Product Safety, Product Safety Policy and Product Safety Law[+]

Christian Joerges[*]

Introduction

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

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[*] Christian Joerges is Research Professor at the University of Bremen, Faculty of Law at the Centre for European Law and Politics (ZERP) and the Collaborative Research Center "Transformation of the State" (SfB597).

[1] See the colourful, though USA-related, examples given by *Feldman, L.P.*, Consumer Protection. Problems and Prospects, St. Paul/New York/Los Angeles/San Francisco 1980, 73 et seq.; *Lowrance, W.W.*, Of Acceptable Risk. Science and the Determination of Safety, Los Altos, Cal. 1976, 102 et seq.

[2] Though there are some counter-examples, the most prominent being *Nader, R.*, Unsafe at Any Speed, New York 1965.

[3] Cf. for more details *Brüggemeier, G./Falke, J./Holch-Treu, H./Joerges, Ch./Micklitz, H.-W.*, Sicherheitsregulierung und EG-Integration, Bremen ZERP-DP 3/84, 8 et seq.

[4] Cf. *Paschen, H./Bechmann, G./Wingert B.*, Funktionen und Leistungsfähigkeit des Technology Assessment im Rahmen der Technologiepolitik, in: Kruedener, J./Schubert, K. (Ed.), Technikfolgen und sozialer Wandel, Zur Steuerbarkeit der Technik, Köln 1981, 57 et seq.

There are objective reasons for these differences. The risks of nuclear power stations, the level of residual risk to be tolerated or the long-term effects of air pollution or food additives place different requirements on the identification and legal assessment of risks than do the dangers resulting from defective cots and playpens. Nevertheless, it would be illusory to imagine that the problems of technical consumer products are simple. The potential danger is considerable, and it can be just as difficult to assess the contribution of a construction feature towards accidents as it is to assess the health hazard of chemicals (see section 1 below). In connection with technical consumer products too we must ask which risks are unavoidable, which must be eliminated at all costs and which should be reduced through design requirements. The alignment of corresponding decisions to technical standards specifying general safety duties is equivalent to setting a threshold value establishing the extent of permissible risks in general terms (see section 2 below). And finally, a range of subtle and expensive instruments has also been developed for the purpose of regulating the safety of technical consumer products. The simple blanket clauses of safety laws in this area are entirely compatible with a regulatory practice which proceeds no less demandingly than is customary in the present-day regulation of health or environment hazards (see section 3 below).

1. The identification of risks

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

[5] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[6] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.3.3. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[7] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[8] *Pertschuk, M.*, Revolt against Regulation. The Rise and Pause of the Consumer Movement, Berkeley/Los Angeles/London 1982, 5 et seq. and the summary in *Bollier, D./Claybrook, J.*, Freedom from Harm, Washington, D.C./New York 1986, 275 et seq.

[9] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf; also OECD, Safety of Consumer Products. Policy and Legislation in OECD Member Countries, Paris 1980, 14 et seq.

1.1. Data

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

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

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

Shortly after publication of the National Commission on Product Safety's final report, an alternative survey method was tried out in the form of a "Household Safety Study"[16] financed by several American companies and government departments. In the first phase of the study 27,000 households were questioned about injuries and damage sustained during the past three months. In the second phase diary records of 22,000 households covering a similar period were evaluated. "Environment-linked" accidents were found to be the most

[10] National Commission on Product Safety, Final Report Presented to the President and Congress, Washington, D.C. 1970, 1.

[11] Cf. OECD, Data Collection Systems Related to Injuries Involving Consumer Products. Report by the Committee on Consumer Policy, Paris 1978.

[12] Evidence of Commission Chairman S. Statler, given to the hearings before the Subcommitee on Health and Environment of the Committee on Energy and Commerce. House of Representatives, 98th Congress, First Session on H.R. 2271 and H.R. 2201, 5 and 12.3.1981, No. 97-4, Washington D.C. 1981, 321. For the bases of these estimates cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[13] Cf. Cmnd. 9302, The Safety of Goods, 1984, White Paper, para. 9, and details of the British system in *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[14] Cf. Stichting Consument en Veiligheid, Report of 1984 Data Home Accident Surveillance, Amsterdam 1985, 2 et seq., 10, 12, 46. The report "Veiligheid in de privésfeer" (Tweede Kamer, vergaderjaar 1983-84, 18.453), Nos. 1-2, 12,17 et seq., estimates the dangers of accidents resulting from medical treatment at 2 to 2.6 million.

