Chapter 2

FEDERALISM IN PROCESS

HANS - W. MICKLITZ

THOMAS ROETHE

Contents

I. Introduction

The study on the management of emergency situations in the Member States and in the Community is located in the dimension of federalism and responsibility. The guiding hypothesis of the Member States safety regulations and the Rapid Exchange System can be set out as follows: The driving force for structural and institutional reform in the Community is the management of emergency situation. There is a strong interrelationship between the emergence of an emergency, its management within the existing legal and administrative structure, the lack of appropriate rules and structures to deal with emergencies, the reform of rules and structures to handle emergencies better, the emergence of the next emergency which entails again a revision of the instruments and the structure, and so forth.

Emergencies escape regulation. Regulation must fail because the circumstances of the emergency cannot be anticipated[1]. A consequence which does not entail too far-reaching repercussions in Member States, which does, however create many more problems at Community level where the frame to further develop adequate structures and means is restricted by primary Community law and by the unwillingness of Member States to initiate a change. What Member States are doing in the adoption of the safety directive is to develop further in the restraint frame complex institutional structures which sum up Member States experience, which are, however, to a large extent not appropriate to tackle the problem of emergency management adequately. The Member States squeeze the management of emergency situations in a procrustean bed. The regulation is inadequate and short-sighted because it does not take care of the unforeseeable character of the emergency which requires much more flexible loosely knit structures than the Member States are willing to grant. It would be wrong to conclude that the efforts of all those participating in the law-making at Community level are useless or even worthless. They document a remarkable progress in the reform of administrative structure in a constitution which is in flux and they may be apt to deal with all kinds of non-emergency situations. They remain nevertheless insufficient.

The "clou" of product safety regulation, however, is that it develops its own structures, *if the emergency occurs*. And exactly these new adhoc structures indicate the direction in which the institutional reform of the Community further drives — towards much more flexibility and openness, to a looser frame than that provided for by the product safety directive and to a looser frame than that provided for by the Treaty. The legal problem is that the management of emergency situations *then* occurs largely outside the finely tuned institutional balance between the Member States and the Community organs. It will rest upon the European Court of Justice to bring practice outside the strict legal institutional frame and the necessity of adequate management of emergency situations together. The result will be another element of the Community legal order, again done by the Court.

In order to verify the hypothesis we will first look at the "should be structures" in the Member States and in the Community which have been established to deal with emergencies[2]. The analysis here is based on the graphs and flow charts which have been developed for the five selected Member States and the Commission[3]. The main findings clash together with all that we could learn from

1 In more detail, cf. infra, III, 58 et seq.

2 II. is dedicated to that question, 39 et seq.

3 They may be found as an annex to respective reports of the Member States and of the management of emergency situations.

the case-studies[4] and the interviews taken with the experts at all levels[5]. The comparison of the "should be structures" with the "as it is in practice" will hammer out the deficiencies of the administrative structure and the role of emergency situations as a guiding principle in shaping responsibilities in an emerging federalist European Order[6].
The leading theoretical category, which characterizes "federalism in process", is "emergency".

> Emergencies can be seen as one end of the dimension 'Safety, Risk, Danger, Damage and Emergency. These 5 categories have in common that they are to a large extent contingent upon social interpretation. Nevertheless a rough sketch is possible: 'Safety' presents a holistic-positive reference to unwanted effects of life and biography. In every day life the strive for safety appears to be delusive, because objective and subjective safety are not the same at all, rather one variant can perfectly exist without the other. Objective safety is a phenomenon of a sufficiently ex post cognition, it is, however, hardly more than the objective to avoid dangers and damages or keep them restricted. The term 'risk' includes on a theoretical level the power of imagination, competence of explanation and the desire of investigation, available to a society which intends anticipativly to fend off dangers and to secure a relative safety for the future. Engagement in risk brings into operation the intellectual segments of societal experience and evaluating knowledge which are concentrated on the prevention of might-be calamities. Split from that and semantically to be distinguished, 'danger' becomes apparent in the very moment of its realisation in the real-time. There is no risk anymore, the theoretical dimension, the projection, evaporated in favour of an imminent threat of a disaster, if no action is taken. Danger compels appropriate action according to the factual and dynamic situation, otherwise a damage will occur. 'Damage' leaves the affected person or the public startled. There is no chance for immediate action anymore. What seemed to be avoidable up to that very moment had happened despite of risk-assessment and protective measures against danger. The occurring of damage throws a bad light upon all efforts to prevent it and puts responsibility in its true light: damages do not seem to be preventable at all. Once bitten twice shy. Damage is the reverse-image of risk-control. What in retrospection is explainable as a disastrous consequence of ill-structured decisions becomes the ground of a prospective risk-management calculating in a new round an enlightened chain of cause and effect. The term 'emergency' carries along lots of elements of the other four. It may be regarded as the worst possible compound. Ingredients are: Danger wasn't perceived. A damage can be observed, no matter how many suffer from it. That means safety in at least one case is lost. The damage might lead to further damages

4 They have been undertaken as part of the research project in the five selected Member States.
5 The interviews taken at the Member States and at the Community level with the risk managers have been analysed in Part I, Chapter 3, 87 et seq.
6 Cf. infra, IV, 81.

similar to a chain-reaction. Whether a damage is an indicator for an emergency in the field of product-safety, firstly depends on the instruments a society provides to detect it. These instruments might be bodies of surveillance, systems of notification an information and staffs of experts. These instruments, however, do not function by themselves.[7] It needs competent personnel who is able to solve a crucial problem. That means, because of the lack of definitive criteria what an emergency might be — that is because an event that cannot be expected cannot be defined and regulated in advance — these criteria have to be developed in no time. In a first step research and evaluation of facts have to be undertaken. But nearly simultaneously measures of hazard-prevention must be found. Only these two operations are differing circles of action. One is bound to a logic of reconstructing the connex between the technical design of a product and its faulty consequences in every-day-use and the other one puts the immediate pressure on constructive solutions. These two circles are connected to a difficile interrelation. Regarding an emergency it has to be found out, whether a causal damage will indeed lead to consequences going far beyond the initial trouble. Of much more importance is the reach of consequences which has to be estimated, mainly if they could run out of control. All the routines of risk-assessment have to be undertaken by the emergency managers under the condition of real life without intellectual hoop-jumping in an extremely short time span, as there are: what might be the subsequent dangers, how is the cost-benefit-relation shaped, might the dangers be tolerable, all these criteria have to be reproduced under the conditions of real-time and real damage and the threat of forthcoming catastrophies.

Emergencies are challenging structures and produce new structures outside the European legal system. The institutional constraints, imposed by the Law of the European Community foster what the Member States constantly blame: over-bureaucratization and over-politization of decision-making procedures, where more flexibility and a substantial input of semi-professionalized[8] expertise is required. The "emergency" escapes these regulatory institutional constraints. It provides lee-way for the development and insertion of expertise. The new structures largely built outside existing law and even somewhat outside legal control, can produce socially accepted results only if it is ensured that the fora of experts do not favour particular interests. Social imbalance may only be avoided if the consumer in general as subject of European law is regarded as the centre of all efforts to regain safety.

7 In Germany for instance the case-study on the "exploding" office chairs revealed that hundreds of minor accidents caused by the breaking gas-cylinder had been notified. Not before the severe accident in Hannover events were seen as an emergency.

8 Cf. the notion of semi-professionalized is explained in Th. Roethe, Strukturprinzipien professionalisierten anwaltlichen Handelns. Eine hermeneutische Rekonstruktion anwaltlicher Scheidungsberatungen, Baden-Baden 1994.

The Member States invoke the subsidiarity principle[9] and the "illegal intrusion" of Community law in the national legal system[10] to maintain their autonomy and to strive the Community legal order behind supremacy, direct effect and pre-emption[11]. This is especially true for the Federal Republic of Germany which has challenged Art. 9 of the directive being at the heart of the management of emergencies[12]. Once and again the Court of Justice is prompted into a key role in order to decide under the overall heading of "competence rules" in the nowhere land of admissible interpretation and inadmissible policy making[13] on the future European Integration. The Court of Justice is given priority in legal analysis and voices have been raised from different sides advocating judicial restraint, in order to stabilize the legal order rather than to promote further development[14]. Does — to frame it in the words of J.H.H. Weiler — Member States' intergovernmentalism prevail over European supranationalism? Or will it remain on the Court of Justice to tie the whole "construct" together and to push for an institutional reform of the EEC which has so blatantly been neglected in and around the Maastricht negotiations? The interplay between intergovernmentalism and supranationalism may serve as a cluster in the search for a response.

II. Typology of should be structures in product safety regulation

Administrative structures of product safety regulation in the Member States cannot be separated from the constitutional pattern of the Member States[15].

9 Cf. J. Pipkorn, Das Subsidiaritätsprinzip im Vertrag über die Europäische Union - rechtliche Bedeutung und gerichtliche Überprüfbarkeit, EuZW 1992, 697 et seq.; N. Emiliou, Subsidiarity. An effective Barrier Against "the Enterprise of Ambition", ELRev 1992, 385 et seq.

10 Cf. E. Steindorff, Quo vadis Europa? Freiheiten, Regulierung und soziale Rechte nach den erweiterten Zielen der EG-Verfassung, in: Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb, e.V. (ed.) Weiterentwicklung der Europäischen Gemeinschaften und der Marktwirtschaft, Köln-Berlin-Bonn-München, Heft 148, 1992, 11 et seq. The point at stake is the erosion of the principle of enumerated powers.

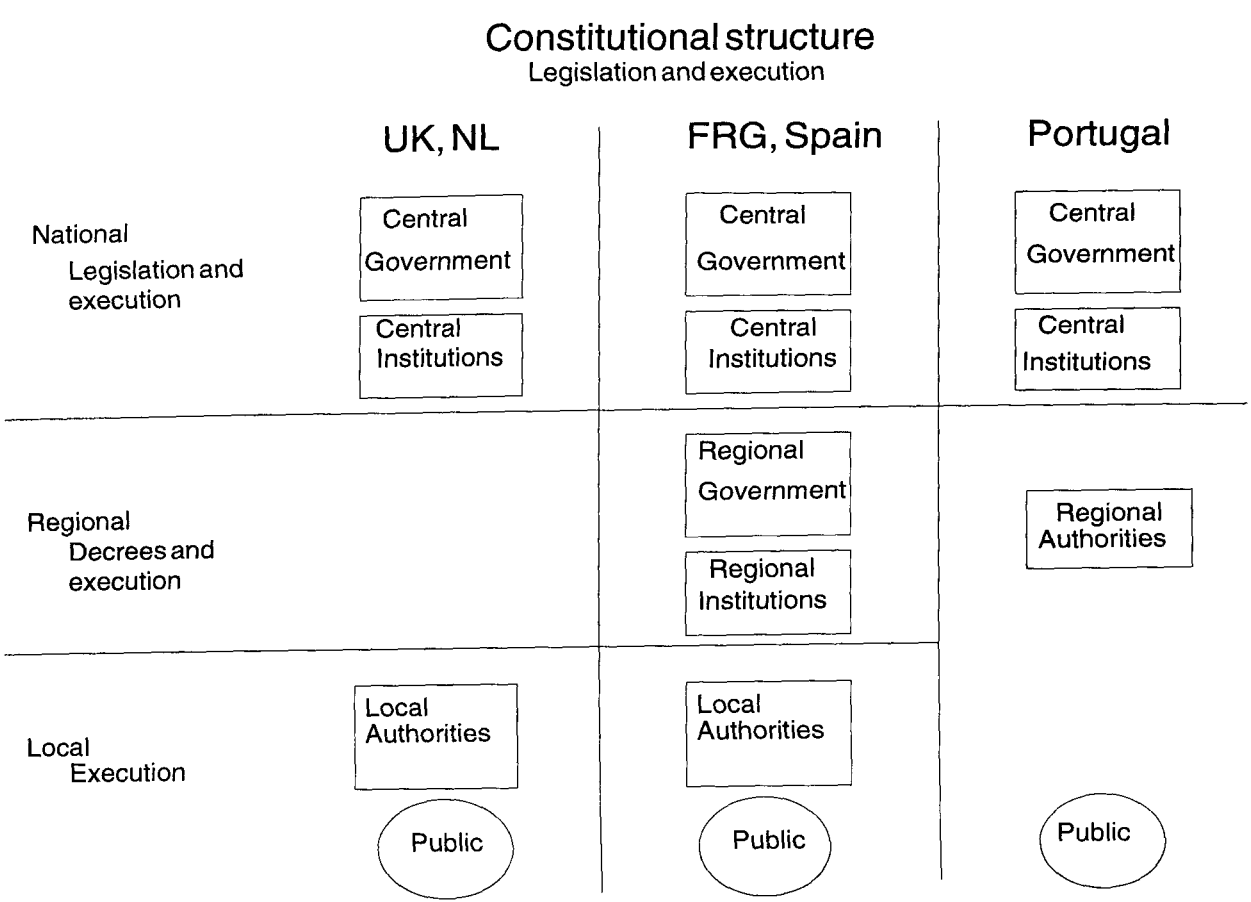
11 As the still constituting principles of the Community legal order, cf. E. Stein, Lawyers, Judges and the Making of an International Constitution, AJIL 1980, 1 et seq.

12 Cf. Case C-359/92, OJ C 288, 5.11.1992, 10 et seq.

13 Cf. Ch. Joerges, European Economic Law, the Nation State and the Maastricht Treaty, in R. Dehousse (ed) The European Union Treaty, München 1993; St.Weatherill, Regulating the Internal Market: Result orientation in the House of Lords (1992) 17, ELRev 299 et seq.

