CONSIDERATIONS SHAPING FUTURE CONSUMER PARTICIPATION IN EUROPEAN PRODUCT SAFETY LAW

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TABLE OF CONTENTS

I. An Alternative Introduction

In the Federal Republic of Germany (FRG), product liability cases are brought before the special chamber of the Federal High Court (Bundesgerichtshof BGH), with jurisdiction for product liability cases. Judges sitting in this court have in addition to their vocation already earned themselves a reputation in legal writing. Yet even these judges get into difficulties when they have to decide whether the producer has complied with necessary technical precautions in protecting the user from injury. This requires a degree of outside assistance which is to be found in technical standards. Infact there are several thousand of them, and judges find it hard to know whether they actually reflect the present state of art, or have since become obsolete; whether perhaps they will be contested by technical experts or consumers. Thus, a Federal High Court judge has to keep informal methods close at hand and does not rely exclusively on expert advice. By simply picking up the phone, the judge is in contact with the person responsible for employment protection at the Federal Public Prosecutor's Office. In product liability circles people know each other, and their reputations. Informal conversation determines the bounds of arguments made in a given case and the judge will obtain all the background information necessary to the procedural process, on an informal basis, which appears in the written judgment, if at all, in coded form.

My point here is not to claim that such conversations are unprofessional. The small, but everyday affairs can illustrate much more about the role technical standards play (or can play) in practice, where they supposedly play no role. It therefore becomes all the more important to find procedures which guarantee third party (in our case consumer) influence in the development of technical standards - giving consumers a formal guarantee of participation in standard-setting procedure, whose standpoint could then take effect directly through the producer - likewise participation in post-market control. The terms 'procedure' and 'participation' are couched in the sense used in the debate on the role of the consumer in product safety law. This refers to the inclusion of the consumer in the standardisation process, in post-market control, as a person with no direct interest, but who represents the public interest. As can be seen then, we are not dealing with legal redress, but the right to be heard.

My starting point is that consumer participation is deficient at both levels of regulation.[116] I would go further in stating that existing fundamental principles of EC law, provide basic elements for the development of a procedural right to participation, which should be founded as an extension of the right to safety. In the long term, any such EC-based procedural right needs to be founded on consumer participation in the processes of standardisation and post-market control.[117]

My considerations for this stem from two diverse sources: firstly, from a debate concerning the constitutional grounding of the participation of environmental organisations, or third parties, in cases where the safety or environmental impact of industrial plants is considered in the approval procedure;[118] alternatively, from a typically German perspective, where procedural rights are comprehended as complementary to basic constitutional rights, and not as an integral part of the democracy.[119] Here, I intend to put safety law and industrial sites planning law on an equal footing. This approach may seem surprising, in view of the different perspectives, procedural regulation and product regulation[120], given the multifaceted developments or risk-based arguments, and

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116. The state of consumer participation in standardisation and decision-making over post-sale control is described in the expanded German script.
117. My considerations are based largely on a study written for the European Commission, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, Ch. Joerges/ J. Falke/ H-W. Micklitz/ Gert Brüggemeier; Baden-Baden Nomos 1988.
118. For a comparison between safety policy in factory planning law and product safety, see Sicherheitsregulierung und EG Integration, Brüggemeier/ Falke/ Holch-Treu/ Joerges/ Micklitz, ZERP DP 3/84 p. 23 et seq.
119. Neumann in Demokratischer und Autoritärer Staat, 1957 p. 20 et seq.
120. For this distinction and its meaning for product safety law, Brüggemeier et al. op cit. FN 118 p. 23 et seq.

clearly requires an explanation.[121] In industrial sites planning law, participation in the administrative decision-making process and participation in the standard-setting process are distinguished.[122] The processes of development of technical standards are identical in principle; in both areas of law, problems of access to jurisdiction and participation resemble each other throughout and can be discussed alongside each other.[123] By contrast, it seems that participation in the approval procedure for the construction of a site of potential danger to the environment can hardly be compared with the possibility of consumer participation in post-market control procedure. This is because, in industrial sites planning law, the danger to the environment originates in the plant itself, the consumer cannot avoid exposure to danger. In product law on the other hand the situation is quite different. In this case, the consumer seems to imperil himself, since he makes a decision to purchase a product. He exposes himself to risks which first appear through the marketing of a product.[124] It is therefore a