[15] Cf. Section 6.2. of the report (COM (84) 735, section 6.2) on the model study attached to the Commission Proposal for a Council Decision on introducing a Community system of information on accidents in which consumer products are involved (7 January 1985); for further details see *Falke, J./ Joerges, C.*, The "traditional" law approximation policy approaches to removing technical barriers to trade and efforts at a "horizontal" European product safety policy, Hanse Law Review (HanseLR) 2010, 239, 3.3. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf.

[16] Chicago 1972.

important category, with accidents in sport and play in second place; the user's own (mis-)behaviour was universally found to be a major factor in the cause of accidents. A similar method was adopted for a study of household and leisure accidents carried out in 1985 on behalf of the Government of the Federal Republic of Germany by the HUK (association of insurance companies).[17]
According to the findings of this study, 3 million home or leisure-time accidents requiring medical treatment or having an effect lasting for more than 14 days (and 100 million minor accidents) can be assumed for the Federal Republic of Germany,[18] with 12,000 deaths per year. In order to be able to define the role of products more precisely, the study distinguishes between five accident categories. According to the study, only in the case of "handling" accidents, which account for 17% of accidents, are faulty appliances a potential cause; in practice they are responsible for still fewer, only 2% of all accidents. If cases of incorrect use are disregarded and a distinction made between old and new appliances, the figure falls still further. The conclusion is that "technical shortcomings on newly purchased machines, tools or other appliances are clearly an insignificant factor in the causes of household and leisure accidents".[19]

1.2. Recording problems

"Measuring" hazards is a science in itself. When developing accident information systems it is necessary to reflect on whether data should be collected from hospital accident units and/or doctors' surgeries, how a representative sample can be obtained, to what level of detail information on the nature of injuries, the victims and the circumstances of the accident can be collected, and which product categories it would be useful to distinguish[20]. However, the data collected after clarification of all these questions still do not permit any definite conclusions on how dangerous products are. As well as the accident rate, the seriousness of injuries is also important. It is very difficult to grade and assess injuries. In the USA, the National Electronic Injury Surveillance System (NEISS) uses an Age-Adjusted Frequency-Severity Index for this purpose, taking into account not only the accident figures for individual product categories, but also the average nature of injuries, with an additional distinction by user age;[21] as of late, accident-related economic costs are also calculated, using an Injury Cost Model.
The "measuring" of product hazards can be taken even further. It seems logical for critics of the NEISS to insist that intensity of product use be considered or to call for

[17] *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985; cf. for more details *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.
[18] *Pfundt*, K., Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985, 4 et seq.
[19] Loc. cit., 190.
[20] Cf. OECD, Data Collection Systems Related to Injuries Involving Consumer Products. Report by the Committee on Consumer Policy, Paris 1978, 27 et seq. and the two preliminary studies published in the Netherlands on the extension of the PORS *Bruggers, J.H.A./Rogmans*, WH.J., Registratie van Ongevallen in de privésfeer, Veiligheids Instituut, Amsterdam 1982 and *Rogmans, W.H.J.*, Ernst en omvang van Ongevallen in den privéseer, Veilichkeits Instituut, Amsterdam 1982.
[21] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.2.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf and by way of comparison the OECD report, Severity Weighting, 1979.

epidemiological studies which would provide more accurate statistical information on the extent to which specific population groups are affected, or for the US Product Safety Commission itself to test new procedures for gathering data on causes of accidents.[22] But accident circumstances are extraordinarily complex.[23] They are influenced both by permanent and fortuitous background factors (physiological and psychological capabilities and environmental factors on the one hand, and personal factors such as illnesses and external circumstances on the other), and by unexpected events which distract the person's attention or disturb his concentration. Product quality, the effect of normal wear on the same, and sudden faults are no more than contributing factors to a complex process. Consequently, accident information systems can treat the data they collect on the involvement of products in accidents only as an impulse for more detailed follow-up studies of typical accident patterns or individual accident circumstances – the only way to obtain true information on the contribution of design features towards accidents. Such studies inevitably lead to a question of appraisal: as soon as statements on the hazardousness of products are no longer limited to statistical connections between product characteristics and accidents, in other words where the safety of products is to be judged, a distinction has to be drawn between the spheres of responsibility of manufacturers and users. We shall return to this subject presently.

