

## Examples of Product Safety Legislation<sup>+</sup>

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### Introductory Remark

Up-to-date comparative accounts of product safety law in force in Community Member States are unavailable. This is no coincidence. Technical safety law, to the extent that it deals with technical consumer goods, has been largely ignored by academic legal science, and therefore still less noticed in comparative law. Moreover, product safety law specifically is much more strongly bound up than, say, general civil law with technical and organizational administrative structures that must be known in order to understand its regulatory functions, but are hard for the foreign observer to gain access to. The description below will therefore have to proceed selectively, and will be confined to the law of France, Britain and the Federal Republic. Restriction to these States is problematic because it means overlooking innovative developments in smaller Member States and the situation in new ones. But the choice of France, Britain and the FRG is in line with the economic importance of these States and their general influence in the Community. US law is also taken into account, since important stimuli to the further development of product safety law came from the American Consumer Product Safety Act.

### 1. Product safety law in France

French product safety law is hard to fit into a market-oriented approach<sup>1</sup>. The French analytical framework, conceived from a State or administration viewpoint, of prevention/repression/reparation, cuts straight across a German market-oriented category frame of market-related rules, setting of standards and follow-up market controls<sup>2</sup>. Given the emerging Europeanization of safety policy, it is important to grasp what convergence exists and seek to bring it into a European, self-contained product safety policy.

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<sup>1</sup> Since France can be regarded as a market economy in the German sense only conditionally; see *Behrens, P./Korb-Schikaneder, F.*, *Europäisches Wettbewerbsrecht vor französischen Gerichten*, *RabelsZ* 1984, 457 et seq.

<sup>2</sup> This classical approach can be found in precisely the same way in the consumer policy debate; see *Calais-Auloy, J.*, *Proposition pour un Nouveau Droit de la Consommation. Rapport de la Commission de la Refonte de Droit de la Consommation au Secrétaire d’Etat auprès du Ministre de l’Economie des Finances et du Budget chargé du Budget et de la Consommation*, Paris 1985, 77 et seq.

### 1.1. French perspectives on product safety law

An approach to the field can be secured from a schematic overview of French safety and standards policy. A historical outline of the development of both policies will be attempted. An evaluation of the process might seem to be a bold venture, but the Europeanization of product safety has to start from a definition of the state of Member States' product safety policy. A more technical matter is the explanation of the French categorical framework of prevention/repression/ reparation, but this is a necessary prerequisite for an understanding of the specifically French way of perceiving and understanding product safety policy.

#### 1.1.1. Schematic overview of French product safety and standards policy

The diagrams below make no claim to completeness, but do aim to outline the tendencies operating in both policy areas. This cannot be done without considerable simplification. As starting point has been taken the state of legal development at the turn of the century. This is simply because relevant laws were enacted in France shortly thereafter. The thread of development is then picked up again for pragmatic reasons after the Second World War, with special consideration going to the wave of reforms in the 1970s, which then led to a phase of regression. Since there has not been a coherent product safety policy in France so far, at least not including technical standards, development in both policy areas must initially be described separately. This leads to a time shift, since standards policy as it were leaps over the reform phase of the 70s, and does not take on importance in France until economic crises, unemployment and the wave of deregulation began to determine day-to-day politics. For the conceptual framework, the classical French system of prevention/repression/reparation<sup>3</sup> has been adopted. A transfer of this conceptual approach into standards policy makes it possible to compare regulatory instruments in each policy area with each other and thereby show that there is no overlap.

“Prevention” includes the following measures: information, standard setting both private and governmental, follow-up market control (administratively ordered recall), prohibition orders and the work of the French Consumer Safety Commission.

“Repression” concerns primarily penal sanctions, but also covers imposition of compensatory payments and accompanying measures of sanction (bans or recalls ordered by judges, confiscation, destruction, closures etc.).

“Reparation” deals with the French version of manufacturer liability.

The reasons for the French conceptual structure lie in the one-sidedly administrative perspective on product safety as whole. The viewpoint has already undergone some change through inclusion of reparation as an instrument of safety policy, first incisively practised by the Commission de la Refonte.<sup>4</sup> The liberalization policy pursued for some ten years now in France ought to lead to a blurring of the outlines of the categories, since the private economy, the consumer and the courts will gain ground in safety regulation. However, at present the whole political, legal policy and legal theory debate on standardization and product safety in France continues to follow traditional lines.

<sup>3</sup> This distinction is based essentially on the work of the Commission de la Refonte (fn. 2 above) and the description of product safety law by *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, *Dalloz* 1984, 13 et seq., 19 et seq., which is so far the sole comprehensive overall description of the law.

<sup>4</sup> See *Calais-Auloy, J.*, Proposition pour un Nouveau Droit de la Consommation, Rapport de la Commission de la Refonte de Droit de la Consommation au Secrétaire d'Etat auprès du Ministre de l'Economie des Finances et du Budget chargé du Budget et de la Consommation, Paris 1985.

## 1.1.2. Product safety and standardization side by side

The conceptual framework of French product safety policy has (from the consumer's viewpoint too and especially) led to a very narrow understanding of product safety, which has no room for a number of relevant cross-connections. Thus, there is no systematic incorporation of standardization into product safety policy. This is still more true of certification, which is hardly discussed at all. Though manufacturer liability is included in safety policy, it is treated only as leading to individual compensation for damages, not as an instrument for controlling product safety. Finally, there is no discussion of the relationship between manufacturer liability and technical standard setting. The research approach pursued here, of bringing product safety and technical standards into relation with each other, meets in France partly with rejection and partly with misunderstanding. It is rejected because the administration continues to be seen as the best guarantor of product safety; it is misunderstood because the connecting lines are not seen, due to the absence of intermeshing between product safety and standards; indeed perhaps they do not even exist. The last point is true at any rate for the sphere of manufacturer liability, which seems not to refer to technical standardization at all.

Regulation of product safety is a task for government in France.<sup>5</sup> Standards are set by order. The administration's responsibility for product safety has remained unshaken even by the reform attempts of the 80s. The setting up of a Consumer Safety Commission<sup>6</sup> was fitted seamlessly into an administrative product safety policy, for all that was done was to shift tasks from the administration, without limiting ultimate administration responsibility and control at all. Looking closely at the distribution of roles among the three powers, the thing to stress from a French viewpoint as a decisive change in law on consumer safety in 1983 was the cautious inclusion of the courts in product safety policy.<sup>7</sup> Still existing legislative and executive mistrust of inclusion of the judiciary can be seen from the fact that though Art.1 is conceived as a general clause, it is not directed explicitly at the courts. Accordingly, until the significance of Art. 1 has become clear, more importance should attach to the courts' power, newly introduced in 1983, to issue a banning order or withdraw products from the market by emergency procedure on application - and not just the relevant secretary of state or consumer minister, or certain administration officials.<sup>8</sup> The 1978 law still saw product safety policy entirely administratively, and was explicitly aimed at excluding the courts from prevention.<sup>9</sup>

Standardization is in France a task for government.<sup>10</sup> AFNOR has been incorporated into the governmental organization of standardization, with the task of drawing up technical standards, which however has to be supervised and checked by the Commissioner for Standardization as representative of the State. AFNOR has discretion only insofar as it is allowed by the French administration. The essentially governmental and administrative organization of standardization also meant that the reforms of the 1980s changed nothing. Nevertheless, the reform is bringing shifts that might in the long term lead to a change in the division of tasks between government and the economy. The keywords are privatization

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<sup>5</sup> For details see 1.4 below.

<sup>6</sup> See 1.3 below.

<sup>7</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, *Dalloz* 1984, 13 et seq., 19 et seq.

<sup>8</sup> See point 1.4.1 below.

<sup>9</sup> *Calais-Auloy, J.*, *Droit de la Consommation*, Paris 1980, 113 et seq.

<sup>10</sup> See point 1.7 below.

and politicization of standardization. Privatization comes in since the reform made the administration yield some competences to the privately organized standards body AFNOR; politicization because creation of the Supreme Council for standardization makes the guidelines for standardization policy into a topic of public debate. The parallel with the standardization agreement reached in 1975 between DIN and the Federal Government suggests itself.<sup>11</sup> No intermeshing of the reform attempts in product safety law and in standardization, which were pushed forward in parallel, they took place, at least openly. With some exaggeration, one might say that product safety was discussed without standardization, and standardization without product safety. Para. 3 of the GSG (reference to standards) constitutes, from the German viewpoint, the bridge between the two policy areas. C. Germon and P. Marano<sup>12</sup> proposed the “German solution” in their report to the French Ministry for Industry. No discussion of the advantages and drawbacks of the German approach took place. However, there were some hints at it. The rearrangement of French standardization was aimed primarily at strengthening the French economy’s competitiveness; expansion of consumer protection and the setting up of a supreme council for standardization were to enhance acceptance of French standards in public awareness. Though the German GSG and German consumer trust in standards were taken by C. Germon and P. Marano as a shining example, the French plainly went their own way towards increasing the national competitiveness. Comparison of the reform proposals with the law shows that the French government ultimately shrank from copying the German method of reference.

## 1.2. The “safety philosophy” of the 1983 law

While Art. 1 of the French law on product safety<sup>13</sup> does lay down a general obligation on the manufacturer to bring only safe products to the market, reference to the “generally recognized rules of the art” (allgemein anerkannten Regeln der Technik) is lacking:

*Les produits et les services doivent, dans des conditions normales d'utilisation ou dans d'autres conditions raisonnablement prévisibles par le professionnel présenter la sécurité à laquelle on peut légitimement s'attendre et ne pas porter atteinte à la santé des personnes.*

The constitutive elements of this general clause are (1) the “autres conditions prévisibles par le professionnel” and (2) “la sécurité à laquelle on peut légitimement s’attendre”. It is sometimes disputed that these are indeed two constitutive elements, since the “safety one may legitimately expect” also covers admissible use. This is not so.<sup>14</sup> The “other reasonably foreseeable conditions” describe the safety requirements on manufacture of the product. The addressee is the manufacturer. The “safety one may legitimately expect”, on the other hand, defines the consumer’s justified expectations of safety. Though the viewpoints can theoretically be separated, in practice they nevertheless stick very closely together. For the

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<sup>11</sup> Cf. 3.4.2 below.

<sup>12</sup> Germon, C./Marano, P., La normalisation clé d'un nouvel essor, rapport au Ministre de la Recherche et de l'Industrie, Paris 1982.

<sup>13</sup> Loi no. 83-660 du 21 juillet 1983 relative à la sécurité des consommateurs et modifiant diverses dispositions de la loi du 1er août 1905, German translation in PHI 1984, 71 et seq.

<sup>14</sup> Schmidt-Salzer, J., Kommentar EG-Richtlinie Produkthaftung, Bd. 1: Deutschland, Heidelberg 1986, Art. 6, para. 13 et seq., 116 et seq., 138 et seq.

actual safety level must include requirements on the manufacturer and the consumer's expectations.

#### 1.2.1. The general clause in Art. 1

The important innovation in the 1983 law was the general duty of safety imposed on the manufacturer. France was thus drawing the consequences of the almost complete failure of the 1978 framework regulations.<sup>15</sup>

Only two orders were issued between 1978 and 1983. Accordingly, administrative regulation of the classical type could be regarded as having failed. The cumbersome decision-making process within the administration must have given the stimulus for setting up a separate consumer safety commission, which would have some autonomy at least in the areas of information gathering, assessment and processing. In 1985 the Commission had a budget of 2.4 million francs at its disposal, 500,000 francs of which is supposed to be for carrying out research. The secretariat consists of four people, including a secretary.

Through the general clause, the Commission can itself consider almost any question; it is not dependent on special authorization by any order or provision. Just this was the weakness of the 1978 law.<sup>16</sup> Administrative cumbersomeness again no doubt helped in having the courts brought back in to the process of State standard setting. Even these changes, however, do not alter the main thrust of product safety regulation. As before, the chief addressee is the administration, which alone can give the safety obligation legal bindingness, by specifying the general clause by enacting orders, or by a ministerial decree.<sup>17</sup>

Since the French legislator has rejected adoption of the method of reference to standards, the question remains open as to how the safety standards can be made specific. Technical standards can be adduced as aids to interpretation, but their observance does not offer the French manufacturer any protection against action under Art. 1.<sup>18</sup> In practice, the manufacturer's main fear must be of the activities of the Consumer Safety Commission, which has explicitly stated that the safety requirements of Art. 1 may well lie higher than those of the technical standards drawn up by AFNOR.<sup>19</sup>

#### 1.2.2. Determination of safety levels

The shift in French safety philosophy emerges clearly from the change in wording from the 1978 safety law's "conditions normales d'utilisation" to the 1983 "autres conditions raisonnablement prévisibles par le professionnel (qui doivent présenter) la sécurité à laquelle on peut légitimement s'attendre". The 1983 safety law for the first time separated the distinct standpoints of consumer and manufacturer, and at the same time heightened the

<sup>15</sup> Loi no. 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services. The decisive passage of Art. 1 goes "dans des conditions normales d'utilisation". On the Act, see *Calais-Auloy, J.*, *Droit de la Consommation*, Paris 1980, 113 et seq.

<sup>16</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, *Dalloz* 1984, 13 et seq., 19 et seq., 14 et seq.

<sup>17</sup> More details in 1.4 below.

<sup>18</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, *Dalloz* 1984, 13 et seq., 19 et seq., 17, para. 13.

<sup>19</sup> Commission de la Sécurité des Consommateurs, 1er Rapport au Président de la République et au Parlement, 1985 (cited below as Commission, 1985), 15; Commission de la Sécurité des Consommateurs, 2ème rapport au Président de la République et au Parlement, 1986 (cited below as Commission, 1986), 13.

requirements on the manufacturer. The criterion is not proper use, but reasonably foreseeable use; this is what the manufacturer has to take as guide in design and production. Not many problems are presented by the consumer's position. The definition states clearly that it is not the individual viewpoint that should be decisive, but the position of the average consumer.<sup>20</sup>

Far greater difficulties of interpretation are presented by the intensification of the safety obligations on manufacturers.<sup>21</sup> The elementary political significance of the change in safety policy becomes clear from the stormy parliamentary debate. Admittedly, the preliminary draft had focused on "condition anormale d'utilisation" (improper use), thus considerably contributing to raising the temperature. Efforts then concentrated on clarifying what was to be understood by "autres conditions raisonnablement prévisibles par le professionnel". The French debate becomes comprehensible only if it is borne in mind that consumer organizations were pressing for adoption of "improper use". The move away from "condition anormale d'utilisation" made two things clear: (1) improper use resulting from culpable conduct by the consumer was not to be covered by the general clause; (2) on the other hand, foreseeable collective error was to be covered. The parliamentary debate centred on the "condition anormale" alone. By contrast, there was wide unanimity about obliging manufacturers to take account not only of foreseeable conduct but also specifically of foreseeable misuse. But even the French formulation of the general clause is of no further help when it comes to distinguishing collective foreseeable misuse from misuse that is unforeseeable because it is improper. The distinction will be left up to the judge, who will have to decide how far the marketing of a faulty product is criminal, or else to be compensated for by payment. This presupposes that in the specific case an order has been issued that makes the general clause specific.

It is hard to give any meaningful summary. Experience with the new product safety law of 1983 is very limited, so that the important fact that remains is that in the European Communities it is only in France that there is a "safety philosophy" that explicitly includes foreseeable "misuse".

### 1.3. Information policy and the Commission for Consumer Safety

A State policy on safety information has existed in France only since 1983. The 1978 law,<sup>22</sup> even though its title includes "information to consumers", provided no measures to meet the consumer's specific safety requirements. It was only with the 1983 law<sup>23</sup> and its creation of the Consumer Safety Commission that there was an instrument aimed essentially at improving information.

#### 1.3.1. Information from regulatory bodies

The Commission has the task of gathering, analysing and (within limits) informing the public of necessary data on product safety.<sup>24</sup> To make it possible to set up a database,

<sup>20</sup> Pizzio, J.-P., La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq., 15.

<sup>21</sup> On all this see Pizzio, J.-P., La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq., 15-17.

<sup>22</sup> Op. cit., 14 et seq.

<sup>23</sup> See above, fn. 13.

<sup>24</sup> Pizzio, J.-P., La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq., 19 et seq. and the two annual reports of the Consumer Safety Commission (fn. 19 above).

almost all authorities and institutions that might be concerned with safety problems connected with the use of consumer goods are obliged to inform the Consumer Safety Commission.<sup>25</sup> Theoretically, therefore, all authorities nationwide would be obliged to notify the Consumer Safety Commission of all damage, accidents, and suspicions that might have to do with the manufacture or use of an unsafe consumer item. The courts are included in the obligation of notification. In practice, this is a compromise in the dispute about setting up a national accident surveillance system. Just as with other European Community Member States, France too in the early 80s gave out contracts for research into the feasibility of a national accident surveillance system to combat accidents and unsafe products.<sup>26</sup> The arguments adduced against setting up a national accident surveillance system more or less coincide with the German stance against a Community one.<sup>27</sup> In fact, the Community directive on setting up an accident surveillance system has overtaken developments in France.<sup>28</sup> The Consumer Safety Commission has since its creation been doing the necessary preliminary work to permit a nationwide accident surveillance system. To date, four hospitals have declared their willingness to cooperate. How far the notification obligation on French supervisory authorities is suitable for setting up a wider, or different, data picture is still an open question. At any rate, the French courts have been *de facto* refusing cooperation.<sup>29</sup> The Commission's 1985-6 annual report allows no conclusion as to whether the authorities in fact furnish the Commission with information, or whether information that does come in is technically useful.

The Consumer Safety Commission is further responsible for sifting incoming data, determining significant points and selecting those to analyse further. Here it may draw on the help of the French laboratories. Its small staff makes it hard for the Commission to develop activities of its own to any noteworthy extent. It is largely reduced to using factual and issue analyses from third parties, or to trusting to their quality. Cooperation has intensified in the second year of the Commission's existence.<sup>30</sup>

Data evaluation finds its formal conclusion in the production of reports or parliamentary position papers. These are later published in the activities reports for each calendar year. The Commission is aiming at publication in the French Official Journal.<sup>31</sup>

### 1.3.2. Consumer information

The Consumer Safety Commission can also approach the public itself.<sup>32</sup> Though it is forbidden from sending reports or opinions to the press itself, it does have the possibility of

<sup>25</sup> Art. 14 (2) of the 1983 Act (fn. 13 above).

<sup>26</sup> *Accidents Domestiques*, 1981; cf. esp. the ministerial position on this report: *Ronze, B.*, (Inspecteur Général des Finances). Note sur un recensement éventuel des données relatives aux accidents de la consommation, 2.7.1981, Paris 1981.

<sup>27</sup> See esp. *Ronze, B.*, (Inspecteur Général des Finances). Note sur un recensement éventuel des données relatives aux accidents de la consommation, 2.7.1981, Paris 1981, in his "Resumée et Conclusions".

<sup>28</sup> See the Council decision of 22 April 1986 concerning a demonstration project with a view to introducing a Community system of information on accidents involving consumer products, OJ L 109, 26 April 1986, 23; for details on this 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>.

<sup>29</sup> For a criticism see Commission, 1985, 13.

<sup>30</sup> Thus Commission, 1986, 12-14.

<sup>31</sup> See Commission, 1986, 16 et seq.

<sup>32</sup> On this cf. Commission, 1985, 15.

publishing a summary. This has in fact been done, to date without objection. This means that the Commission has opened up a way of bringing safety problems in handling consumer goods to the attention of consumers. The Commission is at present considering how it can reach consumers still better. A quarterly publication of its findings, a safety bulletin as it were, might serve this end. For direct contact with the consumer, however, much greater importance attaches to whether the videotext system TELETEL, widespread in France (1.8 million users) can be successfully used to disseminate information. A pilot study has furnished conclusions about the prospects by the end of 1987<sup>33</sup>.

#### 1.4. Preventive regulation of product safety<sup>34</sup>

In the whole conception of product safety law, the administrative regulation of product safety stands at the centre of interest. For it is only if the general clause can be made specific in further administrative measures that it can – quite apart from the range of tasks of the Consumer Safety Commission – develop legal effect for the commercial circles involved. The distinction between normal procedure and emergency procedure is central to an understanding of the French safety law.

##### 1.4.1. The normal procedure for product regulation

For removing unsafe products from the market, the law<sup>35</sup> provides for a still relatively cumbersome procedure, justified on grounds of finality and of possible heavy damages for the industries concerned. In formal terms, the procedure can be split into two sections. The first phase takes place before the Consumer Safety Commission, which is called on by either the minister, a consumer organization, the industry, the trade or individuals to take up a problem. The Commission may also take up a matter itself. Once the affair has got going, the Commission sets experts from laboratories and other scientific institutions to work evaluating the product. At the same time firms involved are heard.<sup>36</sup> They can present their position and may make proposals for removing the hazard by changes to the product. The Commission has wide discretion as to how it acts during such negotiations. Only if it is convinced that the product continues not to offer the safety required by Art.1 does it furnish a recommendation as to how the ministries should respond to the hazard from the product. The *second phase* then takes place within the administration. The ministry or ministries are in no way bound by the Commission's suggestions. Their importance will depend ultimately on whether the relevant ministries tend to follow the recommendations, or to incorporate them into measures to be taken. According to the text of the law, two categories are available:

- firstly, general measures, laid down by way of regulation. These are ones that concern a range of products or of services. These regulations require agreement among several ministries as to whether there is in fact a need to adopt a regulation;
- secondly, specific measures, which may be laid down by ministerial order. Only a named product or service may be the object of these. Agreement among ministries is necessary.

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<sup>33</sup> Thus Commission, 1986, 5.

<sup>34</sup> The following account is based on the final report of the Commission de la Refonte (fn. 2 above) and the explanations by Pizzio, *J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq.

<sup>35</sup> Art. 2 of the 1983 Act (fn. 13 above).

<sup>36</sup> As stressed by Commission, 1985, 5.



By contrast, there are no differences as to the means available to the ministries to ban the risk. The 1983 law considerably expanded the arsenal available for combatting hazards by comparison with the 1978 law<sup>37</sup>.

#### 1.4.2. The emergency procedure for product regulation

However, the normal procedure is much too clumsy when a danger that has arisen has to be responded to quickly. Accordingly, the law provides for the possibility of emergency measures, to be adopted without involving the Consumer Safety Commission. At the same time, though, they are provisional in nature. The only requirement for initiating the emergency procedure is the existence of an actual situation of risk. This need not be grave; it is the imminence of the damage that creates the urgency, not the severity. Accordingly, a non-immediate risk situation justifies commencement only of the normal procedure, even if it is severe. With a view to increasing the range of possibilities of intervention, the law<sup>38</sup> provides for various types of emergency measure, which coexist:

- the minister, or secretary of state, responsible for consumer protection may adopt a provision, without involving the Consumer Safety Commission. This kind of measure is valid for at most one year: long enough for decision-taking within the normal procedure as to whether a definitive regulation should replace the provisional one;
- a judge too can issue an injunction order for recall of a product. He takes his decision on application from a consumer organization or a ministry. The provisions on entitlement to take action derive from the *Loi Royer*.<sup>39</sup> The injunction order may not have a duration of more than six months. The normal procedure has then to be used to decide whether the measure is to be maintained or suspended. Firms are no longer allowed, as hitherto, to market the products again after this period has expired. If penal proceedings are embarked on, the examining judge or the criminal court is competent. The judge can take only specific measures relating to a particular product;
- various administration officials specifically mentioned in the law<sup>40</sup> may seize products and even have them destroyed. Such measures are to lead to the commencement of court proceedings, with involvement of the public prosecutor within 24 hours. A prerequisite is that the urgency of the measure be beyond all doubt. In cases of mere suspicion, the officials can only block the product for 14 days pending results of scientific and technical tests. Whatever the outcome of the measure, a copy of the record of proceedings is to be sent to the Consumer Safety Commission.

It is still quite unclear whether the emergency procedure will make headway.

#### 1.5. Post market controls

Any description of French safety law has to go thoroughly into the administration's role in follow-up market controls. Neglecting the whole repressive control machinery would give a completely distorted picture of French product safety law, since this is the area where

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<sup>37</sup> On this see 1.5.2 below.

<sup>38</sup> Art. 3 of the 1983 Act (fn. 13 above).

<sup>39</sup> *Calais-Auloy, J.*, *Droit de la Consommation*, Paris 1980, 205 et seq.

<sup>40</sup> Art. 4 of the 1983 Act (fn. 13 above).

control is centred.<sup>41</sup> The repressive powers will first be described (1.5.1.), and then a special description of recall given (1.5.2.).

### 1.5.1. Repressive product regulation

Scarcely anywhere else in French safety law does the fragmentary nature of its provisions emerge more clearly. This concerns in part the substantive legal requirements for action by way of post market control. There is nothing in the 1983 law that makes marketing unsafe products a criminal offence.<sup>42</sup> Were that so, the control authorities could engage in post market controls without their powers first having to be specified by ordinance or by ministerial decree. In the absence of any ordinance laying down specific penal sanctions for manufacturing and distributing particular products or groups of products, the only grounds for intervention have to be based Art. 1 of the 1905 law in its 1978 version. Since that date, the scope of Art. 1 has included acts of deception in connection with use of the thing sold.<sup>43</sup> Thus, for instance, sale of a hazardous product can be punished if the risks ought to have been brought to the buyer's attention. The 1983 act's fragmentariness in regulation is still more striking when it comes to who has the post market control. The law creates no administrative infrastructure, no special safety authority with hundreds of inspectors, but merely extends the area of action of the "Direction Générale de la Consommation et de la Répression des Fraudes" (DCRF).<sup>44</sup> Admittedly, the 1905 law<sup>45</sup> also extended that body's powers of intervention; in part specifically to controls on products, but in part more generally, i.e. to the whole area of application of the 1905 law. This mixing makes it hard to understand the control machinery, and not only for outsiders.

The first step in control is the search for and establishment of breaches of the law. The relevant provisions of the 1983 law on the one hand strengthen existing intervention powers of DCRF officials, and on the other create new control instruments. A full picture cannot be given; we shall confine the description to an outline of the chief powers.<sup>46</sup>

The officials have a right to enter firms' premises at any time of day or night. This access right is now extended to rooms not used exclusively for business purposes but also private ones. Should the businessman concerned refuse access, officials may inspect the premises only if the public prosecutor gives them permission. More recently, the officials have also been given the right to inspect production documents. Without prior court permission, they can seize dangerous products or remove them.

If breach of the law has been found, a broad range of sanctions is available. The prerequisite is either that a decree provides for punishment for the manufacture or marketing of an unsafe product, or that the intervention requirements of Art. 1 of the 1905 act are present. Sanctions available under the 1983 act centre round a range of measures besides punishment that can be ordered at the time of sentencing. This requires the issue of a decree in normal procedure or else a ministerial order in emergency procedure. Three

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<sup>41</sup> On this see the account by *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq.

<sup>42</sup> Significantly, the Commission de la Refonte (fn. 2 above, 82) calls for precisely this penal general clause.

<sup>43</sup> *Calais-Auloy, J.*, Droit de la Consommation, Paris 1980, 128.

<sup>44</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq., 19 et seq.

<sup>45</sup> Loi du 1er août 1905 sur les fraudes et falsifications en matière de produits ou de services.

<sup>46</sup> This account is based on *Pizzio, J.-P.*, La loi du 21 juillet 1983 sur la sécurité des consommateurs, Dalloz 1984, 13 et seq., 19 et seq., 19 et seq.

types can be distinguished: the court may order publication of the decision or require specific information of the public; it may order recall or destruction of the product at issue; it may confiscate illegally acquired gains.