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121. In this respect see E. Gurlitt, Die Verwaltungsöffentlichkeit im Umweltrecht 1989, p. 131 et seq., who tries to found a similar interpretation for the admissibility of product law (for medicine and chemicals).
122. Also G. Winter, Die Angst des Richters bei der Technikbewertung, ZRP 1987, p. 247.
123. Besides, there are limits: it is precisely the reticence of German administrative courts to develop procdural rules for the calculation of technical standards which supports the administrative checking systems, cf. Winter op cit. FN 122 p. 427, mit Nwen aus der Rechtsprechung und der Literatur. There is no approval procedure. This is very different from product safety law. This may help to explain why civil courts have far fewer difficulties than administrative courts in laying down the meaning of control in relation to technical standards.
124. Such an approach is supported by the attempts of Laubinger, Grundrechtsstruktur durch Gestaltung des Verwaltungsverfahrens, in VerwArch 73 (1982) p. 76, who likes to differentiate between "the gravity of the action, the probability of injuring a person's rights and the degree of legality of the action according tot he nature of the good."

valid exercise to call to mind the fundamental basis of procedual participation. In industrial sites planning law, this ought to make it possible for the individual to effectively defend his constitutionally protected rights, for example, life and health. In industrial sites planning law, the public duty of protection is based on the principle that the State takes on a joint responsibility for risks.[125] There is nothing more to product safety law in this sense. In so far as the marketing of a product is coupled to statutory approval, the public duty is obvious. Technical consumer goods, however, are not submitted for statutory approval; in this case, however, the state has the task of guaranteeing protection of the individual through an effective post-market control system. Thus far, the post-market control procedure is functionally equivalent to an administrative decision for the approval of an industrial site.[126] Despite these arguments, the objection remains that, in product safety law, the consumer exposes himself to the risk of damage to health through his choice of purchase. The acceptance of such risk would only be conceivable where a consumer makes a decision knowing of the risks involved. In reality, the consumer has no choice and no possibility of making an informed decision. The decision is taken away from him by standardisation organisations, who define the level of safety required. The consumer himself is symbol-orientated. Seen in this light, it appears possible to make generalisations on the constitutional debate concerning procedurally guaranteed participation. Intellectually speaking, we can refer to Article 2(2) Basic Law (Grundgesetz GG), guaranteeing the right to life and procedural protection through the legal opinion of the German Constitutional Court

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125. See III 2 with reference to the Mülheim-Kärlich decision, BVerGe 53, p. 30 et seq.
126. This begs the question whether, in relation to the formulation of post-sale control, consumers should be granted a priori legal protection simply be exercising their right to a hearing - for comparison with the USA see Joerges et al., op cit. FN 117 p. 230 et seq..

(Bundesverfassungsgericht BVG).[127]

II. The Right to Safety

1. Statement of aims

Since President Kennedy's message to consumers in 1962,[128] the right to safety has been neatly dovetailed into the mainstream of consumer policy objectives. The European Community has likewise demanded,

> "an effective protection from dangers in the interests of health and safety of consumers",

in its two consumer policy Programmes of 1976 and 1981.[129] A long-awaited third consumer policy Programme has still to appear. 'The New Impetus for Consumer Protection Policy' 1985, however, lays down Community objectives for a safety policy. The policy of completion of the internal market has to be achieved through a general safety duty valid throughout the Community.[130] In a Communiction to the Council, 8th May 1987[131], entitled 'The Safety of Consumers' - which the Council acknowledged and approved on 25th June 1987[132] - the first conceptions towards a general product safety duty are developed. Programmes, impetus and communictions are not legally binding, although their precise legal effect is open to

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127. Winter, op cit. FN 122 p. 427; BVerGe 53, 30 (65), see esp.. the far-reaching statement of aims of OVG Lüneburg, NVwz 1985, 357 (Buschaus) as well as Judges Simon and Häusler in the Special Chamber of the BVerGe 53 p. 30 et seq. (Mülheim-Kärlich) 77.
128. Reprinted by Ev. Hippel, Verbraucherschutz 3. Auflage 1986 p. 281 et seq.
129. Details from N. Reich, Förderung und Schutz, diffuser Interessen durch die Europäischer Gemeinschaften, Baden-Baden 1987, RZ 68 p.160
130. 23 July 1985 COM(85) 314 final, approved by Council 26 March 1986 OJ C 167 5 July 1986
131. COM(87) 209 final
132. OJ C 176 4 July 1987

question.[133] No-one would dispute every collateral function of the programmes and formulations which lend support to the case argued.

