while conceding to Member States the power to check the justification of such presumptions. The dangers that these Member States' powers pose to the unity of the internal market can be countered only *ex post* in the safeguard clause procedure. However, this corrective function requires equivalent standards for follow-up market control[89] if it is to be effective.

The new harmonisation policy has thus produced a "regulatory gap" as far as follow-up market control is concerned. This term refers to the inadvertent creation of a need for positive intervention by a policy aimed at market integration[90]. Indeed, the Member States have neglected the development of follow-up market control as an instrument for product safety policy[91]; now they are under pressure from the "anti-interventionist" principle of the free movement of goods and the "anti-interventionist" reference method to introduce positive regulation. This consequence appears paradoxical only at first sight. It is in line with the logic of an integration policy that does not allow the achievements of a

88 Cf. Chapter IV, 3.3.

89 Cf. Chapter IV, 3.4 for details.

90 Cf. Bourgoignie/Trubek, 1987, 3-4, 12 et seq., 171-72.

91 Cf. Chapter I, 3.3 (end), and the description of the legal situation regarding follow-up market control in Member States in Chapter III, 3.4.

single internal market to be jeopardised again by one-sided and uncoordinated safety policy measures of Member States.

3.4.2 Information sources

The intensity with which Member States seek to detect hazards is the essential determinant of the practical importance of their safety provisions, and the well-considered utilisation of information is one essential condition for rational use of administrative resources. To date, the Community has contributed to controlling the "information input" to follow-up market control essentially only through the decision on exchange of information on product hazards[92]. It has however begun to build on this pledge. By Articles 12 and 13 of the draft Toy Directive[93], Member States would be obliged to verify observance of toy safety requirements by export checks and inform the Commission on application of the test and supervision procedures[94]. Similar supervisory measures are provided for in the Directive on airborne noise emitted by household appliances[95]. Article 4 of the Directive on dangerous imitations of consumer goods[96], finally, provides that information on measures taken by a Member State may be communicated prior to an "exchange of views" on their justification.

The most obvious way of systematically advancing from these starting points is offered by the demonstration project on a

92 OJ L 70, 13 March 1984, 16; on the limited scope of this decision and the need for its reform, see Chapter III, 3.4.

93 OJ C 282, 8 November 1986, 4, amended proposal of 2 October 1987, COM (87) 467 final.

94 On the "Europeanisation" of positive decisions cf. 3.4.4 infra.

95 OJ L 344, 6 December 1986, 24 (Art. 5).

96 OJ L 192, 11 July 1987, 49.

Community accident information system[97]. Its data can, as American experience with NEISS shows[98], be utilised for follow-up market control. Data from the European accident information system are suitable as a primary information source. Since they are collected according to uniform criteria Community-wide, making use of them would help to harmonise administrative practices[99].

However, accident information systems cannot be the sole source of information. Member States must be free to make use of their existing administrative facilities and, for example, to evaluate studies carried out by test institutes. However, a range of information sources should be underpined by uniform principles: the admissibility of consumer complaints, the admissibility of input from consumer organisations, the obligation to take account of legal judgments concerning product liability, and an obligation of enterprises to provide notification whenever they possess knowledge from which it can be reasonably concluded that the products they market represent a significant hazard[100].

Consideration of legal judgments concerning product liability fulfils a function specifically related to integration policy, because it indirectly[101] contributes towards the harmonisation of safety law criteria. In contrast, the obligation on enterprises to provide notification primarily furthers safety policy. Especially where serious risks are involved, enterprises will move to eliminate them of their own accord, and for instance voluntarily make recalls[102]. It should not be assumed, however, that the willingness

97 Note 52 supra.

98 Cf. Chapter II, 4.2.

99 Though a prerequisite for this would be removal of the existing prohibitions on using the data (cf. 3.2.1 supra, and Chapter III, 3.3).

100 Cf. for US law as a model, Chapter II, 4.5.2.

101 Cf. 3.4.3 infra.

to do so exists throughout an entire industry or will (or even can) lead to corresponding action on export markets. Nevertheless, the obligation to provide notification would not only meet the safety requirements of consumers but also provide information on inadequacies of standards or deficiencies of national attestations of conformity.

3.4.3 Requirements for intervention and instruments for taking action

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

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102 Cf. Chapter III, 3.4.

103 For this distinction, see Chapter IV, 3.2.

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

It does indeed seem appropriate to leave Member States the freedom to use institutional solutions that are in line with their various legal traditions. For example, the obvious approach for the Federal Republic of Germany would be to entrust follow-up market control to the industrial inspectorate (Gewerbeaufsicht)[107], while France would do best to maintain the division of functions between the Commission for Consumer Safety and government administration[108], and the United Kingdom should retain the responsibility of local authorities[109]. Finally, the establishment of independent commissions is also conceivable[110].

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104 Note 96 supra.

105 Note 93 supra.

106 Cf. the corresponding provision of Article 7 of the Directive on airborne noise emitted by household appliances, note 95 supra.