In addition to the new provisions on measures accompanying punishment, mention should also be made of the codification of longstanding case law of the Higher Criminal Court, according to which the manufacturer of a product infringes Art.1 of the 1905 Act if he brings a product to market without first checking that it complies with safety and health provisions in force. The Higher Criminal Court had seen criminal responsibility of the manufacturer as established when, against the express tenor of Art. 1, he could be accused merely of gross negligence<sup>47</sup>. The regulations take over the case law, but do not extend it to mere traders. That does not mean, however, that traders can escape their responsibility. French case law<sup>48</sup> has long recognized that traders can be made responsible under the provisions of Art. 1 of the 1905 Act if they have neglected specific duties on traders (unsuitable storage, inadequate conservation, inadequate labelling). Indeed, a trader has even been condemned for breach of Art.1 of the 1905 Act because he had distributed goods whose nonconformity with the legal provisions was clear.

The closeness in content to comparable efforts at differentiation in German case law on product liability is evident. But while in the FRG breach of duty by manufacturer or trader as a rule leads to entitlement to compensation for damage, France relies more intensively on administrative solution of the problem. The parallel is interesting above all from the viewpoint of allocation of the burden of proof. German civil case law takes it that infringement of safety provisions in force (or non-compliance with technical standards) is a *prima facie* indication of the defectiveness of a product and therefore also of fault. But *prima facie* rules of this kind are not enough to justify *criminal* condemnation of the manufacturer. In principle, the administration has to show that the manufacturer had not carried out the necessary checks. This seemingly clear burden of proof is however brought into question by Art. 7 of the 1983 Act. Art. 7 takes it that a manufacturer who has not observed officially prescribed checks on verification of compliance with the law has, unless the contrary is shown, infringed Art. 1 of the 1983 Act. But there is a difference between Art.1 of the 1983 Act and Art. 1 of the 1905 Act insofar as the 1983 Act lacks a criminal-law general description of an offence, allowing condemnation merely because a product does not comply with the requirements of the general clause. Nevertheless one may envisage types of case in which the presumption under Art. 7 of the 1983 Act leads to condemnation under Art. 1 of the 1905 Act.<sup>49</sup>

### 1.5.2. Product recalls

The 1983 Act for the first time provides the possibility of compelling the recall of a product. This requires either the issuing of a regulation or in urgent cases a ministerial order.

Article 2 says: "These *regulations* may likewise specify that products be removed from the market or recalled for modification, that the purchase price be reimbursed in whole or in part or products be exchanged, and that consumer information obligations be laid down."

<sup>47</sup> Calais-Auloy, J., *Droit de la Consommation*, Paris 1980, 129, and references from the case law.

<sup>48</sup> On this Pizzio, J.-P., *La loi du 21 juillet 1983 sur la sécurité des consommateurs*, Dalloz 1984, 13 et seq., 19 et seq., 25, para. 47.

<sup>49</sup> Op. cit.

Article 6 says: "They (the Ministers responsible for consumer protection or the departmental Minister concerned) may also order the publication of warnings and precautionary measures for use, as well as recalls for exchange, repair or full or partial reimbursement of the purchase price."

To avoid misunderstandings, it should be clear that the Courts too can order recalls on the basis of Article 1 of the 1983 Act, without being empowered by a regulation or ministerial order. To date no use has been made of the regulatory powers of Article 2.

Conversely, it would be wrong to conclude on the basis of the formal absence of regulations that product recalls with involvement of governmental bodies do not take place in France. For practice up to October 1984, O. Dellenbach<sup>50</sup> has presented a case study that draws a strict distinction according to whether the safety threshold appearing in

technical standards was demonstrably set too low, or whether a safety standard existed at all. In the first group of cases, Dellenbach has analysed in more detail three cases that caused much furore in France in the second half of the 70s: (1) Crash helmets that were subject to material fatigue; (2) fan heaters that easily caused fires; (3) electrically unsafe automatic egg boilers. For all the differences in detail, the three cases took an almost identical course. The unsafeness of the products was discovered on carrying out product tests. Attempts by consumer organizations to negotiate an agreement with the manufacturers on possible recall and its terms failed. The consumer organizations then went before the public, at the same time informing the competent authorities. Under public pressure, the French administration saw itself compelled to put pressure on the firms to secure recall of the products.

The picture is less clear cut in areas where the technical standards contain no safety requirements: carrycots and child-proof seals on cleaning products. Again it were consumer organizations that discovered the problem. The campaign for child-proof seals gained additional weight through the involvement of the anti-poisons centres.<sup>51</sup> The campaign against unsafe carrycots led after six years to the establishment of a technical standard, which was however declared non-binding and did not cover other similar dangerous products. French consumer organizations had asked

for the passing of a relevant regulation, on the basis of the Act of 10 January 1978 (the predecessor of the 1983 Act). The fight for childproof cleaning product containers ultimately led to adoption of a regulation on the basis of the Council Directive of 18 September 1979 on the harmonization of legal and administrative provisions for the classification, packaging and labelling of dangerous substances (Art.15(2)).<sup>52</sup> Far more interesting than the course of proceedings in this group of cases is an international comparison of delays in making a regulation. In Britain a safety standard for carrycots has been in existence since 1965, and childproof seals have been compulsory in the US since 1970.<sup>53</sup>

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<sup>50</sup> For an account of the issues, see *Dellenbach, O.*, *Les Normes de Sécurité*, Mémoire Droit de la Consommation soutenue en Octobre 1984, Université de Montpellier, Directeur de Mémoire: J. Calais-Auloy, Montpellier 1984, 32-44.

<sup>51</sup> *Activité des Centres Anti-Poisons*, 1982.

<sup>52</sup> OJ L 259, 15 October 1979, 10.

<sup>53</sup> On issues connected with this regulation see *Viscusi, W.K.*, *Consumer Behaviour and the Safety Effects of Product Safety Regulation*, *J. of Law and Economics* 28 (1985), 527 et seq., 537 et seq.; see also, 4.6. below.

### 1.6. Liability<sup>54</sup>

Following the development of contractual guarantee liability and of liability in tort virtually irrespective of fault between 1962 and 1972,<sup>55</sup> French case law in the next ten years went on to make a considerable contribution towards bringing the two types of liability closer together.<sup>56</sup> While the rule of non-cumulation (of claims based on contract and tort) continues to apply, the case law has nevertheless *de facto* developed a unitary concept of fault for both law of tort and law of contract. This unitary concept of fault is based in law of contract on liability of the professional vendor, or else through direct liability of the manufacturer, while in law of tort it leads to liability irrespective of fault as the outcome, at any rate where the injured party was demonstrably supplied with a faulty product.<sup>57</sup> The injured party to the contract has the burden of proving that the defect had arisen before supply. This allocation of the burden of proof may lead to problems, particularly in supply chains where it can no longer be determined where the defect arose. Liability in tort presupposes, as in German law, that the injured party can show the defectiveness of the product.

A second important approximation of law of contract to law of tort lies in the development of groups of cases comparable to those in German law. This is true at least for defects in design, manufacture and instructions. Development defects can consistently be covered only by contractual liability in France. Conversely, as far as can be discovered no duty in law of tort to monitor products (post market or post sale duties) seems to exist.

The approximation of the two types of liability has been considerably strengthened by adoption of the product liability directive.<sup>58</sup> The typically French problem of two types of liability according to whether the contractual partner or an uninvolved third party is the injured party was eliminated at the preparatory stage of the Community directive in favour of a unitary type of liability for injured contracting parties or an uninvolved third party. Though national law on contractual liability continues to exist, the classical distinction loses significance in practice.

An admittedly cursory survey of the French case law suggests the conclusion that consumer disputes play a great part, but that the cases of injury were in the main ones involving specifically French peculiarities. Thus, in France a need continued to exist into the 70s for many households to store propane gas containers, since no central gas supply was provided (and is to some extent still not). Containers exploding during transport, on consignment or in use have much concerned the French courts and made their contribution to the

<sup>54</sup> The following account is based essentially on *Viney, G.*, *La responsabilité de fabricants et distributeurs*, *Economica* 1975; *Ghestin, J.*, *Conformité et Garanties dans la Vente*, Paris 1983 and *Lamy Commercial, Concurrence-Distribution-Consommation*, Paris, 1985, 1286 et seq., para. 4678 et seq.; a description from a German viewpoint is given by *Weber, K.-H./Rohs, U.*, *Produzentenhaftung im französischen Recht*, *PHI* 1984, 36 et seq.

<sup>55</sup> See *Ghestin, J.*, *Conformité et Garanties dans la Vente*, Paris 1983, 244 et seq. (esp. 251 et seq.), who follows the stages in the case law on the development of guarantee liability irrespective of fault. There is no key decision like the German *Hühnerpest* judgment (BGHZ 51, 90 et seq.) in the law of contract. The case is different in law of tort. Here the decisive judgment that altered the burden of proof in favour of the consumer was *Cour de Cassation Civile*, 21 March 1962, *Bull. Civ. I*, 155. Other decisions in this connection are in *Viney, G.*, *La responsabilité de fabricants et distributeurs*, *Economica* 1975, 76, note 19.

<sup>56</sup> Much information can be found in *Lamy Commercial* (fn. 54 above), 1286 et seq., para. 4678 et seq. A description of the legal position from a German viewpoint is offered by *Weber/Rohs*, 1984.

<sup>57</sup> References in *Lamy Commercial* (fn. 54 above), 1288, para. 4683.

<sup>58</sup> *Ghestin*, speech at the Conference "Sécurité et Défense des Intérêts Economiques des Consommateurs. Droit National et Communautaire", 17-18 April 1986 in Dijon.

development of manufacturer liability in tort. A second specifically French variant in the development of manufacturer liability is the great importance of liability cases connected with the production, supply and use of agricultural products. Characteristically, French case law has transferred strict contractual liability to agriculture, without any beating about the bush.<sup>59</sup> Correspondingly, the French bill to implement the product liability directive is likely to include agricultural products.<sup>60</sup>

France is ahead of all Member States in almost fully unifying the concept of defect in the area of prevention and repair. Art. 1 of the 1983 Act and Art. 6 of the Product Liability Directive, in the French version, are by no means co-incidentally very similar, and in part identical in tenor. In the negotiations on the Product Liability Directive, France managed largely to push through its conception of defect.<sup>61</sup>

### 1.7. Technical standardization and product safety<sup>62</sup>

The basic structure of French standardization, with its peculiar interweaving of government and the economy, was created by the Vichy Government in 1941.<sup>63</sup> It gives the French Government great influence on standardization that goes beyond a single company. This influence has effects first of all on the organization of standardization. This is largely integrated with the national administration, if not organizationally then at least functionally. The Commissioner for standardization exercises the office of Government Commissioner in AFNOR. AFNOR and the Bureaux de Normalisation (trade associations for standardization) are part of the Service Public, i.e. they are comparable with firms under controlled administration. AFNOR's statutes are laid down by the State, which also determines and appoints its decision-making bodies. A special statute provides for financing of AFNOR through a parafiscal levy. Another peculiarity is the possibility of giving technical standards gradations of legal effect. The range goes from quasi-binding for the administration to universal bindingness including the economy.

#### 1.7.1. Privatization trends

A multiplicity of ministerial decrees and orders over the decades has not shaken the basic division of tasks. The decree of 26 January 1984<sup>64</sup> on the status of standardization also keeps the basic structure. At the same time, one may note a shift in competencies within the

<sup>59</sup> Lamy Commercial (fn. 54 above), 1289, para. 4687 b).

<sup>60</sup> Directive on liability for defective products of 25 July 1985, OJ L 210, 7 August 1985, 29; more in *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>. An official French bill converting the Directive is not yet available.

<sup>61</sup> This is due fairly largely to Ghestin himself, who was involved in the government decision-making process in France and likewise belonged to the Commission de la Refonte which had worked out the 1983 Safety Act; see also *Ghestin* (fn. 58 above).

<sup>62</sup> A fundamental account in German is *Lukes, R.*, Überbetriebliche technische Normung in den Rechtsordnungen ausgewählter EWG- und EFTA-Staaten, Köln/Bonn/München 1979, 5 et seq.; the description is based on his account. Much information on the history is also in *Rasera, M.*, L'A.F.N.O.R. et la liaison administration-industries, *Semaine Juridique, Cahier de Droit de l'Entreprise C I* 1980, 28 et seq., 28 et seq.

<sup>63</sup> The relevant acts, decrees and orders are reprinted in *German, C./Marano, P.*, La normalisation clé d'un nouvel essor, rapport au Ministre de la Recherche et de l'Industrie, Paris 1982, 109 et seq.

<sup>64</sup> Décret no. 84-74 du 26 janvier 1984 fixant le statut de la normalisation, reprinted in *Enjeux* No. 44, 2/1984 52 et seq., and in German in *DIN-Mitt.* 63 (1984), 255 et seq.

fixed framework from the State towards AFNOR, i.e. the private standardization organization. This development was actually already introduced with the 1941 Decree. Until last year France had pursued the intention of organizing standardization governmentally.<sup>65</sup> Accordingly, AFNOR had no standardization powers. It had only to encourage the drawing up of standards, verify the proposals from the standardization associations and propose them for recognition by the Comité Supérieur de Normalisation. The 1941 Decree clearly cut back administrative *standardization* activity. This continues to be possible formally, but the emphasis in governmental activity has since been on the supervision exercised by the Minister for Trade and Industry or the Minister for Agriculture over all technical standardization above company level. In practice, this control is exercised by a high official in the Ministry of Trade and Industry, the Commissaire à la Normalisation (Commissioner for standardization). The Standardization Commission is at the top of the French administrative hierarchy. Only five people work in it: the Commissioner himself, a deputy and three clerks. This small staff contradicts glaringly with the broad tasks assigned to the Commissioner by the 1941 Decree. He is not only to lay down general guidelines for drawing up standards, supervise the application of standards and decide on applications to depart from them, and supervise the work of the French standardization agencies, but also – at any rate theoretically – to verify the content of each individual standard. In this he was supported at the time by the Comité Consultatif, which was absorbed the Comité Supérieur de Normalisation. The wide range of tasks led to manifold difficulties, which the Commissioner sought in 1964 to eliminate by abandoning practically all technical control.<sup>66</sup> But the Commissioner was unable to perform the other control tasks either. In practice what emerges as its most important task was organizing communication between ministers interested in standardization and AFNOR or the Branch Standardization Committees. The relationship between the Commissioner for Standardization and AFNOR as newly regulated in the 1984 Decree takes account of developments over the last 20 years. Registration of technical standards had de facto been transferred to AFNOR before 1984, and it also decides on homologation.<sup>67</sup> All that remains of the former wide powers of the Commissioner for Standardization is the duty of supervision and a right to veto. The Commissioner has also given up its arbitration role in standardization committees, which had often given ground for criticism.<sup>68</sup>

#### 1.7.2. Democratization tendencies

The stepwise privatization of standardization – from governmental standardization pre-1941 to comprehensive supervision and control over privately organized standardization to recognition of privately organized standardization subject to an ultimate governmental veto – has run in parallel with a process of democratization of the guidelines of standardization policy.<sup>69</sup> The term democratization is justified in so far as the circles of participation in

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<sup>65</sup> *Rasera, M.*, L'A.F.N.O.R. et la liaison administration-industries, *Semaine Juridique, Cahier de Droit de l'Entreprise* C I 1980, 28 et seq.

<sup>66</sup> On this *Lukes, R.*, *Überbetriebliche technische Normung in den Rechtsordnungen ausgewählter EWG- und EFTA-Staaten*, Köln/Bonn/München 1979, 22.

<sup>67</sup> See 1.7.4 (1) below.

<sup>68</sup> *German, C./Marano, P.*, *La normalisation clé d'un nouvel essor, rapport au Ministre de la Recherche et de l'Industrie*, Paris 1982., 69 et seq.; Annex 2, "Rapport du groupe de travail - Normalisation et sécurité des travailleurs".

<sup>69</sup> This process was introduced by *German, C./Marano, P.*, *La normalisation clé d'un nouvel essor, rapport au Ministre*

policy formation have been steadily enlarged. While in the Comité Supérieur de Normalisation the State had dominated policy formulation, the economy was already given a place in the consultative activity of the Comité Consultatif. Creation of the Standardization Supervisory Board<sup>70</sup> completed the opening to consumers and trade unions, which now have a sit and a say in a body with an important part to play politically. “The Standardization Supervisory Board shall propose to the Minister for Industry, taking account of national and international economic requirements, of the major national programmes and of the special needs of both sides of industry as expressed in the economic plan, the general orientation for standardization work”.<sup>71</sup> Though without powers of decision, the Standardization Board is to provide assistance in setting French standardization policy guidelines. In other words, the French State is covering its retreat from standardization by strengthening participation by consumer organizations and trade unions. Democratization of policy formation cannot therefore simply be equated with greater orientation of standardization policy to the needs of consumer organizations and unions.

### 1.7.3. AFNOR

The stepwise shift of standardization work from the State towards AFNOR has considerably affected its range of action and tasks.<sup>72</sup> Today, centralization and coordination of all French standardization activity is incumbent on AFNOR. It passes instructions from the Ministers competent for standardization or the Commissioner for standardization to the Bureaux de Normalisation and verifies their implementation. It is responsible for supporting technical standardization committees in working out draft standards, and for homologation procedure.

In practice, standardization work lies largely in the hands of AFNOR itself. The industrial standardization associations are often not financially in a position to set up their own technical standardization committees and maintain them. AFNOR has to provide assistance, set up a technical standardization committee in the technical sector concerned and support it with staff and above all resources. Yet AFNOR is not entirely autonomous here, since the setting up of a technical standardization committee requires ministerial authorization.

### 1.7.4. Categories of standardization

The shift in powers from Government to AFNOR appears particularly clearly in the various categories of standardization, only two of which are however important for our purposes: approved and registered standards.<sup>73</sup>

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de la Recherche et de l'Industrie, Paris 1982.. On the “new” French standardization policy, however, see also *Marano, P.*, L'avenir de la normalisation: une mission élargie des moyens accrus, *Enjeux* No. 31, 12/(1982), 40 et seq; *Marano, P.*, Quelle normalisation pour de nouveaux enjeux, *Enjeux* No. 31, 12/1982, 42 et seq. Deux grands principes animent la réforme: concertation et décentralisation, entretien avec Laurent Fabius, Ministre de l'industrie et de la recherche, *Enjeux* No. 44, 2/1984, 48 et seq. (in which the political objectives are very clearly expressed). From a German viewpoint, Schulz, 1983, and the German translation of the address by Laurent Fabius at the first meeting of the Supreme Council on Standardization, *DIN-Mitt.* 63 (1984), 610 et seq.

<sup>70</sup> See fn. 64 above.

<sup>71</sup> From Art. 1 of the German translation of the Decree (fn. 64 above).

<sup>72</sup> AFNOR statutes were also amended accordingly. The version adopted by the General Assembly on 7 December 1983 is reprinted in *Enjeux* No. 44, 2/1984, 55 et seq.

<sup>73</sup> The account in *Lukes, R.*, Überbetriebliche technische Normung in den Rechtsordnungen ausgewählter EWG-



- (1) *Approved standards* have existed since 1941. These are standards given official recognition by the State. Approval takes place through ministerial decree, and is published in the “Journal Officiel”. The 1941 Act does not define in any more detail what the verification criteria in the approval procedure are. Simplifying heavily, one might say that the Commissioner for Standardization has to verify standards brought before him to see if they are against the “public interest”. This category of standard is the most important, both in number and in the importance of the individual standards. However, the numbers are steadily declining in relative terms. While in 1968 70% of all official French standards were still given approval, this percentage had fallen to 54% by 1972.<sup>74</sup> Observance of Government-recognized norms was made compulsory for all national procurements by the 1941 Decree. However, this obligation was not much applied in practice. Accordingly, the competent Minister, following detailed consultations between the various ministers, the Commissioner for Standardization and AFNOR, issued an administrative order<sup>75</sup> whereby the bindingness of standards for government contracts in principle remained; but the principle was not to be applied rigidly, but flexibly in accordance with the needs of the Administration and of the generality. Pragmatic count was thus being taken of the actual facts.

The 1941 Act also allows approved standards to be declared universally binding. Branches of the economy involved are then obliged to take the binding technical standards into account. The 1941 Act however fails to clarify the conditions on which this declaration of universal bindingness can be made. With the restructuring of standardization, the decision on approval of technical standards was transferred to AFNOR. AFNOR has to check a proposed standard to see whether it is in line with the general interest and does not offer grounds for objections that might prevent its adoption (as a government-approved norm). Approval as a norm is declared by AFNOR’s Administrative Board, after the proposed standard has passed the verification and control procedures. The Commissioner for standardization can however oppose AFNOR’s decision on approval of a draft standard. Decree No. 84/74 of 26 January 1984<sup>76</sup> contains no provision for the case where the Commissioner for standardization makes use of his veto right. In particular, no procedure for taking up the conflicting interests is provided for.

At the same time, the Decree of 26 January 1984 once again confirms the bindingness of approved standards on public procurements by the State, public bodies or state-subsidized firms. As far as that goes, then, nothing has changed from the previous legal position. What is unusual, though, is the way the French Government seeks to stress this intention.

Against customary usage, the Prime Minister had a circular to this effect published on 26 January 1984.<sup>77</sup> Its contents largely coincide with the 1971 compromise sketched out above. The circular nevertheless demonstrates how little attempts to increase the importance of the approved standards have borne fruit in practice.

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und EFTA-Staaten, Köln/Bonn/München 1979, 23-25, continuous to be pertinent.

<sup>74</sup> Figures in *Lukes, R.*, *Überbetriebliche technische Normung in den Rechtsordnungen ausgewählter EWG- und EFTA-Staaten*, Köln/Bonn/München 1979, 24.

<sup>75</sup> Circulaire du 15 janvier 1971 relative à une recommandation de la section technique de la commission centrale des marchés publics concernant les spécifications techniques dans les marchés.

<sup>76</sup> J. O., Février 1984, N. C. 1127.

<sup>77</sup> Circulaire du 26 janvier 1984 portant sur la référence aux normes dans les marchés publics et dans la réglementation, J. O., février 1984, N. C. 1127, reprinted in German in *DIN-Mitt.* 63 (1984), 257 et seq.

As before, approved standards can be declared universally binding. But the conditions under which a declaration of universality can be made are now specified. Article 12 of the 1984 Decree says:

*Where for reasons of public order, public safety, protection of the life and health of people and animals or safeguarding of vegetation, protection of national cultural treasures of artistic, historical or archeological value or for compelling reasons connected with the effectiveness of tax inspection, the propriety of business procedures and the protection of the consumer the need arises, application of a confirmed (approved) standard may by decree be declared mandatory, subject to the special exceptions provided for under the conditions of Art.18 (admissibility of possible departures).*

This clarification was a response from the French Government to frequent criticism by the European Court of Justice and the Commission of the EC of the general provisions allowing standards to be declared universally binding.<sup>78</sup> The links with European law will be gone into further below.

- (2) *Registered standards* were introduced in 1966.<sup>79</sup> They have since enjoyed a steady increase in popularity. This is shown *inter alia* by the fact that by 1972 33% of all French standards were already in this category, whereas in 1968 the figure had been only 18%. This popularity is closely connected with the simpler procedure for bringing out a registered standard. This category of standard is favoured above all in areas of rapid technical change. Registered standards have not to date been the object of governmental regulation. A change has taken place in practice, since registration initially took place through the Commissioner for Standardization but has gradually passed into the hands of AFNOR. Registration is not bound up with any verification of contents. It takes place when the technical standards committees consider the standardization procedure to be complete and wish to make their results available to the economy. There is a link with approved standards to the extent that registered standards often constitute a preliminary stage towards Government-recognized standards.

### 1.8. Certification and product safety

No special certification procedure for verifying safety standards, nor offering an external indication of them by a special safety mark exist in France. The proposal by C. Germon and P. Marano<sup>80</sup> to introduce a special safety mark, on the model of the German regulations, was rejected, for unknown reasons. Accordingly, safety can be an object of certification only along with other characteristics of the product. Types of this comprehensive certification are the mark of conformity (Norme Française) and the qualification certificates (Certificat de Qualification).

<sup>78</sup> On the background to the problem see Lukes, 1979, 28. The European reference is discussed under 1.9.1 (3).

<sup>79</sup> Lukes, R., *Überbetriebliche technische Normung in den Rechtsordnungen ausgewählter EWG- und EFTA-Staaten*, Köln/Bonn/München 1979, 25.

<sup>80</sup> German, C./Marano, P., *La normalisation clé d'un nouvel essor*, rapport au Ministre de la Recherche et de l'Industrie, Paris 1982, 52.

### 1.8.1. NF mark of conformity

The conditions for awarding the French mark of conformity, NF, are regulated by a decree of 1942.<sup>81</sup> To that extent, certification is an integral part of the overall reorganization of standardization in 1941-3. The mark of conformity can in principle be issued for any product but is in practice important mainly for household appliances. The mark testifies that the product bearing it has met the standards drawn up by AFNOR or the standardization associations and subsequently given approval. It is incumbent on AFNOR to check whether the product in fact meets the standard. Considered this way, the NF conformity mark provides objective information. However, this information is often misunderstood by the consumer. Consumers believe that the conformity mark indicates a particularly high quality of product, whereas in fact the standard merely lays down a kind of minimum.<sup>82</sup> This problem is quite well known and arises in other countries too. The safety of a product can theoretically be checked by the legally prescribed procedure where the underlying norm regulates important elementary characteristics of the product. This is exactly what happened with the technical standard on durability of crash helmets, since the French Government has by decree obliged all crash helmet manufacturers to put their product through certification procedure. This is, however, a unique exception.<sup>83</sup>

Criminal penalties can be derived from Art. 1 of the 1905 Act, if the manufacturer uses the NF conformity mark without authorization. The civil-law position is less unambiguous.<sup>84</sup> The purchaser can, referring to the absence of conformity, terminate the contract and perhaps even claim compensation for damages. But the purchaser may also by Art. 1382 of the *Code Civile* claim damages from the Certification Office itself, if it has omitted to exercise its control powers. Such a claim for damages is a purely hypothetical case, as even AFNOR is not in a position to set up an all-embracing control network to guarantee disclosure of infringements. Moreover, at any rate in the event of unauthorized use of the conformity mark NF, it would have to be clarified how far Art. 6 of the 1942 Decree ruling out such liability by the Certification Office still applies.

### 1.8.2. Certificates of qualification

The conditions for issuing certificates of qualification are regulated in the 1978 Act,<sup>85</sup> the predecessor of the 1983 Safety Act. The relevant passages have not been abrogated by the new Act. The motivation for the legal regulation of the issuing of certificates of qualification was the growing enthusiasm of industrial associations to pump up sales of their products by creating a quality mark for their association and regulating the certification procedure internally. Familiar examples are "Coton Flor" or "Qualité France". A problem, and not only from the consumer viewpoint, was that neither minimum

<sup>81</sup> Reprinted in *German, C./Marano, P.*, La normalisation clé d'un nouvel essor, rapport au Ministre de la Recherche et de l'Industrie, Paris 1982, 124 et seq.; described in *Lukes, R.*, Überbetriebliche technische Normung in den Rechtsordnungen ausgewählter EWG- und EFTA-Staaten, Köln/Bonn/München 1979, 50 et seq.

<sup>82</sup> *Calais-Auloy, J.*, Droit de la Consommation, Paris 1980, 94, para. 65.

<sup>83</sup> For an account of the issues see *Dellenbach, O.*, Les Normes de Sécurité, Mémoire Droit de la Consommation soutenue en Octobre 1984, Université de Montpellier, Directeur de Mémoire: J. Calais-Auloy, Montpellier 1984.

<sup>84</sup> On the possible legal consequences see *Calais-Auloy, J.*, Droit de la Consommation, Paris 1980, 95 et seq., fn. 13.

<sup>85</sup> On this see *Calais-Auloy, J.*, Droit de la Consommation, Paris 1980, 95 (para. 9); *Repussard, J.*, La certification en France, *Enjeux* No. 43, (1/1984), 51 and *Bonhomme, M.-H.*, L'Information certifiée, une des plus anciennes Revendications des Consommateurs, *Enjeux* No. 43, 1/1984, 62 et seq; and comprehensively *Schroeder, C.*, La qualification des produits, Thèse, Paris 1984.

requirement existed for awarding the certificates, nor quality requirements. The French Government commissioned a study in 1976<sup>86</sup> that came to the conclusion that it was urgently necessary to a properly functioning market for the confusion to be cleared up.