14 Cf. G. Brüggemeier/Ch. Joerges, Europäisierung des Vertrags- und Haftungsrechts, in P.-Ch. Müller-Graff (ed.) Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 1993, 233 et seq.

15 Cf. chart on the constitutional structure of the five Member States in question, which is based on the graphs on the surveys of the institutional structures of the different Member States, 42.


Constitutional structure
Legislation and execution
UK, NL
FRG, Spain
Portugal
National
Legislation and
execution
Central
Government
Central
Institutions
Central
Government
Central
Institutions
Central
Government
Central
Institutions
Regional
Decrees and
execution
Regional
Government
Regional
Institutions
Regional
Authorities
Local
Execution
Local
Authorities
Local
Authorities
Public
Public
Public

The Federal Republic of Germany alone is a fully developed federation. Federalist elements are found in Spain, although the FRG and Spain cannot be put on an equal footing[16]. The United Kingdom, the Netherlands and Portugal are far away from a federalist structure. The constitutional differences are reflected at the administrative level. Fully fledged federations usually have three administrative levels: national, regional and local. Competences between the national and the regional level are shared by and in the constitution. Conflicts between the two levels are part of the federalist system. Autonomy of the regions always stands against national power. The local authorities are dependant on the regional level. They have to assist the regional centres in law enforcement.
Non-federalist nations do not know an intermediary regional level equipped with constitutional competence. If a regional level exists, it is established for improving coordination between the national and the local level. Regional administration, if it exists, may even have powers, but these powers would derive from the national power, they are not genuine in the sense that they are constitutionally guarantied. Usually, local authorities have a greater role to play than in federalist nations. This is clear from the constitutional mandate, but it facilitates pragmatic solutions in the risk management. Local authorities are perhaps not the only one, but certainly the first one to act, if an emergency occurs. The national level is far away from the real problem. Coordination takes time, even if a regional organisation coordinates the flow of information.
For a deeper analysis of the administrative structure it is necessary to go beyond the rough constitutional distinction between federalist and non-federalist countries. The challenge for defining typologies is to find catch-words, which characterize the national structure without being superficial whilst avoiding the danger that elements which do not fit into the typology are set aside. Being aware of the danger we would like to distinguish three types of administration, which have a lot to do with the reasons and the background of the constitutional decision on institutional responsibilities: (1) Rule guided administrations, (2) pragmatic and (3) "democratic" administrations. This distinction needs explanation and even the meaning of each needs explanation. It will be done by following the four types of graphs on the way in which levels of hierarchy (power to instruct), the exchange of information, the duty of consultation and the powers to take action are organised[17]. The institutional analysis[18] provides the background for the way in which the different administrations handle i.e. should

16 Spain, however, has become a subject of interest for research undertaken in Germany, A. López-Pina, Der gerichtliche Grundrechtsschutz in Spanien, KritV 1990, 34 et seq.

17 For a general introduction to the better understanding and reading of the graphs, cf. Chapter 1, Federalism and Responsibility, 6.

18 This is the purpose of the flow charts on the "Survey of the institutional structures", cf. Chapter 1, Federalism and Responsibility, 6.

handle, from their very starting point, an emergency situation. Ideally each typological pattern should, if the hypothesis is correct, determine risk management. Flow charts elaborated for each Member State seen and reviewed in a comparative analysis will facilitate the understanding and give a deeper insight of how institutional patterns guide the management of emergency situations which form the core of the analysis[19].

The inter-national comparison of institutional structures already makes clear how difficult it is to develop an institutional frame for the management of emergency situations at Community level. Law-making at the community level by way of adopting directives or guide-lines follows the maximisation principle[20]. The system now established in the product safety directive reflects the three structural types of the five Member States. The mechanism in Art. 8 et seq. of the directive is rule-guided, pragmatic and democratic. It bears elements of each type which can be traced back to the respective national traditions. It is fascinating to see how the Community develops progressively, by yielding new supra-national structures, so far unknown in the Community. Again, it is not submitted that these administrative structures are adequate in fighting emergency situations, but it is striking to see that the product safety regulation prepares the institutional ground for a European risk management, which, if it occurs, will probably break the rules and push the development of the institutional infrastructure one step further.

It is the practical management of emergency situations which functions as a vehicle for the elaboration of a constitutional frame[21]. Meanwhile, questions and answers arising in relation to product safety spillover into other fields of Community development. And vice versa — institutional and constitutional questions tackled elsewhere come to influence the evolution of product safety policy. No single area of Community activity can exist in isolation. It is true, the federal issues confronted by the Community are made much more difficult because of the absence of a single federal pattern in the Member States. Therefore examining national systems and their differences automatically offers new perspectives on the prospects for Community federalism.

19 The flow charts are to be found in the respective annexes to the Member States' and to the Commission's reports, cf. list of graphs, VII et seq.

20 Already A. Bleckmann, Zu den Auslegungsmethoden des Europäischen Gerichtshofs, NJW 1982, 1177 et seq.

21 For a deeper analysis of the importance of emergency situations for the institutional and social development, cf. infra, 60 et seq.

1. Rule-guided administrations — the example of the Federal Republic of Germany

Rule-guided administrations cover those countries whose structure, whose competences, and whose daily practice is determined by the availability of rules in form of constitutional norms, laws, regulations, and even inner-administrative guide-lines (Verwaltungsvorschriften). Rule-guided does not necessarily mean "verrechtlicht" — judicialized. Rule-guided puts emphasis on the structural relevance of rules for the "risk-managers"[22]. Rule guided would mean that in case of emergency the risk manager is not individually but structurally bound to raise the question: Are there rules against which the risk can be measured?[23]
Though the Federal Republic of Germany lies in the centre of the analysis, one might easily attribute the typology of rule-guided to French and American administrations[24]. Such a side-step illustrates that rule-guided administrations are not only found in federations. The French risk management is to a large extent rule guided[25], although France is not a federation and will not become one, not even after its shift towards regionalism[26]. The effects of rule guided structures in France are different though. As regions are still not autonomous in what they are doing the risk managers are structurally expected to ask in case of an emergency "what will Paris say?", before they take any action. In France rule guided management is connected to the very hierarchical structure of the French administration[27].
It is characteristic of the German administrative structure that there is a clear borderline between the national and the regional (Länder) level. The Länder have to enforce the federal law. That is why one may speak of "Vollzugs-Föderalismus", enforcement federalism[28]. The Länder are not dependant on

22 There is no need to discuss the phenomenon of judicialisation (Verrechtlichung) here.
23 The individual behaviour of the risk-managers is not at stake here. It is one striking phenomenon that the risk managers in case of emergency forget about their rules, cf. infra Part I, Chapter 1, 87 et seq.
24 We would like to refer to our study on post-market control of consumer goods, where we investigated the recall mechanisms of inter alia France and the United States, cf. H.-W.Micklitz (ed.) Post Market Control of Consumer Goods, ZERP Schriftenreihe Band 11, Baden-Baden 1990.
25 Perhaps with the exception of the Commission pour la sécurité des consommateurs, cf. H.-W.Micklitz, in: Ch. Joerges et al., loc.cit., Produktsicherheitsrecht in Frankreich, 61 et seq.
26 Cf. H. Siedentopf/J. Ziller (eds.) Making European Policies Work - The Implementation of Community Legislation in the Member States 1988, Brylant (II Volumes).
27 Although the administrative structure as such has considerably changed since its reform in the early eighties, cf. H. Siedentopf/J. Ziller, loc. cit.: The regulation of product safety remains somewhat apart as the example of the "Commission pour la Sécurité des Consommateurs" shows.
28 Cf. J.Abr. Frowein, Integration and the Federal Experience in Germany and Switzerland, in: M. Cappelletti/M.Seccombe/J.H.H.Weiler (eds.) Integration through Law, Berlin 1986, 586 et seq. and H.-W.Micklitz, Organisational Structures of Product Safety Regulation, in: B.Stauder (ed.) La sécurité des produits de la consommation, Intégration européene et consommateur suisse, Actes du colloque organisé avec le centre d'étude juridiques européennes, Faculté de Droit de Genève, Février 1992, 49 et seq.

national instructions and they are not even obliged to take care of what the other German Länder are doing in law enforcement[29]. The strong constitutional position of the Länder is grounded already in the foundation of the Norddeutsche Bund in 1850[30].

The Länder authorities have the power to instruct the local authorities. Interference from outside the respective Land whether horizontally or vertically is not possible. It is a downward instruction chain which begins at the Länder level[31]. Information exchange and consultation beyond the internal Länder structure is not possible without regulatory intervention to restrict the autonomy of the Länder. Information and consultation duties mean a decline of power and autonomy. And the Länder are quite reluctant to give up their constitutionally guarantied position. That is why it is so difficult to build up in Germany a network of mutual information exchange and consultation in both directions, horizontally and vertically. Any legislation needs the explicit consent of the Länder in the German Bundesrat, otherwise it is not possible to impose binding obligations on the competent authorities. The present system is a mixture of relatively imprecise obligations combined with an informal network, erected and managed by the Bundesanstalt für Arbeitsschutz or as in the field of foodstuff, a set of non-binding rules which defines the cooperation to regulate emergencies at all levels[32]. The strong regional autonomy culminates in the monopoly of the Länder authorities to make decisions. However, in case of an emergency, the strong position of the Länder can be turned down as the federal minister disposes of a genuine competence to warn the public which is derived from its constitutional mandate to protect the citizens against risks. The third statutory function — safety not security[33] — challenges the federalist principle on which the decision monopoly is built.

29 Within the constraints of mutual cooperation duties, cf. generally, J. Falke, in: Ch.Joerges et al., loc., cit., 132 et seq.

30 For the relationship between the economic and the legal-constitutional development of Germany, cf. G. Brüggemeier, Die Entwicklung des Rechts im organisierten Kapitalismus, Band 1, 1977.

31 Cf. charts on the power to direct, cf. German report Part II, Chapter 6, 244 et seq.

32 The so-called Allgemeine Leitsätze, cf. German report, Part II, Chapter 6, 261 et seq.

33 Cf. H.-W.Micklitz, Consumer Rights, in: A.Cassese/A.Clapham/J.H.Weiler (eds.) Human Rights and the European Community: The Substantive Law, European Union - The Human Right Challenge, Florence 1991, 53 et seq.

2. *The dominance of pragmatism in the administrative structure — a lesson from the UK and the Netherlands*

Where the link between the national and the local level is not subject to the constitutional architecture, pragmatic solutions are easier to install. Whatever the structure might be it is shaped according to the needs of the issue involved. If it is regulating product safety, it is done in a way so as to make efficient solutions possible and feasible. Though and again, as in countries with a federalist structure, the lee-way for functional and pragmatic administrative structures cannot be understood without the very specific constitutional background that is to say the development of a democracy of the Netherlands and the UK[34].

The striking characteristic of the United Kingdom consists in the degree to which national bureaucracies are free from governmental political influence. This is especially true for the Health and Safety Commission which is responsible for the regulation of the products used at work[35]. It is less developed, though still existing, in the field of product and food safety. One might link the autonomy and independence of these institutions to the well-settled democratic foundation of the British society. There seems to be no fear that these national institutions are abusing their powers[36]. Such a basis allows much discretion in the concrete shaping of the administrative structures.

The Netherlands send another message. Here parallel structures of control have been established. They may be called parallel, because there are on the one hand the public officials of the Department of Welfare, Health and Cultural Affairs who have the competence to intervene at the local level, and there are on the other hand the regional inspectors of the Food and Commodities Inspection Department, the Management of the Food and Veterinary Affairs and Product Safety who control likewise the product and foodstuff safety at the local level. The probable duplication of administrative structures might have something to do with a Dutch phenomenon which seems to be unique even in the European Community. The enforcement of foodstuff and product safety regulation lies in

34 There is no need, to discuss the existence of a constitution in the UK. It suffices to refer to the development of a democracy in the UK.

35 Cf. the UK report, Part II, Chapter 10, 463 et seq.

36 The parallel to the American agencies is striking, though different to explain. The United States do not know social rights of the third generation which are constitutionally guarantied. The national government accepts the responsibility for the health and safety of the American citizens, but it is not a constitutional responsibility. Might be that there is a linkage between the strong status of the American agencies, like the Consumer Product Safety Commission (strong in relation to parallel European institutions, but weak in comparison to the Food and Drug Agency or the Environmental Protection Agency), cf. G.Majone, Cross-Cultural Sources of Regulatory Policy Making in Europe and in the United States, Journal of Public Policy 1991, 79 et seq.

the hands of the same authorities. There is no inner-national sharing of competences between different national branches of the government[37].
Information exchange and consultation procedures correspond to the flexible structures in the UK and the Netherlands. For the UK information exchange cannot become a question of power, autonomy or even sovereignty of the authority in charge. Information exchange can entirely be bound to efficiency. Lacots and Hazprod document the leading position of information exchange systems which remain unaffected by constitutional or status problems. The same can be said for the organisation of the consultation procedure. Who is to be consulted at what stage is decided under pragmatic considerations. Regulating food safety needs consultation and advice from competent local authorities. It is here where the competence is settled. Quite the contrary is true for the regulation of consumer goods. A strong link between the local authorities and the consultation and advice from the national Consumer Policy Unit brings to bear a centralised risk assessment. The parallel structures in the Netherlands heavily influence the information exchange and the consultation procedure. The mutual need between the different branches of the government to exchange information and to seek advice and to require consultation leads necessarily to relatively complex structures[38].
It goes without saying that the decision-making level in countries like the Netherlands and the United Kingdom remains in the hands of central national authorities. They have to take the decisions as they bear the final responsibility for the consequences of statutory intervention. Recent years document a trend, however, which runs counter to the German development. Whereas emergency management in the Federal Republic of Germany has shown the need to centralise decision-making at least in exceptional cases, the UK and the Netherlands have strengthened the powers of the local authorities[39]. This is particularly true for the trading standard officers, who have been given regulatory powers under the 1987 amendment of the Consumer Product Safety Act, but it is likewise true for the Netherlands where the regional competences have been reorganised and strengthened. One may conclude "safety" as a state function yields a diversification of the action-taking authorities. It is no longer possible to concentrate the decision making power either in the hands of the national or the regional authorities, powers are needed where the problems come up, quite independent of where the risk first appears, at the national, the regional

37 Dutch product safety regulation has emerged from food regulation. Products were integrated in the regulatory framework of the very same Warenwet, cf. the Dutch report, Part II, Chapter 7, 326 et seq.
38 Cf. the charts on information exchange and consultation from the Netherlands, Part II, Chapter 7, 344 et seq.
39 For a closer analysis of the effects of EEC law on the inner-administrative structure of the Member States, cf. infra II. 5., 53 et seq.

or the local level. This insight should immediately trigger an awareness of the problem that will inevitably be encountered when a Community level comes to be added. Institutional and constitutional problems will be deepened.