107 Cf. Chapter II, 3.3.7.

108 Cf. Chapter II, 1.5.1.

109 Cf. Chapter II, 2.2.3, 2.3, 2.4.1.

110 Cf. for example the proposals by A. Pauli, 1985, 180 et seq.; in the Netherlands, a Parliamentary initiative to supplement the Government Bill amending the "Warenwet" (note 77) specifies that responsibility

However, as regards the legal instruments to be made available to these bodies, Community coordination would be advisable. The possibilities are bans, confiscations, recalls, warnings and compensation to consumers affected by recalls.

The type of action taken should depend on the nature and severity of the hazards. Bans or even confiscations are not always necessary, but may sometimes be insufficient. It may suffice to have the manufacturer rectify faults. However, it may also be necessary to have products replaced or recalled, with compensation for financial losses. The right to inform the public or demand that the manufacturer or importer provide appropriate information is essential, but the necessity and nature of the information will in turn depend on the seriousness of the product risk. For example, a public information campaign will not be required if the manufacturer is able to identify the customers concerned directly from its files and contact them. This particular example illustrates that the appropriate control measures should best be agreed in conjunction with the manufacturer or importer. A commitment by the concerned enterprise to propose, in the event of significant product hazards, a catalogue of measures for preventing such dangers, would normally enable a settlement to be reached, as is shown by the example of US law[111].

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

The development of the law relating to follow-up market control is not an end in itself, but fulfils a dual function in terms of both safety policy and internal market policy. The aim of Europeanising follow-up market control is to reduce the potential

lies with the Minister of Welfare, Public Health and Culture (Tweede Kamer, vergaderjaar 1985-86, 17495 No. 22).

for conflict in the field of safety policy resulting from the objectives of internal market policy[112], by Europeanising the practice of safety law.

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

The Model Directive provides for all questions connected with the implementation of new directives to be handled by the Standing Committee on technical standards and regulations. However, the main task of this committee is to advise on new plans for directives and standards. In addition, the primary function of the safeguard procedure is to examine the quality of European and national standards and, when necessary, ensure that they are developed further. On the other hand, follow-up market control essentially involves executive tasks. The question of whether certain risks require intervention can be considered separately from the question of whether these risks require changes to European or national standards. This distinction could also be taken into account in the institutional arrangements: the Standing Committee on technical standards and regulations should be relieved of executive tasks to allow it to concentrate entirely on problems of legislation and standardisation.

The executive tasks are difficult enough. Harmonisation of informational sources, conditions for intervention and instruments of follow-up market control are necessary but not sufficient conditions for achieving an equal standard of safety throughout Europe. The Community thus requires a body through which differences of opinion between the competent bodies can

111 Cf. Chapter II, 4.5., note 154.

112 Cf. Chapter IV, 3.4, and Chapter V, 3. to 4.

be argued out and settled. With a view to harmonising practice in Member States, their inclusion on a "Committee on follow-up market control" is to be recommended here as well. However, since it will be concerned with executive questions, this committee does not need the legal status of an administrative or regulatory committee, but should be set up as a subcommittee of the Advisory Committee on product safety proposed above[113].

Making the administration of follow-up market control institutionally autonomous does not immediately seem to be in line with approaches in the Community's recent legal acts in the area. The Directive on airborne noise emitted by household appliances[114] explicitly refers all questions in connection with its implementation to the Standing Committee set up by Directive 83/189/EEC (Article 9 (1))[115]. The draft Toy Directive[116] takes the position that the Commission alone will decide on questions of follow-up market control (Article 7 (4)), and where shortcomings in harmonised standards or gaps in the standards become apparent, will provide for consultation of the Standing Committee on technical standards and regulations (Articles 5 and 7 (2)). The Directive on dangerous imitations of consumer goods entrusted the Advisory Committee on information exchange on dangers arising from the use of consumer products, set up by Decision 84/133 of 2 March 1984, with the tasks of coordinating measures by individual States[117].

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113 3.1 supra.

114 Note 95 supra.

115 On problems of the differential treatment of objections to European standards on the one hand and to national standards on the other, see Chapter IV, 5.3.

116 Note 93 supra.

117 The reference to the decision (note 92 supra) can be found in Article 4 of the new Directive (note 96 supra).

3.3.3.2 Decision-making powers of the Commission

The above-mentioned functions of the Europeanisation of follow-up market control entail requirements that cannot be met simply by an exchange of information restricted to the authorities concerned, which leaves any reaction to hazards at the discretion of Member States. The Community must therefore go well beyond the Council Decision of 2 March 1984[118]. It requires comprehensive information and considerable decision-making powers.

Initially, it needs to be informed of decisions by the competent bodies in the Member States. However, the obligation on Member States to supply information should not be confined to cases where positive measures are ordered. It ought also to cover cases where a settlement was reached or where intervention was rejected, since such procedures are no less important for the harmonisation of administrative practice, and their justification can be just as questionable as the ordering of positive measures. Decision-making in the Commission and the Advisory Committee on follow-up market control proposed here can also be aided by the findings of the demonstration project on accident information systems, as well as by other own sources of information. Consumer organisations should be allowed to approach the Commission, and the "Consumers' Consultative Committee on standardisation"[119] should have access to Commission decisions.