The object of the 1978 legal regulations was to allow certificates of qualification only where they gave the consumer *objective* and *comprehensible* information on the characteristics of the product. This was to be secured partly by allowing certifications henceforth only by Government-recognized bodies. The competent Ministry, the Ministry for Industry, must during approval procedure verify the institution's impartiality, and that there are guarantees in objective (technical) and personnel terms that the certification procedure can be properly carried out. By early 1984 18 institutions had been accepted, foremost among them AFNOR. This seemed to have put a stop to the current practice of self-certification of products to promote sales. But only seemed, since self-certified products have to date not disappeared from the French market.

In order to meet the self-set goal of providing the consumer with objective information, the legislator would through the certification procedure have to set minimum requirements for "quality". The difficulties of such an endeavour are obvious. The French legislator has dodged the issue by speaking merely of certain characteristics (*certaines caractéristiques*). Apparently the French legislator wanted to avoid going into the definition of quality. Industry associations and consumer organizations were given the task of specifying through negotiations what the "certain characteristics" might mean in specific cases. These negotiations are given formal shape in an Advisory Commission to the Ministry for Industry. It is not hard to see the opposing positions of the parties to the negotiations. The consumer side sees the chances of objective information as maximized if quality is standardized. Standardization must on this view cover the functional and utility characteristics of the product. Industry rejects the idea that quality can be standardized. Standardization would allegedly eliminate differences between products and threaten the mechanism of competition. The debate closely resembles the discussions in the Federal Republic of Germany on the meaning and purpose of comparative product information on quality.<sup>87</sup> The German legislator too declined to define quality and handed over the task to both sides of the market. This road seems in both countries to have ended in a blind alley. Neither has arrived at any noteworthy amount of comparative quality information. Theoretically, the French model could also be applied to the issuing of safety certificates. But this aim would be obstructed by the one-sided sales-oriented regulation of certificates of qualification. The safety of a product can be used only to a limited extent to boost sales.

### 1.9. The 1983 Act in the light of European Community Law

The object of the analysis is to bring the French viewpoint into the debate on European safety law. The sole basis for a treatment of the French position to date is the study by J.-P. Pizzio.<sup>88</sup> His whole portrayal is adapted to the French way of looking at things, to the extent that European Community law too is considered and analysed from the viewpoint of

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<sup>86</sup> *Repussard, J.*, La certification en France, Enjeux No. 43, (1/1984), 51, refers to this in his account, though without mentioning the exact title.

<sup>87</sup> On this see *Micklitz, H.-W.*, Three Instances of Negotiation Procedures in the Federal Republic of Germany, JCP 1984, 211 et seq. (deutsch: Verhandlungsmodelle im Verbraucherschutz, MD VZ-NRW 1984, 67 et seq.).

<sup>88</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 et le droit communautaire. Rapport de recherche rédigé par Mlle. Foucher sous la direction de J.-P. Pizzio, Dijon 1986.

whether administrative means of sanction are available to implement product safety. European Community policy was always to allow Member States much leeway in their implementation of the substantive law. The report keeps to this premise.<sup>89</sup> Community intervention with French administration arouses considerable mistrust. The inclusion of the Single European Act in the description gives Pizzio a chance to go into the relationship between internal market policy and product safety policy in more detail. Since by contrast with environment protection and labour protection, consumer protection was not included in the treaties as a policy objective, product safety must be taken to be subordinated to the goal of creating free movement of goods.<sup>90</sup>

The analysis of the relationship between the Product Safety Act and European Community Law is done in two stages. The 1983 Act is first checked for its interaction with free movement of goods, and then specifically for the effects of the new approach on French safety policy, and on the 1983 Act itself.

#### 1.9.1. The 1983 Act and free movement of goods

- (1) *Scope of the 1983 Act*: Article 8 is aimed at regulating cases of conflict between Community law and the 1983 Act. The wording seems to make it clear that the 1983 Act is no longer applicable where the products concerned are already covered by a Community directive. An interpretation *au pied de la lettre* would have the consequence of excluding only regulation by *Statute*, while the French government would be free to regulate product safety by decree even in the event of conflict. This rather jesuitical version is however immediately abandoned, and for all forms of regulation the substantive focus is whether the products have already been the object of a Community provision. It follows that in cases of total harmonization France retains competence of its own only in the emergency case provided for in the 1983 Act. But even here Community law can retain primacy over French national safety law as long as the harmonization measure includes a special safeguard clause explicitly covering such emergency measures.<sup>91</sup>
- (2) *The duty to notify regulatory measures under the 1983 Act*: If these are measures to be taken as part of a normal procedure, then the objective scope of the Directive of 28 March 1983<sup>92</sup> covers a comprehensive obligation of notification including now agricultural products, foodstuffs, medicaments and cosmetics.<sup>93</sup> To date (1986) the duty of notification has become relevant on two occasions, when the French legislator embarked on specifying the general clause in the 1983 Act by issuing special decrees.<sup>94</sup> In the first case Pizzio notes a delay of nearly two and half months, but the proposed decree has not yet come into force in France. The second case is more interesting, above

<sup>89</sup> Op. cit., 9 et seq.

<sup>90</sup> Op. cit., 15.

<sup>91</sup> Op. cit., 19 et seq.

<sup>92</sup> OJ L 109, 26 April 1983, 8. For details on this see *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, 3.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>93</sup> OJ L 81, 26 March 1988, 75.

<sup>94</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 et le droit communautaire. Rapport de recherche rédigé par Mlle. Foucher sous la direction de J.-P. Pizzio, Dijon 1986, 31 et seq.; and basically *Lecrenier, S.*, Les Articles 30 et suivants CEE et les Procédures de Contrôle prévues par la Directive 83/189/CEE, RMC 1985, 6 et seq.

all because it involves the first decree issued on the basis of the 1983 Act.<sup>95</sup> It forbids the manufacturer, sale and importation of erasers that look like foodstuffs. The Community has since, in response to various national measures banning imitations of edible products, adopted a directive on products of misleading appearance liable to endanger consumer health or safety, which covers all types of products.<sup>96</sup>

The notification obligation becomes more problematic in the case of an emergency measure.<sup>97</sup> Certainly, the Information Directive provides for an abbreviated procedure, but localized bans, withdrawals from sale and the like are not covered by the obligation of notification. Since however in France the “Commissaires de la République” have wide-ranging competences regionally, there is a loophole here for measures regulating safety that might escape Community notice.

Another question is the extent to which regional measures on product regulation are (or must be) notified to the Community on the rapid information system.<sup>98</sup>

Pizzio<sup>99</sup> regards the notification procedure as extremely effective, since experience to date in France shows, he says, that the Commission's consultation procedures offer adequate possibilities for making national safety regulations compatible with Community Law.

- (3) *Compatibility of the 1983 Act with Articles 30 and 36 of the EEC Treaty*: “Measures having equivalent effect” within the meaning of Art. 30 EEC also include technical standards drawn up by AFNOR. A specifically French possibility of conflict results from the possibility of declaring standards legally binding by decree. The taking of this step led in 1983 to the bringing of an action for breach of treaty, because of the legal bindingness of a technical standard on the manufacturing of refrigerators.<sup>100</sup> Following the Commission's intervention, France changed the scope and coverage of the standard but kept its legal bindingness.<sup>101</sup> But France feels very sure of its chances of justifying national health and safety provisions through Art. 36 EEC or the Cassis de Dijon Case Law on Art. 30 EEC.

#### 1.9.2. The 1983 Act and the new approach to technical harmonization and standards

In his commentary on the new approach to technical harmonization and standards, J.-P. Pizzio<sup>102</sup> points to a number of noteworthy problems which are however only partly dealt with in the report:

- The essential requirements should be defined in such a way as to be capable of leading to sanctions (behind this there is again the specifically French - administrative - approach to safety policy).

<sup>95</sup> Of 18 février 1986, published in J. O., 28 février 1986.

<sup>96</sup> OJ L, 11 July 1987, 49.

<sup>97</sup> Pizzio, J.-P., La loi du 21 juillet 1983 et le droit communautaire. Rapport de recherche rédigé par Mlle. Foucher sous la direction de J.-P. Pizzio, Dijon 1986, 32.

<sup>98</sup> Council decision of 2 March 1984 introducing a Community system for rapid exchange of information on hazards in using consumer products, OJ L 70, 13 March 1984, 16 et seq.

<sup>99</sup> Pizzio, J.-P., La loi du 21 juillet 1983 et le droit communautaire. Rapport de recherche rédigé par Mlle. Foucher sous la direction de J.-P. Pizzio, Dijon 1986, 33 et seq.

<sup>100</sup> Written Question N° 835/2, OJ C 93, 7 April 1984, 1.

<sup>101</sup> See J. O., Novembre 1984, N. C. 10307; and in general Pizzio, J.-P., La loi du 21 juillet 1983 et le droit communautaire. Rapport de recherche rédigé par Mlle. Foucher sous la direction de J.-P. Pizzio, Dijon 1986, 38.

<sup>102</sup> Op. cit., 52 et seq.

- Member States should be banned from subjecting technical products to prior approval procedures.
- Should consumer protection necessitate the inclusion to any large extent of technical specifications in the fundamental requirements, recourse to the new approach would, he says, not be appropriate. Deciphered, this means that Pizzio doubts the effectiveness of reference to standards in this very area of the safety and health of persons.
- The problem of certification could be solved on the example of the Franco-German bilateral model; i.e. mutual recognition of certification institutes and their certificates, and also mutual recognition of safety marks (though one would have first to be created in France).

In very general terms, the new approach is claimed to have effects on the relationship between product safety and technical standards. Member States would have to adopt a policy of deregulation in the area of product safety. Accordingly, *de jure* or *de facto* binding technical standards would in the long term have to be broken down and adapted to the requirements of the common market. This would require the building up of trust in technical standardization as a guarantee of product safety, but also, at the level of the Common Market, compel recognition of the equality in principle of safety levels, even where solutions differ.

At the end of the report, Pizzio<sup>103</sup> asks the decisive question: What happens when the Community has adopted a directive defining the safety requirements in principle but a Member State nevertheless wants to take national measures that go beyond the defined goal? The problem already arises with the Directive on simple pressure vessels,<sup>104</sup> which in departure from Art. 1 of the 1983 Act is based on a safety concept that does not include foreseeable misuse. By a circuitous route through a treatment of the *Cremonini v. Vrankovich* ruling<sup>105</sup> of the European Court of Justice, Pizzio<sup>106</sup> arrives at the following conclusions:

- The primacy of Community law makes it compulsory to allow even products that would not comply with Art. 1 of the General Clause of the 1983 Act to circulate freely. (Though Pizzio does not say this explicitly, the differing safety concepts in the Community Directive on simple pressure vessels (usage in accordance with instructions) and in the 1983 Safety Act would not be an obstacle to the capacity of their circulation).
- Recourse to Art. 36 would be open to Member States only where the basic requirements had not been fully defined.
- It would follow that where the Community had adopted particular directives on the basis of the model Directive, a Member State would be able to pursue a national safety policy only in the context of the safeguard clause procedure.

<sup>103</sup> Op. cit., 65.

<sup>104</sup> OJ L 220, 8 August 1987, 48.

<sup>105</sup> ECJ [1980] 3583, case 815/79, judgment of 2 December 1980. For details on the low-voltage Directive, see *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, 2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>106</sup> *Pizzio, J.-P.*, La loi du 21 juillet 1983 et le droit communautaire. Rapport de recherche rédigé par Mlle. Foucher sous la direction de J.-P. Pizzio, Dijon 1986, 68 et seq.

### 1.10. The bilateral agreement between the Federal Republic of Germany and France on the removal of technical barriers to trade<sup>107</sup>

In July 1983 Chancellor Kohl and French Prime Minister Mauroy agreed the following measures on a reciprocity basis<sup>108</sup>:

- mutual recognition of safety standards of equal value from the technical viewpoint;
- improvement of relations between applicants and test centres;
- mutual recognition of test centres.

The negotiations for converting the agreement into national law on each side were handed over to a Franco-German working party. The object of the following account is not so much to give a detailed analysis of the bilateral agreement as to attempt to estimate the effect and function of the bilateral agreement for a European safety policy.

#### 1.10.1. Background to the bilateral agreement

Immediately after enactment of the German Machine Protection Act (*Maschinenschutzgesetz*), various Member States were already active in Brussels to ensure that the Act would not have any negative effects on free movement of goods.<sup>109</sup> The Federal Government agreed at the time to incorporate foreign standards, especially those of Community Member States, in a separate list accompanying the Machine Protection Act (today the Appliance Safety Act (*Gerätesicherheitsgesetz*)). AFNOR then drew up a sixty-page list of a 1,000 French standards on technical devices, which was submitted to the German authorities. On the German side, however, the view was taken that it was impossible to take the French standards into account. The requirement for the incorporation of a note on the standards in the annex to the Act was to be compliance with the following three conditions:

- a) the French standards would have to be available in German translation.
- b) the French standards would have to contain specifications on the safety of persons.
- c) the French standards would have to be individually verified by an expert committee.

In fact, the Federal Government did not then meet its clear formal agreement.

From around the mid 70s, German technical standards and thus also the Appliance Safety Act came increasingly under fire from French critics.<sup>110</sup> There were reports of difficulties

<sup>107</sup> On this see *Laurent, J.*, Bilaterale Abmachungen im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus französischer Sicht, DIN-Mitt. 63 (1984), 117 et seq; *Winckler, R.*, Bilaterale Abmachungen im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus der Sicht der deutschen Industrie, DIN-Mitt. 63 (1984), 120 et seq; *Strecker*, 1984; joint declaration by AFNOR and DIN on standardization, DIN-Mitt. 63 (1984), 194 et seq.; *Becker, U.*, Fortschritte durch Vertrauen, BArbBl. 2/1985 et seq.; *Winckler, R.*, Rechtsvorschriften für Anlagen, Geräte und Stoffe - Bestandsaufnahme und kritische Würdigung. Materialien und Geräte unter besonderer Berücksichtigung des Gerätesicherheitsgesetzes, der 2. DurchführungsVO zum EnWG und der Niederspannungsrichtlinie, in: *Recht und Technik. Rechtliche Regelungen für Anlagen, Geräte und Stoffe im deutschen und im europäischen Recht*, Studienreihe des Bundesministers für Wirtschaft, Nr. 53, Bonn 1985, 26 et seq., *Beauvais, E. v.*, Diskussionsbeitrag, in: *Recht und Technik, Rechtliche Regelungen für Anlagen, Geräte und Stoffe im deutschen und im französischen Recht*, Studienreihe des Bundesministers für Wirtschaft, Nr. 53, Bonn 1985, 76 f.

<sup>108</sup> Thus *Becker, U.*, Fortschritte durch Vertrauen, BArbBl. 2/1985 et seq., 37.

<sup>109</sup> *Strecker, A.*, Bilaterale Abmachung im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus der Sicht des Bundesministeriums für Wirtschaft (BMWi), DIN-Mitt. 63 (1984), 123-124, 123.

<sup>110</sup> *Laurent, J.*, Bilaterale Abmachungen im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus französischer Sicht, DIN-Mitt. 63 (1984), 117 et seq., 117,



for French industry in exhibiting their goods at trade fairs in the Federal Republic. In themselves these obstacles to trade would hardly have been sufficient to make the technical standards into an object of high-level politics. But the issue acquired greater importance when in the late 70s and early 80s the French made a connection between their growing current account deficit and the technical standards. In fact, on Commission's statistics, German consignments to France more or less exactly doubled between 1977 and 1982, thus rising by 100%, while in the opposite direction the rate of increase was only around 75%.<sup>111</sup> We need not here go into whether there is indeed a connection between the balance of payments deficit and German standards as potential technical obstacles to trade. In any case, the French succeeded in bringing in the European Community in the person of DG III Director-General Braun, who in a lecture to a German audience more or less adopted the French version as his own by calling the Germans the secret sinners in the setting up of non-tariff barriers to trade. Encouraged by the press, the equation 40,000 German standards = 40,000 technical obstacles to trade began to circulate.

On the other side, the Germans referred to a practice of French authorities begun some time in the early 1980s of adopting decrees that *de facto* made the import of German products into France impossible.<sup>112</sup> These decrees for particular individual groups of products were always built up on the same pattern: (1) the product had to meet a French standard and (2) this had to be documented by a test certificate and a NF-mark. The majority of decrees concerned safety requirements for wood-working machines.<sup>113</sup>

The mutual reproaches led in 1983 to the surprising outcome of a bilateral agreement. Apparently, following the controversially pursued public debate, pressure to negotiate was so great on both sides that action had to follow. The exchange of ideas and information between the authorities and the relevant institutions intensified. One product of the intensified relationships was the colloquium organized in Strasbourg in June 1984 by the Franco-German society for science and technology on cooperation between German and French testing and standardization institutions.<sup>114</sup> In it, competent experts, significantly, discussed the areas that the Community had mentioned in the preliminary work on the model directive as deserving priority in harmonization: construction, measuring equipment, materials testing and welding techniques.

But the bilateral agreement did not meet purely with acceptance. The joint declaration by AFNOR and DIN makes reservations about the need for a bilateral level of standardization clear.<sup>115</sup> Bilateral agreements might, from the viewpoint of the standardization institutions, serve a transitional function only as an interim solution for relevant problem areas, while in principle standardization at European or international level was to be aimed at. It is hard to say how far the commencement of an action for breach of the Treaty against the French decrees on admission of woodworking machines was directly or indirectly induced by the bilateral agreements.<sup>116</sup> It is in any case conceivable that through its action the Community

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<sup>111</sup> Winckler, R., Bilaterale Abmachungen im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus der Sicht der deutschen Industrie, DIN-Mitt. 63 (1984), 120 et seq., 120.

<sup>112</sup> Strecker, A., Bilaterale Abmachung im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus der Sicht des Bundesministeriums für Wirtschaft (BMWi), DIN-Mitt. 63 (1984), 123-124, 123.

<sup>113</sup> On this see Becker, U., Fortschritte durch Vertrauen, BArbBl. 2/1985 et seq., 34 and Table I.

<sup>114</sup> AFAST, 1984.

<sup>115</sup> Joint declaration by DIN and AFNOR (fn. 104 above).

<sup>116</sup> ECJ [1986] 419, case 188/84, judgment of 28 January 1986 - woodworking machines. On this judgment see also Falke, J./Joerges, C., The new approach to technical harmonization and standards, its preparation through ECJ case

wished to pull the rug from under the bilateral agreements between France and the Federal Republic. One indication in this direction is the almost complete identity in the thrust of the German and European criticisms of French administrative practice. For in the action for breach of treaty, the European Community attacks precisely those market admission regulations on woodworking machines that had been the basis for the German attacks on the French Government.<sup>117</sup> On the other hand, the Commission's bill of complaint was not submitted to the ECJ until July 1984, by which time the bilateral agreement had long been concluded.

#### 1.10.2. Results

Following the end of the political talks, AFNOR in an initial phase checked at the highest level 281 DIN standards in 19 branches of industry (excluding electrical engineering) to compare them with the 295 corresponding French standards.<sup>118</sup> This list was the starting point for initial activities by the competent authorities in both countries to begin being serious about facilitating circulation of goods. The conference organized by the Franco-German Society for Science and Technology supplies further illumination as to the chances and difficulties for the bilateral agreement. In relation to the three objects of the agreement mentioned at the beginning the following provisional balance sheet can be drawn up:

- (1) The chances for mutual recognition of standards differ considerably from one branch of industry to another. The Strasbourg conference brought out highly differentiated findings in the branches discussed there. The situation in the construction industry is so different in both countries that necessary research work would first of all have to be done in order to be able to define political goals. By contrast, the situation as regards measuring instruments is relatively clear. While there are considerable formal differences, in substance the two systems largely overlap. Harmonization seems possible if the political will to break down the formal distinctions is present. The situation is different again in the area of welding techniques and material testing. Here the need for removal of existing obstacles to trade seems to be very great, but the objective meets with not only political but also technical difficulties. Experts are agreed in their assessment when it comes to electrical engineering. Here the international network of technical standards and testings centres is so widely developed that a bilateral agreement could at most have negative effects.

The nature of the bilateral agreement has since become clear. It is certainly not concerned with facilitating trade in consumer goods. To that extent, there is only a very indirect connection with the topic being discussed here. However, the bilateral agreement is interesting for the way it uses techniques to make the legal systems compatible with the various foreign standards.

The BMA has, according to information from the French Ministry for Foreign Trade and Industrial Development, published an initial list C on the general administrative

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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, 1.2.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>117</sup> It is sufficient to compare the decrees attacked by the Commission in case 188/84 (fn. 116 above) with the survey in *Becker, U.*, *Fortschritte durch Vertrauen*, *BArbBl.* 2/1985 et seq., 35.

<sup>118</sup> *Laurent, J.*, *Bilaterale Abmachungen im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus französischer Sicht*, *DIN-Mitt.* 63 (1984), 117 et seq., 118.

provisions of the Appliances Safety Act, of 118 French standards.<sup>119</sup> The list is based on an assessment that the French standards listed therein are in principle equivalent to the German standards contained in list A. The authorities should intervene only where there is reason to doubt whether the French standards correspond to the safety level prevailing in the FRG.<sup>120</sup>

French law requires different solutions, since it does not have the device of the derogating clause as in the Appliances Safety Act. Since manufacturers are obliged to comply with a norm specified by a decree (Arrêté), German standards can be incorporated into the system only if this obligation is met through them too. This presupposes abstract verification of the equivalence of German standards before including them in the decree. The French Ministry for Industry has in this way incorporated 9 DIN standards important in the eyes of the German Federal Ministry for the Economy into its system of binding technical standards, thereby giving them the same legal bindingness as the corresponding French standards.<sup>121</sup>

- (2) To improve the relationships between applicant and test centre particularly in the case of small and medium-sized enterprises, both governments have decided to explain the bases of the test centres' activity and the relationship between test centre and applicant. In the meantime, circulars to the test centres in accordance with the Appliance Safety Act and general guidelines for applying the conformity tests in accordance with the French decree on standards have been published.<sup>122</sup> Both publications explain the administrative, technical and financial aspects of the national conformity tests.
- (3) Before mutual recognition of test centres, though, there is still a long way to go politically. Although there is agreement that certificates or test marks probably cause greater technical obstacles to trade than do different technical standards, the bilateral agreement has so far shown hardly any effect. Nevertheless, inclusion of the LNE (Laboratoire Nationale d'Essais) in the list of test centres under the Appliance Safety Act has made a start. Information on the procedure aimed at is provided by the Joint Declaration by AFNOR and DIN.<sup>123</sup>

*In the area of certification with the NF mark and the DIN test and inspection mark, AFNOR and DIN will collaborate by in principle carrying out tests of products and inspections of methods of manufacture in the country of origin and by systematically aiming at mutual recognition of these tests and inspections in the context of and in implementation of the regulations drawn up for the purpose by CENCER.*

This passage makes it clear that a strict distinction has to be drawn between full mutual recognition of test results *and* conveyance of certifying power to a foreign office. The furthest-reaching goal is full mutual recognition of test results, but at present efforts are being concentrated on conveying certification powers. This would mean, to give one example, that German testing institutions would be entitled to test French products to see whether they meet the requirements of the NF conformity procedures. Conversely, the Federal Republic has declared its willingness to grant French test centres empowerment to

<sup>119</sup> BArbBl. 11/1984, 52 et seq. Cf. *Becker, U.*, Fortschritte durch Vertrauen, BArbBl. 2/1985 et seq., 37.

<sup>120</sup> *Op. cit.*, 37.

<sup>121</sup> *Op. cit.*, 37.

<sup>122</sup> *Op. cit.*, 38. The German paper was published in BArbBl. 11/1984, 52. Cf. also 3.3.4. below.

<sup>123</sup> Joint declaration by DIN and AFNOR, DIN-Mitt. 63 (1984), 194 et seq.

confer the German safety mark GS, if full mutuality is guaranteed “with the maintenance of the usual reservations”<sup>124</sup>.

### 1.10.3. Effect and function of the bilateral agreement on the creation of a Community safety policy

The opposite poles of the analysis are an accusation of protectionism and a possible pioneering role. Protectionist tendencies might be pointed to in the bilateral agreement because in the European Community a Franco-German axis is build up that might have disadvantageous effects on integration in the common market. While list C under the general implementing regulations for the Appliances Safety Act is at least theoretically open also for the inclusion of norms of other European Community Member States, in France explicit inclusion of foreign standards in the decree is necessary in order to guarantee the possibility for the goods to be traded in France. This comparative cumbersomeness of the French administration has readily been treated as an argument for the flexibility of the German system of reference to standards. This would, however, be to overlook that an administrative act is necessary for the incorporation in the list too. To that extent, the accusation of protectionism applies both to France and to the Federal Republic. The tendency to a Franco-German alliance within the Community is strengthened still further if the fact is included that in the standardization the French are concerned above all with information technology.<sup>125</sup> Finally, the cautious attitude of both DIN and AFNOR should be pointed out, since both continue to maintain the objective of international standardization and regard bilateral agreements as at best a transitional possibility, tending as they do to impede international trade in goods.

Yet there are positive things about the bilateral agreement too. Mutual recognition of standards in special Franco-German committees is objectively nothing other than political harmonization as also aimed at in the context of the Standing Committee under the model directive. Franco-German preliminary work, as done for instance at the Strasbourg colloquium in 1984, might thus accelerate procedure in the Standing Committee. Possibly even more important, however, is the attempt to be serious about mutual recognition of test centres. The model directive did not cover this issue<sup>126</sup> and the standardization organizations themselves have got scarcely anywhere with it outside the area of electrical engineering. A bilateral solution to this extremely important question might be able to act as a model for European regulations on mutual recognition. In very general terms, the bilateral agreement seems in relevant technical and political circles to have aroused considerable response and not only in the Federal Republic and France.

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<sup>124</sup> *Strecker, A.*, Bilaterale Abmachung im Zusammenhang mit der Anerkennung Deutscher und Französischer Normen - Darstellung aus der Sicht des Bundesministeriums für Wirtschaft (BMWi), DIN-Mitt. 63 (1984), 123-124, 124.

<sup>125</sup> On this see *German, C./Marano, P.*, La normalisation clé d'un nouvel essor, rapport au Ministre de la Recherche et de l'Industrie, Paris 1982, throughout.

<sup>126</sup> See *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, 3.3.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

## 2. Consumer Product Safety Law in Britain<sup>+</sup>

### 2.1. Introduction

In the world's oldest industrial country too, consumer product safety law has followed the path of development typical of most developed societies. It follows the tradition of governmental technical control starting in the 19th century, and develops relatively late out of technical (plant/factory) safety law and safety-at-work law. Accordingly, it concentrates firstly on protection of life and limb. Its instruments are administrative control and criminal sanctions. Moreover, safety law for consumer products is, more than technical safety law and safety-at-work law, *market regulation*. That places it under stronger requirements as to economic efficiency and public policy legitimation. In Britain too, this ambivalence marks the structure of existing consumer product safety law and the current debate on prospects for extending it.