2. Primary Community law

'The basic right of the Community consumer to health and safety' may be deduced through the decisions of the European Court of Justice (ECJ), based on the relationship between Articles 30 and 36, and the *principle* of proportionality. This was first conceived by N. Reich.[134] Such a basic right might be understood as an 'immanent barrier to Community action in the sphere if integration policy'.[135] Infact, the ECJ is trying to maintain the compatability of the objective of free movement of goods with the duty of Member States to protect its citizens *from dangerous goods*. The method of the ECJ is similar to that of the German Federal Constitutional Court (BVG).[136] It extends the effect of Article 30, 'measures having equivalent effect' - equally the laws of Member States governing social protection tend to be regarded as barriers to trade. Alongside the extension of the field of application, however, the ECJ broadens the conceivable legal justifications. The ECJ is developing a right to safety as a defense for Member States against the predominantly internal market aims of the Commisson. Article 100(a) (iv) employs, such a conception, at least indirectly. *Within the limits of applicability of* Article 100 (a), para. 1, Member States are empowered to reject harmonisation rules which are entirely based on internal market considerations, thereby denying Member State

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133. See Mertens AG 1982, 29 et seq., the legal validity of the international code of conduct was vehemently disputed, Horn (ed.) Legal Problems of Codes of Conduct for Multinational Enterprises, Vol. 1 Studies in *Transnational Economic* Law, Kluwer 1980; recently the teaching of the sources of law has grown in importance, see Pflug, Status und Kontrakt im Recht der AGB, 1986, as to the legal validity of the AGB.
134. op cit., FN 129, RZ 120 p. 227-229
135. op cit., FN 129, RZ 176 p. 301
136. In this respect, Denninger, Verfassungsgerichtliche Schlüsselbegriffe in Festschrift, R. Wassermann 1985, p. 269 et seq.

responsibility in safety matters, through a special safeguard procedure.[137]

The problem of developing a basic right to safety as a defensive right lies in its coupling to the objective of a uniform internal market. Such an approach complies with the logic of the development of the relationship between the movement of goods and product safety. It is confirmed by the readiness of the Commission to understand the harmonisation of product safety as a matter of Community concern, since a further division of the market is foreseeable as a result of divergent national post-market control decisions. This approach, however, limits ths conception of the right to safety. This can never become more than a right annexed to Article 30, and is always faced with the threat of being 'crushed' by the wheels of the internal market machinery.

A starting point for a fundamentally different understanding of the right to safety, independent of the internal market approach, could be taken through Article 130 (r) paragraph 1. Article 130 (r) assimilates environmental protection to the inventory of objectives of primary Community law, a privilege - as it is well known - which is denied to consumer protection. Yet before we turn to the content of Article 130 (r) para. 1, it is necessary to enquire into the meaning of consumer protection pursuant to the Single European Act (SEA).[138] The latter only appears in Article 100 (a) para. 3, and is also subordinated to the aims of internal market policy. In order to deduce a right to safety independent of the internal market, Article 100 (a) para. 3 therefore offers no foothold, chiefly because it addresses only the Commission and this could probably not be submitted to the jurisdication of the ECJ.[139]

It is worth mentioning that Article 100 (r) para. 1 extends into environment issues, since a detailed definition of protection of health is presented as an aim

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137. Also Reich, op cit. FN 129, RZ 176 p. 301
138. See esp. the position of the European Consumer Law Group, Consumer Protection in the EEC after the Ratification of the Single Act, in JCP Vol. 10 No. 3 (Sept. 1987), p. 319 et seq., mainly written by Reich.
139. Reich, op cit. FN 129, RZ 176 p. 297 et seq.

of environmental policy. Theoretically, the right to safety could be incorporated into health protection, and accordingly be brought under the expansive and protective wing of environmental law as a constitutional right of the EC.[140] The problems of coordination between Articles 130 (r), 100 (a) and 100 have triggered off discussions on their interrelation.[141] One could almost say that there is some agreement to subordinate internal market orientated health regulations, Articles 100 and 100 (a) respectively, and only comprehend such regulations within the framework of Article 130 which pursues genuine health policy objectives.[142] For our purposes, the distinction is like the opposition of chalk and cheese. Admittedly, it is realistic, but it destroys the chance of giving new meaning to a concept of health without it being merely annexed to the movement of goods. And this is precisly the point. To date, the conception of product safety, and equally that of a right to safety, focus on possible risks which result from the circulation of goods. Both neglect the conditions of production and removal of these products. A change in approach is required, equally 'infecting' product safety law with environmental law considerations.[143] Statements are to be found in D-G XI preparatory work on a directive product safety in which