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

But the HUK study not only aims to measure hazards, but at the same time pursues the ambitious goal of assessing the safety of products. For this purpose a very small number of "case studies" were carried out, with the cases selected from among the handling accidents. These studies, based on the interviews with the persons concerned, contain some very firm assessments (users chose "easy alternatives", acted "carelessly", "did not pay attention",

[22] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.2.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[23] Cf. Netherlands report "Veiligheid in de privésfeer", (fn. 14 above), 21, and *Compes, P.C.*, Sicherheitsstrategie und -taktik in der Privatsphäre, Einführung in die Problematik, in: Unfall-Risiken der Privatsphäre. Epidemiologie - Dignose - Prävention, VI. Internationales GfS-Sommer-Symposium, 3.-5. Juni 1985, Wuppertal 1986, 59 et seq. and *Gürtler*, H., Standard-Unfallhergänge im Hausbereich. Bedingungsgefüge - Ablauf - Folgen, in: Unfall-Risiken der Privatsphäre. Epidemiologie - Prävention, VI. Internationales GfS-Sommer Symposium, 3.-5. Juni 1985, Wuppertal 1986, 83 et seq.

[24] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

"were thinking about television", "were trying to carry too much luggage", "selected an unsuitable position", or "were distracted by children").[25] Such assessments are no doubt unavoidable in evaluating product safety. But simply questioning accident victims is a very poor basis for making judgments. A pilot study by the US Consumer Product Safety Commission[26] shows that only 27% of accident victims surveyed were capable of answering the question whether their accident should be attributed to a product defect, to the age of the product, to its design, to their own errors, personal inadequacies or environmental factors.[27] It also stresses that the interaction between survey personnel and respondents influences the findings in ways that are hard to calculate, that there is a tendency on the part of accident victims to blame themselves, that it is, above all, unrealistic to expect reliable, appropriate statements on product defects, still less design faults, from users, and that therefore interviewers must be trained not only psychologically, but also technically. Clearly, therefore, a product hazard survey that is not only to measure the involvement of products in accidents but also to supply conclusions as to causes and responsibilities has to be a much more sophisticated matter than the HUK study has been.

2. Assessment of hazards

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

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

In the legal policy debate on consumer product safety, the distinction between "proper" and "foreseeable use" or "misuse" plays a central role. The distinctions represent intuitively

[25] Pfundt, K. op. cit. (fn. 17), 1985, 99, 101, 105, 119. Such assessments can be found even in cases that have elsewhere led to governmental regulations. Thus, the section on lawnmowers states that the majority of accidents were caused by blades that were running or slowing down, but it states even earlier that the machine is dangerous not during mowing as such, but when stopping, starting or being cleaned (loc. cit., 136). It was precisely these characteristics that led in the US to the development of relevant safety standards (see *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.,* Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.3.2.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf).

[26] US Consumer Product Safety Commission, Division of Hazard and Injury Data Systems: Results of a Pilot Study to Collect Causal Data from Victims Treated in Hospital-Emergency-Rooms for Product-Related Injuries from April 15, 1985 through April 28, 1985, Washington, D.C. 1985.

[27] All the same, 10% of those questioned identified manufacturing or design faults as causes of accidents. This very high proportion by comparison with the findings of the HUK study is a further indication of the relevance of forgetfulness in the case of retrospective studies. In 11% of cases, product misuse was seen as the cause of an accident; 42% of these, though, concerned children under ten, whose "mistakes" were in part typical childish behaviour.

[28] *Lowrance, W.W.*, Of Acceptable Risk. Science and the Determination of Safety, Los Altos, Cal. 1976, 75; similarly cf. e.g. OECD, Product Safety. Risk Management and Cost-Benefit-Analysis, Paris 1983, 13.