3. *Democratic-induced administrative structures — the Spanish and Portuguese contribution*

All administrative structures in the Member States of the European Community are democratic in the sense that the States are all democracies. Why then call the administrative structures of Spain and Portugal "democratic"? The reason is this: In Spain and Portugal consumer protection is part of a social movement which ought to help stabilizing the young democracies. These countries alone have integrated consumer protection in their constitutions, and these countries alone have concretised the constitutional mandate in comprehensive and far-reaching consumer protection legislation, in between others — regulation and protection of health and safety[40]. The evolving consumer protection is inevitably linked to the process of democratisation, a finding which does not hold true for any other Member State of the Community, perhaps with the exception of Greece. Democratic-induced consumer protection has guided the establishment of the necessary administrations to enforce the new laws, thereby putting the risk managers into a position where they must look for allies if they want to take action. Decision-making is structurally bound to the societal support in these countries[41].

If one takes a look at the flow charts in order to discover who has the power to give instructions to whom, one might first of all be surprised by the very complex and detailed network between the different levels and the different authorities. It seems to be as if the national governments in Spain and Portugal intend to keep the enforcement of product safety regulation under control. This first impression is somewhat counterbalanced by the constitutional position of the Spanish autonomous regions which is similar to that of the German Länder. The autonomous regions bear original and constitutional competences to regulate product safety[42] and to execute the national and regional laws. But, and this is true even for Spain, the rules adopted to realise product and food safety provide

40 Cf. H.-W.Micklitz, Consumer Rights, loc.cit.

41 In so far, Spain and Portugal are relatively near to third world countries like Brazil, Uruguay or Malaysia, where consumer protection is not an isolated field of more or less well-established organisations, consumer protection is part of movement to push for or to strengthen the yet not stable democracies.

42 The shared competences in the law-making is not without conflicts, cf. the Spanish report, Part II, Chapter 9, 402 et seq.

the national government with the ultimate power to instruct the subordinated or even the concurrent institutions. The government has to ensure, if it becomes necessary, that it has the power to instruct the regions what to do. Holding central powers in reserve is a mere Spanish characteristic and might be explained by the overall fear that the young democracies need guidance in case of competence conflicts. The over-organisation of instruction powers shows remnants of fascism[43].

The complex organisation of the administrative structure with its interwoven powers of who is enabled to instruct whom requires a complementary finely tuned network to organize information exchange between the different levels and the different authorities and a comprehensive testing machinery which allows a high degree of substantative rationality, again in order to document the "physical presence" of the democracy. Likewise complementary to the anticipatory set of instruction powers operates the shaping of the consultation procedure. Here, at least in Spain, the consultation procedure brings up the problem whether and to what degree the regions are really and may or shall remain autonomous. They defend their autonomous rights and try to reject consultation duties imposed on them[44].

Action taking competences in Portugal remain in the hands of the national government and the national authorities. Portugal has adopted product safety legislation which was inspired by the French approach providing for a Consumer Product Safety Commission with limited though relevant competences to inform the public on possible dangerous products[45]. In Spain the competences between the national authorities and the autonomous regions are shared. Contrary to the German solution, however, the respective rules provide in case of emergencies for the opportunity to build up cooperative joint decision-making structures, joint because the national and the authorities participate in the procedure. Laying responsibilities in the two hands, the national government and the regions, seems to be quite a promising model even for the organisation of the future decision-making procedure in the European Community[46]. It might even be a solution to avoid constitutional debates on sovereignty and autonomy.

43 The extreme formality of the rules and the fiction that everything can be and should be regulated.

44 This lesson can easily be drawn from a number of law-suits between the national government and the autonomous regions, cf. the Spanish report, Part II, Chapter 9, 404 et seq.

45 Cf. H.-W.Micklitz, in: Ch.Joerges et al., loc.cit.

46 For details, cf. infra, II.5., 51 et seq.

4. *The flow charts on the management of emergency situations — the cornerstone for managing emergencies*

The purpose of the flow charts is to focus on the way in which these different types of administrative structures are — in theory — prepared for the management of an emergency situation. This is, at one level, very detailed information applicable only to product safety. Yet, precisely because of the detailed differences shown to exist between the Member States, the graphs present some very wide-ranging questions about the prospects of Europeanisation of law and practice.

Flow charts have been prepared for each country according to the type of product concerned, consumer goods or foodstuff[47]. They follow the same pattern whilst dividing the flow of information, consultation and decision-making into more or less four sectors: Notification, processing, evaluation and decision, warning the public at large. Notification refers to the way in which the competent authorities obtain knowledge of a possible risk; processing means the organisational, the informational and the consultative preparations; evaluation and decision aim at the question, whether there is a risk, which must be defined as an emergency that requires statutory action; warning the public concerns the quality of the statutory intervention, where the information of the public is the last resort to which the responsible authorities refer only if all other efforts to handle the problem have failed.

The notification systems though they are differing in detail, have one thing in common: they centre on information input from statutory agencies, authorities, officials. Emphasis must be put on "statutory" notifications from private actors, whether from the consumers or the producers which are not structurally integrated in the notification system. For Spain and Portugal, the state-orientated notification systems are easily explained by the overall assumption that a strong and authoritative state must protect the citizens against criminal near violations of product and food safety law. Such an interpretation is not apt to explain the similar British and German nucleus. Here one must seek the explanation quite contrary to the Spanish and the Portuguese reliance on a strong state in the responsibility attributed to the market mechanism. There is no need to impose notification duties on the producers and the suppliers, if the market mechanism works efficiently[48]. If at all, the Netherlands alone integrate the manufacturers into the notification system. The reason here seems to lie in the size of the country which allows under the assumption of a similar or identical degree of

47 They are to found in the respective annexes to the national reports, cf. list of graphs, VII.

48 On the possibilities and restraints to influence the market mechanism by way of information, Ch.Joerges, in: Ch. Joerges et al., loc.cit., 51 et seq.

industrialisation a better networking between the statutory authorities and private industry/commerce.

Processing is to a large extent guided by the different product categories. The British and the German systems on processing risks of dangerous consumer goods are rooted in the much older establishment of appropriate control systems for products used at work[49]. Expert knowledge is the dominating factor. There is no structural anticipation to integrate external knowledge from other levels and other decision-makers into the processing itself. It resembles a closed system where access is limited to those who belong to the guild of experts[50].

Processing in the field of foodstuff cannot be organised in the very same way. Risk managers and decision-makers have to be brought together here. Processing is structurally not possible without combining the different levels of competences. Complicated and complex information exchange mechanisms and consultation procedures bear witness to that necessity. This is true for the United Kingdom, the Netherlands and Portugal where there is an ongoing search for the setting-up of feasible links between experts and decision-makers. In Spain and Germany "processing" challenges the federalist structure. The Spanish cooperative approach is an attempt to balance out the constitutional conflict between the national government and the autonomous regions. It might well be that the opportunity to set into being the "extraordinary organ" protects Spain against a permanent constitutional conflict on the sharing of responsibilities[51].

The same difference between consumer goods and foodstuffs comes to bear in the evaluation of the risk and the determination of the decisions. There is a structural preponderance of experts, the risk managers, in the evaluation *of - and* the decision making about consumer goods. Quite the contrary is true for foodstuff. Here the preponderance lies with the political decision-makers. There is a structural divergence between consumer goods and foodstuffs which will attract our attention at a later stage[52]. Testing foodstuffs and the test results are in themselves meaningless, at least to a large extent. They gain societal importance only if the political decision-makers interpret them as a source of action[53].

Warning the public remains the ultimate means always in the hands of the national governments. There is a correlation between the intensity of statutory intervention and the degree to which decision-making is centralised. This

49 Cf. Beyond the national reports, the research undertaken by the National Institute of Advanced Legal Studies under the direction of R. Baldwin & T. Daintith (eds.) Harmonisation and Hazard : Regulating Workplace Health and Safety in the European Community, London 1992.

50 F. Wagner, Der öffentliche Dienst im Staat der Gegenwart, in VVDStRL 37 (1979), 214 et seq. 238 names them as so called "Fachbrüderschaften".

51 Cf. the Spanish report, Part II, Chapter 9, 402 et seq.

52 Cf. infra, III, 60 et seq.

53 This is explained in detail, cf. infra III, 58 et seq.

phenomenon is to be reported from all Member States whatever their constitutional requirements are. It does not mean that decision-making is always done at the central level. The elaboration of product safety legislation has led to a diversification of responsibilities in decision-making, apart from warning the public. For the sake of honesty it should be recalled, however, that in Spain even local authorities are empowered to warn the public. This peculiarity goes back to the Colza-scandal and must be seen as a strong connection to the intention of the legislator that decision making should remain close to the citizen in order to grant social groups some form of constitutional status[54]. The delegation of the power to warn the public, from the national level to the municipalities, binds the latter to the objectives of the Spanish democracy.
Criminal sanction structures are on the decline. They are not compatible with a market society. Criminal sanctions are to be replaced by civil sanctions. Warning the public as the last resort means a shift, not only in safety policy where information on risks has become the cornerstone for the availability of regulatory mechanism, but also a shift from an "administered" market to "free" market[55].

5. *The structural response of the EEC — a mirror image of the Member States in maximising their substantial elements*

The structural response at stake here is to a large extent determined by the Community legal order. The Treaty of Rome does not allow the establishment of direct links between the Commission and the regional and local level of the Member States. The rules of the Treaty are Member States centred, although the European Court of Justice has steadily enlarged the notion of state under Community law. Addressee is not the Member State alone, but the three constitutional powers, inter alia the administrations. Regional and even local institutions have come under a legal obligation to respect the EEC rules[56]. What the Court can do and what the Court is doing within its jurisdiction[57] is to stretch Community law beyond the institutional frame of the Community legal order. A real break-through (and that is what is still needed) would be to use Art. 5 as the basis for constructing primary Community law based competences of the Commission to enter into direct contact with the regional and local authorities in order to enhance the enforcement of Community law and vice versa. One might even consider the fostering of transboundary cooperation not only of Member

54 As addressees of the intervention.
55 For a comparative view, F.W.Scharpf, Sozialdemokratische Krisenpolitik in Europa, 1987.
56 Cf. infra Part I, Chapter 4, 199 et seq.
57 Cf. from that side, D.Curtin, The Province of Government: Delimiting the Direct Effect of Directives Perspective in the Common Law Context, ELR 1990, 195 et seq.

States, but of competent regional and local authorities themselves under Community law. Especially horizontal effects of Community law seem to be a powerful, though still underdeveloped instrument in Art. 5[58]. What is at stake here, is not so much an obligation of the local and regional authorities as well as of the Commission, but a Community competence to build up ties outside the national (federal) channel.

a. Structural deficits

What the Court really offers, so far, is an opportunity for active, EEC orientated local or regional authorities to enforce primary and even secondary law[59], independent of what the national authorities as the designated primary addressees want them to do. They would not be allowed to instruct the respective local or regional authorities to stop their activities because such an instruction would clearly violate Community law. For the very same reasons private industry and commerce would have to obey to measures taken by local and regional authorities which are based on Community law. Such a scenario sounds utopian, but it has already become reality in the field of environmental protection. One wonders whether and to what extent these initiatives are sponsored or at least indirectly supported by the Commission[60].

Despite the promising trends to extend the notion of state beyond its mere national boundaries, there remains an important deficiency of Community law with little or limited hope for change. Member States legislations on product or food safety have a clear addressee, the national citizen. Accepting a statutory responsibility for the health and safety of citizens does not necessarily mean that the addressee gets a legal right which entitles him to participate in the process of concretising the statutory responsibility or even a right to sue the competent statutory authority to take action[61]. The situation is much more complex and difficult at the Community level. The Court has attributed direct effect to primary Community law and in case of non-implementation to directives[62].

58 Cf. J. Temple Lang, Community Constitutional Law, Art. 5 EEC Treaty CMLR 1990, 645 et seq.

59 In relation to environmental protection, cf. G.Winter, Direktwirkung von Richtlinien, DVBl. 1991, 657 et seq. who analyses in detail the effects of secondary Community law on the different administrative levels.

60 A similar initiative seems to lie behind the recent proposal of the Commission to set up five regional centres which should survey the enforcement of European consumer law, cf. OJ C 205, 13.8.1992, 10 et seq.