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140. Also N.C.D. Ehlermann, The Internal Market Following the Single European Act, CMLR 1987, pp. 361 382 et seq., who want to see environmental protection regulation limited to procedural regulation. This however, once again heightens the disparity between factory planning law and product law which we believed we had already overcome in our arguments, above III.
141. For an overview, see Joerges et al., op cit. FN 117 pp. 374-375; Krämer, The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law, CMLR 1987 659 et seq.; Reich, Schutzpolitik in der Europäischen Gemeinschaft im Spannungsfeld von Schutznormen und institutioneller Integration, Schriftenreihe der juristischen Studiengesellschaft, Hannover, Heft 17, 1988.
142. In this respect, Krämer, op cit. FN 141; Reich op cit., FN 141.
143. See Winter, Perspektiven des Umweltrechts, DVB 1988, p. 659 et seq.

waste should be considered as a problem of regulation.[144] Article 130 (s) should become the key to understanding safety policy and safety law in terms of environmental policy and environmental law. For this to be the case, however, one still needs a dogmatically conceived legal understanding of the interrelationship between the provisions.

3. Secondary Community law.

The Directive on product liability completes the safety policy conceptions of the New Approach. It is not incidental that the approval of the directive and adoption of the New Approach come together in the Council at the same time. The safety policy programme of the Community, 'credo', was timed to run from the middle of 1985 in the following way: post-market control falls to Member States, the EC limits itself to the organisation of exchange of information and the coordination of regulatory actions; the directive on product liability aapplies indirect pressure on the manufacturer to produce safe products only and protects the integrity interests of the Community consumer. I do not believe that the policy of the time was already directed 'towards the creation of a right to safe products for all consumers' by simply using the notion of 'defective products' in the directive as a common basis.[145] The unilateral alignment of compensation for damages, as well as its incorporation into the safety policy of the New Approach weighs against that idea. The gaps in safety policy can only be closed by a separate directive, which imposes a duty on the producer to bring only safe products into circulation.[146] In the meantime, a first proposal has been developed which will soon be published in the Official Journal. The chances of the project being achieved is quite another question. Only, it has become clear that the safety policy conception in

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144. Ch. Joerges and the author are members of a formally constituted working committee of DG XI.
145. But see Reich op cit. FN 129, RZ 120 p. 228
146. In this respect, Joerges et al., op cit. FN 117 p. 447 et seq. See Communications(89) 162-SYN 192, Vorschlag für die Richtlinie des Rates zur Ausgleichung der Rechts- Verwaltungsvorschriften der Mitgliedstaaten über die allgemeine Produktsicherheit.

the New Approach needs to be supplemented.[147] This is central to our hypothesis because a definitive basis of the right to safety is linked to the adoption of a special directive on product safety.

III. The Right to be Heard[148]

Both Senates of the Consitutional Court have derived a duty to observe procedural formalities, based of Article 2 para. 2 of the Basic Law (GG), which excludes, as far as possible, injury to the party protected by the Law.[149] Underlying this is the idea that the State must honour its protection duties by providing procedural guarantees. It seems to me that the essentially German idea of procedural rights flowing from basic rights, still has a role to play despite all reservations about transferring the German model to the creation of a Community right to procedural participation. This is because, according to 'productivist concepts of the EC',[150] integration is to be achieved through the concept of negative integration.[151] The political impetus of Member States has not sufficed for the formulation of democratic rights in Treaty and the SEA.[152] For this reason, the democratisation of the movement of goods must be deduced as a necessary consequence of of productivist concepts.

1. Statement of aims

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147. This is a further opinion expressed in our book, Joerges et al., FN 117 p. 431 et seq.
148. By way of clarification: we are not concerned with legal redress of citizens/ consumer organisations in this context.
149. BVerGe 53 p. 31 et seq. (55 et seq.) (minority vote).
150. Reich, op cit. FN 129, also Th. Bourgoignie/ D. Trubek, Consumer Law, Common Markets and Federalism in Europe and the USA, 1987, p. 99 et seq.
151. Reich treats the shortcomings of this concept in relation to consumer and environmental protection, op cit. FN 129.
152. Alternatively, the EP draft, references in Reich, op cit., FN 129 p. 26 FN 19

'The right to be heard' lies at the heart of consumer policy, as does the right to safety. It is different to the right to safety, however, in that it has never been concretized in legal terms. Its expression in the consumer programme has remained purely placatory.[153] The programmes insist on participation in relevant political decision-making processes. This may lie in the concentration of consumer policies on the enforcement of substantive rights. The interventionist approach to consumer law, however, has come to a halt. The prevalent policy of incentives and cooperation in itself should allow room for the development of a policy on consumer participation,[154] yet hitherto it has not come to this.