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

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

However, § 3 (1) of the German GSG explicitly protects the user of technical consumer products only where they are put to their "proper use" and also refers to the "generally accepted rules of the art". In explaining the phrase "proper use", § 2 (5) of the GSG does, however, state that this is either the use specified by the manufacturer or the "normal" one for the product. These criteria may clash; accordingly, the reference to "normal use" means that the manufacturer no longer has the power to "define" the care to be expected from users of his product.[29] Even more importantly, especially in connection with safety matters, the relevant standards (DIN 820, Part 12, and DIN 31.000/VDE 1000) lay down more stringent requirements, specifying that "foreseeable misuse" must be taken into account. This amendment to § 3 (1) of the GSG on the assessment of safety aspects corresponds to the general trend in present-day safety legislation and product and manufacturers' liability law.[30]

Whilst it is important to retain this basic consensus on safety policy, it is difficult on the other hand to deduce precise criteria for establishing the appropriate safety level from the alternatives to "proper use". All norms are both capable of being interpreted and in need of interpretation. If, as required by DIN 820, Part 12 and DIN 31.000/VDE 1000, foreseeable misuse must be taken into account, a decision must be made on whether and to what extent this has to be done at the product design stage ("direct safety technique") or whether other protective measures are needed ("indirect safety technique"), or whether safety information should be sufficient ("indicatory safety technique").[31] The concept of "foreseeable" use

[29] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.3.3.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[30] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1.6. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf and on European Law *Falke, J./ Joerges, C.*, The "traditional" law approximation policy approaches to removing technical barriers to trade and efforts at a "horizontal" European product safety policy, Hanse Law Review (HanseLR) 2010, 239, 3.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf.

[31] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.3.5. Online available at: http://www.hanselawreview.org/pdf10/

leaves similar room for interpretation. Whilst Article 1 of the French Consumer Safety Act of 21 July 1983[32] refers to "conditions reasonably foreseeable by an expert" and the level of safety which can "legitimately" be expected, a decision is still required on the degree of anticipation to be required of the manufacturer and where the limits of legitimate consumer expectations lie. The fact that such decisions involve a difficult compromise between hazard avoidance, technical possibilities and economic constraints is well known from product liability law.[33]

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

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

2.2 Hazard assessment, freedom of decision and cost-benefit analyses

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

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[32] Journal Officiel 115 No. 168, 2261; cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[33] Cf. for details *Brüggemeier, G.*, Deliktsrecht. Ein Hand- und Lehrbuch, Baden-Baden 1986, para. 544 et seq.

[34] For details on the difficulties of interpreting the "unreasonable risk" test, see *Hoffmann, M.E.*, The Consumer Product Safety Commission: In Search of a Regulatory Pattern, Columbia J. of Law and Social Problems 12 (1976), 393, 401 et seq.; see also *LaMaccia, J.T.*, The Consumer Product Safety Act: Risk Classifications and Product Liability, Indiana L. Rev. 8 (1985), 846, 849 et seq.

[35] This debate is therefore fully documented; cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf for French law, *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.6.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf for British law and *Falke, J./ Joerges, C.*, The "traditional" law approximation policy approaches to removing technical barriers to trade and efforts at a "horizontal" European product safety policy, Hanse Law Review (HanseLR) 2010, 239, 3.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf and *Joerges, C./Micklitz, H.*, Completing the New Approach through a European Product Safety Policy, Hanse Law Review 2010, 383, 3.3. for European law. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art07.pdf.

2.2.1. Political and moral hazard assessments

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

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

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

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

[36] Cf. in particular *Lave, L.B.*, The Strategy of Social Regulation: Decision Frameworks for Policy, Washington, D.C. 1981, 8 et seq.

[37] Consistently, DIN 31.000/VDE 1000 says that in case of doubt safety requirements take priority over economic considerations.

[38] *Lave, L.B.*, The Strategy of Social Regulation: Decision Frameworks for Policy, Washington, D.C. 1981, 8 et seq.

[39] Cf. OECD, Product Safety. Risk Management and Cost-Benefit-Analysis, Paris 1983, 34 et seq.

[40] Loc. cit., 45-51; a more general and even more sophisticated list is provided by *Lowrance, W.W.*, Of Acceptable Risk. Science and the Determination of Safety, Los Altos, Cal. 1976, 86 et seq.

differentiation by age groups, recognizability of dangers, likelihood of misuse; increased costs resulting from safety requirements and anticipated economic effect of a reduction of hazards.

2.2.2. Economic rationality criteria

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

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

Taking a position in principle on the application of cost-benefit analysis to problems of safety regulation serves little purpose unless we go into the details of the different variants of this analysis method. However, a thorough cost-benefit analysis indisputably involves considerable expense, is often based on very unreliable estimates[44] and does not take

[41] Out of the extensive literature available, cf. *Miller III, J.C./Yandle, B.* (eds.), Benefit-Cost Analyses of Social Regulation, Washington, D.C. 1979; a brief introduction can be found in OECD, Product Safety. Risk Management and Cost-Benefit-Analysis, Paris 1983, 63 et seq.