61 Cf. infra, Part I, Chapter 4, 203 et seq.

62 There is an large literature on the direct effect and or the direct applicability (there is no consistency in the terminology) in the doctrine, cf. P. Pescatore, The Doctrine of Direct Effect: An Infant Disease of Community Law, 8 (1983), ELR 155 et seq.

Direct effect of primary Community law has been the first of the three principles which the Court has developed to consider the peculiarities of the Treaty of Rome as an independent legal order. Those who benefit from direct effect, the holders of individual rights, industry and commerce have been and still are the driving force for the future development of the European Constitution[63].
There are not, or not yet, equivalent rights given to consumers. If any, they could derive from secondary Community law or from an amendment of the Treaty. But even Maastricht does not insert rights to consumers in Art. 129 a[64]. The Court went far in accepting the notion of the consumer as being or becoming the addressee of primary Community law. But it has not yet had much occasions to specify what the notion really means. There lies potential in the jurisprudence, mainly in connecting it to the here proposed new reading of Art. 36. The Community legal order, seen as a fully-fledged European constitution, can awake to life, if responsibility has a clear addressee, the European citizen.
Such a European citizen must be granted rights in the area of health and safety. One might wonder, how far the Court of Justice will go. Even if it will replace the lacking charter of human rights, it would be necessary to examine what kind of charter shall be substituted: The Convention on Human Rights with its notion of the liberal state or the Social Charter which gives more weight to social welfare implications of an integrated market[65]. The Member States are not only rejecting the development of human or citizen rights, they spend a lot of energy to exclude consumers from the scope of application of product safety regulation. Member States have not yet understood that the consumer, who must be regarded as addressee of the regulation (beside the producer), has historically emerged from the mere subject and has thereby superseded the organized subjectivity[66]. The recently adopted product safety directive is just another piece to prove such thinking. Consumers appear only once, in so far as they have to contribute to the performance of a recall initiative by a producer of unsafe product[67].

63 Cf. H.-W.Micklitz, Organisierte Rechtsdurchsetzung im Binnenmarkt, KritV 1992, 170 et seq.
64 Cf. for a full understanding of Art. 129 a, H.-W.Micklitz/N.Reich, Verbraucherschutz im Vertrag über die Europäische Union, Perspektiven für 1993, EuZW 1992, 593 et seq.
65 The conceptual difference between the European Convention of Human Rights and the Social Charta has not yet been developed in detail.
66 In more detail, infra III, 2., 69 et seq.
67 Cf. Art 14 (1) OJ L 228, 11.8.1992, 24 et seq.

b. Building meta-administrations

Any form of product safety regulation aiming at the management of emergencies quite necessarily leads to the establishment of administrative meta-structures, where Member States keep their sovereignty and where all sub-levels of enforcement beneath the national level are excluded from European decision-making. Such a meta-structure can be characterised by a twofold phenomenon: It enhances centralisation of enforcement in Member States thereby taking away competence and power from the local and regional authorities, that is away from the risk managers working with the problems. A European citizen cannot be more than an *object* for such a type of meta-administration. The Member States by constantly invoking the danger of competences and powers drifting to Brussels find legitimate ground for centralising risk management. The administrative structures as foreseen under the directive comply grosso modo to such a scenario. Already nowadays, one might realize that some Member States cannot resist the temptation. They use the said shift of powers to the Community as a disguise for the restructuring of the national administration[68]. This should also serve as a reminder that these issues, arising here in relation to product safety, are in fact of much more general application in any appraisal of the evolution of the Community/State relationship.

Management of emergency situations in the Community is treated as a technical administrative problem which can be solved by improving information exchange and by developing a procedure which allows the extension of national decision to all other Member States. This type of bureaucratic management has nothing to do with risk management, but a lot to do with state-orientated, state focussed over-bureaucratisation of product safety regulation. Developed federations have found simpler and less bureaucratic solutions for the same type of problem: Mutual recognition, and even non-federalist nations, like the United Kingdom reach quasi harmonisation of decision-making by use of the home authority principle[69].

However, such a scenario does not fully cover the potential of developing administrative structures beyond the national level. A closer analysis demonstrates that the European meta-structure contains elements, though in an infant stage, which allow management of emergencies close to the citizen which by-pass bureaucratic meta-structure. Point 8 of the Technical Annex of the product safety directive should be recalled[70]:

68 This would be true for the United Kingdom, but is not a unique phenomenon. France demonstrates that the contrary is likewise possible.

69 Cf. St.Weatherill, Reinvigorating the Development of Community Product Safety Policy, 14 Journal of Consumer Policy, 1991, 171 et seq.

70 Cf. OJ L 228, 11.8.1992, 24 et seq. 32.

> "8. At the same time the Commission, when it considers it to be necessary, and in order to supplement the information received, can in exceptional circumstances institute an investigation of its own motion and/or convene the Committee on Emergencies provided for in Article 10 (1) of this Directive.
>
> In the case of such an investigation Member States shall supply the Commission with the requested information to the best of their ability".

The catch-word is "exceptional circumstances". What it really means is not clear. The Commission is given wide discretion in defining the existence of "exceptional circumstances". In addition to the normal management procedure which aims at the technical bureaucratic decision if it is feasible to extend an action taken by one Member State to the rest of the Community, the Commission can institute an investigation procedure on the existence of an "emergency". So what the Commission is really entitled to do here is to initiate risk management. It is entitled to "process" the danger, i.e. to build up information exchange and consultation procedures between the experts of the Member States and the experts of the Community. Again the directive does not restrain the Commission's powers in deciding how the investigation should best be organized. It is left to the discretion of the Commission, a wise understanding of the difficulty to structure the "processing" of emergencies in advance. One might bring the extra-investigation power of the Commission in relation to the explicitly mentioned impossibility to define an "emergency"[71]. All that can be said on the performance of the investigation procedure can be drawn from the general mandate of the Commission to link the investigation procedure to the work which is done in all the other committees which have been established in recent years along the line of the implementation of the new approach to technical harmonization and standards[72]. It would not exclude, however, that the Commission decides to consult external experts, if it deems it to be necessary.

Certainly, one should not overestimate the opportunities which are inherent in the Commission-managed investigation procedure. The Commission needs information input from one of the Member States to start its research activities. It is not allowed to start investigating a risk if it has got the information on a regulatory action or on the mere existence of a risk from a source outside the rapid exchange system. And the Commission shall only investigate the risk, it is not allowed to make a decision, not even to propose to take a decision. All that it can do is to convene the Committee on Emergency. It rests upon the Member States alone to decide what they will do with the results of the investigation, mainly if they believe that an emergency exists and that action-taking is

71 Cf. OJ L 228, 11.8.1992, 24 et seq. 32, Point 2 of the Annex.

72 Cf. OJ C 136, 4.6.1985, 1 et seq. and J.Falke, Technische Normung in Europa - Zieht sich der Staat wirklich zurück?, in: G.Winter (Hrsg.) Die Europäischen Gemeinschaften und das Öffentliche, ZERP-DP 7/1991, 79 et seq.

necessary. It does not need much fantasy to imagine that the Commission would be able to by-pass some of the institutional constraints, like the binding to the information input and the right to propose a measure, which both lie in the hands of the Member States. The decision monopoly remains, however in the hands of the Member States. Despite the not yet fully developed consequences of the Commission's power to institute emergency investigation, it might become clear that the directive, somewhat hidden in the Annex, provides for procedural flexibility, which runs counter to the over-bureaucratic mechanisms on which the whole directive focuses. According to us, the opportunity given here in the mere investigation is a chance: a chance to allow emergency evaluation and emergency management where the problems appear, at the ground level and to develop adequate structures beyond the constraints of primary Community law and beyond the mechanism foreseen in the directive. The investigation procedure breaks down the concentration on States, as it allows cooperation based on expertise and not on formal competence and realises the subsidiarity principle, as it grants investigation power only if the Member States have failed to process the danger[73].

c. *Realising the maximisation principle — the new structures for the management of emergencies*

The intention of the directive is to create new structures which rest on the old well-established mechanisms available in the Member States. Although the difficulties and even failures of the established procedures in the management of emergencies are foreseeable, the new structures of the directive go beyond mere academic interest. They forestall, so runs the hypothesis, the re-shaping of the institutional frame within the Community legal order[74]. And exactly these effects are made possible by maximising experience and knowledge built up in the Member States.

The EEC mechanism to manage emergencies in the field of products which come under the scope of the product safety directive[75] reflects the three types of approaches of the selected Member States. One might understand it as rule-orientated, because "rules" shall guarantee that the transfer of competence to the Commission is controlled and supervised by the Member States. The Commission's activities are structurally bound to the powers it gains under the

73 It is a double judicialisation of the subsidiarity principle, as the Commission's intervention is bound to the prerequisites of Art. 9 a)-d) and the present failure of the Member States to investigate the risk.

74 Cf. infra III, 60 et seq.

75 Cf. Art. 2 a) OJ 228, 11.8.1992, 24 et seq.

directive. The flow chart on the management of emergencies underlines that the Commission's possibilities to act are dependent on the Member States, at each and every level of the management: in the notification, in the processing, and in action taking[76]. Such a rule guided transfer of competence from the lower to the upper level is characteristic of the making of federations. It is functional for the integration of autonomous states into a supranational system[77] and insofar the rule-guided approach might entail far-reaching consequences beyond the mere subject of product safety and the management of emergency situations.

Pragmatism seems to require quite different ways and means to organise the management of emergencies. How best to solve problems would be the guiding maxim. Flexibility and the concentration of powers where they are needed are characteristic of such thinking. Pragmatism can be found in the differentiation between the "normal" management of emergencies and the "special" management in case of "exceptional circumstances". The normal procedure aims at harmonising a regulatory decision to restrict the marketing of a dangerous product beyond national borders. If Member States come to an agreement on what to do, the Commission's role is to provide a forum and to function as a catalyst. There is no need to transfer powers to the Commission. The normal type of management under Art. 9 seems to have such a situation in mind. If, however, Member States cannot reach an agreement on what to do, once a potential emergency has come up[78], the Commission is given a right to step in without any further explicit decision of the Member States which give the Commission the right to do so. The directive itself provides the Commission with that power. The interrelationship between both procedures and the ultimate power of the Commission to compensate for the failure of the Member States, give rise to soft pressure on the Member States to ensure compliance with the philosophy of the directive.

But why is the EEC procedure "democratic"? There is a linkage between the Spanish and the Portuguese instrumentalisation of consumer protection and the adoption of a consumer product safety directive, both exercised and both pushed in order to promote the development of "democracy". Consumer protection apart from Spain and Portugal, has arisen out of the need to compensate for market failures and to re-install the consumer as a partner in the market economy. There is much discussion in the Member States on the role and function of consumer protection beyond its instrumentalisation for the workability of the market

76 Cf. flow charts on emergencies, annexes to the national reports, list of graphs, VII.

77 Again one might refer to the Norddeutsche Bund.

78 The directive differentiates between the notification of measures and the notification of risks, Art. 8. Notification of risks is not mandatory, though already done by some Member States, cf. J.Falke, What should be the Content of a Horizontal Product Safety Policy for the European Community, BEUC Legal News No. 16 (1986), 16 et seq.

economy[79]. Put into the frame of our analysis the question was and the question still is whether consumer protection is or might become a vehicle for social reform, for developing more rights for consumers and for integrating them into the law-making and the enforcement procedure[80]. Spain and Portugal have introduced new elements to the potential power of consumer protection: the notion of democracy and democratisation. Consumer protection, especially in combination with environmental protection, is linked to the shaping of a new democracy, it is bound to real historic movements even outside the narrow field of consumer protection. Both are more or less true for the role and function of consumer protection at the Community level. Consumer protection might become a driving force in the Community to develop democratic structures. The transfer of responsibility for health and safety from the Member States to the Community entails a definition of the potential addressee. The addressee must be after all the EC-citizen, and he or she is most of all a consumer in a market society such as the European Community. The recognition of the consumer as an EC-subject will heavily influence the structures to manage product safety. So far, these structures are state-orientated, but the consumer is already knocking at the door. He or she is more than a mere market partner. It might well be that a process of democratisation is initiated by the consumers[81]. Spanish and Portuguese experience might pave the way for taking the next steps, although one must admit that the potential of the role of the consumer in the Community is not yet developed, not even in the directive on product safety. It might well, however, be that the discretion left to the Commission in the shaping of the investigation procedure produces the necessary incentives for developing the role of consumers beyond the frame of primary Community law and beyond the frame of the directive.

III. Theory of regulating emergencies and managing emergencies in practice

The leading hypothesis is based on possible discrepancies between "should be structures" and the application of the rules in concrete emergency situations.

79 In terms of N. Reich, Markt und Recht, 1977, it is the difference between "marktkomplementären" and "marktkompensatorischen" measures.

80 Cf. M. Goyens, Consumer Protection in a Single European Market: What Challenges for the EC Agenda? CMLR 1992, 71 et seq.

81 Ausbau der Demokratie durch den Ausbau des Rechtsstaates, U.K.Preuß, Perspektiven von Rechtsstaat und Demokratie, KJ 1989, 1 et seq. and from the same author, Revolution, Fortschritt, Verfassung, Berlin 1990.

Both aspects have been dealt with separately in the preceding chapters. Now it comes down to verify the hypothesis, to confront the results of the analysis of the typology with the management of concrete emergencies and to elaborate where the discrepancies are to be found and what they look like. It is helpful to follow the same criteria, the same yardstick which has already been used for the analysis of the typology.