### 2.2. The Consumer Protection Act 1961

#### 2.2.1. Pre-history

Technical safety law in England and Wales stands unchanged within the tradition of the heroic age of the 19th-century factory acts. This command and control model of government regulation of safety as a rule consists in a broad definition of goals by the legislator. To achieve the goal, an administrative structure is set up. The top of the administrative body largely autonomously determines measures to be taken in order to secure the legal objective. Implementation and verification is incumbent on an inspectorate on the spot. Accordingly, there is relatively wide freedom of action. Informal conflict settlement and cooperation are clearly to the fore. Recourse to the criminal courts constitutes the ultimate – rarely used – legal means of sanction against safety infringements. While the Health and Safety at Work Act 1964 – the first comprehensive regulation of British safety-at-work law – still largely follows this regulatory model (with a separate administrative structure), consumer product safety law took a different road from the outset.<sup>127</sup>

Till the end of the 1950's, there were legal regulations only for individual cases of particular consumer products [Fabrics (Misdescription) Act 1913; Heating Appliances (Fireguards) Act 1952; Oil Burners (Standards) Act 1960].<sup>128</sup> In 1959 the Committee on Consumer Protection was set up and in 1960 submitted an interim report, followed by a comprehensive final report in 1962.<sup>129</sup> The main impetus for this initiative came from the “consumer sovereignty fallacy”, which could not longer be overlooked. The Committee's proposal aimed at institutionalizing consumer power in the form of a governmental Consumer Council made up of independent persons.<sup>130</sup> Its main tasks were to be: gathering information; verifying the existence of a need for political action; influencing the public to

<sup>+</sup> The account is confined to England and Wales.

<sup>127</sup> On the development of consumer protection law in Britain in general, see *Borrie, G.*, *The Development of Consumer Law and Policy - Bold Spirits and Timorous Souls*, London 1984.

<sup>128</sup> The latter two were repealed by the Consumer Protection Act 1961 and replaced by safety regulations under the CPA: the Heating Appliances (Fireguards) Regulations 1973 and the Oil Heaters (Safety) Regulations 1977.

<sup>129</sup> Final Report of the Committee on Consumer Protection, 1962.

<sup>130</sup> *Op. cit.*, 278 et seq.

take specific consumer-protection policy measures. Fifteen years later, the 1976 Green Paper on consumer safety again advocated the setting up of a Consumer Committee;<sup>131</sup> 21 years later a consumer protection committee of this type was set up in France.<sup>132</sup> In Britain, by contrast, legislation took a different course. In 1961 – before the Committee on consumer protection had finished its work but in implementation of some of the recommendations from its interim report – a safety law covering all consumer products was enacted for the first time: the Consumer Protection Act (CPA).

### 2.2.2. The content of the CPA 1961

The Consumer Protection Act (CPA) 1961, slightly amended in 1971 and 1977, is a mere *framework law*. It does not itself contain any substantive regulations of relevance to safety. Essentially, it covers three points:

- Section 1 implements the main recommendations of the 1960 Interim Report of the Committee on Consumer Protection:<sup>133</sup> the executive (the competent Secretary of State) is empowered to enact binding safety requirements for particular types of product where this appears advisable. The safety requirements relate to two things: 1) requirements on composition, content, planning, design, manufacture and packaging of products, to avoid danger to life and limb; 2) requirements on instructions and warnings to potential purchasers.
- Section 2 contains the *general obligation* on every professional seller of the product in question at all stages of trade to observe the safety requirements formulated in the Safety Regulations. This duty of observance does not apply to *inter alia* private sellers (Section 2 (3) (a) CPA) or exporters (Section 2 (3) (b) CPA).
- Section 3 regulates the sanctions for infringing the Safety Regulations. Infringements of the duty of observance pursuant to Section 2 are subject to criminal proceedings (Section 3 (2) CPA). In the event of damage, *any* person damaged by the unsafe product can raise criminal compensation claims against the seller (offence of breach of statutory duty - Section 3 (1) CPA). General common-law entitlements to compensation remain untouched (tort and contract).<sup>134</sup>

### 2.2.3. Assessment

All in all the CPA 1961 keeps to the approach of individual case regulation in safety law. All that happens is that competence to regulate the individual cases is shifted from the legislature to the executive. For enactment of safety regulations, the CPA makes no formal approval by either House of Parliament necessary. Usually, though, the Joint Committee on Statutory Instruments, a joint committee of both Houses of Parliament, is involved. Section 1 (5) lays a duty on the Secretary of State to consult “such persons or bodies of persons as appear to him requisite” before issuing a regulation. A safety regulation can be suspended at any time by decision of either House of Parliament (“negative resolution procedure” – Section 1 (6) CPA). The CPA 1961 is innovative in its consumer protection policy effect in two ways: by extending the power of legal regulation to *all consumer*

<sup>131</sup> Consumer Safety. A Consultative Document, Cmnd. 6398, London HMSO, 28.

<sup>132</sup> Cf. 1.3 above.

<sup>133</sup> Interim Report of the Committee on Consumer Protection, Cmnd. 1011, London HMSO 1960.

<sup>134</sup> Cf. 2.7 below.

*products* and by making safety regulation *dynamic* through delegating power to issue safety regulations to the executive without involvement of Parliament. One weakness is implementation. No separate hierarchical administrative structure was set up to apply the CPA. Verification of observance of safety requirements was instead left to the local authorities, the trading standards officers of the local Weights and Measures Authorities. These are entitled – but not obliged – to carry out inspections within the area of application of safety regulations, and to take random samples of goods for further investigation. They are not given any further powers. In particular, the local implementing bodies cannot issue any prohibition orders. Over and above formal sanction, the CPA trusts to voluntary observance of the safety regulations and to the market-complementary method of consumer information or sensitization. Altogether, between 1961 and 1978, eighteen safety regulations on the basis of the CPA were issued.<sup>135</sup> There do not however seem to be any indications as to how many sellers had proceedings brought against them in that period for breach of safety regulations.

### 2.3. The Consumer Safety Act 1978

#### 2.3.1. Background

A further stocktaking of consumer product safety law in Britain came fifteen years after enactment of the CPA, in the 1976 Government Green Paper on “Consumer Safety”.<sup>136</sup> This summarized the then prospects for a British consumer product safety law, which in the later White Papers of 1982, 1984 and 1985 were merely taken up again in part and given

<sup>135</sup> Regulations made under the Consumer Protection Act 1961, Section 1, now in force.

<i>Subject</i>	<i>Statutory Instrument No.</i>
The Stands for Carry Cots (Safety) Regulations 1966	SI 1610
The Nightdresses (Safety) Regulations 1967	SI 839
The Toys (Safety) Regulations 1974	SI 1367
The Electrical Appliances (Colour Code) Regulations 1969	SI 310
The Electrical Appliances (Colour Code) Regulations 1970	SI 811
The Electrical Appliances (Colour Code) Regulations 1977	SI 931
The Electric Blankets (Safety) Regulations 1971	SI 1961
The Cooking Utensils (Safety) Regulations 1972	SI 1957
The Heating Appliances (Fireguards) (amended by Regulations 1973 1977/167)	SI 2106
The Pencils and Graphic Instruments (Safety) Regulations 1974	SI 226
The Glazed Ceramic Ware (Safety) Regulations 1975	SI 1241
The Electrical Equipment (Safety) Regulations 1975 and 1976	SI 1366 and 1208
The Vitreous Enamel-Ware (Safety) Regulations 1976	SI 454
The Children’s Clothing (Hood Cords) Regulations 1976	SI 2
The Oil Heaters (Safety) Regulations 1977	SI 167
The Babies’ Dummies (Safety) Regulations 1978	SI 836
The Cosmetic Products (amended by Regulations 1978 (also S2(2) ECA 72) 1984/1260; to be revoked in 1988)	SI 1354
The Perambulators and Pushchairs (Safety) Regulations 1978	SI 1372
The Oil Lamps (Safety) Regulations 1979	SI 1125
The Cosmetic Products (Amendment) (revoked by Regulations 1983 (also S2(2) ECA 72) 1984/1260))	SI 1477

<sup>136</sup> Consumer Safety (loc. cit, fn. 131).

new emphases. Four main points are picked out as shortcomings of consumer protection policy.<sup>137</sup>

- Lack of regular systematic *information* on product-related accidents and of in-depth studies on the exact involvement in accidents of such products, or on cumulative causes of accidents; lack of international exchange of information.
- Lack of *BSI standards* for consumer products, and difficulties in developing and/or updating them;
- *Cumbersomeness* and *procedural restrictions* of safety regulations, in particular the absence of any possibility outside the regulations to respond to new hazards and issue banning orders or have products recalled;
- Weaknesses in implementing safety regulations.

Among the proposals for improving consumer protection we shall here deal only with the set of technical standards. In order to secure a wider range of specific technical standards, the Government contemplates the following possibilities:<sup>138</sup>

- Introduction of special safety standards;
- Setting of time limits for developing new technical standards; in this context adoption of the offeror procedure practised by the US CPSC is recommended;<sup>139</sup>
- Generalized formulation of safety requirements in safety regulations, even if no British Standard is available, so that manufacturers themselves can develop appropriate technical solutions;
- A shift to the method of non-binding reference to technical standards in safety regulations;
- Development of conformity marks;
- Encouraging economic associations to develop self-regulatory codes of conduct in the area of consumer safety law too, as already usual in competition law under encouragement from the Office of Fair Trading (since 1973).

### 2.3.2. The content of the CSA 1978

An initial partial response to the criticism and proposals in the 1976 Green Paper was the Consumer Safety Act 1978.<sup>140</sup> The characteristic of this Act, still authoritative today, is flexibilization on the sanctions side. The rigid two-dimensionality of overall empowerment by statute and regulation of individual cases by the executive is abandoned. Besides the safety regulation, three other instruments are added to the executive's range of safety law measures; the prohibition order, the prohibition notice and the notice to warn. The only one important in practice is the prohibition order, which supplements safety regulations by acting as a time-limited emergency measure.

The CSA contains essentially five points:

- (1) Section 1 lays down "the law" of safety regulations. The objects of the regulations are firstly - here made explicit for the first time - the *safety* of consumer products,<sup>141</sup> and

<sup>137</sup> Loc cit., 11 et seq.

<sup>138</sup> Loc cit., 16 et seq.

<sup>139</sup> Cf. 4.3.1. below.

<sup>140</sup> On the information aspect cf. 2.8 below.

We shall not here go into the technical legal difficulties arising from continued co-existence of the CPA with its regulations and the CSA.

<sup>141</sup> The concept "safe" is defined in Section 9 (4) CSA: "Safe means such as to prevent or adequately to reduce any



secondly the furnishing of consumers with appropriate *information* (Section 1 (1) CSA). The way these goals are to be met through the regulations is set out in detail in Section 1 (2). A notable feature, as a further reflection of the proposals in the 1976 Green Paper, is the prominent place given to technical standards. Technical standards as a substantive reference point for safety regulations appear in four of the nine points. In the context of measures to inform and warn the consumer, marks are also explicitly mentioned.

The procedure for enacting safety regulations is, by comparison with the CPA, made formal. Competence remains with the executive (Secretary of State). However, the duty of consultation is extended. The Secretary of State is now obliged to consult organizations that represent interests affected by the regulation (Section 1 (4) CSA). One example of what this means is that in connection with the Novelty (Safety) Regulations 1980, 66 people and/or organizations were consulted. Additionally, safety regulations must now be approved by both Houses of Parliament (Section 7 (7) – “affirmative resolution procedure”).<sup>142</sup> Both mean considerable complication and prolonging of the procedure for issuing safety regulations.

- (2) Section 3 regulates the new instruments of action. The cumbersomeness of the safety regulation procedure is evidently to be compensated here by opening up additional possibilities of rapid regulatory intervention.

*Prohibition orders* (Section 3 (1) (a) CSA) are orders that prohibit the sale of a particular group of products.<sup>143</sup> The Secretary of State has in principle to announce the issue of a prohibition order 20 days in advance, secure opinions and check those received. This “preliminary procedure” may be dispensed with only in urgent cases (“emergency procedure”). The prerequisites for an “urgent case” are not specified in any more detail. Prohibition orders expire by law after 12 months. Additionally, they may at any time be waived by decision of either House of Parliament (Section 7 (6) CSA).

*Prohibition notices* (Section 3 (1) (b) CSA) are issued to a particular person. The procedure for issuing prohibition notices is regulated in Schedule 1 Part II CSA - in too much detail and out of all proportion to their practical relevance. Intensive exchange of information between the trader/importer affected and the Secretary of State is provided for. This seems to amount to legal regulation of the prevailing practice at the implementation stage of informal settlement of disputes.

*Notices to warn* (Section 3 (1) (c) CSA) are instructions to suppliers to provide information or warnings on particular hazards of products supplied by them<sup>144</sup>.

- (3) *Contraventions* of prohibition orders, prohibition notices or notices to warn issued by the Secretary of State are criminally (Section 2 CSA) and civilly (Section 6 CSA – offence of breach of statutory duty) actionable.
- (4) For the first time, a comprehensive *information right* of the Secretary of State is also given legal embodiment. He may secure information, call for documents and ask to see them, etc. Breaches of this duty on suppliers constitute an offence.
- (5) Section 5, taken together with Schedule 1 Part III, regulates in detail the powers of the implementing agencies. These are – as under the CPA – confined to the right to enter

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risk of death and any risk of personal injury from the goods in question or from circumstances in which the goods might be used or kept, ...”

<sup>142</sup> For details on procedure, see *Weatherill, S./Woodroffe, G.F.*, Consumer Safety in the United Kingdom. Report for the European Communities, Contract No. 85-B 6673-11-005-11-C, 93 et seq.

<sup>143</sup> Details of the procedure are regulated in Schedule 1 Part I CSA.

<sup>144</sup> The procedure is regulated in Schedule 1 Part III CSA.

business premises, see documents, take samples of products for further investigation, and where necessary secure assistance from authorized agencies to enter business premises by force and, in compliance with prescribed procedures, forcibly open receptacles.

### 2.3.3. Assessment

The thinking of the CSA 1978 is characterized by the division of labour between safety regulations and prohibition orders. Prohibition orders are a response to new types of product hazard. During their 12 months duration, experience accumulated can be used to decide whether there is justification for extending the provisional measure into a safety regulation. Of the eight prohibition orders issued under the CSA between 1978 and 1983, six have been converted into safety regulations. Prohibition notices and notices to warn have not so far played any role in practice.

Statements on the effectiveness of the CSA in guaranteeing the safety of consumer goods can only be tentative. As against the eighteen safety regulations made under the CPA between 1961 and 1978, fourteen were made under the CSA between 1978 and 1985.<sup>145</sup> As regards formal punishments for contravention of safety regulations and prohibition orders, the government's first five-year report (pursuant to Section 8 (2) CSA) to Parliament on practice with the CSA (and CPA), of 1983, gives the following figures<sup>146</sup>:

**Table 1:** Contraventions of safety regulations

<i>Period</i>	<i>Number of persons convicted</i>	<i>Number of breaches of the law</i>
1.11.78 - 31.3.79	54	59
1.4.79 - 31.3.80	98	142
1.4.80 - 31.3.81	109	158
1.4.81 - 31.3.82	185	439

<sup>145</sup> Regulations made under the Consumer Safety Act 1978, Section 1

<i>Subject</i>	<i>Statutory Instrument No.</i>
The Dangerous Substances and Preparations (Safety) Regulations (amended by 1980 (also S2 (2) ECA 72) 1985/127)	SI 136
The Upholstered Furniture 1980 (Safety) (amended by Regulations 1983/519)	SI 725
The Novelties 1980 (Safety) (amended by Regulations 1985/128)	SI 958
The Filament Lamps for Vehicles (Safety) Regulations 1982	SI 444
The Upholstered Furniture (Safety) (Amendment) Regulations 1983	SI 519
The Pedal Bicycles (Safety) Regulations 1984	SI 145
The Pedal Bicycles (Safety) (Amendment) Regulations 1984	SI 1057
The Motor Vehicles Tyres (Safety) Regulations 1984	SI 1233
The Cosmetic Products (Safety) Regulations 1984 (also ECA 72 & CPA 61)	SI 1260
The Gas Catalytic Heaters (Safety) Regulations 1984	SI 1802
The Food Imitations (Safety) 1985 (amended by Regulations 1985/1191)	SI 99
The Dangerous Substances and Preparations (Safety) (Amendment) Regulations 1985	SI 127
The Novelties (Safety) (Amendment) Regulations 1985	SI 128
The Food Imitations (Safety) Amendment Regulations 1985	SI 1191

<sup>146</sup> According to *Weatherill, S./Woodroffe, G.F.*, Consumer Safety in the United Kingdom. Report for the European Communities, Contract No. 85-B 6673-11-005-11-C, 122.

1.4.82 - 31.3.83	256	665
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Much greater importance, however, attaches to “soft implementation”, to cooperation between the on-the-spot implementing agencies, the trading standard officers, and the manufacturers and traders concerned.

Summarizing, one may say that there is consumer product safety law in Britain only to the extent that safety regulations and/or prohibition orders have been issued under the CPA and CSA. Local implementing agencies can act only on the basis of these provisions for individual cases. Their powers are limited to the disclosure of breaches. They have no powers to prohibit further sale of unsafe goods, far less order recalls of products that cause damage. The CPA and CSA continue the traditional dual strategy of British safety law unchanged: (1) voluntary compliance with safety regulations following informal warnings from the authorities, and (2) where necessary, penal sanctions. The only additional possibility is an official Government warning through the media against buying particular products.

#### **2.4. Present prospects for development**

##### 2.4.1. Legal reform projects

Six years after enactment of the CSA, the 1984 Government White Paper “The Safety of Goods”<sup>147</sup> brought a new stock-taking of British consumer good safety law. Moving on from the fundamental Green Paper of 1976, it singles out the following two main weaknesses of the CSA.

As regards *implementation*, the possibilities offered of pursuing the most effective and cheapest road to consumer protection, namely preventing unsafe products coming to market at all, are too slight. Obligatory safety checks or safety marks as legal prerequisites for sale are rejected, with explicit reference to problems in connection with Community law (technical barriers to trade). Instead, more lasting preventive effects are expected from higher criminal penalties (higher fines), and extension of powers for local implementing agencies to make preventive checks is recommended. Moreover, local authorities have no way of preventing further illegal sale of goods or of withdrawing from the market goods clearly out of line with safety regulations or prohibition orders. Above all, institutional provisions are required in order to catch unsafe imports (specially from non-EEC countries) at the frontiers.

It should be noticed in passing that these suggestions led to an amendment to the CPA and CSA, the Consumer Safety (Amendment) bill, which was enacted in August 1986. As regards the problem of checks on imported goods, obviously felt to be urgent, the customs and excise authorities are given the right to impound imported products for 48 hours for investigation by the competent local implementing bodies. They have also to inform the competent bodies of any suspicions they may have.

The range of instruments available to local implementing bodies is extended by the introduction of the *suspension notice*. This allows the competent authorities, on justified suspicion of infringement of a safety regulation or prohibition order, to issue sales bans valid for 6 months. Finally, for the first time (!), the possibility is opened up of withdrawing

<sup>147</sup> Cmnd. 9302, London HMSO, July 1984.

unsafe products from the market. On application from a local authority, a court may order the destruction or confiscation of incriminated goods. Recall procedure is still not provided for.

The decisive step towards making British consumer good safety law effective is however seen as a change in the underlying conception: replacement of individual case regulation through safety regulations and prohibition orders by generalization of the safety law approach. The introduction of a *general safety duty*, already present in the Health and Safety at Work Act (Section 6 HSWA) and favoured in the 1976 Green Paper, is once again advocated. This duty would require all manufacturers and traders (importers, wholesalers, retailers, etc.) to bring only safe goods to market in Britain. It would allow the implementing agencies, without having to pass through safety regulations or prohibition orders, to proceed directly against any trader because of any consumer product whatever, provided it be *unsafe*. While the CSA 1978 was still endeavouring to give an exhaustive definition of the concept of safety (Section 9 (4))<sup>148</sup>, the 1984 White Paper completely abandons any such legal semantics of safety. The safety of consumer goods is defined by referring to “sound and modern standards of safety”. The 1984 White Paper is thus bringing into safety law on consumer products what had already been achieved in 1974 by the HSWA but was only adumbrated by the CSA 1978: the step to delegalization, or to “legislation by reference to standards” (J. Fraser). “Sound standards” are in the first place British Standards,<sup>149</sup> but also European and international standards that have been recognized as such. Observance of relevant standards would indicate “due diligence”, and rule out criminal responsibility.<sup>150</sup>

The 1984 White Paper’s approach – possibly not uninfluenced by similar considerations at European level – very strongly links interests in the international competitiveness of the British economy<sup>151</sup> and in safety and consumer protection policies. Once this link is set up, experience shows that the latter have the worse of it. The consequences of this kind of “reference to standards” approach for consumer product safety policy are obvious, even though they have not yet been drawn and do not even seem realizable at all: development of genuine (consumer product) safety standards and/or effective consumer involvement in the standardization process.

The 1985 White Paper “Lifting the Burden”<sup>152</sup> again expresses the Government’s intentions in legal policy: to move towards a general safety duty and wind down single-case regulation. This consumer protection policy approach is now even more closely tied in with an overall deregulation programme intended to eliminate needless regulatory burdens and costs for the British economy.

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<sup>148</sup> Cf. fn. 141.

<sup>149</sup> In November 1982 a memorandum of understanding between Government and BSI was signed, recognizing the BSI as the national standardization body and aimed at speeding up production of technical standards. It is reprinted in the White Paper “Standards, Quality and International Competitiveness”, 1982, Annex A.

<sup>150</sup> For details see 2.7 below.

<sup>151</sup> Cf. esp. the White Paper, “Standards, Quality and International Competitiveness”, London HMSO 1982.

<sup>152</sup> Cmnd. 9571, London HMSO, July 1985, based on an interministerial study on administrative and legislative obstacles for small firms in Britain: “Burdens on Business”, London HMSO, March 1985.

#### 2.4.2. Consumer Protection Act 1987

In November 1986 the British Government published the draft of a Consumer Protection Bill,<sup>153</sup> which was passed by Parliament in summer 1987. The Consumer Protection Act 1987 (CPA) contains three substantive sections:

(1) Incorporation of the Community Product Liability Directive into British law; (2) revision of the CSA 1978 by introducing a general safety requirement and (3) a regulation on deceptive price indications. In this context only the second part, on consumer protection or consumer product safety (consumer safety) is of interest. This part came into force in autumn 1987. It thus brings both aims – generalization of consumer product safety requirements and policy of reference to technical standards – into legislative practice. In future, the supreme principle in British consumer protection law will be not to bring any goods to the market that “fail to comply with the general safety requirement”. Consumer goods within the meaning of the Act are products intended for private use and consumption. Separately regulated areas like cars, medicines, tobacco, etc. are excepted.

The general safety requirement is not met if consumer goods “are not reasonably safe having regard to all circumstances” (Section 10 (2) CPA). Among such circumstances are mentioned: (1) characteristics of goods that would constitute a defect within the meaning of the Community Product Liability Directive; (2) technical (safety) standards; (3) the technical possibility of producing a product more safely, if this is in reasonable relation to the costs incurred, etc.

The new Act does not apply to secondhand goods; to goods not intended for the British market; or to retailers to whom the lack of safety was not apparent. Moreover, it is always a sufficient defence to show that the product meets the requirements of a safety regulation or a tested technical (safety) standard. The *regulatory* instruments of the CSA 1978, as last augmented by the 1986 Amendment, are unchanged. In particular, the general safety duty does not correspond to any general recall powers for the competent Government offices. There is only the limited possibility of issuing a suspension notice on the basis of an existing safety regulation or prohibition order.

As far as penalties go, a distinction has to be drawn: breach of the general safety duty is merely an offence punishable by fine or imprisonment. There is *no* civil sanction. This is kept for the new product liability law,<sup>154</sup> as a conversion of the Community Product Liability Directive. Contraventions of specific governmental regulatory measures, in particular safety regulations, retain their traditional twofold character as crimes and as the tords of breach of statutory duty.

#### 2.5. Accident information systems

The consumer protection policy debate in Britain takes on a special quality because the relevant legal policy work was set on an empirically based scientific foundation. Since the mid-70s, the UK had been developing the most comprehensive accident information system of the times alongside NEISS in the US, namely the Home Accident Surveillance System (HASS). Following a preliminary stage in 1976, there has since 1977 existed in England and Wales a system for collecting data on accidents at home and in the garden. Twenty hospitals with 24-hour accident and emergency services are incorporated into the system as

<sup>153</sup> Reprinted in PHI 1987, 18-26. The Consumer Protection Act 1978 is published by HMSO, London 1987.

<sup>154</sup> Which came into force on March 1988, as Part I of the Consumer Protection Act 1987.

information sources. In an alternating pattern, ten hospitals at a time supply data on non-fatal accidents requiring medical treatment in hospital. Fatal accidents are surveyed and assessed by the Office of Population Censuses and Surveys (OPCS). According to the last available HASS report, from 1986 and based on 1985 figures,<sup>155</sup> every year in Great Britain, i.e. England, Scotland and Wales,<sup>156</sup> 5005 people die in home accidents; 3.1 million people are sufficiently seriously injured as to require medical treatment. Home accidents constitute 40% of all fatal accidents in Great Britain (as against 42% road accident deaths), and at 34% are by far the biggest proportion of accident victims treated in hospitals. The number of fatal home accidents in the narrower HASS survey area, England and Wales, has been very stable at around 4800 since 1980.

The hospital figures collected by HASS on non-fatal accidents are systematically assessed and published every year. In particular, the annual report contains product-related data on accident frequency. Additionally, the Safety Research Section of the Department of Trade and Industry does in-depth studies, or has them done, to determine where there is need for political action in the form of a safety regulation.

The Community experimental model accident survey system of 1981 was largely inspired by this British example. Its present successor, the demonstration project of 22 April 1986, is however patterned more closely on the Dutch model (PORS), under test since 1980. It goes beyond HASS in three respects: (1) non-restriction to house and garden, but inclusion of leisure and sport activities; (2) inclusion of fatal accidents too; (3) diversification of information sources to more than just hospital casualty services. In Britain, HASS is at present being extended on the model of the Community demonstration project; specifically, a Home Accident and Death Database (HADD) is being added, into which sport and leisure accidents are subsequently to be integrated. The pilot stage began in November 1986 with one initial hospital. Inclusion of Scotland and Northern Ireland, i.e. the extension of the accident information systems (HASS/HADD) to Great Britain and to the United Kingdom as a whole, is still to be awaited.

## 2.6. Technical standardization

### 2.6.1. British Standards Institution

The central institution for standardization in Britain today is the British Standards Institution. The BSI is similar in history and structure to the DIN. It started in 1901 as the Engineering Standards Committee, founded by engineering associations. The first technical standard was on rolled steel sections for rails. In 1918 it became the British Engineering Standards Association. A Royal Charter of 1928 gave it legal capacity. The present name was adopted in 1931. The tasks of the BSI, as formulated in Royal Charters of 1928, 1931 and 1981, consist primarily in developing technical standards and in certification of products.

Today the BSI is headed by a board responsible for general standardization policy. Below the board are six Councils in specific areas: building, chemistry and health, engineering, electricity, technology and computing. There is also a Quality Assurance Council, responsible for product certification, tests and inspection. The latter recently (1984) developed into the National Accreditation Council for certification bodies. Its tasks are to

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<sup>155</sup> Home Accidents, 1986.

<sup>156</sup> Figures for Scotland are supplied to HASS by the Scottish General Register Office.

monitor and authorize for product certification and quality assessment other certification bodies than the BSI. Practical standardization work is done by some 300 technical committees.<sup>157</sup> In these, some 28,000 experts, primarily from interested business circles, work on a voluntary basis. The BSI has more than 1074 permanent employees.

Besides the technical committees, the Consumer Standards Advisory Committee is of importance from the viewpoint of consumer goods safety. Some 70-80 representatives of consumer associations work on it. The Consumer Committee developed out of the Women's Advisory Committee introduced in 1951. Its task is to ensure involvement of consumer interests in the standardization process. The Consumer Committee is at present represented on 230 technical committees. Since consensus or unanimity by Committee members is a precondition for adoption of a technical standard by the BSI, opposition by a consumer representative can block a standard.

At present there are 10,124 British Standards. 8,900 standards are being worked on (more than half of them international standards). The BSI budget at present amounts, according to the 1985-6 Annual Report, to 26 million pounds. This sum derives mainly from contributions from the 18,000 members, from the sale of standards specifications and from government contributions (4.5 million pounds).