[42] Non-authorized memorandum of the US Consumer Product Safety Commission of 25 February 1986 by P.H. Rubin, 3.

[43] A summary of the situation can be found in *Viscusi, W.K.*, Risk by Choice. Regulating Health and Safety in the Workplace, Cambridge, Mass./London 1983, 93 et seq.

[44] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.3.2.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf (lawnmowers) and 4.3.2 (formaldehyde) and the examples in OECD, Product Safety. Risk

account of possible distributive effects or the effects of regulations on competition; furthermore, criteria for calculating benefit in cash have to abstract from individual suffering, so that cost-benefit calculation requires willingness by the decision-maker to take an abstract approach.

3. Instruments of Safety Regulation

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

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

Markets too are regulatory mechanisms. Their particular characteristic is that they do not specify the "regulatory outcome", but rely on the supply-and-demand discovery process. It can be shown that under certain circumstances markets bring about an optimum allocation of resources. This applies to the price-performance relationship in general and therefore also to the safety level of products. Here too it is a matter of weighing up benefit and cost in order to decide which safety precautions are economically viable and which hazards should be tolerated. However, the market process brings optimum results only under certain model conditions which in practice are difficult to guarantee, particularly as far as the level of safety is concerned.[45] This is particularly true of the rationality of consumers' safety decision.[46] Only a "fully" informed decision would be economically rational. This condition is sometimes followed strictly, sometimes less so. It will certainly not be fulfilled, in fact it cannot be fulfilled, as long as the stage reached by medical research does not permit conclusions on health hazards. On the other hand this condition is not sufficient in cases where the user of a product endangers not only himself, but others as well. "Normal" cases are more difficult to assess. The hazards are recognizable, but the user does not bother to obtain the information, for reasons of economy or convenience. Attention is drawn to

Management and Cost-Benefit-Analysis, Paris 1983, 79 et seq.

[45] Cf. Oi, 1973; *Streit, M.E.*, Reassessing Consumer Safety Regulation, in: Giersch, H. (ed.), New Opportunities for Entrepreneurship, Tübingen 1984, 190 et seq.

[46] This is even conceded by *Viscusi, W.K.*, Regulating Consumer Product Safety, Washington D.C./London 1984, 5 et seq.

hazards, but the information cannot be processed; hazards are seen but ignored, since "bad things always happen to the other guy".[47] In addition, suppliers can put such cases of "information failure" to strategic use. In any event we should not expect product advertising to draw attention to hazards, and we must not automatically assume that a high level of safety is always beneficial to the supplier.[48]

3.1.1. Information policy measures

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

3.1.2. Product liability

A manufacturer's strict liability for defective products constitutes, from the viewpoint of economic analysis of liability law, a form of compulsory insurance of consumers against particular hazards involved in the use of products; the customer's freedom to choose "uninsured", but cheaper, products and to rely on his own care in using the product is thus

[47] *Calabresi, G.*, The Costs of Accident, New Haven/London 1970, 56.
[48] Cf. *Akerlof, G.A.*, Market for Lemons: Quality and the Market Mechanism, Quarterly J. of Economics 84 (1970), 488 et seq.
[49] For the up-to-date situation cf. *Dedler, K./Gottschalk, J./Grunert, K.G.Heiderich, M./Hoffmann, A.L./Scherhorn, G.*, Das Informationsdefizit der Verbraucher, Frankfurt/New York 1984.
[50] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.3.2.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.
[51] Cf. *Silberer, G./Raffée, H.*, Warentest und Konsument, Frankfurt/New York 1984.
[52] Cf. *Mayer, L.N./Nicosia, F.M.*, Consumer Information: Sources, Audiences, and Social Effect, in: Katz, R.N. (ed.), Protecting the Consumer Interest, Cambridge, Mass. 1976, 41 et seq.

lost.[53] However, the obligation on the manufacturer to take responsibility is only an incentive to reduce product hazards. It remains up to the manufacturer what steps he takes in response: design changes, liability insurance, waiting and seeing. This indirect mode of operation of liability law, which exploits the market mechanism, explains why product liability is often interpreted as a "pro-market" alternative to direct government regulation of product safety, and recommended as such.