2. Primary Community law

Renewed statements on procedural developments can be found in the decisions of the ECJ based on Article 30. This grants the consumer the right to choose and freedom of choice with respect to his need for satisfaction for his products.[155] The acknowledgment of such a right, first and foremost, brings a change in perspectives: consumers are not only indirectly affected by the free movement of goods, they are consignees and consignees have 'rights'; consumers can only choose when they have alternatives and when they are informed about the possible alternatives. Alternatives create obligations, that means retaining a competitive market and not restricting the consumer;[156] information about alternatives signifies making demands on the producer or possibly the 'State', which are aimed at the consumer receiving help in finding his way about the market. In the broadest sense, a process for the dessemination of information must be founded. The right to a market-informed decision not only offers the consumer

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153. See the second Community consumer programme, Bulletin EC 4/79 18 et seq.
154. As far as can be seen, the BEUC has likewise not systematically grasped the concept of consumer participation at various levels. for an overview see Krämer, EWG - Verbraucherrecht, 1986, RZ 46 et seq.
155. This is emphasised by Reich, op cit. FN 129, RZ 14 p. 52, citing Steindorff ZHR 148 (1984) 338 and Donner SEW 1982, 362 et seq.
156. Here Reich has in mind the parallel imports urged by the Commission, op cit. FN 129, RZ 120 p. 228.

the opportunity for active participation, it also burdens him with the responsibility of participation, or of mere passivity. In this sense, Article 30 engenders a right to participation or a right for participants, from which concrete requirements can be developed.[157] Thus it follows: (1) Article 30 is not only aimed at Member States and producers, rather it provides the consumer with a legally guranteed position in relation to the movement of goods, and, (2), a role which the consumer can only fill if producer and Member State take the necessary procedural precautions. To this end, the decisions of the ECJ based on Article 30, show tendencies comparable to those in Constitutional Court decisions, setting aside a procedure for the basic rights flowing from Article 30 and guaranteeing the exercise of those basic rights. Since the Cattenom decision,[158] it should have become clear that ECJ considers formal competence to be a minimal requirement for procedural rights.

3. Secondary Community law

The prospects for a concretisation of procedural participation seems to be out of the question. In recent years, the Commission has certainly laid the foundation stones for environmental law and consumer law. In spite of a dearth of regulation, one can easily identify the impetus of EC policy: procedural participation in post-market control, the administrative approval procedure respectively only comes into question at national level. Procedural participation in European standardisation takes place, however, not only at national level but notably also at Commuity level.

Thus, Article 4 of the Advertising directive[159] contains

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157. I attempted this approach for the right to general Community provisions, my interpretation of Article 30 should allow the consumer to elect his best right; H.-W. Micklitz, Der Schuts des Verbrauchers vor unlauteren Allgemeinen Geschäftssbedingungen, Typescript 1988.
158. Decision of the Court, 22 September 1988, Case 187/87.
159. Guidelines 84/450 EWG 10 September 1984 on The Approximation of Laws and Regulations of Member States on Misleading Advertising, OJ L 250/17 19, September 1984.

procedural stipulations to be followed before national authorities or jurisdictions; a parallel provision is planned[160] for the draft directive on unfair contract terms. It imposes a duty on Member States to take appropriate procedural measures without specifying what is to be understood by this. Strictly speaking, the directives are significant since they oblige Member States to set minimum standards for post-market control. However, they neglect to lay down any concrete provisions concerning the role of the consumer. Consumers may be entitled to take a joint (class) action as in the FRG, thus post-market control itself becomes privatised; equally they can be excluded from post-market control only if the authorities are present[161] to undertake the supervision of pertinent laws. Here again, the provisions remain obscure regarding their objectives. The fact nevertheless remains that the consumer/third party must be included in the procedure. The shift to Community level offers far lesser prospects. In the EC, consumers are not included in the vast majority of committees,[162] which in fact pave the way for the formation of the EC's own administration, be it in the form of pre or post-market control. There are no exceptions to the rule that, consumers/third parties have no access to proceedings negotiated there, nor to information exchanged. A little information is given to them, as is the case for the general public, in the form of often delayed and incomplete reports and committee activities.