#### 2.6.2. Methods of "reference to standards"

British Standards are, like DIN standards, mere recommendations. They have no legal standing.<sup>158</sup> This has changed since the "reference to standards" policy pushed by the British Government in worker and consumer protection law since the late 70's. This policy is in turn determined by the great political value attaching to British Standards for the international competitiveness of the British economy in the last decade, especially following UK entry to the EEC in 1973. Among political expressions of this situation are the (already cited) 1976 Green Paper on consumer safety, the GATT Agreement on Technical Barriers to Trade, to which Britain acceded in early 1980, the 1982 Memorandum of Understanding between Government and BSI, and particularly the 1982 White Paper "Standards, Quality and International Competitiveness".

Ignoring for the moment the possibility of using British Standards for contractual description of performance, something done above all by the State when placing orders, there are four ways of particular importance for giving technical standards legal relevance:<sup>159</sup>

- A formerly widespread reference method (figuratively speaking) is to incorporate a British Standard, in modified form or sometimes verbatim, into a safety regulation. An example of this is the Oil Heaters Regulations of 1961/1966. By contrast with reference proper, here it is the regulation itself - even though (partly) incorporating a British Standard - that independently, and exhaustively, regulates the technical requirements.
- *Strict reference.* With this reference method, so far the major one in Britain, the provision (as a rule a safety regulation) refers for safety standard, test procedure, etc. directly to a British Standard, indicating the BS number and date. Compliance with this technical standard is then a legal obligation. In German terminology, this is a case of rigid/static

<sup>157</sup> The data refer to the BSI's Annual Report for 1985-6.

<sup>158</sup> Every British Standard contains the following clause: "Compliance with a British Standard does not of itself confer immunity from legal obligation".

<sup>159</sup> Cf. also BS O: A Standard for Standards, Part 1: 1981, clause 9.

legal reference. Any change to the technical standard necessitates adaptation of the safety regulation. Examples of this are the Heating Appliances (Fireguards) Regulations (1973) and the Nightdresses (Safety) Regulations 1967.

- *Undated reference.* In this case the safety regulation refers to one or more specific standards by simply mentioning the BS number, but compliance with the norm is not made binding. The manufacturer/importer then has alternative possibilities of meeting the safety requirements. This reference is made on a “deemed to satisfy” basis.
- *General reference.* The legal provisions may however also describe the safety requirements in general, or abstractly contain a general safety obligation.<sup>160</sup> The manufacturer/importer/trader is free to choose the way he wishes to meet the requirements. One acceptable way will be to comply with the relevant British Standard, or equivalent technical standards, if they exist. More recently, the Ministry has gone over to providing so-called *administrative guidance*. Here there is a clear statement of which technical norms satisfy the safety requirement concerned. This reference is made on the so-called “approved” basis. Practical examples are the Electrical Equipment (Safety) Regulations 1975, the Building Regulations and the area covered by the HSWA. By contrast with administrative provisions under § 11 of the German GSG, administrative guidance has no formal legal standing.

This model (“approved” basis) ought also to be applicable now that a general safety duty has been statutorily introduced into consumer product law. Specific safety requirements will now be defined by “sound and modern practice” or “sound and modern standards of safety”. What this in turn means would have to be specified in approval schemes, which would no doubt be worked out under BSI direction with broad involvement of governmental and consumer representatives. Technical standards passing this test of certification or approval would then be published in a list, comparable to that for administrative guidance.

Though they have no legal significance, informal recommendations of technical standards by local implementing agencies continue to be of great importance in practice.

The two methods of non-binding legal reference to technical standards (“undated and general reference”) seem to be becoming steadily more common in Britain. In particular, the 1982 Government White Paper “Standards, Quality and International Competitiveness” is decidedly in favour of this regulatory approach (“statute plus BSI”). The parallels with the “new approach” to harmonization of technical standards at Community level are unmistakable. The introduction of a general safety duty in consumer product safety law, announced in the 1984 and 1985 White Papers and brought about through the Consumer Protection Act 1987, is thus merely a consistent development of this legal area, in respect of both industrial policy and consumer protection policy.

### 2.6.3. Product Certification

Certification is an area that has been intensively discussed and dealt with in Britain, partly also from trade policy standpoints. In 1982, certification procedure was available for between 200 and 300 types of product. In the main, BSI kitemarks are issued. Product certification is handled by the BSI through the Certification and Assessment Department.

<sup>160</sup> E.g. Section 6 (1) (a) HSWA 1974, which, borrowing from § 3 (I) GSG, postulates a general duty “to ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to health when properly used”.



Besides this, there are other recognized certification institutions in particular areas: among them are the British Electrotechnical Approvals Board (BEAB) for electrical products and the British Board of Agrément (BBA) in the area of building and construction. In Britain, three marks of conformity or quality are usual:

- *BS number*. Mere use of the BS number has the weakest force. It contains merely a statement, not checked by anyone else, by the user or manufacturer that the product has been manufactured in accordance with the relevant British Standard.
- *Kitemark*. This conformity mark has existed since 1903. Authorization to use the kitemark is given by the BSI following checking at the manufacturing plant to ensure that the requirements are met. At the end of 1986 there were 1,365 kitemarks. The BSI Inspectorate carries out continual checks to ensure that the provisions are still being complied with.
- *Safety mark*. Since to date there are (as yet) no specific safety standards and a British Standard is not necessarily oriented towards coverage of all possible relevant safety requirements, in 1974 a safety mark was introduced. Firms may use it on products that have met special safety requirements when tested by the BSI. Eventually, however, in practice the safety mark has so far not caught up with the kitemark. As against the 1,365 kitemarks at the end of 1986, there were only 37 safety marks.

A fairly important procedure in Britain is that of *quality assessment*. This centres not around an individual product, but on whether a manufacturing or service firm in general meets the requirements of BS 5750,<sup>161</sup> the BSI's basic quality standard. Firms that meet the requirements – at present there are 1,402 of them – are registered by the BSI. This registration also seems to be of interest to the firms concerned from a marketing viewpoint.

## 2.7. Liability

Traditionally in safety law in Britain, the main non-administrative response to contraventions of safety regulations is criminal sanction.<sup>162</sup> The CSA lays down penalties of up to three months imprisonment and fines of up to 1000 pounds (Section 2 (4)). However, the conditions under which the accused may put forward the defence of due diligence are in each case regulated in detail.<sup>163</sup> While the HSWA 1974 explicitly excludes civil sanctions, they are explicitly permitted by the CPA 1961 and the CSA 1978. The Consumer Protection Act 1987 once again provides only criminal sanctions for breaches of the general safety requirement (Section 10 (1) CPA). As to liability, in consumer product safety law in England and Wales there were three possible grounds of claim, of which however we shall describe only the first two in more detail, given their more direct relevance: breach of statutory duty, negligence (“product liability in tort”) and contract.

<sup>161</sup> BS 5750 has since been adopted internationally as ISO 9000.

<sup>162</sup> With the general political trend towards deregulation in Britain too, the interministerial study “Burdens on Business” (op. cit., fn. 152), p. 62, has recently for the first time unreservedly recommended restriction to civil law and to insurance solutions. But even outside the narrower area of consumer product safety law, increasing decriminalization of economic regulation is being called for. Cf. *Tench, D.*, *Towards a Middle System of Law*, London 1981; *Breaking the Rules: The Problem of Crime and Contraventions. A Report by Justice*, London 1980.

<sup>163</sup> Section 2 (6) CSA; Section 12 Consumer Safety (Amendment) Bill.

### 2.7.1. Breach of statutory duty

The most interesting from the liability point of view, even though to date it has no practical importance<sup>164</sup> in consumer product safety law, is the offence of breach of statutory duty. This institution is controversial in the English legal literature on liability. Dias/Markesinis, for instance, say that it lies “between” liability on grounds of negligence and strict liability.<sup>165</sup> Firstly, Section 6 (1) CSA clearly states that breaches of obligations under safety regulations, prohibition orders or prohibition notices constitute a civil offence of breach of statutory duty. It seems also to be undisputed that this is strict liability, since the criminal-law defence of due diligence is ruled out. Liability is based on merely marketing an unsafe or damage-causing consumer product. However clear this differentiation may seem at first sight, the demarcation becomes unclear when one comes to consider the cases of primary interest here, where the manufacturer/trader has complied with a technical standard referred to (in particular a British Standard). No problems arise with the case where a safety regulation bindingly prescribes compliance with a particular standard (Section 1 (2) (b) CSA). Here compliance with a technical standard that ultimately proves technically inadequate (for instance, because it is out of date) excludes breach of statutory duty as a ground of liability. More interesting, since it will no doubt be of greater importance in future, is *non-mandatory* reference to technical standards, for instance pursuant to Section 1 (2) (c) CSA.

For civil liability on grounds of breach of statutory duty, it must here suffice for the plaintiff to show that there has been a breach of the relevant safety regulation, in other words, an unsafe product has been brought to market. Since action for breach of statutory duty does not require negligence, the defence that a relevant British Standard has been complied with is not admissible. The main defence open in breach of statutory duty cases is to show that the person suffering the damage is (largely) co-responsible. Compensation for damage is limited to personal injuries. Exclusion of liability or limitation of liability is null and void.<sup>166</sup>

Whether the courts will maintain this line of interpretation in the sense of “strict liability” in consumer product safety law in England and Wales is at present completely uncertain. Firstly, there have not so far been any relevant decisions. Secondly, with the Consumer Protection Act 1987, British legislation has in part taken a different course. Breach of the general safety requirement now introduced has been specified solely as the elements of an offence. The liability aspect has been left for British product liability law, which has to implement the Community product liability Directive. By contrast with the National Consumer Council’s expectations expressed in 1984,<sup>167</sup> the offence of breach of statutory duty does thus *not* extend to the general safety duty. Breach of statutory duty remains confined to the safety regulations and comparable governmental regulatory acts. Most recently, in this area, there has been a noticeable general trend by courts in England and Wales to look at the political objectives lying behind individual-case statutory regulations

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<sup>164</sup> According to information from the legal expert of the Department of Trade and Industry’s Consumer Safety Unit, no action for compensation on the basis of breach of statutory duties can be traced. See also the DTI’s document of November 1985, “Implementation of EC Directive on Product Liability”, § 42.

<sup>165</sup> *Dias, R.W.M./Markesinis, B.S.*, Tort Law, Oxford 1984, 156. Cf. also in general *Stanton, K.H.*, Breach of Statutory Duty in Tort, London 1986.

<sup>166</sup> Section 3 (1A) CSA, introduced by the Unfair Trade Act 1977.

<sup>167</sup> The Safety of Goods (*loc. cit.*, fn 22), 7-10.

in order to specify the content and extent of the statutory duty and the circumstances that mean breach of it.<sup>168</sup> Since it has however become clear since the 1980s that in the view of both Government and Parliament “sound and modern standards of safety” ought to define the scope of the duty, it cannot be ruled out that if standards “approved” by the BSI<sup>169</sup> are observed, liability for breach of statutory duty will not arise.

### 2.7.2. Negligence (manufacturer liability)

Liability under the common-law offence of negligence takes us outside the narrower context of consumer protection law. Entitlement may here arise – subject to any special provisions of accident insurance or labour law – for anyone harmed by a product: a worker in a production process; a businessman in connection with goods he uses in his trade; the final private consumer. Liability for damage lies primarily with the manufacturer of a product, who also has to answer for negligence by his employees, on the principles of vicarious liability.

Offence-based manufacturer liability on grounds of negligence<sup>170</sup> developed relatively late in English common law. Whereas in the US and in Germany the foundations had been laid by similar decisions at the highest judicial level at around the same time, 1915-1916<sup>171</sup>, this did not come about in England until 1932. The landmark decision *in re M’Alister* (or *Donoghue*) *v.* *Stevenson*<sup>172</sup> for the first time assumed positive duties of care between persons outside contractual relationships, which could be breached merely by being negligent (“not using reasonable care”). Subsequently, negligence liability by manufacturers of defective products was consolidated. The general duty of care was differentiated into manufacturing duties (“production defects”), design duties (“design defects”) and duties of instruction (“marketing defects”). Procedurally too it may now be taken as a basis in England and Wales – comparable in this respect with the FRG – that it is in principle sufficient for the injured party to show that interests protected under the law of tort have been injured during proper use of the product in question. By the *res ipsa loquitur* rule, the manufacturer’s negligence is (refutably) presumed.

As regards the evidentiary position of technical standards, it is in principle to be taken as a basis in English law too that conformity with a standard or departure from one is not synonymous with conduct in accordance with or contrary to one’s duty. Non-compliance with a British Standard engenders a strong presumption of negligence. Observance of relevant technical standards to which non-binding reference has been made places the onus on the plaintiff to provide positive proof of the manufacturer’s negligence. In cases of strict reference, compliance with the technical standard concerned should suffice to rule out negligence.

At least since *Walton v. British Leyland UK Ltd.* (1978) a duty to monitor a product and respond accordingly seemed to have been recognized. This is the counterpart in law of tort to the regulatory “notice to warn”. In the *Walton v. British Leyland* case, the car manufacturer was condemned to make compensation for damages, on grounds of tortious breach of a duty of recall. English law has also developed duties of care and transaction

<sup>168</sup> *Dias, R.W.M./Markesinis, B.S.*, Tort Law, Oxford 1984, 158.

<sup>169</sup> Cf. 2.6.2 above.

<sup>170</sup> Cf. esp. *Hepple, B.A./Matthews, M.H.*, Tort, Cases and Materials, 3rd ed., London 1985, 258 et seq.

<sup>171</sup> RGZ 87,1 - Brunnensalz (1915); *Mac Pherson v. Buick Motor Comp.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>172</sup> A. C. 562 (1932).

under law of tort for the marketing stages. The road to “strict liability”, taken in the law of most US States since 1963,<sup>173</sup> has not been completed by English law of tort any more than by German manufacturer liability law.

### 2.7.3. The present legal policy situation (1987)

Starting with the forthcoming implementation of the Community product liability Directive in British law and the British Government’s undertaking as regards legal policy to introduce a general safety duty into consumer protection law, in 1987 several options opened up for developing product liability law: (1) Introduction of a general safety duty into the Consumer Safety Act; raising criminal penalties; removal of the offence of breach of statutory duty from the CSA, with revised provision for it in a special act on product liability; (2) Introduction of a general safety duty into the CSA, with retention of (possibly raised) criminal and civil sanctions; implementation of the Community Directive in a separate product liability act.

The Consumer Protection Act 1987 largely implemented the second option. Accordingly, British product liability law will, as far as consumer goods are concerned, in future be based on three principles:

- Modified strict liability under the Product Liability Act (implementing the Community Directive);
- Breach of statutory duty in so far as safety regulations or comparable measures have laid down specific duties as to conduct;
- General liability in common law, specifically under law of tort (negligence).

Infringement of the newly introduced general safety requirement remains irrelevant for purposes of civil law. Criminal sanctions only are provided.

## 2.8. Information

As regards information on product hazards, two addressees should in principle be distinguished: (1) the regulatory authority and (2) potential purchasers of the unsafe product.

### 2.8.1. Information of regulatory bodies

As regards information to governmental agencies on damage-causing products, the 1976 Green Paper referred to the following sources:<sup>174</sup>

- individual Government departments;
- complaints about product defects from MPs and the public;
- local authorities;
- consumer associations and the Royal Society for the Prevention of Accidents;
- the national and international press and specialist journals;
- the BSI;
- the Office of Population Censuses and Surveys (OPCS).

<sup>173</sup> Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 377 P. 2d 897.

<sup>174</sup> Cmnd. 6398, 1976, page 2.

By far the greatest importance at present, though, attaches to the HASS/HADD accident information system as regards reporting on non-fatal accidents in England and Wales. HASS and HADD are described above.

#### 2.8.2. Information to purchasers of products

Purchaser information outside the market traditionally plays a major role in Britain. Three elements in particular should be stressed: comparative tests of goods, conformity marks and consumer education.

As in other countries reported on, *comparative tests of goods* have long been customary in Britain too. A prominent part in this connection is played by the Consumer Association Ltd. This is a private-law non-profit-making organization founded in 1957, financed exclusively from membership dues. Membership at present amounts to some 700,000. The Consumer Association carries out comparative tests on all types of consumer goods and relevant services. Test results are published in the magazine "Which?", directly available only to members. Since, however, test results are also reported on television and in the press and the magazine is available in public libraries, the Consumer Association and "Which?"<sup>175</sup> have an importance in general for consumer education that cannot be much less than the German Stiftung Warentest and its magazine "test".

In addition to general "brand names" (including various types of marks used by various firms or businesses), conformity marks or trade marks are of importance as conveyors of information to purchasers. Certification trade marks, above all the BSI kitemarks, are regulated in general in the Trade Marks Act 1938 (S 37). Authorized use of the conformity mark testifies to compliance with particular quality or safety requirements.

One peculiar feature of the British situation is the importance attached to consumer protection, here primarily in connection with safety in the home, through *consumer education*, even in school. The Royal Society for the Prevention of Accidents (ROSPA), maintained from public funds, is the main vehicle of the endeavour to get safety questions brought into syllabuses. The government's Press and Information Office supplies schools with film material for the purpose. Television stations broadcast corresponding "safety messages" in pauses between programmes.

### 3. Product safety policy in the Federal Republic of Germany

The description of product safety policy in the Federal Republic of Germany will concentrate mainly on the Appliances Safety Act and its implementation in practice (3.3) and on technical standardization of relevance to safety (3.4). A final section deals with liability for technical consumer products that cause damage (3.5). The account is introduced by notes on home and leisure accident research (3.1) and a discussion on some general questions on the German system of reference to technical standards (3.2).

#### 3.1. Research into home and leisure accidents

While industrial accidents in particular have for years been fairly completely covered by the occupational accident insurance associations, as have road accidents and accidents in

<sup>175</sup> The "Shopper's Guide", published by the DTI and originally a possible competitor for "Which?", is of no significance today.

schools and nurseries,<sup>176</sup> the Federal Republic lacks comparable statistics for the area of home and leisure. The Federal Government did not take part<sup>177</sup> in the Community pilot experiment relating to a Community system of information on accidents involving products outside the spheres of occupational activities and road traffic,<sup>178</sup> and was also reluctant about the demonstration project decided on in April 1986 with a view to introducing a Community system of information on accidents involving consumer products.<sup>179</sup> It based itself above all on a study carried out by the Association of Liability Insurers, Accident Insurers, Automobile insurers and Legal Costs Insurers, a registered society (HUK-Verband e.V.) on home and leisure accidents in the Federal Republic;<sup>180</sup> till then findings on home and leisure accidents were available only for selected groups of people and types of accidents.<sup>181</sup>

The HUK study treats as a home or leisure accident an occurrence in which a person doing something not having to do with either a road traffic, occupation or school suffers an injury requiring medical treatment or leading to impairment for at least several days. An initial survey asked 89,393 representatively sampled households<sup>182</sup> whether one or several household members had suffered a home or leisure accident in the last 12 months. The figures collected are not stated, though the projection based on them is. This estimates home and leisure accidents with personal injuries requiring medical treatment or at least leading to longish impairment at some 3 million for the Federal Republic; 15% of those injured will require in-patient treatment. The number of trivial home and leisure accidents is estimated at over 100 million per year.<sup>183</sup> It is further stated that in 1982 fatal accidents numbered approximately 11,000 in road traffic, some 2,500 at work or school, and some 12,000 at home or in leisure time. More than 3/4 of the last group of victims are over 64.<sup>184</sup> In methodological evaluation of the study, the extremely high forgetfulness curve should be noted. For the period within a month of the survey, 5.3 times as many accidents are mentioned as in the period within 12 months of the survey; for accidents with in-patient treatment, there was still a forgetfulness factor of 2.1 for the same period.<sup>185</sup> This rules out comparison of the HUK study with accident survey systems that collect figures directly from accident stations immediately after the accident, and also arouses doubt as to the reliability of the detailed accounts of the circumstances of accidents. Doubts about the

<sup>176</sup> Cf. the Federal Government reports on the state of accident prevention and the accident situation in the Federal Republic of Germany (Accident Prevention Report) the latest being the Accident Prevention Report 1985, BT-Drs. 10/6690, 5 December 1986.

<sup>177</sup> On the ground that project was too costly and that it was intending to promote surveys carried out at regular intervals. See answer to written question No. 2194/84, OJ C 203, 12 August 1985, 3.

<sup>178</sup> Cf. Council decision 81/623/EEC of 23 July 1981, OJ L 229, 13 August 1981, 1 et seq.

<sup>179</sup> OJ L 109, 26 April 1986, 23 et seq.

<sup>180</sup> *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985. Cf. *Mertens, A.*, Heim- und Freizeitunfälle: Aufklärung intensivieren, BArbBl. 5/(1986), 32 et seq., 321 et seq.; *idem*, 1986, 246 et seq. On the methodology of accident analysis, see also *Pfundt, K.*, Zur Methodik einer Risiko-Analyse im Bereich von Heim und Freizeit, in: Unfall-Risiken der Privatsphäre. Epidemiologie - Diagnose - Prävention. VI. Internationales GfS-Sommer-Symposium, 3.-5.6. 1985, Wuppertal 1986, 99 et seq.

<sup>181</sup> The findings are briefly summarized in *Pfundt*, 1985, 205-211. Cf. also *Compes*, 1986; *Kern*, 1986; *Henter/Milarch/Hermanns*, 1978; specifically on do-it-yourself accidents, *Tittes*, 1986.

<sup>182</sup> Not including foreigners and people living in institutions.

<sup>183</sup> *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985, 9.

<sup>184</sup> *Op. cit.*, 10-14.

<sup>185</sup> *Op. cit.*, 4.

study's methodological grip arise also from the facts that not a single accident resulting in death was covered and that the proportion of accidents involving children was only 15%, whereas for instance in the Netherlands study it was 30%.<sup>186</sup>

A second phase of survey asked for further details on the course and consequences of accidents, in telephone interviews on a total of 3,064 accidents.<sup>187</sup> The breakdown by individual category of accident is as follows:<sup>188</sup>

Accidents in sport and games .....	44%
Accidents in locomotion .....	24%
Accidents in manipulation .....	17%
Accidents involving motion on the spot .....	8%
Passive accidents .....	8%

Manipulation accidents are 12% with a machine and 32% with a tool. These two categories together make up 8% of all accidents surveyed; because of the relatively slight consequences of the accidents and the resulting higher forgetfulness rate, the proportion is probably to be estimated higher in reality.<sup>189</sup>

The case studies did not from the outset provide any category for covering design-related causes of accidents, but made only the following behaviour-based assignments:<sup>190</sup>

Infringement of elementary safety rules .....	2%
Failure to observe a fairly obvious safety rule.....	15%
Everyday situation that "went wrong" .....	72%
Accident to child because of clumsiness, with adult unable to intervene....	10%

Altogether, the HUK study summarizes to the effect that technical inadequacies in newly purchased machines, tools or appliances seem to play no part in the causation of home and leisure accidents. The Appliances Safety Act was supposed to have ensured that hardly any inadequate, dangerous to handle machines were still being sold. 99% of home and leisure accidents are seen as being the consequences of more or less serious mistaken actions.<sup>191</sup>

In his politically ambitious account and assessment of the study, Mertens comes to the conclusion that accidents with appliances and machines as yet undamaged by wear and tear that have been used properly and safely accounted for much less than 0.5% of all home and leisure accidents.<sup>192</sup> The conclusion he claims to be obvious, that the major part of appliance and machine accidents are due to improper or unsafe use or to damage through wear and tear, can derive support only from the "case studies"<sup>193</sup> on the handling accidents, which are full of very tendentious assessments, and also presupposes that wear and tear and mistaken actions are negligible when it comes to setting technical standards. The Stiftung Warentest comes to a quite different estimate. It believes that many accidents today classed as user caused could very quickly come to be seen as appliance caused if the necessary

<sup>186</sup> Report of 1984 Data Home Accident Surveillance System, Amsterdam 1985, 18.

<sup>187</sup> By way of comparison, the Dutch accident survey system in 1984 covered some 70,000 cases.

<sup>188</sup> For details see *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985, 23-57.

<sup>189</sup> *Op. cit.*, 40-44.

<sup>190</sup> Calculated from *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985 163-165, 184. On the methodological problems of allocation see *loc. cit.*, 203-208.

<sup>191</sup> *Loc. cit.*, 190.

<sup>192</sup> *Mertens, A.*, Heim- und Freizeitunfälle: Aufklärung intensivieren, BArbBl. 5/(1986), 32 et seq. 34.

<sup>193</sup> *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985, 96-188.

creativity were applied to thinking how foreseeable misuse could be avoided by suitable technical arrangements.<sup>194</sup>

We do not wish here to go any further into the fact that in 1984 24% of appliances tested by trade inspection offices in any case proved defective<sup>195</sup> nor into the serious, widespread shortcomings in systematic market control by the North Rheni-Westshfalia Central Office for safety technique that have come to light.<sup>196</sup> One observation of Mertens that remains convincing is that data collection on accidents must be made much more detailed if it is to be of use for technical standardization. What he deduces from this, however, is not the need for intensive directed studies, for instance on handling accidents with appliances and tools, but instead the basic principle of “hazard analysis that has stood the test of decades” which he says makes it possible to prevent accidents beforehand by applying technical safety principles to removing danger spots and sources of risk. According to him, the Community should instead of focusing its accident prevention work on appliance and machine accidents that have already happened “concentrate more on intensifying supranational work on technical safety regulations and standards”.<sup>197</sup>

### 3.2. The reference technique in general

A characteristic of German product safety law, as of German safety law in general, is the “interplay between governmental legal standards and private technical standards drawn up by technical and scientific associations, in a complex multilayered system of standards”.<sup>198</sup> The object of technical safety law is on the one hand to protect life, health, property and the environment against damage from technical products and installations, and on the other to provide legal guarantees in connection with economic activities bound up with certain technical risks. To this end, statutes and legal ordinances lay down binding safety objectives, vaguely defined using such formulae as “generally recognized rules of art”, “state of the art” or “state of science and technology”. These indefinite legal concepts are amplified by references to technical rules or standards drawn up by public-law committees of experts or by private standardization associations. Manufacturers or users of potentially dangerous technical products or installations are not legally bound by the technical rules or standards, but may choose other solutions if at least the same level of safety is achieved (deviation clause). This is intended to take account of the rapid development of modern technology and avoid hampering progress and producing rapid outdateding.

<sup>194</sup> Loose, P., Sicherheitstechnische Prüfung von Gebrauchsgütern durch die Stiftung Warentest, in: Unfall-Risiken der Privatsphäre. Epidemiologie - Diagnose - Prävention, VI. Internationales GfS-Sommer-Symposium, 3.-5.6.1985, Wuppertal 1986, 361 et seq., 366.

<sup>195</sup> For details here see the survey in 3.3.5. below.

<sup>196</sup> For details see the 1984 Annual Report of the Trade Supervisory Office of Land Nordrhein-Westfalen, 49-59; Fischer, R., Systematische Marktkontrollen durch die Zentralstelle für Sicherheitstechnik. Ein Beitrag zur Abwehr sicherheitswidriger Produkte, MD VZ-NRW 2-1984, 48 et seq.

<sup>197</sup> Mertens, A., Heim- und Freizeitunfälle: Aufklärung intensivieren, BArbBl. 5/(1986), 32 et seq.

<sup>198</sup> Marburger, 1979, 111. A typical example is the resolution of the .... Committee for Technology of 2 December 1966 (published in VDI Information No. 14, April 1967), which says: “technical knowledge and its application are subject to rapidly, steadily advancing development. ... The usual procedure of governmental law-making, aimed at codifying an area as exhaustively as possible, is therefore not suitable for keeping up with accelerating technical development through legal rules. ... Governmental law-making should therefore confine itself in the technical area to setting the necessary requirements and criteria for the general good, leaving it to the organized, representative knowledge of experts from theory and practice to determine how precisely these requirements and criteria can be met in technical rules to be drawn up by technical and scientific bodies in voluntary self-regulation”.