The actual effects of product liability on the level of safety of consumer products depend on the details of liability, the treatment of development hazards, the requirements in respect of proving a connection between product defects and damage, the level of penalties and consequences of co-responsibility, etc. Moreover, only an analysis of these detailed regulations can show how far product liability in fact relies on the logic of the market process, and how far it additionally switches risks according to criteria of social acceptability. There are also other various factors which, independently of the more detailed legal aspects of liability, restrict its regulatory effects.[54] First of all it is highly doubtful whether penalties under liability law are or ever can be so formulated as to produce the required safety policy effects. At any rate the "signals" of product liability law are rather too irrational; for example, in the case of injuries to children a death can be "cheaper" than a serious injury. Secondly, the reactions of firms to claims for damages depend on contingent circumstances: the competition situation on relevant markets, the internal organization structures and financial strength of the firm concerned, and its willingness not to simply ignore the possibility of future penalties in favour of sure short-term advantages. A third cause is the insurability of the liability risk. Insurance premiums are obviously not specifically matched to risk. It seems possible to make distinctions only between branches or product groups, as adapting premiums to product-specific risk factors in all cases would not be compatible with the philosophy of insurance protection, nor in any case with insurance practice.[55] A fourth weakness of manufacturers' liability stems from the extreme selectivity of the private prosecution system. The law covering manufacturers' liability can neither guarantee that injured parties will take upon themselves the trouble and financial risk of a private prosecution, nor can or should it exclude out-of-court settlements.[56]

3.2. Product standards

The weaknesses of information policy and product liability law mean that in principle the justification for preventive safety regulations is undisputed. It is also undisputed that the technical complexity of product regulations and of continually adapting them to technical progress is beyond the means of general parliamentary legislation procedures, meaning that the task of introducing specific regulations has to be delegated. In this connection there are ideally two alternatives: the introduction of legally binding safety regulations by specialized public agencies, or the introduction of self-administered safety norms by the

[53] Cf. on economic analysis of product liability, *Adams, M.*, Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung, Heidelberg 1985, 17 et seq.

[54] Cf. *Pierce, R.J.*, Encouraging Safety: The Tort Limits of Tort Law and Government Regulation, Vanderbild, L. Rev. 33 (1980), 1281 et seq., *Sugarman, S.D.*, Doing Away with Tort Law, California L. Rev. 73 (1985), 558 et seq.; *Eads, G./Reuter, P.*, Designing Safe Products. Corporate Responses to Product Liability Law and Regulation, Santa Monica, Cal. 1983.

[55] See also *Schäfer, H.-B./Ott, C.*, Lehrbuch der ökonomischen Analyse des Zivilrechts, Berlin 1986.

[56] *Ramsay, J.D.C.*, Rationales for Intervention in the Consumer Marketplace. Office of Fair Trading, London 1984.

industry concerned. However, in practice these ideal alternatives are not encountered; product regulation is dominated by hybrid systems with a tendency towards "corporatism".

3.2.1. Mandatory product standards

As the assurance of safety is one of the duties of the State, it would appear logical to make State authorities responsible for drafting product regulations. This is the path followed by modern product safety laws. The UK Consumer Protection Act 1961 delegated the issuing of safety regulations to the executive authorities, giving Parliament only the right to participate in the process, and the right of subsequent annulment.[57] In the USA the Consumer Product Safety Act, in its original version of 1972, went even further. It set up, in the form of the Consumer Product Safety Commission, a State agency (though protected from the direct control of the House of Representatives or the Administration), which was allowed to fix its own priorities and draft its own regulations.[58] The practical and organizational problems of such an allocation of responsibilities match the complexity of a comprehensive normative assessment of hazards.[59] For such an assessment it is first of all necessary to "measure" risks, i.e. to develop an information system for the identification of product hazards. A second precondition is that the authority concerned should be competent, from the technical and scientific point of view, to assess design characteristics of technical consumer products, to identify any risks and develop technically feasible requirements aimed at reducing the risk. A third precondition is that it should be competent, from the economic and sociological viewpoints, to assess the social consequences, implications for competition policy, costs and benefits of a regulation. Authorities invested with only legal competence to pass product regulations are not in a position, or if so only to a limited extent, to carry out a comprehensive assessment of risks.

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

[57] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.2.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[58] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.1.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[59] See 2.2.1 above.