With this in mind, it is amazing to have to acknowledge that consumer participation in standardisation at a European level was generally thematised and 'regualated', even if both documents could not easily be assigned to secondary Community law. The agreement of the Commission on collaboration with CEN/CENELEC[163] is admittedly, formally legitimated by the Council Decision 16th July

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160. DG XI/124/87 - EN, Further Draft Articles for Discussion on Unfair Contract Terms, June 1987.
161. Council Guidelines 27 June 1985 on the verification of compatibility of certain public and private projects (85/337/EWG); OJ 175/40, 5 July 1985.
162. In this context, see Krämer, op cit. FN 154, RZ 63, o page 48 he estimates the number of committees to be 200.
163. Printed in DIN-Mitt. 63 (1985), 78 et seq.

1984,[164] yet equally it is doubtful whether the Commission can conclude legally binding contracts which provide for the delegation of Community authority[165] to private standardisation organisations. Leaving aside legal quality/nature, it still remains a fact that, according to the agreement, the circles working in that field ought to be included, and that the Commission will 'contribute to the ascertainment of suitable arrangements according to the circumstances'. A right to participation is acknowledged, but concrete provisions for the form of participation are completely absent.

The official communication of the Commission of 11th December 1987, is hardly more helpful.[166] It concretises general principles. Its legal quality is therefore tied to the estimation of its worth. The Commission is urging for increased consumer participation at national level to ensure that consumer interests are injected into CEN/CENELEC in the form of national representation. Just how this is to projected at a European level remains open to speculation.[167] The Commission wants to 'have a new agreement with CEN/CENELEC concerning new working techniques'.The Commission is free to take the initiative. In accordance with the Council Decision, it has a political mandate which it is only carrying out very hesitantly. The problems would therefore seem not to lie in the lack of will on the part of Member States - they have carried out the formal requirements of the Council Decision - but in the engagament of the Commission, where conceived, and possibly in its own conception, as the joint European administrative organ. Secondary[168] Community law points towards the existence of a right to participation, but leaves its form undisclosed. In this analysis we therefore come back to primary Community law to consider the questions which can possibly

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164. Printed in DIN-Mitt. 63 (1984) 681
165. See also Joerges/ Falke/ Micklitz/ Brüggemeier op cit., FN 117 p. 403
166. COM (87) 617 final 11 December 1987.
167. There are informal ideas for this, whose actual value is difficult to assess, see Joerges et al., FN 117, p. 427.
168. I use the term in parenthesis, because it is not used in the traditional sense of Community law, and the justification of the interpretation was attributed later.

be resolved there; whether or not concrete requirements can also be deduced on procedural form from the acknowledgment of the right to participation.

4. Requirements for the content of procedural participation in the standardisation process.

Again, light may be thrown on the problem with an introductory survey of German constitutional debates. G. Winter[169] is of the opinion that the development of procedural requirements in the standardisation process is for 'mainly terra incognita' in German administrative and constitutional law. This opinion holds true as long as it refers to the Mülheim-Kärlich decision of the Constitutional Court. In this case, the majority of the judges finally decided to leave the decisive question unresolved and follwed established legal requirements.[170] It must also be stated that, at a lower jurisdictional level, there are voices which urge for a much more tangible procedural form for the standardisation process. Here one could mention the OVG Lüneburg,[171] which introduced the concept of legitimation through procedural requirements, without defining, however, what the term really means. The dissenting opinions of judges Simon and Heussner are more informative in the Mülheim-Kärlich decision of the Constitutional Court, since they refute the possibility of deriving 'procedural form by direct application of objective fundamental criteria embodied in Article 2, para. 2 Basic Law on a case by case basis; on the other hand they state the case for a 'higher degree of State responsibility.... both in relation to the normative form of the procedural right, and for its application.[172] They consider the verification of the constitutionality of the commission responsible for the development of technical norms to be valid, and similarly the verification of certain procedural provisions used in the drafting of standards.

It is certainly true that a complete statute containing rights and duties for participants cannot be deduced from the constitutional right to be heard. At the same time,

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169. op cit., FN 122 p. 427
170. BVerGe 53, 30 et seq., 66
171. NVwZ 1985, 357 (Buschhaus)
172. Dissenting opinion of BVerGE 53, 71 et seq. (77 and 78).

however, one can imagine the development of procedural principles to be observed in accordance with the constitution and which cannot be undermined by the 'tricks' of procedural technicalities. Accordingly, a step in this has been taken by the Constitutional Court in a key decision concerning the procedural rights of asylum-seekers.[173] Following this decision, both the rights of audience of the interested party and the formal decision of competence to take jurisdication belong to the central body of procedural rights. The limits of the general principles of procedural participation, valid for technical standards, arise from the function of participation in procedure in a democratic society. Its most important aspect consists in increaseing public awareness, it does not amount to taking over the role of spokesman for the economy or government,[174] and can neither be brought in a decisive context into the realm of protection of individuals.[175]

- The formal shaping of procedure: the content of basic rights is empty if the participants have no idea whatsoever about what facilities are available to them. Thus, it is necessary to define and set forth rights and duties in written form.