The choice among the expressions “generally recognized rules of art”, “state of the art” and “state of science and technology” determines the lag in adapting legal requirements to technical or scientific advance.<sup>199</sup> The legally indefinite expression “generally recognized rules of art” focuses on the prevailing view among technical practitioners, on what is generally regarded as tried and tested in professional practice. This criterion thus always lays behind further technical advance. The formula “state of the art” shifts the legal criterion for what is permitted or commanded to the front line of technical development; the decisive point is not what is generally recognized or established in practice, but what is technically necessary, appropriate and possible, even if commercial practice is not yet in line with it. If a requirement mentions the “state of science and technology”, those precautionary measures regarded as necessary according to the latest scientific findings must be used. If this cannot (yet) be achieved technically, permission may not be issued, since the limit to the requirement is not set by what is currently technically achievable. Detailed technical rules have been displaced from the context of governmental law-making to the allegedly more flexible level of non-governmental regulation, so as to permit quicker adaptation to technical progress but above all to allow for representative collaboration by “interested circles” in industry and the economy, science, technical monitoring organizations and other interested and expert groups in society. P. Marburger speaks of the structural principles of flexibility and cooperation.<sup>200</sup> R. Wolf calls the standardization logic of technical regulation a “self-regulatory mechanism in the shadow of regulative policy”.<sup>201</sup> Before dealing with the specific form of private technical standardization and its controlled adoption by government in the area of safety of technical consumer goods in detail, we shall briefly summarize the German debate on the legal admissibility of reference to technical rules,<sup>202</sup> since the legal admissibility of the new approach to technical harmonization and standards raises similar questions.

<sup>199</sup> Fundamental to the reference trial is the so-called Kalkar decision of the German Constitutional Court of 8 August 1978, BVerfGE 49, 80 (135 et seq.); see Breuer, 1976, 67 et seq. From the burgeoning literature, see Marburger, 1979, 145-176; *Rittstieg, A.*, Die Konkretisierung technischer Standards im Anlagenrecht, Köln/Berlin/Bonn/München 1982, 21-43; *Wolf, R.*, Der Stand der Technik. Geschichte, Strukturelemente und Funktion der Verrechtlichung technischer Risiken am Beispiel des Immissionsschutzes, Opladen 1986, 277-295.

<sup>200</sup> *Marburger, P.*, Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979., 117-120.

<sup>201</sup> *Wolf, R.*, Der Stand der Technik. Geschichte, Strukturelemente und Funktion der Verrechtlichung technischer Risiken am Beispiel des Immissionsschutzes, Opladen 1986, 153-159. The effect of unburdening the State was already stressed by *Gasde, F.*, Das Gesetz über technische Arbeitsmittel (GtA) als Modell einer liberalen Regelung, wie sich der Staat unter Verweisung auf Technische Regelwerke entlasten kann, in: Technische Regelwerke - ein Beitrag zur Staatsentlastung, Schriften des Gemeinschaftsausschusses der Technik, Nr. 4, Düsseldorf 1972, 16-17.

<sup>202</sup> See *Marburger, P.*, Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979., 117-120; *idem*, Die gleitende Verweisung aus der Sicht der Wissenschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde Bd. 17, Berlin/Köln 1982, 27 et seq.; *idem*, Marburger, P., Rechtliche Bedeutung sicherheitstechnischer Normen, in: Risiko - Schnittstelle zwischen Recht und Technik, VDE-Studienreihe 2, Berlin/Offenbach 1982, 119 et seq., 129-135; *Schwierz, M.*, Die Privatisierung des Staates am Beispiel der Verweisungen auf die Regelwerke privater Regelgeber im Technischen Sicherheitsrecht, Frankfurt/Bern/New York 1986, 63-99; *Ossenbühl, F.*, Die verfassungsrechtliche Zulässigkeit der Verweisung als Mittel der Gesetzgebungstechnik, DVBl. 1967, 401 et seq.; *Karpen, U.*, Die Verweisung als Mittel der Gesetzgebungstechnik, Köln 1970; *idem*, Die Verweisungstechnik im System horizontaler und vertikaler Gewaltenteilung, in: Rödig, J. (Ed.), Studien zu einer Theorie der Gesetzgebung, Berlin/Heidelberg/New York 1976, 221 et seq.; *Arndt, G.*, Die dynamische Rechtsnormverweisung in verfassungsrechtlicher Sicht - BVerfGE 47, 285, JuS 1979, 784 et seq.; *Brügger, W.*, Rechtsprobleme der Verweisung im Hinblick auf Publikation, Demokratie und Rechtsstaat, Verwaltungs Archiv 78 (1987), 1 et seq., 41-44; *Buckenberger, H.-U.*, Gleitende Verweisung aus der Sicht der Wirtschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde, Bd. 17, Berlin/Köln 1982, 52 et seq. *Schnapauß, K.-D.*, Gleitende Verweisung aus der Sicht der

There is no dispute as to the admissibility of *rigid reference*<sup>203</sup> in which a law or regulation refers to a quite specific version of a technical rule. Here the legislator can verify the content of the technical standard, and the content of the standard referred to cannot be altered without assent by the legislator. Rigid reference to technical standards is nothing other than a drafting abbreviation in the text of the statute. It does not transfer any legislative powers to non-legitimated non-governmental bodies, and it complies with the constitutional principle of certainty of law. The amplitude of the reference makes the content of the technical rule referred to binding not only on the administration but also on the citizen.

Since rigid reference bindingly prescribes a particular technical solution, it is a suitable method for linking legal standards with technical rules only where one or several technical standards can be referred to, where technical development has already reached some sort of end-point and major innovations are unlikely, or will remain irrelevant as far as the object of legal protection is concerned. By comparison with statutory regulation of individual technical questions, rigid reference means unburdening the legislative bodies and the statutory text of detailed technical questions, allowing more flexible adaptation to technical advance, since it is not the text of the statute or regulation that has to be reworked, but only a formal correction to the reference that is required.

The admissibility of *sliding or dynamic reference*, where reference is made to one or more technical standards in their most current form, was for long disputed.<sup>204</sup> P. Marburger names four legislative functions of sliding reference:<sup>205</sup>

- To free the legislator or regulator of a regulatory task for which they usually lack the necessary technical understanding<sup>206</sup> (unburdening the legislator);

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Verwaltung, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde, Bd. 17, Berlin/Köln 1982, 40 et seq; *Staats, J.-F.*, Zur Problematik bundesrechtlicher Verweisung auf Regeln privatrechtlicher Verbände, ZRP 1978, 59 et seq.; *Strecker, A.*, Rechtsfragen bei der Verknüpfung von Rechtsnormen mit technischen Normen, in: Technische Normung und Recht, DIN-Normungskunde, Bd. 14, Berlin/Köln 1979, 43 et seq.; *Vogel, H.J.*, Technische Normung im Spannungsfeld zwischen Rechtsordnung und technischem Fortschritt, DIN-Mitt. 58 (1979), 451 et seq.; *Ernst, W.*, Rechtsgutachten zur Gestaltung des Verhältnisses der überbetrieblichen technischen Norm zur Rechtsordnung, Berlin/Frankfurt 1973, 27-41. Finally, see also Arbeitsschutzsystem, Bd. 1, 1980, 299-308.

<sup>203</sup> On rigid reference, see *Marburger, P.*, Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979, 387-389; *Hunscha, A.*, Die starre Verweisung aus der Sicht der Wissenschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde, Bd. 17, Berlin/Köln 1982, 75 et seq; *Meyer*, Die starre Verweisung aus der Sicht der Wirtschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde Bd. 17, Berlin/Köln 1982, 88-89; *Strecker, A.*, Starre Verweisung auf Normen in Rechtsetzung und Verwaltung, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde, Bd. 17, Berlin/Köln 1982, 79 et seq.

<sup>204</sup> On sliding or dynamic reference, see *Marburger, P.*, Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979., 390-407; *Schwierz, M.*, Die Privatisierung des Staates am Beispiel der Verweisungen auf die Regelwerke privater Regelgeber im Technischen Sicherheitsrecht, Frankfurt/Bern/New York 1986, 57-99; *Marburger, P.*, Die gleitende Verweisung aus der Sicht der Wissenschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde Bd. 17, Berlin/Köln 1982, 27 et seq; *Buckenberger, H.-U.*, Gleitende Verweisung aus der Sicht der Wirtschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde, Bd. 17, Berlin/Köln 1982, 52 et seq; *Schnapauß, K.-D.*, Gleitende Verweisung aus der Sicht der Verwaltung, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde, Bd. 17, Berlin/Köln 1982, 40 et seq.

<sup>205</sup> *Marburger, P.*, Die gleitende Verweisung aus der Sicht der Wissenschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde Bd. 17, Berlin/Köln 1982, 27 et seq., 29 et seq.; *idem*, 379-383.

<sup>206</sup> More clearly, it may be said that in the area of technology the State has a structural information deficit vis-à-vis the industry that does the research development work (cf. *Marburger, P.*, Die Regeln der Technik im Recht,

- to keep the text of the statute or ordinance free of complicated and often very voluminous detailed technical provisions (unburdening the law);
- to allow rapid adaptation of the content of the law to technical advance, by shifting the technical details of safety regulation out of the formal legislative procedure (flexibility);
- to allow involvement of expert circles in law-making (cooperation).

The involvement of “expert” circles *may* be a guarantee that technically practicable and also adequate safety solutions will be adopted if it can be made certain that the competent experts are in fact represented on the relevant standards committees. Involvement of those concerned in establishing technical standards ought to increase willingness to comply with the standards. This ought not, however, to be bought at the price of adopting objectively unsuitable regulations because of one-sided representation of interests – and “expert” circles are always also “interested” circles. The interests concerned must be represented truly comprehensively, including suppliers, consumers and representatives of the public interest.<sup>207</sup> The procedure of private technical regulation, and specifically the way it is actually done and not what it said on paper, decides whether sliding reference will lead to adoption of apposite regulations in the public interest or decisions in the particular interest of manufacturers.<sup>208</sup>

Large constitutional objections have been raised against the admissibility of sliding reference to technical rules.<sup>209</sup> It has been seen as disguised transference of law-making power to private persons, as infringement of the democracy principle, of the constitutionality principle, specifically of the precept of certainty and clarity of law, of the requirement for proper publication of laws and of the principle of separation of powers.

These objections are upheld against the admissibility of *sliding reference in supplementation of standards*, making reference *directly* and bindingly to technical standards in their successively current forms<sup>210</sup>. With this form of reference, in which the technical regulations referred to become binding law in their current version for both citizen and administration, the legislator or regulator refrains from determining the content of the law, or leaving it to private standardization bodies. What this comes down to is a blanket law, a law whose content can be altered at the whim of the private regulator.

*Sliding reference in specifications of norms*<sup>211</sup> occurs always in connection with an indefinite term in the legal text, which it serves to specify. The law may, for instance, prescribe compliance with the “recognized rules of art”; as a rider or in connection with this, it may then be stated that particular technical standards count as such recognized rules

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Köln/Berlin/-Bonn/München 1979, 381 et seq.).

<sup>207</sup> Cf. *Marburger, P.*, Die gleitende Verweisung aus der Sicht der Wissenschaft, in: Verweisung auf technische Normen in Rechtsvorschriften, DIN-Normungskunde Bd. 17, Berlin/Köln 1982, 27 et seq., 30.

<sup>208</sup> For details on the procedure for drawing up DIN standards see 3.4.3 below.

<sup>209</sup> See *Ossenbühl, F.*, Die verfassungsrechtliche Zulässigkeit der Verweisung als Mittel der Gesetzgebungstechnik, DVBl. 1967, 401 et seq; *Karpen, U.*, Die Verweisung als Mittel der Gesetzgebungstechnik, Köln 1970, 131 et seq.; *idem*, Die Verweisungstechnik im System horizontaler und vertikaler Gewaltenteilung, in: Rödig, J. (Ed.), Studien zu einer Theorie der Gesetzgebung, Berlin/Heidelberg/New York 1976, 221 et seq., 232 et seq.; *Arndt, G.*, Die dynamische Rechtsnormverweisung in verfassungsrechtlicher Sicht - BVerfGE 47, 285, JuS 1979, 784 et seq.

<sup>210</sup> On this see *Marburger, P.*, Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979, 390-395, *idem*, Gleitende Verweisung, 1982, 31-34.

<sup>211</sup> On this see *Marburger, P.*, Die Regeln der Technik im Recht, Köln/Berlin/-Bonn/München 1979, 395-407; *idem*, Gleitende Verweisung, 1982, 34-37. *Schwierz, M.*, Die Privatisierung des Staates am Beispiel der Verweisungen auf die Regelwerke privater Regelgeber im Technischen Sicherheitsrecht, Frankfurt/Bern/New York 1986, 61 et seq. speaks about “dynamic references that prescribe a general safety criterion”.

of art. What is legally binding on the manufacturer of a product or the operator of an installation is only compliance with the statutory safety standard, which thus conclusively determines the duties as to conduct. Often machinery is developed for controlled response to relevant technical rules. Thus, the Federal Ministry for Labour and Social Affairs verifies DIN standards of relevance to safety before including them in list A of the General Administrative Regulation under the Appliances Safety Act.<sup>212</sup> The new approach to technical harmonization and standards likewise creates, through administration of the list of standards, a possibility of checking the harmonized standards and the declared national equivalent ones for their compliance with the underlying safety requirements.<sup>213</sup> This *additional* reference to specific technical rules is intended on the one hand to give addressees of the norm an indication of how to comply with the legal safety requirements, and on the other to oblige the competent authorities to accept appliances or installations that meet the technical standards listed. Firms are free to choose solutions departing from the technical rules if at least the same level of safety is attained. If they keep to the listed technical standards, there is a (refutable) presumption that the statutory safety duty has been met. Whether a technical regulation referred to in fact meets the statutory safety standard is subject to judicial verification. The competent administrative authorities remain free to act against a product manufactured or installation operated in accordance with the standards, where there is a concrete risk. Observance of technical standards acts merely as an indicator of compliance with the statutory safety obligation.

### 3.3. The Appliances Safety Act and its application in practice

The German law on technical appliances (the Gerätesicherheitsgesetz - Appliances Safety Act (GSG))<sup>214</sup> is regarded as a model for the Low-Voltage Directive, and along with it as providing the pattern for the new approach to technical harmonization and standards. The GSG, an offshoot of labour protection law, has developed into one of the most important German laws for preventive protection of consumers against defective products, and at the same time forms a link between governmental product safety policy and safety-related technical standardization. In presenting the GSG, therefore, one has therefore always immediately to include technical standardization of relevance to safety.

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<sup>212</sup> For details see 3.3.4 below.

<sup>213</sup> For more on this see *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. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>214</sup> Of 24 June 1968 (BGBl. I, p. 717), last amended on 18 February 1986 (BGBl. I, p. 265). In general on the GSG see *Schmatz/Nöthlich*, *Gerätesicherheitsgesetz. Kommentar und Textsammlung, Sonderausgabe aus dem Handbuch „Sicherheitstechnik“*, hrsg. von Schmatz/Nöthlich; *Jeiter, W.*, *Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel)*, München 1980; *Meyer, T.R.*, *Gerätesicherheitsgesetz*, Berlin 1979; *Peine, F.-J.*, *Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar*, Köln/Berlin/Bonn/München 1986; *Zimmermann*, *Gerätesicherheitsgesetz*; *Lindemeyer, B.*, *Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen*, in: *Brendl, E.*, *Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis*, Gruppe 11, 167 et seq.; *Diekershoff, K.H.*, *Gerätesicherheitsgesetz*, in: *Handbuch zur Humanisierung der Arbeit*, Bd. 1, Bremerhaven 1985, 607 et seq.; *Marburger, P.*, *Die Regeln der Technik im Recht*, Köln/Berlin/-Bonn/München 1979, 71-78.

### 3.3.1. Lines of development

The 1929 Industrial Safety Bill already included the basic idea of guaranteeing safety for workers through quality requirements on appliances; the competent authorities themselves were to determine the requirements on machines needed to protect workers' life and health. In the same year, the ILO adopted a recommendation on responsibility for protective devices on mechanically driven machines. In 1963 it extended its earlier recommendation and decided on Convention No. 119 on machine protection, with the supplementary recommendation No. 118. This was the basis for the Machine Safety Bill,<sup>215</sup> which took the following guidelines:

- All technical appliances should be covered, whether for use in factory, office, home or leisure;
- Safety requirements on appliances should not be detailed in regulations, but emerge from safety rules developed by experts;
- In principle manufacturers or importers should be responsible for the perfect safety of products.

This meant that three decisive steps had been taken: manufacturer responsibility was to aim at *preventive hazard elimination* through safety-minded development, design and manufacture of technical appliances. Till then, only the employer had been under an obligation, as part of a labour-law duty of care in accordance with the industrial safety and accident prevention regulations, to make only safe appliances and machines available to the employees in his premises. Still more than the businessman, the non-commercial final consumer is with advancing technical content no longer in the position to verify the technical safety of appliances. Accordingly, the idea developed in the industrial safety context of preventive hazard protection is consistently extended to *all technical utility goods*, including those for home and leisure use.<sup>216</sup> With the rapid development of technology and the range of goods on offer, the focus is placed not on administrative quality requirements but on the *generally recognized rules of art*, to which special provisions and regulations are a guide. The supervisory authorities confine themselves to spot checks and to intervention in hazardous situations.

With effect from January 1980<sup>217</sup> the law on technical work materials that had come into force in November 1968 with the brief title "Machinenschutzgesetz (Machine Safety Act)" was amended, both to give it the new brief title "Gerätesicherheitsgesetz (Appliances Safety Act)", appropriate to the broad scope, and to include inspection of installations, provide

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<sup>215</sup> On the historical background to the development see *Lukes, R., Vom Arbeitnehmerschutz zum Verbraucherschutz - Überlegungen zum Maschinenschutzgesetz*, RdA 1969, 220 et seq., 220 et seq.; *Eberstein, H.H., Technische Regeln und ihre rechtliche Bedeutung*, BB 1969, 1291 et seq., 1292 et seq.; *Diekershoff, K.H., Gerätesicherheitsgesetz*, in: *Handbuch zur Humanisierung der Arbeit*, Bd. 1, Bremerhaven 1985, 607 et seq., 609-611; *Jeiter, W., Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel)*, München 1980, 1-4; *Peine, F.-J., Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar*, Köln/Berlin/Bonn/München 1986, Einführung, para. 5-15. Cf. also the explanatory statement to the draft Act on technical work materials, BT-Drs. FAO/834, 5.

<sup>216</sup> The title of Lukes' 1969 article is significant (*Lukes, R., Vom Arbeitnehmerschutz zum Verbraucherschutz - Überlegungen zum Maschinenschutzgesetz*, RdA 1969, 220 et seq.).

<sup>217</sup> Gesetz zur Änderung des Gesetzes über technische Arbeitsmittel und der Gewerbeordnung, 13 August 1979 (BGBl. I, p. 1432).

legal guarantees for the safety mark “GS = geprüfte Sicherheit (Tested Safety)” introduced by the Federal Minister of Labour, and extend the scope, to some extent, to dealers.<sup>218</sup>

### 3.3.2. Scope

The GSG is addressed to manufacturers and importers in so far as they market or display technical work materials by way of trade or independently in the context of a business undertaking (§ 1 (1) GSG). Although the Länder,<sup>219</sup> the consumer associations and the Trade Supervisory Offices<sup>220</sup> had advocated bringing dealers fully under the GSG, they were covered only exceptionally,<sup>221</sup> on the grounds that retailers were not in a position to make technical safety assessments of products and that there were sufficient possibilities of fighting the danger at source. § 1 (3) GSG explicitly states that the employer’s responsibility under the industrial safety and accident prevention regulations remains unaffected. In this connection, particular importance attaches to § 5 of the Accident Prevention Regulations, “General Provisions” (VBG 1), which obliges the businessman to require suppliers to furnish only those technical work materials that are in line with the Accident Prevention Regulations and the generally accepted rules of art in safety technique and industrial medicine.

The GSG applies to all technical work materials for which there are no specific regulations. Accordingly, it does not apply to vehicles in so far as they are subject to road traffic regulations, nor to technical work materials which by nuclear safety provisions are subject to special requirements, or which are used exclusively by the Army, the Technisches Hilfswerk, the border guards or the police, nor where other provisions aimed at hazard prevention pursuant to § 3 GSG regulate the marketing or display of technical work materials (§ 1 (2) GSG). Accordingly, for instance, toys are governed by the Foodstuffs and Consumer Goods Act in respect of any toxic properties, and by the GSG in respect of mechanical risks.

Technical work materials are, according to § 2 (1) GSG, ready-for-use equipment such as tools, working equipment, working machinery, powered machinery, lifting and conveying devices which can be used for their purpose without the addition of other parts. This work equipment is by § 2 (2) GSG placed on the same footing as protective equipment, lighting, heating, cooling, ventilating or air-conditioning equipment, household appliances, sports and do-it-yourself appliances and toys.<sup>222</sup> Appliances intended exclusively for export may be displayed on Federal territory even though they do not meet the requirements of the GSG, provided that it is clearly indicated that they are intended only for export .... out with the territory of Federal Germany.<sup>223</sup>

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<sup>218</sup> On the latter see the Joint Declaration by Trade and Industry Federations on the application of the Appliances Safety Act of 25 April 1978, printed in *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 7-9.

<sup>219</sup> Cf. the explanatory statement by Bayern on the amendment to the GtA proposed in July 1977, BR-Drs. 133/77, 3 et seq.

<sup>220</sup> See *Wilke*, 12 Jahre Gesetz über technische Arbeitsmittel, in: BAU (Ed.), Sicherheit '80. Heim - Freizeit - Schule, Dortmund 1980, 48 et seq., 67 et seq.

<sup>221</sup> For more see 3.3.7 below.

<sup>222</sup> This provision once again demonstrates the GSG’s origin in industrial safety and its extension into the home and leisure area.

<sup>223</sup> Decision of 24 February 1976 by the Federal Administrative Court, GewA 1976, 172.

### 3.3.3. General safety obligation - § 3 (1) GSG

The core of the GSG is the general safety duty under § 3 (1) GSG:

*A manufacturer or importer of technical work materials may market or display these only if they are, according to the generally recognized rules of art and the industrial safety and accident prevention provisions, of such a nature that users or third parties are when properly using them protected against dangers of all kinds to life or health as far as the nature of that proper use permits. Generally accepted rules of art and the industrial safety and accident prevention provisions may be departed from where equal safety is guaranteed in another manner.*

Users and third parties are thus to be protected against dangers of all kind to life and health. By way of guaranteeing comprehensive hazard protection, § 2 (4) of the General Administrative Provisions on the GSG (AVV-GSG)<sup>224</sup> explicitly states that this concerns not only classical technical aspects of safety such as protection against moving parts or pieces thrown off, stability or protection against touching current-carrying parts,<sup>225</sup> but also such hazards as those resulting from noise, air pollution, heat emission or other effects of use. Taking ergonomic approaches into account, this means all effects on people of the work materials.<sup>226</sup>

However comprehensively the object of protection may be defined, the other elements of the general safety duty on manufacturers and importers are defined restrictively.

#### 3.3.3.1. Proper use

The GSG protects the user only in so far as he uses appliances “properly”. § 2 (5) GSG contains a legal definition, naming two circumstances from which proper use emerges: (1) a subjective characteristic, namely the manufacturer's or importer's indications (particularly those contained in publicity) on ways of using the technical work materials; (2) an objective characteristic, namely the usual use deducible from the design and construction of the technical work materials.

The manufacturer's or importer's indications as to application may contradict the usual use deducible from design and construction. In such cases of conflict, it is always, according to the Münster Administrative Appeals Tribunal,<sup>227</sup> always the usual use deducible from design and construction that applies. The appliance must take account of users' habits. The manufacturer cannot escape his responsibility through instructions for use that go against the uses predictable from the appliance's design. The objective criterion of usual use is not subordinate to subjective criteria of indications from the manufacturer, but in cases of conflict overrides them, since otherwise the manufacturer could through indications of use avoid necessary safety measures. Since the decision cited has as far as can be seen remained isolated, it cannot be assumed that the dispute as to interpretation of proper use is over. Laborious justifications continue to be adduce to try to play down the equal-value objective criterion of para. 2 (5)(2) GSG and give priority in case of conflict to the manufacturer's instructions for use<sup>228</sup>.

<sup>224</sup> 27 October 1970, Bundesanzeiger No. 205, 3 November 1970, amended by AVV, 11 June 1979, Bundesanzeiger No. 108, 13 June 1979.

<sup>225</sup> On this cf. DIN 31000/VDE 1000.

<sup>226</sup> See Zimmermann, N., Das Gerätesicherheitsgesetz, in: Brendl, E., Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Bd. III, Gruppe 11, S. 123 et seq., 131 et seq.

<sup>227</sup> Judgment of 26 October 1978 by OVG Münster - XIII A 881/76, reprinted in Meyer, 1979, 257 et seq.

<sup>228</sup> See Schmatz, H./Nöhlich, M., Gerätesicherungsgesetz, Kommentar und Textsammlung, Sonderausgabe aus dem

The standards underlying safety-related standardization work, DIN 820, part 12 and DIN 31000/VDE 1000, in part go beyond para. 2 (5) GSG. Thus, DIN 820, part 12 says that:

*Technical safety requirements should be specified in such a way that (when the product is properly used) it is unlikely that people, animals or things will be endangered. Ergonomic considerations should apply.* Foreseeable mistakes should be taken into account.<sup>229</sup>

This provision has wide-ranging importance, since DIN 820, in all its parts, is binding for the standardization work of all specialized standard committees of the DIN<sup>230</sup>. At any rate it provides consumer representatives on standardization committees with arguments for basing the establishment of safety standards not the manufacturers postulated application of an appliance but on usual habits, including mistaken ones, of particular, not specially trained, groups of users.

DIN 31000/VDE 1000 takes the following conceptual specification for proper use:

*Proper use within the meaning of this standard is the use for which the technical product is suitable according the manufacturer's indications including those in publicity. In cases of doubt, it is a use that would be taken as usual from the design, construction and function of the technical product. Proper use also includes compliance with operating and maintenance conditions stated and the taking of foreseeable misuse into account.*<sup>231</sup>

DIN 3100/VDE 1000 starts from the basic idea that using technology brings hazards resulting in part from the technical products themselves, in part from the way people handle technical products.<sup>232</sup> Even hazards caused by foreseeable misuse should be combated by design measures, primarily those of direct safety technology, supported by those of indirect safety technology. In practical standardization work, the three-stage method for safety design,<sup>233</sup> among the engineers that more or less monopolize standardization work is likely to drive the consumer policy debate on proper, usual or likely wrong use into the background

### 3.3.3.2. Generally recognized rules of art and the industrial safety and accident prevention provisions

§ 3 (1), the key provision of the GSG, refers in its definition of the safety criterion to the “generally accepted rules of art” and to the industrial safety and accident prevention provisions. With sliding reference to technical rules no lesser criterion can be set up; the requirements clearly lag behind advancing technological development. Accordingly, when a technical rule is generally recognized, it is the experts that have to apply the rules of safety technology that are authoritative. They must primarily be convinced that the rules of art are in line with the safety requirements to be placed on the technical work material. This technical safety solution need not be the one prevailing in practice, but must have been adequately tested in practice and have proved itself under operating conditions.<sup>234</sup> Even

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Handbuch Sicherheitstechnik, Berlin, Kennz. 1125, 11: The objective criterion was allegedly chosen only to make up for the manufacturer’s or importer’s shortage of data or to supplement inadequate data from the manufacturer or importer; *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 42 et seq.: In the case of divergent instructions for normal use, what the manufacturer states must decide, since the manufacturer may have new information.

<sup>229</sup> DIN 820, Part 12, (3.9.1).