Grosso modo discrepancy exists, but only in countries which do provide for management rules, be they of an administrative nature, procedural or instrumental character. Where no such rules exist, or where the rules are extremely flexible, should be structures are almost congruent with present management of an emergency. This is particularly true for the United Kingdom where the administrative structures are loosely-knit and where the setting of the research, the presumed discrepancy between "should be" and "as it is" has met incomprehension and has in itself set incentives for a crossborder exchange of legal cultures. Categorising the UK thinking as pragmatic is an attempt to summarise reservations against the hypothesis and to express them into one catch-word[82]. From the perspective of a continental lawyer[83], however, the hypothesis holds true even in countries like the United Kingdom, might be to a lesser extent than in other countries. But the United Kingdom has developed administrative structures by law, an approach which in itself may be challenged by the present management of an emergency.

What needs to be elaborated is the assumption that administrative structures (the different levels of action), proceedings (information exchange and consultation) and instruments (means of intervention) are developed in the course of the management of the emergency situations. New structures are created according to the needs of the emergency situations, which challenge the even constitutional shaping of competences, new actors appear which are legally not integrated in the processing of the emergency, they participate in the information exchange, they are consulted and they prepare the ground for action. Last but not least instruments are developed which simply do not exist in national laws.

If it is true that emergency situations generate new structures, new procedures and new instruments, those who are making the rules attract the attention, i.e. the emergency managers. Their behaviour and their way of acting is guided by responsibility, experience and autonomy[84]. All three are structurally needed to meet the challenge of an emergency type situation, it is not an individual ability alone. Responsibility, experience and autonomy characterise what is called

82 Cf. supra, II. 47 et seq.

83 The perspective plays a key role in the comparative analysis, cf. G. Frankenberg, Critical Comparisons: Re-thinking Comparative Law, Harvard International Law Journal 26 (1985), 411 et seq.

84 Cf. infra, Part I, Chapter 3, 89 et seq.

professionalization or professionalised management[85]. Professionalization functions as a catalyst for theory and practice, for should be structure and enforcement. Frame structures, procedural rules and basic instruments are still needed, but they are of a relative value only in the concrete management. The message which could be drawn from the striking discrepancy is undoubtedly clear: structures, procedures and instruments should grant lee-way for those who apply the law, for the professionalized emergency managers. What is desirable, is not so much a clearly shaped administrative structure supplemented by a sophisticated procedure, which defines and restricts (!) the space for action of the emergency managers, but legal rules which set incentives for an autonomous, nevertheless responsible handling of an emergency. Overlapping of competences might be more helpful than clear-cut border lines and duplication of activities should not be prevented but even, at least in limits, enhanced.

Such a consequence which comes already near to a political mandate for the law-making instances, the national parliaments and the Community organs, should not be misinterpreted: Although the structures, procedures and instruments are defined in the process of managing an emergency, they are not homogeneous. It is not possible to elaborate finely-tuned rules which are applicable to any kind of an emergency. It lies within the logic of an emergency that the effects it produces and the traces it leaves in product safety legislation are not foreseeable, at least not beyond a certain level of discretion. The rules are the result of the concrete emergency situation which has to be handled. Within the handling of concrete emergency situations the different regulatory philosophies, the different approaches to elaborate a management of emergencies in the Member States come into play. The result is a broad heterogeneity in the way the emergency is handled, from the notification, via the processing to the action-taking. The broad variety of the management traditions as broken down in the three approaches — rule-orientated, pragmatic and democratic[86] — is getting even more complex due to the inherent differences between consumer goods and foodstuffs. The management of consumer goods is open to day to day experience, the management of foodstuffs requires complicated laboratory testing. Particular regulatory traditions have to be made compatible with the specifics of the consumer goods and foodstuffs. The way in which the emergency is handled does not only depend on the respective national regulatory traditions, it is likewise contingent upon the type of the product, a consumer good, a foodstuff or even another product like drugs or medicines[87].

85 Cf. infra, Part I, Chapter 3, 89 et seq.

86 Cf. supra, 41 et seq.

87 This is to say, that the latter categories produce to some extent their own management structures which will certainly differ from those at stake here.

The findings cannot leave a lawyer satisfied: What is the importance of laws and regulations, if they are not applied strictu sensu, but reformulated in present practice?[88] Product safety law suggests that emergencies can be managed in order to improve the protection of citizens. Can these policy objectives be pursued, if law enforcement is no longer application of predefined rules as approved by national parliaments, if application really means to re-write the law according to the needs of the emergency? The practical solutions which were found in the concrete emergencies and which were investigated in depth in the case studies, cannot be blamed for being unfair. One might put into question the concrete management because the handling remained in the hands of experts where there was no access for consumer groups, one might criticize the management for having informed the public too late, or for binding the recall of the incriminated products to a more or less substantial contribution on behalf of the consumers. But, whoever raises doubts on the management has to find an answer to the question which inevitably will be raised: would management in accordance with the legally defined structures, following the legally determined procedures and under consideration of the provided legal instruments have led to better or even quicker results?

The closer analysis of the divergences cannot provide an answer to that question, but it may help to understand better why legal rules and management in emergency situations clash together and it will hopefully elaborate the perspectives for a European management of emergency situations under the given frame of the recently adopted product safety directive. As it has not yet entered into force, Member States have to transform the directive into national laws by the 29th June 1994, the management can only be prospective in nature. And the years to come will demonstrate whether the forecast undertaken based on the experience collected in the Member States and in the Commission on the already existing national and European regulatory schemes can be useful at all. Again, the management of emergencies writes its own rules, develops its own structures, its own procedures and its own instruments.

1. The emergency — legal definitions and practical handling at the Member States' level

The findings of the study are as such: The identification of a case as an "emergency" is the result of a complex social procedure in which the parties involved weigh and measure "risks", "dangers" and "damage", in order to be able to decide whether it is an "emergency". Legislators respond to the social

88 Cf. M.v.Gestel/G.M.F.Snijders, Dutch report, Part II, Chapter 8, 347 et seq.

conceptualization and develop more and more sophisticated notions of safety, risk, danger, damage and — even emergency[89]. One might distinguish three different approaches to the phenomenon of an emergency which differs from a risk and a danger:

(1) The first consists in explicitly introducing in one and the same legislation different notions of dangers covering mere risks, dangers and emergencies. This has been done so in the UK Health and Safety at Work Act. The inspectors entrusted with the enforcement of the act have to decide whether he "has reasonable cause to believe..(that the case in question).. is a cause of imminent danger of serious personal injury"[90]. Without explaining what an "imminent danger" means, one might conclude that there are different degrees of dangers and that the blatant threat to the personal integrity indicates the existence of an emergency type situation. The Spanish legislation follows the same thinking in that it puts the trigger mechanism of statutory intervention in emergency type situations near to criminal activities: "ignorance, negligence or fraud situations which are determinant of an indiscriminate attack against the consumers"[91]. The relatively low threshold for intervention must be seen in the light of the Colza Case, where Spanish hawkers sold poisoned olive-oil to low-income consumers. Portuguese legislation[92] seems to be in line with the French "Loi sur la Sécurité des Consommateurs"[93].

(2) The second way of defining emergency situations which differ from the normal handling of risks and dangers may be reported from the United Kingdom and the Netherlands. It is a more indirect way to draw the attention of those who implement the law to the fact that there are different "degrees of dangers". The Consumer Protection Act envisages a distinction between "normal risks" and "emergencies". The latter may be tackled by an "expedited" safety regulation, made where the Secretary of State believes an order needs to be made without delay. The statute deliberately leaves the assessment to be made by the responsible politicians. It is up to the Minister to decide whether or not the threat is such that an "expedited" order is necessary[94]. The same mechanism can be found in the Netherlands[95]. The Commodity Act provides for the possibility to issue an "emergency provision" by means of an ministerial order. This means

89 Especially in the regulation of chemicals differentiation has already reached a degree which seems to be beyond of what is possible to administer by the enforcement authorities, cf. OECD Administrative and Legislative Aspects of Chemicals Control: Comparative Analysis of Selected Issues (195).

90 Cf. St. Weatherill, UK report, Part II, Chapter 10, 443 et seq.

91 Cf. M.López-Sánchez, Spanish report, Part II, Chapter 9, 423 et seq.

92 Cf. Calvaò da Silva, Portuguese report, Part II, Chapter 8, 362 et seq.

93 Cf. M.-Christine Héloire, Le Contrôle de la Commercialisation des Produits Industriels en France au Regard de la Sécurité des Consommateurs, in: H.W.Micklitz, Post Market Control of Consumer Goods, loc.cit, 213 et seq.

94 Cf. St.Weatherill, UK report, Part II, Chapter 10, 443 et seq.

95 Cf. M.v.Gestel/G.M.F.Snijders, Dutch report, Part II, Chapter 7, 347 et seq.

that the minister may impose rules in case these are urgently needed in the interest of the consumers' health or safety. Again the legislation suggests that it will be up to the Minister to decide whether there is an emergency type situation.
(3) The third way is to define rules for the management of "emergency situations" at the administrative level. These rules bind the authorities but do not imply legal effects towards third parties. Such an approach might be spread wider than we suppose. Such rules are not publicly available and not published. They exist in the Federal Republic of Germany in the management of emergency situations in foodstuffs[96]. Similar rules have most recently been adopted by the Department of Health and Industry[97] in the UK.
So, those who enforce the law in day-to-day practice and who might discover subsequent to a routine investigation, a risky or dangerous product or to whom a risk or a danger has been notified by third parties, are more or less left alone with the identification of a risk as an emergency-type situation. Whatever the rules are and even if a Minister will decide in the end whether the risky or the dangerous situation is indeed an emergency situation requiring the issue of an order, it is the inspector in the field who first handles the problem. The regulatory input from the law can provide him with limited assistance only. The regulatory discretion is a necessary prerequisite for bringing to bear the different regulatory traditions. The German and the Dutch officers rely first on legal rules and technical standards which should at least in theory guide the evaluation of an emergency. Relying on rules, and that is relying on technical standards, does not mean that the officers are legally bound to application of the standards. Under German law they are not bound, but they have to start from the assumption that a product which complies with the technical standards meets the requirements of the law. But the officers are part of the complex network of technical standards which define the safety level. They are trained in the administration of standards, often they even participate in one way or the other in their elaboration. So it is evident, that in case of an emergency type situation they will first refer to technical standards, if there are any. This thinking might explain the key role which the certification mark which was attributed to the incriminated office chairs by a Southern German certification body, has played in the management of risk. The "Fachausschuß Verwaltung"[98] being in charge of managing the situation, had to overcome the obstacle of a seemingly sufficient certification mark before it could develop its own management concept[99].

96 Cf. J.Falke, German report, Part II, Chapter 6, 261 et seq.
97 Cf. Statutory Code of Practice on Local Authority Action in Dealing with Food Hazard Warning Systems, cf. Ch. Willet, UK report, Part II, Chapter 10, 481 et seq.
98 The "Fachausschuß Verwaltung" belongs to the Berufsgenossenschaft, the Industrial Injuries Insurance Institution.
99 Cf. J.Falke, German report, Part II, Chapter 6, 310 et seq.

The UK officers take a much more pragmatic attitude. Once they have realized that a product is "dangerous" they start investigating it whatever the rules are[100]. They do not feel bound by any rules, not even by the technical standards of BSI. They would not even start their work by looking at these rules. The general safety requirement under the revised Consumer Protection Act leaves them enough discretion to take the appropriate steps in finding out whether there is an emergency. The emergency managers rely on their experience and on what they can detect[101]. The UK approach strongly enhances the introduction of a general safety requirement which sets aside the reference to standards and the presumption which is bound to compliance under German law[102]. One might associate the UK way of evaluating the existence of an emergency as an inductive method. It is focused on the emergency evaluation step by step according to the situated needs. There is no formal assessment[103]. And as far as we can see from the interviews, UK officers would strongly reject any formalization of the evaluation procedure.

The UK thinking is not unique, it is neither bound to a specific country nor to a specific product group. In present practice, it can be found mainly today in the evaluation of dangerous foodstuffs. The German evaluation procedure in the case of foodstuffs seems to be similar to the UK approach[104]. Evaluation lies in the hands of the Chemische Untersuchungsämter (chemical laboratories), who have to decide on the existence of the "risk", but they have no regulatory power. One might even conclude that the chemical laboratories are not able to act as emergency managers. Technical-scientific data are theoretically not connected to social decision taking. They do not contain in themselves the means to be transformed from "data" into "assessment". Social assessment needs to be done, but not by those who perform the testing.

Separating technical-scientific evaluation from social decision making could strengthen, at least in theory, freedom of technical-scientific *research*, in contrast to mere testing, weighting and measuring. They might realize that they are not responsible for decision-making, they could then concentrate on the investigation of the "risk", beyond all rules and standards restricting their work. Laboratories, however, apply a standard set of testing procedures. Standardised testing procedures should allow comparability of testing and the opportunity to

100 Cf. Ch. Willet, UK report, Part II, Chapter 10, 481 et seq.

101 It is striking to see that a German engineer when being confronted with the UK approach raised the question on what else one can rely than on rules!

102 That is why the product safety directive presents such a substantial and far reaching progress, cf. H.-W.Micklitz, Die Richtlinie über die allgemeine Produktsicherheit vom 29.6.1992, VuR 1992, 261 et seq.; J. Keßler, Produktischerheit im Europäischen Binnenmarkt, EuZW 1993, 751 et seq.

103 Cf. St.Weatherill, UK report, Part II, Chapter 10, on the notion of risk assessment, what it means to UK lawyers and why there is no formal risk assessment in the UK, 476 et seq.