- Access to information: rules of procedure must endure that consumers receive all the information necessary to

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173. BVerGe 56, 216 et seq., 242 et seq., also Gurlitt, FN 121, 134 et seq.
174. This seems now, as was previously the case, to be the position adopted by the BVerGe and at least partly the OVG, see BVerGe 53 31 et seq. (63 and 64); also Winter op cit. FN 122, p. 427. The criteria developed by courts giving legal protection at administrative hearings are very general and basically apply in the form of procedural rights.
175. In relation to the function of a hearing procedure for a democratic polity see, once again Gurlitt, FN 121, 47 et seq.. In a nutshell one could say that the right to be heard legitimates the outcome if the decision was based on public procedure. On the other hand, procedural rights need to be assured by special jurisdictions, if the outcome is already been determined before the procedure begins.

make a choice. One must strive for equality of information for all the parties involved in procedure.[176]

- Access to allocation and distribution systems: procedural rules must guarantee that the consumer can form his own opinions and viewpoints in the distribution system.

Coordination of committees: consumers have a claim to appropriate participation. The number and eligibility of the representative is to be determined by the type of body constituted.

- Reimbursement of expenses: the basic principles seem capable of being generalised beyond national boundaries.

5. Requirements for the content of a right to a hearing in post-market control.

If we are right in assuming that the idea that post-market control represents the equivalent for the approval of a plant which constitutes an environmental risk, then there is nothing to contradict the transfer of basic principles concerning valid minimum standards developed from procedural law into the from of consumer participation in post-market control. Literally speaking, this could not occur since the areas of applicability are distinguished. It should be possible, however, to develop fundamental principles for procedure. It is therefore a worthwhile exercise to bear in mind the varying roles which consumer participation could play in post-market control: they could produce public awareness of negotiation processes which typically take place to the exclusion of third parties; but they could equally assume the role of taking the initiative for administrative control - that would make the consumer the 'enforcer' of control authorities. Similarly, they could also open the way for consumers to construct their own information system enabling them to vent their grievances without engaging the authorities.

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176. The problem of protection of secrets seems to have no bearing on the standardisation of consumer goods. Perhaps this is because technical standards for consumer goods only have to correspond with 'generally applied technical rules' (Joerges et al., FN 117, p. 147 et seq.), and lag behind scientific developments.

In this sense, they would no longer be the 'enforcers', but the 'watch-dogs' of international, or at any rate, European movement of goods. However, consumers could only play an active role; if their rights and duties were written down; if they had access to the information of the authorities, and when represented in the decision-making bodies, so that they could be given the opportunity to be heard.[177]

IV. Obstacles to the Extension of Participation in Procedure

My concern here is not to map out the political perspectives of a right to health or a right to appropriate participation in procedure. The current discussion is more orientated towards a consideration of the difficulties inherent in consumer participation in standardisation and equally post-market control.

1. Based on the structure of European standardisation.

CEN/CENELEC is the umbrella organization name for national standardisation bodies in the EC and EFTA countries. National standardisation bodies send representatives to the technical committees instituted by CEN/CENELEC. If consumers are to be able to take part in standardisation at a national level, then delegated representatives ought likewise to be able to formulate a joint position through national bodies in relation to its field of activity. CEN/CENELEC fear a doubling of consumer participation which would be incompatible with the sketchy structure of European harmonisation. Nor, it would seem, is there any representation of industry groups at the meetings of the technical committees. In fact, the aim of this critique is to lay bare a structural weakness. This is because the secretariat for coordination, the current 'Organisation for European Consumer Participation', has a structural advantage over European industry in relation to all

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177. A synopsis of national reports on post-sale in Member States, Australia and USA will make it possible to give a firmer basis to the requirements of participation, report for the Commission, H-W. Micklitz (ed.), Nachmarktkontrolle über Verbrauchsgüter in den Mitgliedstaaten der EG, to be published in ZERP Schriftenreihe.

deficiencies. Ideally, it is more suited to injecting a real European input into the standardisation process, a capacity which national industrial bodies are far from able to achieve. In other words, the process of arriving at a consensus, which national industries must first bring about through technical committees, has already been achieved by the observers at the secretariat for coordination, when they take their places on committees. It nevertheless remains that no objection can be raised in principle against European consumer participation based on structural divergency. Increasingly, at European level, consumers are gaining ground in the process of political coordination, which national industries have been organising effectively for a considerable period of time.[178] It is fair to say then that, theoretically, consumers go into negotiation with a consensual advantage.