<sup>230</sup> Cf. § 3 of the agreement between the Federal Republic of Germany and DIN of 5 June 1975.

<sup>231</sup> DIN 31000/VDE 1000, (3.3).

<sup>232</sup> DIN 31000/VDE 1000, (2.1).

<sup>233</sup> For details see 3.3.5 below.

<sup>234</sup> See the official explanatory statement on § 3 (1) GSG, BT-Drs. V/834, 7. See also *Schmatz, H./Nöthlichs, M.*



where the technical standards referred to follow higher requirements, and are for instance based on the “state of the art”, this does not tighten the general safety duty under § 3 (1) GSG, since it is only compliance with generally accepted rules of art that is made binding legally.

Whether DIN standards ought to come up to the “state of the art” or merely reflect “generally accepted rules of art” is not entirely clear in DIN’s own mind. On the one hand, DIN 820, Part 1, which lays down the basic principles for standardization work, says that standards have to *take account* of the current state of science and technology and of economic circumstances.<sup>235</sup> In referring to the state of science and technology, DIN did not wish to anticipate the severest criterion in the conceptual triad of the Federal Constitutional Court’s Kalkar Decision.<sup>236</sup> Along with the state of science and technology, economic circumstances are also to be “taken into account” at the same time. DIN 820, Part 4, states that a standard must be reworked if it is no longer in line with the state of the art.<sup>237</sup> The guidelines for standardization committees give the working groups the task of ensuring that standards are in line with the findings of science and the state of technology.<sup>238</sup> The principles for applying DIN standards state rather soothingly that while the rules for establishing DIN standards call for the state of the arts to be taken into, this call is, it is only because of the steady advance of technology, extremely hard to meet.<sup>239</sup> Finally, the indications to users of DIN standards indicate as an objective that DIN standards ought to be introduced as “accepted rules of art”.

The clear impression one derives is that the formulations (of engineers) in the various DIN regulations are completely decoupled from the conceptual considerations of lawyers on technical safety law.

The industrial safety and accident prevention regulations<sup>240</sup> are not binding solely in so far as they reflect the generally recognized state of safety technology. They are binding not because of consensus by authoritative experts, but because of the autonomous legislative power given by Government to the agencies of legal accident insurance, or from their character as legal ordinances. Many industrial safety provisions are based on the enabling provisions of §§ 120e, 139a GewO (industrial code); others on the Chemicals Act, the Nuclear Act, the Explosive Act or the Federal Mining Act. Among important Federal industrial safety provisions are:

- Verordnung über Acetylenanlagen und Calciumcarbidlager, 27.2.1980 (BGBl. I, S. 220) (Ordinance on Acetylene Plants and Calcium Carbide Stores), with a number of technical

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Gerätesicherungsgesetz, Kommentar und Textsammlung, Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 6-9; *Diekershoff, K.H.*, Gerätesicherheitsgesetz, in: Handbuch zur Humanisierung der Arbeit, Bd. 1, Bremerhaven 1985, 607 et seq., 615; *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung, Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq., 176; *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 3, para. 24-29.

<sup>235</sup> DIN 820, Part 1, (5.7).

<sup>236</sup> Decision of Federal Constitutional Court of 8 August 1978, BVerfGE 49, 80 (135 et seq.).

DIN 820, Part 1, dates from February 1974.

<sup>237</sup> DIN 820, Part 4, (4).

<sup>238</sup> Guides for DIN standard committees, August 1982 version, point 10 (8) (g).

<sup>239</sup> Principles for applying DIN standards, point II.3.

<sup>240</sup> For details see the list of industrial safety provisions in the Accident Prevention Report 1985, BT-Drs. 10/6690, 5 December 1986.

rules for Acetylene Plants and Calcium Carbide Stores, drawn up by the German Acetylene Committee;

- Verordnung über Arbeitsstätten, 20.3.1975 (BGBI. I, S. 729) (Workplaces Ordinance), with around 30 directives on workplaces;
- Verordnung über die Aufzugsanlagen, 27.2.1980 (BGBI. I, S.205) (Ordinance on Lift Installations), with a number of technical rules for lifts drawn up by the German Committee for Lifts;
- Verordnung für Anlagen zur Lagerung, Abfüllung und Beförderung brennbarer Flüssigkeiten zu Lande, 27.2.1980 (BGBI. I, S.273) (Ordinance for Installations for Storing, Bottling or Transporting Combustible Fluids by Land), with some 40 technical rules for combustible liquids, drawn up by the German Committee for combustible liquids;
- Verordnung über Dampfkesselanlagen, 27.2.1980 (BGBI. I, S.173) (Steam Boilers Ordinance), with some 65 technical rules for steam boilers, drawn up by the German Steam Boilers Committee;
- Verordnung über Druckbehälter, Druckgasbehälter und Füllanlagen, 27.2.1980 (BGBI. I, S.184) (Ordinance on Pressure Vessels, Pressurized Gas Containers and Filling Plants), with some 35 technical rules for pressure vessels, drawn up by the Technical Committee on Pressure Vessels under the Central Office for accident prevention and industrial medicine of the Association of Mutual Indemnity Associations, and 90 technical rules on pressurized gases drawn up by the German Pressure Vessels Committee;
- Verordnung über Gashochdruckleitungen, 17.12.1974 (BGBI. I, S.3591) (Ordinance on High Pressure Gas Lines), with 40 technical rules on high pressure gas lines, drawn up by the Committee on High Pressure Gas Lines;
- Verordnung über gefährliche Stoffe, 26.8.1986 (BGBI. I, S.1470) (Ordinance on Hazardous Substances), with more than 50 technical rules for hazardous substances, drawn up by the former Committee for Hazardous Working Materials and by the Committee for Hazardous Materials.

By § 708 (1) RVO, the Mutually Indemnity Associations are autonomously entitled to enact accident prevention provisions binding on their members, employers and employees. They are worked out in technical committees that include experts from the mutually indemnity associations and also representatives of the Factory Inspectorate, of producers and users of technical work material, of the trade unions and of employers, and are adopted by the Assembly of Representatives, which has a parity-based composition. Before they can enter into force, they require approval by the Federal Minister for Labour. Quick response to new technical development is out of the question, since this procedure for issuing rules takes 5 or 6 years.<sup>241</sup>

The accident prevention regulations in general contain detailed indications only on rules of conduct for employees and the wearing of protective equipment.<sup>242</sup> Indications on safety design for machines and work equipment are by contrast formulated only very generally, in turn often referring to the “generally recognized state of the art”. Accordingly, the hope of using the industrial safety and accident prevention regulations to bring safety requirements

<sup>241</sup> *Andresen, K.*, Arbeitsschutz - wie es die Natur des Betriebs gestattet, in: *Kaiske, R.* (Ed.), *Gesundheit am Arbeitsplatz*, Reinbek 1976, 123 et seq., 130. Cf. the issue dates of the accident prevention regulations given in list B accompanying the AVV-GSG.

<sup>242</sup> A survey of rules and regulations of the Mutual Indemnity Associations can be found in *Baum*, 1986.

more in line with the present state of technology or science<sup>243</sup> is illusory. Finally, in 1982 the DIN and the mutual indemnity associations concluded an agreement whereby the latter would in principle formulate safety objectives abstractly, not going into technical details, and the DIN would specify those objectives – apart from instruction for actions – in DIN standards.<sup>244</sup> This means that in the medium term in the area of accident prevention too there will not be any technical regulatory material not involving DIN standards.

### 3.3.3.3. Deviation Clause

The deviation clause<sup>245</sup> of § 3 (1) (2) GSG is intended to make progress in safety technology possible and also to allow the manufacturer to depart from the generally accepted rules of art as long as the safety technology solution he chooses is at least equivalent. This provision for departure becomes relevant where a technical rule contains not only general objects of protection, but detailed technical model rules. In such a case the technical safety objective which is to be attained in some other way has first to be derived from them.<sup>246</sup>

The deviation clause is of particular importance for foreign manufacturers and importers. In general, they too have under the GSG to observe the “recognized rules of art” on the territory of The Federal Republic.<sup>247</sup> If the foreign rule of art is not identical with the domestic one but nevertheless provides the same level of safety, the product may not be objected to.<sup>248</sup> If the same safety level is attained, the deviation clause thus allows foreign manufacturers to continue large production runs without losing the German market for

<sup>243</sup> Thus *Diekershoff, K.H.*, Gerätesicherheitsgesetz, in: Handbuch zur Humanisierung der Arbeit, Bd. 1, Bremerhaven 1985, 607 et seq., 617.

<sup>244</sup> Agreement between DIN and the Federation of Industrial Mutual Indemnity Associations, the Hauptverband der gewerblichen Berufsgenossenschaften e. V./Bundesverband der Unfallversicherungsträger der öffentlichen Hand e. V., DIN-Mitt. 62 (1983), 92-94. This also regulates in detail the involvement of legal accident insurance agencies in standardization work. On this agreement see *Buss, P.*, Zusammenarbeit der gewerblichen Berufsgenossenschaften mit dem DIN, DIN-Mitt. 63 (1984), 295 et seq.; *Jansen, M.*, Unfallverhütungsvorschriften und Normen. Erfahrungen aus der Zusammenarbeit, DIN-Mitt. 65 (1986), 157 et seq.; *Müller, G.*, Berufsgenossenschaften und DIN, DIN-Mitt. 65 (1986), 150 et seq.

<sup>245</sup> In general on the Deviation Clause in § 3 (1) (2) GSG, see *Schmatz, H./Nöthlichs, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 18-21; *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 49-51; *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq., 190-194; *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 3, para. 85-90.

<sup>246</sup> See *Schmatz, H./Nöthlichs, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 19 et seq.; *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 50; *Peine, 1986*, § 3, para. 90.

<sup>247</sup> See *Schmatz, H./Nöthlichs, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 15 et seq.; *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq., 175.

<sup>248</sup> See *Schmatz, H./Nöthlichs, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 20; *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq., 191.

safety reasons.<sup>249</sup> It thus leads to the same outcome as the case law on Art. 30 et seq. EEC. For goods from Community countries, it follows from Art. 30 EEC that they are freely marketable in all Member States if they have been marketed legally in the country of origin, unless the importing country can refer to objects of protection under Art. 36 EEC or to binding requirements in the sense of the Cassis judgment.<sup>250</sup> If the same level of safety is maintained, any appeal to Art. 36 EEC in order to protect against dangers to life or health is ruled out. The bilateral agreements on mutual recognition of German and French standards<sup>251</sup> make it easier to use the GSG deviation clause, since list C in the general administrative regulations for the GSG gives the French standards that are, until proof of the contrary, to be taken as equivalent in safety level to the German standards. At the same time, the bilateral agreement is an indication that neither using the GSG deviation clause nor following ECJ Case Law on Art. 30 et seq. EEC are enough to avoid obstacles to trade between Member States.

The deviation clause applies in favour of manufacturers and importers even in respect of accident prevention regulations. Here distortions of competition may arise because an employer as user of work materials does not have a similar entitlement to deviate where the same safety is guaranteed.<sup>252</sup> As far as capital goods are concerned, a remedy could be found here if the various mutual indemnity associations declared a willingness to allow for corresponding departures in the accident prevention regulations.<sup>253</sup> The problem will lose practical importance as the accident prevention regulations come to specify only general objects of protection but not the technical details for meeting them.<sup>254</sup>

It is controversial whether a manufacturer or importer who appeals to the deviation clause has to show that the same safety has been achieved in another way<sup>255</sup>, or whether the authority wishing to intervene must establish that the other technical safety solution is not

<sup>249</sup> See *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 3, para. 79.

<sup>250</sup> See *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, 1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>251</sup> See 1.10. above and 3.3.4. below.

<sup>252</sup> See *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq.

<sup>253</sup> The Federation of Industrial Mutual Indemnity Associations has so far opposed this; cf. *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq., 192. Whether this position is compatible with Art. 30 et seq. EEC remains questionable even after the ECJ judgment of 28 January 1986 in Case 188/84, ECR [1986] 419-woodworking machines (see also the discussion in *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, 1.2.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>). This judgment explicitly confirms Member States' right to decide on the equivalence of different safety conceptions, though not by simply giving blanket preference to the totality of their own accident prevention regulations.

<sup>254</sup> On this trend, cf. the DIN agreement with the Mutual Indemnity Associations, DIN-Mitt. 62 (1983), 92-94 and *Schmatz, H./Nöhlich, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 17.

<sup>255</sup> Thus *Schmatz, H./Nöhlich, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1135, 20 et seq. See also *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 3, para. 87 et seq.

equivalent.<sup>256</sup> Products are certainly freely marketable in principle without prior permission, even where the manufacturer takes advantage of the deviation clause. However, where the authorities intervene in the presence of a specific hazard, there is more to say for the idea of obliging a manufacturer or importer who departs from the regulation position to provide facts or proof of equal safety.

The obligation to comply with generally accepted rules of art and the industrial safety and accident prevention regulations does not apply to manufacturers or importers where the technical work materials have according to written statements by the proposed user being manufactured to order (§3 (2) GSG).<sup>257</sup>

### 3.3.4. Incorporation of standards in the lists

In Annexes A, B and C to the General Administrative Regulations on the GSG, the Federal Minister for Labour and Social Affairs indicates the rules of art compliance with which leads to a presumption that work material is in line with the underlying rules of art. Through continual supplementation and corrective adjustment (at present twice yearly), the latest results of standardization work and technical practice in the area of accident prevention are taken into account. In October 1987 the individual lists included a total of 1,708 safety rules,<sup>258</sup> which break down as follows:

<i>List A (domestic technical standards)</i>	
DIN standards or VDE definitions	1,277
DVGW standards	3
VDI rules	25
<i>List B (accident prevention regulations, etc.)</i>	
Accident prevention regulations (UVV)	85
Implementing instructions on the UVV	64
Directives, safety rules and leaflets from the mutual indemnity associations	115
Ordinances, administrative regulations, technical rules and directives for installations monitored under § 24 GewO	21
<i>List C (foreign technical standards)</i>	
Standards of the French Standardization Organization AFNOR	118

This breakdown brings out the overwhelming importance of DIN standards or VDE definitions, which account for some 3/4 of the safety rules indicated. Table 2 gives an overview of the numerical development of regulations under the GSG. Since 1970, the number of safety rules included in the lists has more than quintupled. The lists are subject

<sup>256</sup> Thus *Lindemeyer, B.*, Die Anforderungen des § 3 Gerätesicherheitsgesetzes an die Beschaffenheit technischer Arbeitsmittel. Probleme seiner rechtlichen Handhabung in der Praxis und Abwehr nicht sachgerechter Anforderungen, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Gruppe 11, 167 et seq., 192-194 and *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 51. See also § 2 (1) (2) AVV-GSG.

<sup>257</sup> For more on this see *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 3, para. 91-100.

<sup>258</sup> See the first supplement to the list in the AVV-GSG, BArbBl. 9/1986, 63 et seq., which amended and supplemented the new version of the lists dating from January 1986 (BArbBl. 1/1986, 22 et seq.), and list A and B of the AVV-GSG, BArbBl. 11/1987, 47 et seq.

to continuing review. For instance, the September 1986 update deleted 112 technical rules and included 169 new ones.

In November 1984 list C was opened. On the basis of the bilateral agreement between France and the Federal Republic,<sup>259</sup> it contains standards from the French Standardization Organization AFNOR, notified by the Ministry for Foreign Trade and Industrial Development, on which the competent authorities in the Länder, the Committee on technical work materials and interested circles have been heard.

**Table 2:** Development of regulation work under the Appliances Safety Act and number of recognized test centres<sup>260</sup>

<i>Year</i>	<i>Number of standards in list A and B</i>	<i>Number of standards in list C</i>	<i>Number of recognized test centres</i>
1970	287	-	-
1971	529	-	2
1973	623	-	21
1975	679	-	49
1977	823	-	62
1979	925	-	69
1981	983	-	69
1983	1210	-	76
1984	1210	118	76
1986	1565	118	78

If a manufacturer or importer refers to a standard in list C, the Trade Supervisory Office only then – unless safety is evidently guaranteed in another way, pursuant to the deviation clause in § 3 (1) (2) GSG – asks for this standard to be submitted in German. If the work materials prove to comply with the French standard, equal safety counts as guaranteed.<sup>261</sup>

The Federal Minister of Labour is as a rule involved in the issuing of implementing regulations on the accident prevention regulations and in bringing out technical safety rules and leaflets of the accident insurance agencies; indeed, accident prevention regulations require his approval. In general, accordingly, no additional technical testing is necessary for inclusion of these regulations in list B.<sup>262</sup>

<sup>259</sup> For details on this see 1.10. below.

<sup>260</sup> Compiled from the 1985 Annual Report of the Federal Institute for Industrial Safety, p. 23, and the first supplement to lists A, B and C of the General Administrative Regulations under the Act on Technical Work Materials, September 1986, Bundesarbeitsblatt 9 (1986, 63-70).

<sup>261</sup> Cf. the BMA Circular of 3 October 1984 to competent Länder authorities, BArbBl. 11/1984, 52.

<sup>262</sup> Cf. *Schmatz, H./Nöthlichs, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1304, 67.

### 3.3.5. Principles of safety standardization

In establishing the technical norms for inclusion in list A, the Appliances Safety Division of the Federal Institute for Industrial Safety<sup>263</sup> and the DIN Committee on Safety Technology work closely together.

The Commission on Safety Technology was set up in 1965 in connection with the preliminary work on the Act on Technical Work Materials, on the initiative of and with financial support from the Federal Minister of Labour.<sup>264</sup> Its tasks are above all to encourage safety standardization work in the specialized DIN standardization committees, coordinate safety standardization in DIN, select suitable DIN standards for inclusion in the lists and propose them to the Federal Minister of Labour, and, acting on suggestions from the Federal Institute for Industrial Safety and the Trade Supervisory Offices, test whether standards with safety provisions are still in line with the current state of the art.<sup>265</sup> It coordinates involvement of safety experts from the Factory Inspectorate and the Federal Institute for Industrial Safety in the specialized standardization committees, and in 1975 submitted a proposal, never discussed in detail, far less applied, to set up an accident information system covering also the home and leisure sectors.<sup>266</sup> It includes representatives of Federal Ministries and of the Länder labour authorities, of the Federal Institute for Industrial Safety, of the legal accident insurance agencies, of the trade unions, of employer associations, of the Federal Association of German Industry, of standards workers and of science.

The Federal Institute for Industrial Safety delivers opinions on draft standards with safety relevance as part of the regular procedure for establishing standards, and tests the standards proposed by the Safety Technology Committee for inclusion in list A. In a kind of written soundings-taking procedure, it then gives expert circles interested a chance to comment on proposed changes or additions, though without going as far as a new round of discussion on the standards.<sup>267</sup> In order to secure the broadest possible consensus of all expert circles and to cover all reservations and all findings, umbrella associations in industry, trade and handicrafts, and the unions, standardization workers, the DIN Safety Technology Committee, the Länder labour authorities and the members of the Committee on technical work materials are brought in.<sup>268</sup>

At this stage, immediately before publication of the lists, the number of objections still being raised is very small. This is due above all to the fact that test criteria are laid down in detail for all standardization work in DIN 31000/VDE 1000, “general guidelines for safety design of technical products”<sup>269</sup> and DIN 820, Part 12 “standardization work, standards with technical safety provisions, design”<sup>270</sup>.

<sup>263</sup> To which preliminary work on publishing the lists was transferred after 1974; Unfallverhütungsbericht 1976, BT-Drs. VII/4668, 71.

<sup>264</sup> Till then the German Standards Committee, the predecessor of DIN, had neglected safety standardization. Cf. the letter from the President of the German Standards Committee to the chairmen and executive secretaries of the specialized standards committees of 18 February 1966.

<sup>265</sup> For details on the tasks of the Safety Technology Commission see *Lehmann, K.*, *Kommission Sicherheitstechnik im DNA, Arbeitsschutz 1972*, 311 et seq.

<sup>266</sup> Cf. *Lehmann, K.*, *Sicherheitsnormung - Auftrag vom Maschinenschutzgesetz, Arbeitsschutz 1975*, 330 f.

<sup>267</sup> It is not intended that those whose objections against draft standards have failed in the regular standard-setting procedure should be offered a review body.

<sup>268</sup> Cf. *Mertens, A.*, *Das Gesetz über technische Arbeitsmittel und die Normen, Vorschriften und Regeln, DIN-Mitt. 53 (1974)*, 327 et seq., 331.

<sup>269</sup> On this see *Zimmermann, N.*, *Normen mit sicherheitstechnischer Festlegung, Arbeitsschutz 1977*, 347 et seq;

DIN 820, Part 12, published in May 1977, which brings together experience to date in the DIN Safety Technology Committee, the Federal Institute for Industrial Safety and the Federal Ministry of Labour, provides the structural criteria that safety standards must meet for inclusion in list A of the general administrative regulations under the GSG: safety requirements must be laid down concretely and unambiguously, and compliance must be fully and unambiguously testable. Requirements must be specified so exactly that test results are reproducible.

More important than these formal structural criteria are the substantive requirements that DIN 31000/VDE 1000 lays down for the safety design of technical products. The eventual standard of March 1979 had been preceded as long ago as December 1971 by a preliminary standard based on preliminary work under the auspices of the Federal Ministry of Labour.<sup>271</sup> It was to act as the basis for the specification of safety standards or VDE definitions<sup>272</sup> and allow initial assessment of technical products as regard safety, in so far as valid, specific and complete standards for this were not or not yet available.<sup>273</sup> Its provisions are to be specified in standards for individual types of technical product or in VDE definitions for individual types of electrical equipment, and supplemented by indications as to relevant tests.<sup>274</sup>

The safety design of technical work materials is seen in the first place as a design task for engineers. In safety design the preferred solution should meet the safety objective in technically rational fashion as well as being economically the best, and *in case of doubt* safety requirements take priority over economic considerations.<sup>275</sup> The following three-stage method applies: technical products should be so designed that no hazards are present (direct safety technology). If this is not or not fully possible, special safety devices that come into play automatically should be used (indirect safety technology). Only in third place come indications of the conditions under which hazardous use is possible (safety through instructions). The technique of safety through instructions is to be used in combination with direct and indirect safety technology even where hazards with products can be prevented only by particular actions on the part of the user.<sup>276</sup> This restriction can amount to excluding foreseeable misuse from design safety technology and allocating it to the technique of safety through instructions.

To supplement and extend the general guidelines of DIN 31000/VDE 1000, technical safety provisions for particular areas that overlap specialities or safety objectives should be summarized in basic standards (infrastructure).<sup>277</sup> Finally, in order to allow the DIN standards to have full product-specific effect, groups of products or individual products should be covered in standards for special fields or standards for components.<sup>278</sup>

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*idem*, Sicherheitsnormen für technische Arbeitsmittel. Das neue Gerätesicherheitsgesetz und seine Durchführungsverordnungen, DIN-Mitt. 60 (1981), 102 et seq.

<sup>270</sup> On this see *Zimmermann, N.*, DIN 31000/VDE 1000 - Wichtige Orientierung, BArBl. 6/1979, 44 et seq.

<sup>271</sup> On the preliminary work see *Ludwig, N.*, Sicherheitsgerechtes Gestalten technischer Erzeugnisse, DIN-Mitt. 49 (1970), 424; *Sälzer, H.J.*, Arbeitsausschuß Sicherheitstechnische Grundsätze (ASG) im DNA, Arbeitsschutz 1972, 313 et seq.

<sup>272</sup> DIN 31000/VDE 1000 (2.3).

<sup>273</sup> DIN 31000/VDE 1000 (2.4). Some of the banning orders published are based, in the absence of specific product standards, directly on infringement of DIN 31000/VDE 1000.

<sup>274</sup> DIN 31000/VDE 1000, (2.5).

<sup>275</sup> DIN 31000/VDE 1000, (4.1).

<sup>276</sup> Notes on DIN 31000/VDE 1000.

<sup>277</sup> List A of the AVV-GSG at present contains 26 standards with general safety conditions.

<sup>278</sup> See the notes to DIN 31000/VDE 1000 and *Zimmermann, N.*, DIN 31000/VDE 1000 - Wichtige Orientierung,



## 3.3.6. The safety mark “GS = geprüfte Sicherheit” (tested safety)

The GSG does not have an obligation to test technical work materials, but offers manufacturers and importers the possibility of securing confirmation from a recognized test centre, after a design test, that their appliances meet the provisions of § 3 (1) GSG or of a legal ordinance adopted pursuant to §§ 4 or 8a. If the result is positive they secure the right to use the safety mark “GS = geprüfte Sicherheit”, uniform for all types of appliance and accompanied by an identification of the test centre (§ 3 (4) GSG).<sup>279</sup> It was introduced by the Federal Minister for Labour in 1977, after the Association for a Safety Mark had spent seven years failing to agree on one. It is intended to enable the consumer, in a simple, easily remembered way, to choose safer products, and as well as serving the marketing interests of manufacturers, it is also a way of lessening the burden on supervisory authorities, who should refrain from testing appliances bearing the mark<sup>280</sup> unless there are grounds to suspect its illegal use.

The Federal Minister for Labour and Social Affairs, after consulting the Committee on technical work materials and with agreement from the Upper House of the German Parliament, determines by legal ordinance the testing centres competent for the design test. These must be suitable in staff and equipment for the task, economically independent and able to offer guarantees of reliable testing. The list of test centres also lays down the fields for which a test centre is recognized. At present there are 78 recognized centres,<sup>281</sup> among them 10 technical control boards, the Bavarian Provincial Institution for Trade, the Association of German Electrical Engineers, the German Vehicle Testing Association and three mail-order firms,<sup>282</sup> each with an intensive range of competences, plus 27 specialized committees of the mutual indemnity associations, three DIN standards committees, the Federal Institute for Materials Testing and 32 other test centres with very specific areas of competence.<sup>283</sup> In the context of the bilateral agreement between France and the Federal Republic, the Laboratoire Nationale D’Essais was also recognized as a test centre in December 1985. Recognition is preceded by verification by the Federal Institute for Industrial Safety, relating *inter alia* to staffing and equipment and including a demonstration from among the range of areas of coverage applied for.<sup>284</sup>

BArBl. 6/1979, 44 et seq., 1979, 45 et seq.

<sup>279</sup> On the GS mark see *Albertz, R.*, Sicherheitsgeprüfte Geräte - Wert des GS-Zeichens, s.i.s. 1985, 262 et seq.; *Schwarze, D.*, GS-geprüfte Geräte - Entlastung der Fachkraft für Arbeitssicherheit?, *Sicherheitsingenieur* 11/1983, 26 et seq.; *Zimmermann, N.*, Das Sicherheitszeichen Geprüfte Sicherheit, *Sicherheitsingenieur* 6/84, 14 et seq.; *idem*, Gerätesicherheit - Neuordnung der Aufgabenbereiche aller GS-Prüfstellen, *Amtl. Mitteilungen der Bundesanstalt für Arbeitsschutz* 1/1987, 10-11, 142a-144; *idem*, Gerätesicherheit - Neuordnung der Aufgabenbereiche aller GS-Prüfstellen, *Amtl. Mitteilungen der Bundesanstalt für Arbeitsschutz* 1/1987, 10-11; *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 54-58; *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 3, para. 112-144; *Kalwa, W.*, GS - Geprüfte Sicherheit: Seit 10 Jahren erfolgreich, *BArBl.* 11/1987, 11 et seq.

<sup>280</sup> § 6 (1) AVV-GSG. In 1983, 8% of the defective technical work materials reported on in the “standard defect notifications” from the Trade Supervisory Offices bore a test mark from a recognized test centre; cf. the 1984 annual report of the Federal Institute for Industrial Safety, 1984, 21.

<sup>281</sup> For the development over time, see Table 2 above.

<sup>282</sup> These offered the chance of linking the proven work of the incoming merchandise checks with safety tests for the GS mark, at the same time achieving rapid spread of the GS mark to a broad range of goods.