Two types of decision in the area of follow-up market control can be distinguished: responses to urgent measures and definitive decisions on conflicts concerning the justification or

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118 Note 92 supra.

119 3.2.2 supra.

necessity of measures. In cases of "serious and immediate risk", which already have to be notified "immediately" to the Commission under Article 1 (1) of the Council Decision of 2 March 1984, the safety policy function of follow-up market control calls for the Commission to have the authority to order other Member States to take provisional measures. However, such measures should then be discussed with the Advisory Committee on follow-up market control before the Commission takes a final decision. In all cases where no immediate action is required on the part of the Commission, the Committee should be consulted before a decision is taken. Its participation is essential for the development of common assessment criteria in the Community.

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

The network of committees and co-operative relationships sketched out in the foregoing sections may look over-differentiated and too intricate. Nevertheless, all these proposals are ultimately concerned only with the institutional consequences of two conceptual premises embodied in the Community's objectives for realising the internal market themselves. The first premise concerns the relationship between internal market and product safety policies. It states that the legal harmonisation essential in the interest of free movement of goods in the Community is inseparably linked with the elaboration of a European product safety policy, but that both elements of the integration process, that is, mutual interpenetration of economic sectors on the one hand, and the achievement of closer integration through a European product safety policy on the other, call for separate forward-looking policies and organisational structures. This premise is the basis for the proposals for giving the tasks in internal market policy and in product safety policy an independent organisational form in dif-

ferent ways, related to the historical separation of these policy areas in the Community. The second premise concerns the Community's relationships with Member States, and states that both for its legal harmonisation policy and the Europeanisation of administrative tasks essential in connection with it, the Community is dependent on continuing co-operation with Member States. This need for co-operation is confirmed not only by theoretical analysis of the Community's political system and of specific features of European federalism[120], but also by the practice of Community politics, where decision-making processes are open at all levels to influence from the Member States. This development has gone hand in hand with the setting up of administrative, regulatory and advisory committees, something that started early in internal market policy, and is also indispensable in product safety policy.

A first conclusion drawn from these premises is the proposal to set up, alongside the Standing Committee on technical standards and regulations created by the Information Directive 83/189/EEC, a Standing Committee on product safety[121]. It is indubitable that, in drawing up directives and standardisation mandates, safety concerns belong among the most important tasks for the Standing Committee on technical standards and regulations. But whether at national or Community level, product safety policy is not confined to questions of law-making and standardisation. Instead, it belongs much more in the whole context of comprehensive, varied machinery for guaranteeing consumer safety. The Community must in the long term develop such a policy, and will in doing so, be dependent on co-operation with the competent bodies and institutions responsible for product safety policy in Member States. Equally, a legal harmonisation policy concerned with achieving the internal market has to concentrate on

120 Cf. Chapter III, 1.2.

the steps necessary to that end, and thus set its priorities primarily from an economic viewpoint, on which it will seek the necessary agreements. Accordingly, organisational differentiation between internal market and product safety policy does not in any way promote competing political projects, but instead aims at easing the burden on both areas and promoting their co-operation.

A second organisational proposal, namely to set up a Consumers' Consultative Committee on standardisation[122], is connected with the differentiation between internal market and product safety policy and the Community's relationship with Member States, but is primarily a consequence of the technique of reference to standards favoured in the new harmonisation policy. This legal technique links up the European standardisation organisations on "functional" law-making tasks. Because of these *de facto* effects of the reference technique, the justification for calls for consumer participation is in principle indisputable. Our proposals for giving shape to this participation are meant to implement this concept, so as to take account of the organisational and staff constraints on consumer organisations and formally guarantee them possibilities of collaboration.

The third proposal, namely to set up a separate committee on follow-up market control, is a direct consequence of the distinction between internal market and product safety policy, but is also connected with the peculiarities of the new legal harmonisation method. On our proposal, the tasks of verifying the substance of European and national standards and developing them further should remain with the Standing Committee on technical standards and regulations, since from a functional viewpoint this is a future oriented law-making activity. Follow-up market control is,

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121 Cf. 3.1 supra.

122 Cf. 3.2.2 supra.

instead, often concerned with urgent decisions to deal with acute dangers to consumer safety. In each case, where such decisions need to be implemented, the Community is *de facto* dependent on co-operation from the competent authorities in Member States. By its very nature, the case is one of nothing less than the Europeanisation of administrative tasks. In view of these far-reaching implications, it would seem appropriate to create the organisational prerequisites for setting administrative co-operation between Community and Member States on a permanent footing.

In conclusion, the institutional proposals in this section are set out below in an overview:

Table 3: Overview of Standing Committees in the area of internal market and product safety policies

	Internal market policy	*Product safety policy*
Involvement of Member States	Standing Committee on technical standards and regulations (1983 Information Directive and 1985 Model Directive)	Standing Committee on product safety (future Product Safety Directive)
	Subcommittees for individual directives (e.g. for simple pressure vessels, toys, construction products)	Committee on accident information systems (Council Decision of 22 April 1986)
		Committee on follow-up market control (future product safety Directive)
Involvement of non-governmental standardisation actors	CEN/CENELEC	Consumers' Consultative Committee on