104 Cf. J.Falke, German report, Part II, Chapter 6, 237 et seq.

reproduce the testing results by applying the very same procedure. They represent a basic routine of technical scientific allowing for the discovery of standardised risk situations, but they do not respond to the unforeseen or yet unknown event, but that inherent to the notion of an emergency. Again rules, even if they provide for standardised testing, are somewhat counterproductive to the management of emergencies. They may at best help first to identify, that there is "something" which must then be investigated in depth, outside and beyond the testing rules.

Spain and Portugal contribute a quite specific and much different input to the debate on the right way of approaching emergency evaluation, by rules or by pragmatics. For them, risk management has much broader societal implications[105]. Both countries have just started to build up the respective legislation, to create institutions for risk management not only at the administrative level but also at the technical-scientific level, to engage employees to whom the surveillance is entrusted. The mere fact that they are now able to survey the market and take measures to increase the safety of citizens is seen as a part of democratizing society. It seems to be as if emergency management is guided by this perspective, which means that the German/Dutch and UK conflict does not concern them. They might find their own way, a way which will certainly not rely on technical and scientific expertise alone. It is accompanied at least in Spain by a constant conflict between the national government and the autonomous regions on the division of power in the regulation and enforcement of consumer protection legislation[106].

So far we have tried to evaluate foodstuffs and non-food products altogether. There seems to be, however, a major difference which is inherent to the product categories and which therefore could be valid for all investigated countries. Whether or not a technical consumer good may constitute an emergency is mostly subject to every day life experience. There was no debate in the office chair case that the chairs were really dangerous and that urgent action was needed. The point of conflict was to find out where the danger came from, who was responsible and what kind of action should be taken. One might even go one step further and conclude that even the users were able to discover the existence of a danger. The same cannot and perhaps has never been said for dangerous foodstuffs. Whether or not a foodstuff is dangerous and requires an emergency type action is subject to complicated chemical testing procedures. The users might feel ill after having eaten unsafe food but they seldom know where their ill-feeling is coming from. The professionals involved in the chemical testing procedure sometimes do not even know what they should search for. The

105 Cf. M-López-Sánchez, Spanish report, Part II, Chapter 9, 402 et seq.
106 Cf. M.-A.López-Sánchez, Spanish report, Part II, Chapter 9, 404 et seq.

perception of the danger is no longer bound to every day-life experience either of the injured parties or of the technical scientific inspectors. Perception of danger is the result of a scientific evaluation procedure.

There are counter-rotating principles to be found in the two product categories. The social, political and legal development points into the direction of scientification and standardisation. That development furthers the dissolution of responsibilities, standardisation and scientification replaces responsibilities. Especially consumer organisations push for a more scientific approach on risk evaluation especially in the regulation of technical consumer goods. This means: legal definitions of what an emergency might be, rule-induced standards to guide the inspector in the evaluation of the risk. This trend is not dependent on the structural difference between risks which can be identified by everybody and risks which require technical-scientific investigation in order to be discovered. It seems to be as if the regulation on foodstuffs and chemicals functions as a forerunner for the development in the field of consumer goods. It is indeed a social development which encompasses more and more parts of the society[107].

Embedded in this drive for more standardisation and more scientification is the need to increase professionalization of risk management. The emergency managers are structurally invited to take over responsibility beyond standardisation and scientification due to their professionalization. It is true that they are primarily bound to routine inspections which exclude the transfer of responsibilities. But the reluctance against the effects of standardisation and scientification is increasing. The food inspectors become aware of the problem that routine inspections do not suffice to discover unsafe foodstuffs. They have to rely on their experience and autonomy and make samples even in cases where a systematic evaluation of the risks in the laboratories has taken place, but do not show the presumed results. Just one example taken from the case studies: the German "Chemische Untersuchungsämter" have tried to get a grip on wide-spread marketing of the poisoned wine by taking samples from the big dealers' storages. But just incidentally, they discovered that two bottles being filled by the same dealer showed different results[108]. Routine inspections do not suffice!

The intention is not to discriminate against technical-scientific routine inspections dedicated to assist the risk evaluation, but to pin-point that technical scientific methods do not suffice and that it can not replace the experience and the autonomy of the individual inspectors.

One might make a strong argument of counter-productive results in the area of foodstuffs against the ongoing discussion on a stronger input in the regulation of

107 Education would be another example, where the privatisation leads to new regulatory structures and instruments, somewhat similar to the regulation of technical standards.

108 Cf. J.Falke, German report, Part II, Chapter 6, 297 et seq.

dangerous technical consumer goods. Those working on a practical level resist, this was a common plea in all the interviews, to bind their control activities to even stronger and more sophisticated rules whatever their legal character might be. They feel already today overregulated and restricted in their autonomy which they see as being substantial for an effective risk evaluation.
Autonomy is another catch-word in the risk evaluation. Inspectors do not only remain sceptical about rules and regulations, they defend their autonomy particularly in transboundary conflicts. The overall policy of the Commission is to promote the idea of mutual recognition especially in the field of risk assessment by setting up if not common but at least similar conditions for the risk evaluation in order to make them comparable. It is precisely this observation which allows us to use product safety as a reflection of much broader issues which arise in the development of European federalism. In any sector of integration it is essential to address the question of how diverse national traditions can be accommodated within a wider transnational structure, driven by the influence of market integration.
Present practice in the management of emergency situations puts these efforts in the category of wishful thinking. There is an overall tendency in all countries once a risk is notified to start testing according to the countries' standards and philosophies. Take the example of the office chairs: although the German authorities had initiated substantial and comprehensive testing, the British authorities once they were informed by a Swedish source, started their own testing programme[109]. Here a real conflict emerged, as the British authorities considered the German procedure to be flawed[110]. The conflict was not whether the chairs were dangerous or not but what kind of testing procedures should be developed to assess the risk mainly with view to the intended revision of the underlying technical standard. There seems to be only one situation where Member States and their authorities are willing to rely on foreign testing: when the emergency seems to be no longer an emergency and where action taking is no more than an alibi to satisfy the people's need.

2. *Structures, procedures and decision-making — theory and reality at the Member States level*

Whereas the laws tend to spell out more and more the administrative and legal structures, to enhance institutional independence, to rank degrees of safety, risk, danger, damage and emergency, to broaden the spectrum of instruments to

109 Cf. St.Weatherill, UK report, Part II, Chapter 10, 463 et seq.
110 Cf. St.Weatherill, UK report, Part II, Chapter 10, 467 et seq.

guarantee the flow of information and to facilitate decision-making, practice develops its own management rules in the shadow of administrative and legal structures[111].

Summarizing[112] the main trends of product safety regulation along the line of the various charts on the administrative structure, the exchange of information, the consultation and the decision-making[113], shall prepare the ground for their confrontation with the main findings of the current practice of managing emergency situations.

(1) The project on post market control of consumer goods undertaken for the Commission of the European Communities is not even four years old[114]. The trends found there in developing safety regulation have even come clearer since then. Member States devote more and more attention to the regulation of emergencies at the organisational, procedural and instrumental level. The reasons for this steadily growing process of differentiation have not yet been investigated[115]. Legislators do not regard existing structures and legal means to be sufficient to cope with emergency situations. Emergency situations are separated from routine praxis. Such a reading sounds plausible, though no one can tell us in advance what an emergency is, neither the legislator nor those who apply the law. Regulating emergencies could indicate a shift in product safety policy, away from routine management to the concentration on emergencies. Comprehensive routine inspection is no longer fully put under administrative control. Routine inspections could be downgraded to some form of a pre-procedure preparing the selection and elimination of all those risks which do not come under the category of emergencies or — to put it in other words — which do not require speedy action on behalf of the authorities. The differentiation might even pave the way for privatising the control of dangerous products in granting consumers and their organisations a group action to secure compliance with the law[116]. Administrative authorities could concentrate their resources on what should remain in the hands of public powers: The management of emergencies which, because of the intensity of the risk, require professionalization of the management[117].

111 In the shadow of the law, has been a catch-word in the seventies to enlighten the differences between the law in the books and the law in action.

112 Summarizing and not presenting: basic results can already be found in previous research undertaken by ZERP in the field of product safety, cf. Ch. Joerges et al., loc.cit. and H.-W.Micklitz (ed.), Post Market Control of Consumer Goods, loc.cit.

113 Cf. supra II. 2., 47 et seq.

114 Cf. H.-W. Micklitz (ed.) Post Market Control of Consumer Goods, loc.cit.

115 Although they are part of a societal change which involves the philosophy.

116 It could therefore support the long debated insertion of a group action in the field of product safety, which does already exist in France, without playing a role, however, cf. J. Calais-Auloy, Droit de la Consommation, 3è édition 1992, 381 et seq.

117 For the concept of professionalisation, cf. infra Part I, Chapter 3, 89 et seq.

The previous study on post market control[118] had recognized a trend towards institutional independence in the management of product safety. But, even these newly established independent bodies do not suffice to handle emergency situations, at least not in federal states like the Federal Republic of Germany and Spain. The Spanish legislator (and this is an important novelty) allows the national government to create in the most serious situations of ignorance, negligence or fraud a so called "exceptional organ". It is composed of the national government and the regions and is empowered to take regulatory action in case of an emergency. Since the adoption of the law, there has been no reason to bring the organ into operation.

The Guiding Principles (Allgemeine Leitsätze) for the management of emergency situations in the management of foodstuffs, which were developed in the Federal Republic of Germany subsequent to the poisoned wine case pursue the same objective. An ad-hoc gremium should be established composed of the German Länder and the Federal Ministry of Health in order to guarantee coordinated action. It is no coincidence, that federal states tend to put the management of emergencies in the hands of the competent authorities at the central level. Enforcement here lies normally in the hands of the independent regions. They may take differing actions, thereby making nation-wide management difficult.

There is, however, another element inherent in the tendency of taking the competence away from the regions and putting it in the hands of the central level, and it has nothing to do with product safety, but a lot to do with division of powers. And the tendency is not even restricted to federal states. Central governments tend to aggregate regulatory competence in their hands in order to strengthen their position. And the Community with its focus on states encourages and even promotes, unintentionally, that development[119].

The division between a normal and an emergency procedure seems to be well-established despite the remaining doubts on its usefulness and its political and social background. The distinction exists in the UK, between the normal and the "expedited" procedure in the regulation of technical consumer goods, it exists in the Netherlands who have introduced in the 1988 amendments to the Commodity Act a form of speed-up procedure. Similar trends may be reported from Spain and Portugal[120]. There is no such distinction under German law, but the Guiding Principles fulfil the same function in the management of emergency situations in the regulation of foodstuffs. Spanish and Portuguese legislation covers foodstuffs

118 Cf. H.-W. Micklitz (ed.) Post Market Control, loc.cit.
119 Cf. St. Weatherill, Shaping structures, Part I, Chapter 10, 199 et seq.
120 Cf. M.-A. López-Sánchez, Spanish report, Part II, Chapter 9, 404 et seq.

and technical consumer goods. Both provide for specific procedures in the case of an imminent risk.

It is astonishing to see the similarities of the procedure although there are differences in the regulation of technical consumer goods and foodstuffs and although the legal basis and regulatory philosophy differs. The overall objective of the newly introduced procedures is to effectuate the flow of information in the administrations involved, to integrate systematically the technical and scientific expertise in the decision-making process, to concentrate the regulatory power in the hands of the central government or the central authorities, and to restrict participation of the interested parties concerned in order to avoid an undue delay of the decision[121].

The last characteristic of the management of the emergency situations consists in the development of adequate regulatory instruments. Whatever the instruments which can be taken, they are of a temporary character only. Decision-making is only provisional, the responsible bodies reserve the right to revise the decisions, to confirm or to repeal them after the time limit has run out. There is a relationship between the intensity of the regulatory intervention and the level at which it is taken. Strong intervention means in principle that the decision is taken at the national level[122]. The most important and the most debated legal instrument in the management of emergency situations is the competence to inform the public[123]. The first question is whether such competence exists and the second is to whom it is or should be conferred. Some countries have explicitly regulated the competence to inform the public. This is true for the Netherlands and the United Kingdom. Here the Ministry is in charge of deciding whether and under what conditions the public can be warned. The Spanish legislation entitles the Ad Hoc Commission to distribute the results of the studies which have been taken to evaluate the risk. The Municipal Offices of Consumer Information are empowered to inform the consumers on data about the products or services which were suspended, confiscated, or forbidden because of their risks or danger to personal health and safety. This power concerns individual information only. Municipal Offices of Consumer Information are allowed to publish test results and risk assessment. There is a competence to inform the public on risks and the evaluation which is professionally made. The decision of what to do with the dangerous products is left to consumers[124].

Under German law there is no such competence to inform and to warn the public. It is at least not explicitly contained in the respective legal statutes. But

121 Cf. flow charts information management in the Federal Republic of Germany, the Netherlands and the United Kingdom, national reports, Part II, list of graphs, VII.

122 Cf. J. Falke, German report, Part II, Chapter 6, 261 et seq., 291 et seq.

123 See again the flow charts of information management, national reports, Part II, list of graphs, VII.

124 Cf. M.-A.López-Sánchez, Spanish report, Part II, Chapter 9, 404 et seq.

there is an ongoing debate whether and under what conditions the Länder as well as the central government can derive the competence to warn from their constitutional duty to protect the citizen against risks resulting form unsafe products. A non-binding solution has been found in the Guiding Principles (Allgemeine Leitsätze) where the competence to warn is put in the hands of the Ministry of Health[125]. The existence of a competence to warn entrusted to the competent authorities is in principle not denied. The conditions, however, under which it can be executed are subject to a highly controversial and extremely politically important debate. The case of the German noodles should be recalled where the intermediate regional level in Baden-Württemberg issued a warning that certain types of noodles were unsafe[126]. An important German producer, Birkel, brought the case before the courts. The Court of Appeal confirmed the decision of the court at the first instance which blamed the intermediate regional level for having informed the public without having taking the necessary investigations to evaluate the risks. And it seemed to be as if the noodles were safe!