2. Based on the type of cinsumer participation.

National bodies delegate technical experts to the CEN/CENELEC committees, which are often members of interested business concerns. Consumer participation in European standardisation is fed from preferred sources: (i) technical experts from relevant consumer advisory councils or consumer committees for national standardisation bodies; (ii) technical experts from national consumer and usually verification bodies; and (iii) independent experts from research organisations and laboratories etc.. The first group of technical experts from national consumer advisory bodies is not integrated into consumer participation.[179] The representatives of the second and third groups look upon it as unlikely consumer representatives, despite holding their expertise in good esteem, but fear creating 'fraternity of experts'[180] amongst those responsible for drafting standards. One can therefore also accuse European standardisation of being politial rather than technical standardisation. The politicisation of standards through

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178. See W. Brinkmann, Die Verbraucherorganisationen in der BRD und ihre Tätigkeit bei der überbetrieblichen technischen Normung, 1976
179. Joerges et al., op cit. FN 117, p. 414 et seq.
180. F. Wagener, Der öffentliche Dienst im Staat der Gegenwart, in VVDStRL 37 (1979) p. 214 et seq., 238.

consumers should therefore be seen as the true reason for CEN/CENELEC's policy of obstruction.[181]

3. Based on internal structural deficiencies in the organisation of consumer policy.

Alongside all the obstructions blocking the way to the development of efficient participation of third parties - Member States, Commission, industry and standardisation bodies - the consumer bodies themselves create their own obstacles. Here one could mention above all the problems in relation to the organisation of coordination between the consumer advisory committee and the four European consumer organisations. The present situation is that, in four years, the parties concerned have not managed to agree a clear organisational structure concerning the division of competences, with which they could launch an offensive against the Commission.[182] The dual role of the secretariat between the Consumer Consultative Committee (CCC) and European standardisation bodies weakens the position of consumers. There is no conception of how to purposively make use of the organisational advantage and tap the abundant resources of the national consumer bodies. This would require a systematically constructed system for recording and processing information for consumers.[183] As long as these twofold difficulties are not thrashed out, European consumer participation will in its present form continue to have to fight for its own survival.

4. Based on the administrative practice of post-market control.

We have seen that post-market control, despite all the differencies in regulation, points to a common end - the 'decision to control' is negotiated informally with the

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181. Moreover, which for their part could be promoted by industry. Paradoxically, dependency on the fleshpots of the Commission is accompanied by a growing independence of the industrial decision-making framework.
182. On the underlying quarrels, see Joerges et al., op cit. FN 117, p. 412 et seq.
183. cf. my suggestion, Data bank on Product Safety, presented to the coordination secretariat on 9 October 1986.

producer concerned and is never officially made public. Thus, the formal assurance of participation through the hearing procedure can only fall short. This does not make the demand for appropriate participation obsolete. Only the question has to be raised, how the right to participation ought to be shaped in order not to allow participation to dry up despite its factual exclusion from formal decision-making. In this context, it is helpful to reiterate the varying forms of participation in post-market control.

Consumers can only assume the task of taking the initiative if they are in a position to compel authorities to take action against defects and make them account for their actions. Therefore procedural guarantees must be coupled with the right to a fair hearing. One could also infer the imposition of constraints on the authorities to justify the adoption of informal measures of control. The turning point and crucial point of procedural participation is understandably the producer's fear of having to accept damage to his reputation through adverse publicity. This is an argument of only limited validity because an enterprise can incorporate consumer complaints about unsafe products into a selfish market model.[184] European consumer organisations can only work as 'watch-dogs' of the free trade of goods, if they build their own system for recording and processing information. Their participation in State post-market control mechanisms would more than anything have the function of feeding its own information system with the relevant data from the authorties. An important function could be taken over by the testing institutions, whose know-how has as yet not been put to use in the organisation of consumer participation. As a final remark, a certain degree of parallelism in post-market control between authorities and consumers would be desirable, as it would also be in relation to the standardisation process.

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184. For similar assessments of undertakings in marketing, cf. Bruhn, Konsumentenzufrieden und Beschwerden, Schriften zum Marketing, Band 41, 1982.