[60] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.2. and 2.3. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[61] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

3.2.2. Technical norms

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

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

[62] Cf. *Marburger*, P., Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979, 181 et seq.; *Kypke, U.*, Gesellschaftliche Orientierung der überbetrieblichen technischen Normung unter besonderer Berücksichtigung verbraucherpolitischer Ziele, Diss. Duisburg 1983, Ch. III; *Hamilton, R.W.*, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety of Health, Texas L. Rev. 56 (1978), 1329, 1331 et seq., 1368 et seq.

[63] Cf. *Schuchardt, W.*, Außertechnische Zielsetzungen und Wertbezüge in der Entwicklung des deutschen technischen Regelwerks, Technikgeschichte 46 (1979), 227, 236 et seq.

[64] Cf. summary given by *Hamilton, R.W.*, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety of Health, Texas L. Rev. 56 (1978), 1329, 1379 et seq.

[65] Cf. Marburger, Rechtliche Bedeutung, 1982, 138 et seq.

[66] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.4.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[67] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.6.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[68] Cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, Hanse Law Review (HanseLR) 2010, 289, 3.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

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

3.3 Follow-up market controls (Recalls and bans)

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

In 1981 the OECD proposed solutions to the problems of follow-up market control based on the recall provisions of section 15 of the CPSA 1972.[72] The OECD report divides the procedure into three stages:[73] (1) The essential first step is the systematic recording of information on product hazards. The main information sources are accident information

[69] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1.7. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf for more on this.

[70] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[71] *Hamilton, R.W.*, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety of Health, Texas L. Rev. 56 (1978), 1329, 1447.

[72] OECD, Recall Procedures, 1981; for US law cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[73] Cf. in particular OECD, Recall Procedures, 1981, 14 et seq., 31 et seq.

systems and reports from supervisory or certification authorities, followed by reports from manufacturers and importers, and complaints from consumers and consumer organizations. (2) When the dangers have been identified suitable remedies must be taken. First of all the consumers concerned must be warned about the hazards, then positive action must be taken to eliminate hazards and provide compensation for any damage. Measures must be adapted to the individual case; repairs may be sufficient, but in some cases products will have to be exchanged or destroyed and damages paid. (3) For the collection of information, assessment of hazards, and the preparation and monitoring of remedial measures it is necessary to set up a central authority which is in a position to carry out follow-up market control and must therefore be invested with the required legal powers.

No Community Member State has yet fulfilled these requirements. German law provides for marketing bans (§ 5, GSG), but a recall obligation exists only in conjunction with manufacturers' liability.[74] English law provides for "prohibition orders" and "prohibition notices" which the Secretary of State can invoke in the case of "imminent hazards" (see § 3 (1) a - c of the Consumer Safety Act 1978); in practice, however, these instruments are not applied and it is not intended to develop them into a recall procedure.[75] In France the Consumer Safety Law of 21 July 1983 is a potentially far-reaching instrument providing for recalls through the State machinery, but as yet it has hardly been tried out.[76]

In the face of such reticence and resistance in the Member States, it should be noted at this point that the Community's current efforts to complete the internal market will be bound to have consequences for the development of follow-up market controls. The principle that products with European certificates of conformity manufactured according to foreign standards or tested by foreign institutes should be allowed to move freely in all Member States will encounter safety-motivated reservations which may also be linked to protectionist interests. We will return to the resulting need for action at a later stage.[77]

[74] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf, and *Brüggemeier, G.*, Deliktsrecht. Ein Hand- und Lehrbuch, Baden-Baden 1986, para. 563 et seq.

[75] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.3.3. and 2.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[76] Article 3 of Loi No. 83-660 (fn. 32) and *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1.5.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[77] *Falke, J./ Joerges, C.*, The "traditional" law approximation policy approaches to removing technical barriers to trade and efforts at a "horizontal" European product safety policy, Hanse Law Review (HanseLR) 2010, 239, 3.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf; *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, Hanse Law Review (HanseLR) 2010, 289, 3.3. and 3.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf; *Joerges, C./Micklitz, H.*, The need to supplement the new approach to technical harmonization and standards by a coherent European product safety policy, Hanse Law Review (HanseLR) 2010, 251, 3.2. and 4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art06.pdf; *Joerges, C./Micklitz, H.*, Completing the New Approach through a European Product Safety Policy, Hanse Law Review 2010, 383, 3.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art07.pdf.

4. Recapitulation

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