(2) If an emergency occurs, the organisational, the procedural and even the instrumental rules are set aside. Negotiation in the shadow of the law is the most wide-spread solution to tackle safety problems. The investigation undertaken, then allows the elaboration of responses in the shadow of the law and the breaking down of the rules which govern that management.

There is a need in emergency-type situations to make use of ad-hoc committees which can be legally set up or where no such possibility exists to establish an ad-hoc forum for enabling better management. This is particularly true for the Federal Republic of Germany where the Fachausschuß Verwaltung managed the risks resulting from unsafe office chairs and not, as one might expect, statutory authorities at whatever level and under whatever composition[127]. The Fachausschuß has no regulatory competence. It may not even manage emergency situations. It took responsibility for the management by the mere fact that its pluralist composition made it an appropriate organ to bring together all those who are involved in the regulation and the management of product safety. The same ad-hoc approach can be found in the UK in the management of the exploding office chairs[128]. The co-operative approach is constitutive for UK thinking even in the enforcement procedure.

Although there is a common trend to establish ad-hoc committees, there is no common strategy to be found in the membership of the management committees. The Fachausschuß Verwaltung got involved in the management because it could

125 Cf. J.Falke, German report, Part II, Chapter 6, 261 et seq.
126 Cf. J.Falke, German report, Part II, Chapter 6, 261 et seq.
127 Cf. J.Falke, German report, Part II, Chapter 6, 310 et seq.
128 Cf. St. Weatherill, UK report, Part II, Chapter 10, 467 et seq.

take over professional responsibility for the undiscovered insufficiencies of the southern certification mark. The private involvement of the Fachausschuß can be interpreted as an attempt to compensate for the failure in having relied for too long on a misleading certification mark. Quite the contrary is true in the management of the German wine case. The authorities which first got the notification took a very low profile in the management of the emergency situation[129]. With all due care, one might conclude that organisational constraints, even if they are rooted in constitutional requirements, do not present a barrier for setting up an efficient management body, even under private governance.

The procedural rules — information exchange and consultation — which have been analyzed in the country reports, are often the direct result of insufficiencies which have been discovered in the management of a previous emergency-type situation. This is true for the Guiding Principles (Allgemeine Leitsätze) but is also true for the Spanish rules which go back to the Colza-case. Accidents produce legal interventions and they set incentives for the development of often internal, i.e. inner-administrative management rules. It is therefore somewhat misleading to refer to the procedural rules in the structural analysis. Their workability has often not been tested. But what can be said from the analysis of the case studies is this: The procedural rules, if there are any, are adapted to the needs of the case in question. These findings concern the composition of the committees, where technical-scientific competence and regulatory competence is brought together in one and the same gremium. This is true for the management committees in the UK[130] and in the Federal Republic of Germany[131]. Access to information problems, if one sets aside the access of consumers and their organisations[132], are practically eliminated. A cooperative approach facilitates considerably the decision as to who pays for the necessary testing. Case studies indicate that solutions were found on a pragmatic basis. Normally, the responsible competent bodies covered the testing costs. If they were not in the budget of (let us assume) the local or the regional authorities, the federal or the central governments stepped in and mandated the testing institutions or laboratories[133].

A common element of the procedure seems to be that the parties concerned, the manufacturers and dealers, are integrated into the risk evaluation and decision-

129 Cf. J.Falke, German report, Part II, Chapter 6, 297 et seq.

130 Cf. St.Weatherill, UK report, Part II, Chapter 10, 470 et seq.

131 Cf. J.Falke, German report, Part II, Chapter 6, 297 et seq.

132 The Consumer Policy Service had initiated a study on access of information of consumers in the late eighties, but the idea has not been pursued in resent years.

133 In the Federal Republic of Germany the producers of the spare part which finally solved the problems took the costs on bord.

making process. Committees prefer to cooperate with the trade associations instead of individual professionals. An agreement might be achieved more easily with the trade associations than with the traders, at least in routine type situations. If emergency occurs, even the traders and the producers themselves are keen to cooperate and to find a joint solution. Another characteristic of the procedure is the exclusion of consumers and of any other person representing the public interest. Ad-hoc committees are seen as closed shops where the public is only approached once a technical solution to the emergency has been found[134].

The procedural rules in the management of the poisoned wine are different. They are dictated by the case in question. The marketing of poisoned wine constituted a criminal offence. Here a threshold seemed to be passed which excluded cooperation. The already mentioned case of the unsafe German noodles and unsafe English yogurts[135] makes clear that in emergency type situations even in the field of foodstuffs, cooperation has become the dominating principle if the action is not fraudulent as such.

Negotiating a solution in a joint approach does not mean that the law and the powers foreseen in emergency type situations are useless. The Dutch experience in the management of office chairs clearly shows that competences are needed to push reluctant producers, dealers etc, into cooperation[136]. The law should even provide for a sophisticated set of legal instruments. It enhances the position of the competent authorities. They use the legal instruments to threaten the parties concerned. Threat, however, requires that the instruments are available, a possible but not the only conclusion. Where there is a committee composed of the competent authorities, technical-scientific expertise, and trade associations as the main actors, their mutual connections might even bring to bear the application of means which are in fact not available or whose availability is not ensured. The Fachausschuß could initiate a recall procedure which does not exist under German law, the HSE could threaten to close as unsafe any office which was supplied with new chairs of this make[137].

134 Even if access would be legally confirmed, one might wonder if such a rule would be enforced. It might well be that the management is dispersed from the official committee where access is guarantied to an new ad-hoc committee where they remain excluded.

135 Cf. Ch. Willet, UK report, Part II, Chapter 10, 506 et seq.

136 Cf. M.v.Gestel/G.M.F.Snijders, Dutch report, Part II, Chapter 7, 358 et seq.

137 Cf. St.Weatherill, UK report, Part II, Chapter 10, 471 et seq.

3. *The European experiences in the management of emergencies — the rapid exchange system and the hot-line*

The European Community has already gained some limited experience in the management of emergency situations. Then the question is, what, in the management is EC-specific, is pragmatic, rule-orientated or democratic, or is it all in once, undermining the maximisation principle?

As far as consumer goods are concerned management remains at the lowest level one might dare to name management. So far the Commission refrains from processing the notification. The Commission applies literally the rules and procedures foreseen and regulated in the rapid exchange system[138]. Management means channelling the incoming notification to the Member States whilst taking due care not to interfere in the responsibility of the Member States. The Commission works as a catalyst, a behaviour which is characteristic for international organisations. These provide the forum but do not intend and are not entitled to influence the process which takes place.

Such a "management of information" is far from being useless. The case study on the poisoned wine allowed, quasi as a by-product, a deeper insight of the workability of the rapid exchange system. Although the risk was notified to the Commission at a relatively late date, the German authorities were already involved in the management of the emergency situation. It seemed to be, however, as if the information provided help to the Netherlands. The Dutch Health Ministry got important information on testing procedures which was directly usable and used for action[139]. Portugal and Spain, too, undermined the important role of notifications channelled through the system[140]. This is partly due to the fact that their national infrastructures do not yet suffice to produce enough information on products which may be unsafe. The function is not to enhance transboundary information on unsafe products, but to substitute national deficiencies.

Much more relevant is the experience of the Commission in the emergency management of foodstuffs. First of all, there are no rules which govern the notification, the processing and the decision-making at the Community level. The rapid exchange system was not made applicable to foodstuffs, though the Consumer Policy Service tried at a given time to extend the scope of application of the system to foodstuff. The main argument always brought forward against such thinking was the reference to the so-called red-telephone. Integrating the informal management into a regulatory system would deprive the red-telephone

138 OJ L 70, 13.3.1984, 16 et seq.

139 Cf. M.v.Gestel/G.M.Snijders, Dutch report, Part II, Chapter 7, 358 et seq.

140 Cf. Calvaò da Silva, Portuguese report, Part II, Chapter 8, 385 et seq.; M.-A.López-Sánchez, Spanish report, Part II, Chapter 10, 402 et seq.

of its main advantage: unbureaucratic and fast networking over the territories of the Member States centred in the hands of the Commission. If there are no rules, there is no space for rule-orientated management. One might call it pragmatic in a sense. The red-telephone, the hot-line, reflects the need for a European management of emergencies, which sets aside nearly all the formal barriers which have dominated the discussion of the product safety directive for a long time: the type of measures which must and those which should be notified, the focus on mere information exchange under the auspices but without interference of the Commission, and last but not least the complicated and complex decision-making process in the frame of the Comitology[141]. One cannot hide the fact, however, that the hot-line, is bound to personal links between the emergency managers all over the Community. If one looks for a characteristic of the European management, it would be the personal ties between the emergency managers, and the key role of the personal involvement of a limited number of persons all over the Community.

The close contact is the result of the structural organisation of participation and integration in the three foodstuff committees[142]. Neither of these committees, whether consultative, expert or regulatory provide for the management of emergency situations. The Commission and the Member States are jointly operating in a forum, where the law and the legally established structures remain in the background, where the management takes place outside and beyond the law. One might turn the conclusion upside down and interpret the management of emergency situations in the area of foodstuff as an opportunity which is the direct result of a well established common agricultural policy for more than thirty years which has enabled the establishment of such networks on the basis of mutual trust. Consumer protection policy, i.e. the management of emergencies resulting from technical consumer goods, is far away from such a status in the Community, even after the adoption of the general product safety directive on the 29th June 1992.

4. European prospects for action — harmonizing the ground for action

Harmonization of product safety in the Community sets considerable incentives for the improvement of product safety legislation in the Community. Experience in the field of consumer credit and unfair advertising shows that Community legislation even at a minimum level might lead to a revision of consumer product safety legislation even in those countries which are said to have a high level of

141 OJ L 197, 18.7.1987, 33 et seq.

142 There are three different types of committees, cf. H.-W. Micklitz, Organisational Structures, loc.cit.

protection. The introduction of a general safety requirement without reference to standards enhances a pragmatic safety-orientated approach rather than a rule-guided thinking. But Community incentives are beyond the struggle of the role and function of technical standards, as they are important for countries where there is no comprehensive product safety regulation. Here the Community replaces national activities and facilitates the long-awaited improvement of consumer protection.

The directive intervenes in the inner-organizational management of product safety as far as it requires Member States to establish *one* national body, not for the enforcement of product safety legislation, but as a contact point for the Commission in the exchange of information. This study underlines the key role of regional and local authorities in the management of emergency situations (and not in emergencies alone). Community law is addressed to the Member States, that means to the legislator, the administration and the courts. It can not per se include regions or local authorities[143]. Europeanization of product safety strengthens the national level to the detriment of the regional and local levels[144]. Centralization seems to be inevitable to guarantee European management of emergency situations or — in broader terms — of product safety. The directive has missed the opportunity to strengthen even regional and local competence in the Member States[145]. The problem should not be set aside by referring to the structural deficiencies. There is a basic underlying conflict resulting from one-sided market integrating instruments, which focus on states and set aside the inner-national administrative structure. The legal order of the Community is shaped according to the needs of a market[146]. The Single Act has introduced competences to achieve the Internal Market but it has not revised the legal order. Product safety must be realized within or under the concept of the common market, respectively the Internal Market. The structural deficiencies become clear in the difficulties to integrate into a regulatory concept the regional and local enforcement authorities.

The directive shapes the procedure and promotes the insertion of a set of regulatory instruments to enforce the product safety directive. The lesson told by the country reports is simple: procedural rules are needed but they should leave lee-way in their implementation. They must be applicable in the context of the various product safety situations. The same is more or less true for the set of

143 Cf. St. Weatherill, Shaping Structures Part I, Chapter 4, 199 et seq.

144 Cf. the Independent, Monday 6th July 1992: "Thanks to my Super Hero Powers I can tell you what to do, local govt!"

145 The Federal Republic of Germany voted against the adoption of the directive, just to please the German Länder who fear a loss of competence.

146 Cf. Ch.Joerges, Social Regulation and the Legal Structure of the EEC; and H.-W.Micklitz, Organisational Structures of Product Safety Regulations, both in: B.Stauder (ed.), loc.cit.

instruments. They are needed and they must be made available but their application should not restrict the autonomy of those who apply the law at the grass root-level.

5. European prospects — the future management of emergency situations

The directive provides for a distinction between the mere bureaucratic management along the line of the former rapid exchange system and the opportunity for the Commission to step into real management of emergencies in case of "exceptional circumstances". Both mechanisms remain formally within the borders the Comitology[147] has set. Decision-making lies in the hands of the Council.

Against the background of the findings one might raise the question whether the Community will not *de facto* receive the power of managing emergency situations. It can by-pass easily the formal barriers erected by the Member States in binding the Commission's activities to the formal notification of the Member States and in refusing the Commission the competence to propose a regulatory measure to the emergency committee. Once the Commission is able to find a majority for what it believes to be necessary, it is even possible to make a majority decision immediately applicable[148]. Member States are then obliged to enforce the decision within ten days. Such a decision remains in force for three months only[149].

The directive follows the wide-spread regulatory philosophy in its attempt to define the notion of risk. Emergency type situations require a severe and direct danger to the health and safety of consumers. This seems to be in line with the legislation of the Member States. But the directive puts risk evaluation in "exceptional circumstances" in the hands of the Commission, that means a political body[150]. The Member States could come into play only if the Commission so decides. The committee on emergency situations is composed of representatives of the Member States and the Commission. It decides on the regulatory action proposed by at least one of the Member States[151]. The directive does not explicitly envisage the possibility to integrate the technical-scientific expertise which is available at the Member States' level. That means that all the experience, the responsibility and the autonomy of the managers at the national level is set aside. Foodstuff regulation demonstrates the important role of

147 OJ L 197, 18.7.1987, 33 et seq.
148 Cf. Art. 11 (1), loc.cit.
149 Cf. Art. 11 (2) and (3), loc.cit.
150 Cf. for another reading of the directive, J.Falke, Part I, Chapter 5, 223 et seq.
151 Cf. Art. 9 loc.cit.

committees at the community level, even if they have only a consultative status. What is needed then is to establish a consultative committee on product safety[152].

One might understand the directive, despite its flexibility in "exceptional circumstances" as a top down regulatory model, guided by the idea that the Member States notify measures they have already taken. Present management of emergency situations in the investigated Member States shows a bottom-up approach. Evaluation is a procedure in which the competent authorities, the technical-scientific expertise and the trade associations are integrated. The directive, as it stands, is hardly compatible with the findings of the study. The investigation procedure should be made mandatory and put into the hands of the Member States in order to guarantee that their technical-scientific expertise comes to bear. It should be put in the hands of the Member State where the risk first arose. Some form of a home authority principle is needed as it can be found at least in an infant stage in the Council Regulation on the evaluation and control of the risks of existing substances[153] where the assessment is put in the hands of the Member States in order to profit from their aggregated know-how, and in order to replace the technical and scientific expertise lacking at the Community level[154]. Such a European home authority principle could easily be linked to "trusteeship", to the obligation of each Member State to perform the investigation procedure in a European spirit, as a trustee of the Community legal order[155].

Putting the investigation in the hands of the Member States concerned would have the advantage that the assessment is made where the problem comes up and where the managers can bring to bear their specific capacities. This re-defined investigation procedure should be open to other Member States/third countries and to external expertise. In order to guarantee that the investigation procedure can not be instrumentalized by the respective Member State, that the Member State demonstrates responsibility and behaves as a trustee, mechanisms must be established to create counter-balancing competence in case of conflicts. That is to say, to provide for the possibility to integrate technical and scientific expertise from other Member States. Such a balanced committee can no longer be bound to the existence of a Member State's notification of an emergency. The Commission must be formally entitled to initiate the execution of the investigation procedure if it has become aware of an emergency situation. It should be a point of consideration to grant European consumer organisations the right to address complaints to such a board and even to give them the right to ask

152 Which is not yet even published as an official proposal of the Commission.
153 Cf. OJ L 84, 5.4.1993, 1 et seq.
154 Cf.H.-W. Micklitz, Organisational Structures, loc.cit.
155 Cf. on the notion of "trustee", St. Weatherill, Part I, Chapter 4, 193 et seq.

for its establishment[156]. Last but not least, the decision on the risk evaluation at least in the field of foodstuffs, should be made public. Such a policy would be in line with the function entrusted to the European Environmental Protection Agency[157]. The situation is different in the case of technical consumer goods. Here the question arises as to whether the emergency determination should be made public once it is done or whether it should be made public together with concrete proposals of what to do.

What remains to be solved is the problem of the envisaged two-step procedure[158]: at the first step, a decision is taken on the existence of the risk, at the second the regulatory decision is prepared. This two-step procedure is the direct result of the restrictions resulting from the one sided market economy orientated constitution of the Community. Decision-making in the management committee may be down-graded to a decision on the Internal Market and not to a decision on product safety. The Commission under the given structure is bound to leave emergency evaluation at the Member States' level — except in the case of exceptional circumstances — and to leave decision-making within the structures foreseen in the Treaty of Rome. Practice would require the establishment of a cooperative model to manage emergency situations, a model where the three main actors come together: the competent authorities, the technical-scientific expertise, the traders and their organisations. Only such a cooperative model could maintain the key elements of risk management: experience, autonomy and responsibility.

There might be one exception where the two-step mechanism could lead to feasible results: this is in the case of criminal activities. Here the basis for cooperation is missing and the decisions might and should be taken at a ministerial level. But these cases do not constitute the core of emergency situations. What remains to be considered is the acceptance of the Spanish model as an intermediary solution: the setting up of an ad-hoc committee entrusted with regulatory powers and composed of the parties which are needed in a given case. The only question is who should decide on the establishment of the ad-hoc commission in a given case. If the decision is entrusted to the Council or the Commission under the management committee variant politicians would decide on the question of whether investigation of an emergency-type situation is needed or not. There seems to be no opportunity for the Commission to escape the organizational and structural border lines of the prevailing economic

156 Like it exists already in the Common Commercial Policy, at least in the United States, cf. H.-W. Micklitz, Internationales Produktsicherheitsrecht, Zur Begründung einer Rechtsverfassung für den Handel mit risikobehafteten Produkten, Habilitationsschrift Bremen 1992.

157 OJ L 120, 11.5.1990, 1 et seq.

158 The two-step procedure is analysed in detail in H.-W.Micklitz, Organisational structures of product safety regulations, loc.cit.

constitution of the Community. The case of the management of emergency situation shows in a nutshell the dilemma of present Community social regulation. It has to be achieved, because the Internal Market cannot be realized without social regulation. But neither the Treaty of Rome nor the Single Act provide for the appropriate constitutional structure which allows an emergency evaluation and decision-making process beyond the borders of the Internal Market philosophy.

IV. The European Court of Justice — on the threshold to review the Community legal order ?

J. H. H. Weiler[159] has analysed the interrelationship between the divergencies of legal and political developments between the Court and the Commission on the one hand and the Member States as resembled in the Council of Ministers on the other. He stated in 1982 a growing interest of the Member States to influence the decision-making process in the Commission in order to counterbalance the Court's attempt to erect a supranational constitution[160]. The clou of his analysis lies in the conclusion: The double structure of supranationalism and intergovernmentalism stabilizes the integration process. The constant struggle between the different organs, in and around the shaping of a legal order bears a constructive pro-European element. Member States resistance and reluctance outweighs the predominance of the Community legal order. The perspective here focuses on the pros and cons of a supranational community with an independent legal order. It discusses the institutional challenge of the Community legal order which appeared after and alongside with the programme to complete the Internal Market, but not at the inner administrative level within or outside the Comitology. Taking into consideration the institutional dimension of the EEC means foremost to analyse the so-called democratic deficit of the Community[161]. The theory though it has proven to be very successful in explaining the process of integration in its ups and downs and the mutual dependence of the different political actors suffers from one major deficiency. It suggests a coherent notion of Member States and of the Commission and does not really consider that neither the Member States nor the Commission are any longer homogeneous

159 Cf. The Community Legal System. The Dual Character of Supranationalism, Yearbook of European Law, 1 (1981), 267 et seq.

160 Cf. J.H.H. Weiler, Suprantional Law and Supranational Legal System: Legal Structures and Political Process in the European Community, PH.D. Thesis, European University Institute, 1982.

161 This is even true for one of his last papers in which he summarizes the development of the Community Legal Order, The Transformation of Europe, 100 Yale Law Review, 1991, 2403 et seq.

bodies[162]. Below the level of decision making powers, structures have been built during the completion of the Internal Market which have led to an interwoven network of experts and administrators operating largely outside legal and political control[163]. The twofold institutional deficiency at both scales of the balance requires further consideration and explanation and it prompts the Comitology in a key position.

The Comitology must be understood as an attempt to exercise political accountability over the emergent administrative structures by way of formalizing and judicializing these very structures. The ongoing development of product safety regulation has demonstrated the need to further develop the structures and most of all to delegate emergency management to the Commission itself, which is much more than only one step further in the building of administrative structures. The Community would introduce a pass-mark and that is why the litigation between the FRG and the Council on Art. 9 of the directive is of such a striking importance. Delegating safety management powers[164] to the Commission would considerably enhance the establishment of even more flexible and even less legally and politically controllable europeanized intra-, and international forms of cooperation and joint action-taking. The sub-units of the Member States, mainly competent administrative bodies gain political autonomy against the formally responsible national (governmental) entity. Administrative management is no longer channelled through the formerly competent ministries of foreign and/or economic affairs, cooperation takes place at the level of competent ministries and even here it is no longer the political decision-making level, but the expert level, where the real process of Europeanization takes place.

So what needs to be balanced out beyond and after 1992 is not alone the Member States political power as resembled in the Council against a strong European Court of Justice which benefits support from the Commission and the European Parliament in the shaping of a Community legal order. This task will sustain and even gain importance with the introduction of the subsidiarity principle in the Maastricht Treaty[165].

A new task, however, is in the offing and its renders balancing between intergovernmentalism and supranationalism even more complicated. It consists of nothing less than re-constructing the Community legal order in the light of the

162 Although he realizes that it is more and more difficult to speak of Member States, because the concept has so desperately lost clear cut demarcation lines.

163 Cf. G. Majone, Cross Cultural Sources, loc. cit. 79 et seq. speaks of regulatory networks.

164 It is not the decision-making power alone which is the striking feature, cf. H.-W. Micklitz (ed.) Post Market Control of Consumer Goods, loc.cit.

165 Cf. H.-W. Micklitz, The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration, Lakimies 1993, 508 et seq.

emerging institutional patterns and social rights. The institutional patterns concern the reshaping of the notion of "state" in the Community legal order and the social rights, the position of the universal consumer, beyond and after market integration. One might feel tempted to attribute both issues to intergovernmentalism, to politics, to the Member States and release the Court from its role and function in the balancing process. That would theoretically be possible by driving back the process of integration, and by re-politicizing what has become part of the Community legal order, as "acquis communautaire". A first cornerstone will be the reach of the subsidiarity principle, does it justify Member States to refuse the transformation of a directive into national law[166]. It is not yet "exit" that would result from such a reading of the subsidiarity principle, but it would introduce beside "voice" a new category "halt"[167].

Such an understanding of the emergent institutional patterns and the emergent social rights would, however, not fully catch the problem in which the integration process is stuck. There is an obvious gap between the real process of legal and political integration and the very same perception of that process in the Member States and the Community organs. Let us start with the intergovernmentalism side of the balance. Member States behave as if the inner-administrative penetration, horizontally between the different national authorities and vertically with the competent sub-units of the Commission, does not exist. The Community legal order, at the other side of the balance seems to be much more advanced and developed than even the Community organs would admit. It is true the Court seems to be ill-equipped to meet the new challenge. There are no or extremely limited notions in the Treaty of how the inner institutional patterns should look[168] and there are no rights mentioned in the Treaty granted to consumers. The Court, however, has gone far in developing out of the four freedoms and the competence rules social rights[169] and it will have to decide under the heading of competences on the future shaping of emergency management which bear a structural element of the new Community legal order in it[170]. Just like in the area of the four freedoms, the Court gets involved more and more in the inner-organisation of the Member States, a competence, which is formally left in their hands, just like Art. 36 justifies formally the Member States

166 In Spring 1994, the German Cabinet has decided to postpone the implementation of the product safety directive by reference to the subsidiarity principle.

167 Cf. Hirschman, Exit, Voice and Loyality - Responses to Decline in Firms, Organisations and States, 1970, and J.H.H. Weiler, The Transformation of Europe, who uses Hirschman's categories as a cluster for the analysis of the European integration process.

168 Cf. Art. 155 and the Comitolgy, M. Bach, Eine leise Revolution durch Verwaltungsverfahren - Bürokratische Integrationsprozesse in der Europäischen Gemeinschaft, Zeitschrift für Soziologie 21 (1992), 16 et seq.

169 Cf. beyond what has been elaborated supra, E. Steindorff, Quo vadis Europa?, loc.cit.

170 Cf. Case C-359/92, OJ 1992 C 288/10.

to uphold their powers in social regulation. The Court is constantly repeating the basic principles of Community law, the Member States' autonomy to decide on social rights and to shape their own institutional structures, by so doing, however, it is undermining the principles it advocates for and it is constantly doing what it would publicly reject: to create social rights and to establish institutional patterns.

The point here is not so much to define the psycho-sociological constraints of that behaviour and the inner complexities of the European organs, and it is not even or not even alone, whether the Court has jurisdiction to decide on the institutional patterns and on the existences of consumer rights. It is much more whether the Court should go on further that way or whether it endangers by a new set of landmark decisions the balance between intergovernmentalism and supranationalism and provokes a severe draw-back of the Member States at the political side and of the Member States Supreme Courts' at the legal side[171]. It has to be recalled that the German Constitutional Court has decided on the constitutionality of the Maastricht Treaty with the German Basic Law[172]. Legal doctrine in the FRG shows a certain tendency to mobilize the Constitutional Court against the European Court of Justice, a strange alliance of those who want to bring the integration process to a halt and those who want to instrumentalize the national courts for initiating a democratization process after Maastricht. There is no clear answer. The further building of the Community legal order does not necessarily require landmark decisions, at least not as long as the national supreme courts are willing to follow suit[173]. The building of institutional patterns and the elaboration of social rights seems to be better described as a silent process which leads to an absorption of Member States powers on the one hand and to the building of a quasi-European state on the other.

171 Cf. J.H.Weiler, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, Journal of Common Market Studies, (31), 1993, 417 et seq.

172 Cf. Chapter 1, Federalism and Responsibility, 23 et seq.

173 What cannot be taken for granted, cf. the conflict on the notion of misleading advertising between the BGH and the ECJ, E. Steindorff, Unlauterer Wettbewerb im System des EG-Rechts, WRP 1993, 139 et seq.