<sup>283</sup> See the list of test centres in the AVV-GSG, in the version in the October 1986 communication (*BArBl.* 10/1986, 50 et seq.).

<sup>284</sup> For details, and on the test reports, see *Zimmermann, N.*, Gerätesicherheit - Neuordnung der Aufgabenbereiche aller GS-Prüfstellen, *Amtl. Mitteilungen der Bundesanstalt für Arbeitsschutz* 1/1987, 10-11142b-142d.

In order to arrive at uniformity of testing practice, test centres must undertake to participate in the information clearing houses for test centres in their field attached to the Committee for Technical Work Materials, and comply with agreements arrived at there. Apart from individual test contracts, the test centres have the following tasks. Should they find that technical work material for which they have given authorization to use the safety mark has been supplied defectively, they have to cause the manufacturer or importer to provide a remedy. If the faults are not removed, or unsafe appliances continue to be marketed, the Trade Supervisory Offices are to be informed. They have to note accidents arising in using appliances tested by them and see to the removal of faulty goods still found. They have to transfer their experience from testing work into standardization and regulatory work.<sup>285</sup> If an applicant for a test refers to a French standard contained in list C, the test centre has to apply the French standard where the technical work material is not in line with the relevant German standards and equal safety is not obviously guaranteed.<sup>286</sup>

The GS mark has been widely used for many technical consumer goods. The total number of types of appliance or machine with valid GS marks amounted by 31 December 1985 to 85,000.<sup>287</sup> Applicants for the GS mark have the chance to ask for the criteria related to their appliance so as to be able to take the safety requirements in force more reliably into account even at the design stage of technical work materials. Since in the case of many technical consumer products there is competition between various test centres, one cannot ignore the danger that differing test criteria might be applied and that manufacturers and importers might choose test centres likely to give them more favourable test results than others. The only remedy is extension of the information network among test centres, and the checks on test centres by the Federal Institute for Industrial Safety, which started in 1984.

In safety checks carried out by the Stiftung Warentest, appliances bearing the GS mark continually display serious safety shortcomings.<sup>288</sup> The reasons adduced are that particular identifiable test centres interpret the regulations in force less strictly than would be

<sup>285</sup> See the criteria, guidelines and instructions for test centres under § 3 (4) GSG, BArbBl, 11/1984, 50 et seq.

<sup>286</sup> See the BMA Circular of 3 October 1984 to test centres, BArbBl, 11/1984, 52.

<sup>287</sup> Unfallverhütungsbericht 1985, BT-Drs. 10/6690, 5 December 1986, 33.

<sup>288</sup> *Loose, P.*, Sicherheitstechnische Prüfung von Gebrauchsgütern durch die Stiftung Warentest, in: Unfall-Risiken der Privatsphäre. Epidemiologie - Diagnose - Prävention, VI. Internationales GfS-Sommer-Symposium, 3.-5.6.1985, Wuppertal 1986, 361 et seq., 364 et seq.; see also „Normen sorgen für dicke Luft. Warentester legen zu Recht manchmal schärfere Maßstäbe an“, FR, 1 April 1987, p. 5. The Federal High Court recently explicitly decided that the Stiftung Warentest could apply more stringent criteria in safety testing than those in the technical standards: BGH, NJW 1987, 2222 et seq. Cf. *Vieweg, K.*, Verbraucherschutz durch technische Normen und vergleichende Warentests, NJW 1987, 2726-2727 and *Budde, E.*, Rechtsprechung und DIN-Normen, DIN-Mitt. 66 (1987), 317 et seq. In the standard-setting procedure, no consensus had been secured as to the necessary safety arrangements for electric compost choppers. The Stiftung Warentest, other consumer representatives and the Federal Institute for Industrial Safety had tried in vain to get their ideas on adequate safety included, but had to succumb to the supplier side in the opposition procedure. The Federal Minister for Labour has since recommended test centres that had already issued approval for the GS mark on compost choppers meeting the DIN standard to withdraw that approval. The Stiftung Warentest, which overlaps in personnel with the standardization associations, particularly with DIN, – it is represented on the five-member DIN Consumer Council and on some 100 standards committees and other DIN and VDE working bodies, and the Director of DIN is Chairman of the Administrative Board of Stiftung Warentest – only rarely goes beyond the requirements of technical standards in its testing practice. There are scarcely any testing programmes not based on technical standards, at any rate as far as safety testing goes. If an appliance does not meet the safety requirements, it is automatically graded “defective”. The manufacturers’ side understandably supports tighter ties to technical standards for the Stiftung Warentest. According to the “guidelines for industrial experts in the Stiftung Warentest” drawn up by the Federal Association of German Industry, the Stiftung Warentest should not grade a feature of a product poorer than “satisfactory” if it meets the requirements corresponding to the state of the art.

necessary, that products are altered after securing the mark, and that the safety regulations applied are inadequate.

### 3.3.7. Monitoring by the Trade Supervisory Offices; banning orders

The competent supervisory bodies for monitoring the Appliances Safety Act are the National Trade Supervisory Offices, 71 in number. The trade supervisory offices have a very wide range of tasks, with responsibilities for protection against nuisances, social industrial safety and, in the area of technical industrial safety, for workplaces, monitored installations, dangerous work substances, explosive materials, radiation protection, organization of industrial safety in factories and, of course, for technical work materials.<sup>289</sup>

An extensive empirical study in 1979 showed that they devoted only a fraction of their working time, some 2.2%, to application of the Appliances Safety Act.<sup>290</sup> The trade supervisory offices are not obliged to make systematic checks on all technical work materials or all manufacturers or importers. Since 180,000 types of technical work materials come newly on to the market each year,<sup>291</sup> this would be far beyond their resources. From considerations of effectiveness, the principle applied is that of directed monitoring activities. They have to check technical work materials where a competent authority for industrial safety or legal accident insurance agency, officer of policy or other authorities, user of technical work materials or centre dealing with hazards protection under the GSG (Stiftung Warentest, works councils, test centres) has submitted a report on a defective technical work material or on an accident in using a technical work material.<sup>292</sup>

Because of time overloads on trade supervisory officers and on the Federal Institute for Industrial Safety a unique possibility is being unused here. This would be the building up of an accident information system which, though it could not lay any claim to representativity, would specifically pick out the cases where defective technical appliances had caused accidents or led to serious hazards. It is hard to understand why no resources have yet been found in order, for instance, to make systematic evaluations of defect reports passed on to the Länder in which manufacturers or importers of products whose safety has been impugned have their headquarters.<sup>293</sup>

Since the primary objective of the GSG consists in preventive hazard protection, the idea suggests itself of having trade supervisory offices at fairs and exhibitions of more than local importance<sup>294</sup> test work materials on offer there, with economical use of staff.<sup>295</sup> In 1984, 54% of all inspection in connection with the GSG took place at fairs and exhibitions. An advantage is that at fairs, where the latest technical work materials are displayed in large numbers and many types, a whole product range can be covered in each case, without having to trace manufacturing plants and importers scattered over the whole national territory, and also that testing can often be done before mass production begins. A

<sup>289</sup> An illustrative picture of their wide range of tasks is presented by the annual reports of the Trade Supervisory Offices of the Länder.

<sup>290</sup> Arbeitsschutzsystem. Untersuchung in der Bundesrepublik Deutschland, Dortmund 1980:515.

<sup>291</sup> Cf. *Haberland, N.*, Gerätesicherheitsgesetz - Vollzug in einem Bundesland, s.i.s. 1984, 366 et seq., 366.

<sup>292</sup> § 5 (2) GSG and § 1 AVV-GSG.

<sup>293</sup> Not counting the figures for Baden-Württemberg, in 1984 alone there were 1,734 of them with several defects each.

<sup>294</sup> Often in so-called Fairs Committees, along with technical supervisory officials of the accident insurance agencies.

<sup>295</sup> Explicitly regulated in the Circular Order from the Minister for Labour, Health and Social Affairs of Land North Rhine-Westphalia on the implementation of the GSG of 26 July 1982, Ministerialblatt, p. 1473.

disadvantage is that in general testing is possible only through visual inspection, so that only defects that strike the eye can be covered, but no more detailed tests can be done, which would often require the dismantling or even destruction of the technical work appliance.<sup>296</sup>

Ad hoc market checks on particular types of technical work materials suggested by accident reports or safety tests as being particularly accident-prone are done by the Central Office for safety technology, radiation protection and nuclear technology of Land North Rhine-Westphalia. In view of the shocking accident situations in the private sphere, it concentrates mainly on types of appliances intended for use in the home, do-it-yourself, play and sport.<sup>297</sup> The findings secured are, if not yet incorporated in technical safety standards, then used in standardization work.<sup>298</sup>

Should the trade supervisory offices discover defects implying danger to life or health of users or third parties given proper use, the severest sanction open to it, where other measures prove inadequate, is the banning order,<sup>299</sup> preventing the technical work material from being marketed or displayed (§ 5 (1) (2) GSG). Whether an office has recourse to a banning order is in its own discretion, in accordance with its duty. Only in two particularly serious cases does § 5 (2) GSG lay down a duty to test, namely where a competent authority for industrial safety or a legal accident insurance agency has notified it that a technical work material has a defect in quality that endangers the life or health of users or third parties given proper use, or where during use of the technical work material an accident has occurred and there is good reason to believe that the accident can be attributed to a defect in the quality of the technical work material. If the law's objective, preventive accident protection, is not to be frustrated then the authority must act, if only to avoid public liability claims, since any other decision would mean acquiescing in a severe accident.<sup>300</sup>

The order to be issued to the manufacturer or importer, and only under very restrictive conditions to an exhibitor or trader,<sup>301</sup> must be accompanied by reasons, and the defects must be specified in detail. To ensure that banning orders are issued only in justified cases, the Trade Supervisory Office must before deciding, unless the danger of delay or the defect in the nature of the work materials is obvious, consult one of the agencies of legal accident insurance whose members use technical work materials of the same type (§ 6 (1) GSG). Should an accident have occurred because of the defect ascertained and other accidents are to be feared, immediate execution of the banning order should be directed (§ 7 (3) AVV-GSG). A copy of the banning order is to be sent to the Committee on Technical Work Materials (§ 6 (2) GSG).

<sup>296</sup> Cf. *Wilke*, 12 Jahre Gesetz über technische Arbeitsmittel, in: BAU (Ed.), Sicherheit '80. Heim – Freizeit – Schule Dortmund 1980, 48 et seq., 52-54.

<sup>297</sup> Cf. the progress report by *Fischer, R.*, Systematische Marktkontrollen durch die Zentralstelle für Sicherheitstechnik. Ein Beitrag zur Abwehr sicherheitswidriger Produkte, MD VZ-NRW 2-1984, 48 et seq., and the annual reports of the Trade Inspectorate of Land North Rhine-Westphalia 1982, 45-71; 1983, 47-55; 1984, 48-59.

<sup>298</sup> Cf. the list of DIN Standards Committees and Committees of the German Electrical Engineering Commission on which Trade Supervisory Offices collaborated: Annual Report of the Industrial Inspectorate of Land North Rhine-Westphalia 1984, 263-266.

<sup>299</sup> On banning orders see *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 5 para. 25-119; *Falke, J.*, Untersuchungsverfügungen über sicherheitstechnisch mangelhafte Geräte, VuR 1987, 3 et seq.

<sup>300</sup> For details on this see *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986, § 5, para. 31-42.

<sup>301</sup> On banning orders against a trader or exhibitor see the statements in fn. 307-312 below.

Even though they are explicitly mentioned in the GSG as the sole means of sanction, banning orders constitute the last resort, to be used only in severe cases, where no remedy can be secured by more moderate measures. Less invasive measures are, for instance, cautions about defects ascertained and advice about eliminating them or an order to remove defects ascertained within a certain time and thereafter to sell only defect-free appliances.<sup>302</sup> They can be considered only where the manufacturer or importer is prepared to remedy the defects ascertained. Willingness to do so is higher before starting actual marketing. Cases have been reported where importers have after ascertainment of severe safety defects seen their negotiating position with the manufacturer as strengthened by a banning order. Since banning orders are based on Federal law they apply in principle in the whole of Federal territory, even if issued by Länder authorities.<sup>303</sup>

The *synopsis* below gives the picture of trade supervisory offices' test work under the GSG in 1984, not including systematic market spot checks carried out. It was already stressed that more than half the inspections take place at fairs and exhibitions. 57% of the 46,600 technical work materials tested are used primarily in industry, agriculture and administration, and some 29% are foreign manufactures. Of appliances tested, a total of 24% proved defective, 20% of the domestic ones and 34% of foreign products. The systematic market checks, not covered here mostly give considerably higher rates of defect.<sup>304</sup> Appliances with defects on average have two of them. 42% of defects can be remedied by re-equipping, 40% by design measures, and 15.6% result from faulty instructions for use. However, 2.3% of defects are so serious that appliances are unusable, requiring redesign *ab novo*.

**Synopsis:** Tests by Trade Supervisory Offices under the Appliances Safety Act in 1984<sup>305</sup>

	<i>Number</i>	<i>%</i>
<b><i>Number of inspections</i></b>		
Total	13,799	100.0
at fairs and exhibitions	7,465	54.1
<b><i>Technical work materials tested</i></b>		
Total	46,566	100.0
mainly used in industry, agriculture, administration	26,521	57.0
mainly used in home, leisure, school, kindergarten	20,045	43.0
manufactured in Germany	33,185	71.3
manufactured abroad	13,381	28.7
<b><i>Technical work materials with safety defects</i></b>		
Total	11,195	100.0
domestic products	6,609	59.0

<sup>302</sup> See *Schmatz, H./Nöthlich, M.* Gerätesicherungsgesetz, Kommentar und Textsammlung, Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1155, 6-8; *Jeiter, W.*, Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 73 et seq.; *Peine, F.-J.*, Gesetz über technische Arbeitsmittel (Gerätesicherheitsgesetz), Kommentar, Köln/Berlin/Bonn/München 1986 § 5, para. 16-24.

<sup>303</sup> BVerfGE 11, 1 (6).

<sup>304</sup> Thus, BMX children's bicycles had a defect rate of 89%, and a particular kind of heating stove 90% (cf. Fischer, 1984); in 1976-8 65% of technical medical appliances (cf. *Wilke*, 12 Jahre Gesetz über technische Arbeitsmittel, in: BAU (Ed.), Sicherheit '80. Heim - Freizeit - Schule, Dortmund 1980, 48 et seq., 63) and 54% of fork-lift trucks (see Annual Report of the Industrial Inspectorate of Land North Rhine-Westphalia 1984, 57 et seq.) were defective from safety viewpoints.

<sup>305</sup> Compiled from the annual reports of the trade supervisory offices in individual Länder for 1984.

foreign products	4,586	41.0
<b><i>Number of types of defect</i></b>		
Total	20,009	100.0
eliminable by re-equipping	8,407	42.0
eliminable by design measures	8,005	40.0
unusable - redesign necessary	466	2.3
defects in instructions for use	3,131	15.6
<b><i>Letters sent out following inspection</i></b>	1,433	
<b><i>Banning orders</i></b>	49	
<b><i>Court procedures</i></b>	4	

Banning orders were issued in only 49 cases. This small number is only in part because most defects could be more or less easily removed by re-equipping, design measures or changes to instructions for use. It is also due, apart from strict application of the proportionality principle, to the self-image of the trade supervisory offices, who see themselves more as advisers than as supervisory authorities.<sup>306</sup>

Table 3 shows the numerical trend in test inspections by trade supervisory offices and in banning orders from 1969 to 1984. The number of inspections grew steadily until 1974, reaching a plateau of around 14,000 thereafter. The number of banning orders grew from 1969 to 1975 to a unique peak figure of 377 then fell between 1976 and 1981, apart from the high value for 1979, to a figure between 150 and 190, and in 1984, at 49, was only just above the initial year, 1972. This means a critical point is being reached if trade supervisory offices still wish, in their search for less drastic solutions, to be able to use threats of banning orders credibly.

Banning orders against traders are possible only on tighter conditions.<sup>307</sup> Exhibitors at fairs can be banned from displaying work materials with safety defects only if the manufacturer or importer cannot be traced (§ 5 (1) (2) GSG). Otherwise, banning orders to traders presuppose under § 5 (3) GSG that the manufacturer or importer has previously been banned from marketing the technical product, that the trader knows this banning provision, for which it is sufficient for the authority so to inform him, and that the trader has the possibility of returning the defective of technical work material<sup>308</sup> but refuses to avail himself of this right of return. In view of this “protective barrier” of restrictive conditions on action, it is hardly surprising that the power to issue bans to the trade, so urgently called for by the trade supervisory offices,<sup>309</sup> plays no part<sup>310</sup> in practice. It is scarcely possible for

<sup>306</sup> 47% of Trade Supervisory officials see themselves more as advisers, 16% more as supervisors; cf. Arbeitsschutzsystem, Bd. 2, 1980, 587-590.

<sup>307</sup> Cf. Schmatz, H./Nöthlich, M. Gerätesicherungsgesetz, Kommentar und Textsammlung. Sonderausgabe aus dem Handbuch Sicherheitstechnik, Berlin, Kennz. 1155, 15-27; Jeiter, W., Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 74-79; Peine, 1986, § 5, para. 108-119.

<sup>308</sup> This condition reflects the legislators expectation that the Joint Declaration of industry and trade federations of 15 April 1978 (reprinted in Jeiter, W., Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 7-9) will give the trader a contractual right of return where a banning order has been issued against the manufacturer or importer. Cf. the letter from the German Congress of Industry and Trade of 23 August 1979 to Chambers of Industry and Trade (printed in Jeiter, W., Das neue Gerätesicherheitsgesetz (Gesetz über technische Arbeitsmittel), München 1980, 76-78).

<sup>309</sup> Cf. Wilke, 12 Jahre Gesetz über technische Arbeitsmittel, in: BAU (Ed.), Sicherheit '80. Heim - Freizeit - Schule, Dortmund 1980, 48 et seq., 67 et seq.

<sup>310</sup> Of 353 banned types of appliances between 1982 and 1984 not a single one was through a trader, and in 1981 only

trade supervisory offices to forbid marketing of defective products that are already in the trade.<sup>311</sup>

**Table 3:** Numerical trend in test inspections by the trade supervisory offices and in banning orders<sup>312</sup>

<i>Year</i>	<i>Number of Inspections</i>	<i>Number of Banning orders</i>
1969-1971	15,145	19
1972	5,275	40
1973	9,616	92
1974	9,529	211
1975	9,818	377
1976	10,614	183
1977	12,113	190
1978	13,017	178
1979	14,700	314
1980	14,902	147
1981	13,780	152
1982	14,290	98
1983	13,618	108
1984	13,799	49

Banning orders are published in the monthly newsletter on the GSG distributed by the Federal Institute for Industrial Safety in 500 copies for internal use by trade supervisory offices only.<sup>313</sup> Since 1981 the Federal Institute for Industrial Safety has been publishing non-appealable banning orders or those for immediate execution. This is intended to warn owners of defective appliances and, where technical work materials are still in trade, to bring dangers to the attention of traders and potential purchasers. By September 1986, 53 banning orders had been published.<sup>314</sup> One may however doubt whether publication in the Federal Labour Gazette some time after enactment of the banning order can bring about the widely effective information that is necessary. A broadly conceived concerted information campaign by trade supervisory offices, the Federal Institute for Industrial Safety, the mutual indemnity associations and the retail trade has so far been waged only in the case of

44 out of 240.

<sup>311</sup> Cf. *Haberland, N.*, Gerätesicherheitsgesetz - Vollzug in einem Bundesland, s.i.s. 1984, 366 et seq., 369.

<sup>312</sup> Compiled from *Meyer, T.R.*, Gerätesicherheitsgesetz, Berlin 1979, 38; *Diekershoff, K.H.*, Gerätesicherheitsgesetz, in: Handbuch zur Humanisierung der Arbeit, Bd. 1, Bremerhaven 1985, 607 et seq., 623 et seq.; annual reports of trade supervisory offices of individual Länder for 1982 to 1984.

<sup>313</sup> This information service prints all current information of significance for unitary application of the GSG; it has developed into an information clearing house among trade supervisory offices.

<sup>314</sup> Cf. BArbBl. 10/1981, 84 et seq.; 12/1981, 113 et seq.; 1/1983, 85 et seq.; 11/1984, 62 et seq. 4/1985, 94 et seq.; 9/1985, 82 et seq.; 12/1985, 110 et seq.; 9/1986, 97 et seq. These banning orders are regularly preceded by the following text: "The primary object of publication is to support recall actions or similar measures by the manufacturer or importer, and where appropriate also the trader. Above all, those in possession of items already supplied should be warned, and instructed not to use them or, in some cases, at least to take special measures." The average time between issue of a banning order and its publication in the Federal Labour Gazette was by September 1985 11 months (my calculation).

compressed-gas springs in revolving chairs, which are liable to break,<sup>315</sup> with successful effects since some 40% of the hazardous revolving chairs were reequipped. Since 1984 non-appealable banning orders or those for immediate execution have been publicized under the European Commission's system for information exchange on product hazards.<sup>316</sup>

### 3.3.8. Limits of applicability; removal from storage

Despite its general approach, in no way specific to particular products, the GSG did not prove flexible enough to be able without additional measures to serve as the act for converting Community directive in the area of safety of technical work materials. This is evident particularly from the conversion of the Low-Voltage Directive<sup>317</sup> into German law. Because of the far-ranging correspondence between the content and concept of the GSG and the Low-Voltage Directive, the Federal Government took the view that no special legislative procedure would be required to convert the directive into national law. It was only once the Commission, which could not share this view, threatened to go before the ECJ that the Federal Government met the Commission's wish through the first ordinance under the Act on technical work materials<sup>318</sup> and the amendment to the general administrative regulations to the GSG,<sup>319</sup> thereby converting the Low-Voltage Directive "formally in every respect". The extent to which the first ordinance amended or extended the GSG is evident from the criticism, raised by the Commission:<sup>320</sup>

- It was not clear how far the existing state of safety technology in the Community within the meaning of the directive was identical with the general accepted rules of art within the meaning of the GSG;
- the GSG applied only to protecting people, not to the safety of domestic animals and the preservation of material values, as the directive laid down;
- the safety objectives listed in Annex I to the Directive in order to specify the general clause were not contained in the GSG;
- the general clause in the GSG referred to industrial safety and accident prevention provisions which possibly contained other requirements than the Directive's.

Despite the correspondences and similarities between the GSG pattern and the new approach to technical harmonization and standards, the GSG will not be enough to convert directives that follow the new approach, if only because of the difference in objects of protection, the modes of demonstrating conformity and above all the stating of relatively detailed basic safety requirements instead of referring to the generally accepted state of the

<sup>315</sup> Cf. the Annual Report for 1983 of the Federal Institution for Industrial Safety, 19 et seq.; and the Annual Report for 1983 of the Trade Inspectorate of Land North Rhine-Westphalia, 52-55.

<sup>316</sup> On the legal remedies open to purchasers of products whose manufacturers have been banned from continuing to distribute them, see *Falke, J.*, Untersagungsverfügungen über sicherheitstechnisch mangelhafte Geräte, VuR 1987, 3 et seq., 7-9.

<sup>317</sup> For details on the Low-Voltage Directive, see *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, 2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>318</sup> 11 June 1979 (BGBl. I, p. 629).

<sup>319</sup> § 3 (3) and § 6 (4) of the AVV-GSG were added.

<sup>320</sup> Cf. *Zimmermann, N.*, Das Gerätesicherheitsgesetz, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Bd. III, Gruppe 11, S. 123 et seq., 147 et seq. The table presenting the differences between the GSG and the First Ordinance to the GSG (loc. cit., 157-161) brings out the untenability of the Federal Government's original position.



art. Reference to the generally accepted state of the art cannot come into consideration for the Community Directive if only because the Commission, following Article 100 a (3) in the Single European Act, must in its proposals for legal harmonization measures under Article 100 a in the areas of health, safety, environment protection and consumer protection take a very high level of protection as a basis.<sup>321</sup> Adoption of individual directives under the new approach ought thus in the medium term to lead to supplementation of the GSG by a whole fringe of ordinances for specific groups of products. The alternative would be to adopt a parallel act to the GSG, converting all the details of the new approach into national law. But even then it would presumably be necessary to convert each of the product/specific basic safety requirements, relatively detailed by comparison with the German tradition of product safety law,<sup>322</sup> separates into German law in each case – after all it is ultimately vague that determine the level of protection.<sup>323</sup> The second ordinance under the GSG<sup>324</sup> converts Directive 79/663/EEC,<sup>325</sup> which forbids the marketing and use of decorative items containing dangerous liquids. Like the first ordinance under the GSG, it is based on § 4 (1) GSG, which empowers the Federal Minister for Labour and Social Affairs in fulfilment of obligations under bilateral agreements or binding Community decisions to determine by legal ordinance that technical work materials may be marketed only where particular requirements are met or when, following a design test, they have been generally accepted, or when they have passed a conformity test. Other Community directives likewise applying to technical work materials within the scope of the GSG have not led to further ordinances under the GSG because they concern monitored installations and were converted into German law as ordinances pursuant to § 24 of the German industrial code. These ordinances for monitored installations<sup>326</sup> are industrial safety regulations within the meaning of § 3 (1) GSG.<sup>327</sup>

<sup>321</sup> On this 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, 4.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

<sup>322</sup> It is clear that the basic safety requirements are not merely described conceptually in a comprehensive general clause, but laid down in detail specifically for a product. But even after presentation of the first draft directives, it remains questionable how detailed the basic safety requirements are. Among controversial points are e.g. three sentences in Annex II, section B.III in the Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards (OJ C 136, 4 June 1985, 1 et seq.), first introduced in this form in the final version. They run: “the essential safety requirements which must be met in the case of products which can be put on the market shall be worded precisely enough in order to create, on transposition into national law, legally binding obligations which can be enforced. They should be so formulated as to enable the certification bodies straight away to certify products as being in conformity, having regard to those requirements in the absence of standards. The degree of detail of the wording will depend on the subject matter.” These sentences both express the reservations of many Member States regarding far-reaching delegation of safety regulation to standardization bodies, and can be regarded as a retreat from the new approach even before its realization. Cf. the answer to written question No. 119/86, OJ C 19, 26 January 1987, 4 et seq.

<sup>323</sup> Cf. also the verbatim inclusion of the essential safety requirements of the Low-Voltage Directive in § 2 of the First Ordinance under the GSG.

<sup>324</sup> Of 26 November 1980 (BGBl. I, p. 2195).

<sup>325</sup> Directive 79/663/EEC of 24 July 1979, OJ L 197, 3 August 1979, 37.

<sup>326</sup> These are ordinances on steam boiler installations, pressure vessels, pressurized gas containers and filling plants, lift installations, electrical installations in premises where there is an explosion hazard, acetylene and calcium carbide installations and installations for storing, filling and transporting combustible liquids on land.

<sup>327</sup> On the above cf. *Zimmermann, N.*, Das Gerätesicherheitsgesetz, in: *Brendl, E.*, Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Bd. III, Gruppe 11, S. 123 et seq., 162-164.

Following a series of sensational accidents and the disclosure of widespread severe safety defects,<sup>328</sup> § 8 a GSG created the conditions for adopting special requirements for licensing and operating medical technical appliances. This was done through the Medical Appliances Ordinance,<sup>329</sup> which introduced special obligations on instructions and marks, a licensed design system for important types of appliances, the inclusion of all suppliers under the regulations and above all obligations on operators to carry out functional tests before commencing operation, employ only qualified staff, notify defects or malfunctions arising, regularly carry out safety checks and keep data sheets on the appliances. The comparison with technical medical appliances, now outside the scope of the GSG, and with the Medical Appliances Ordinance brings out the GSG's liberal underlying concept particularly clearly. Like the new approach, it rules out safety rules for the *operation* of hazardous installations or appliances.

#### 4. The US Consumer Product Safety Act and its implementation by the Consumer Product Safety Commission

Adoption of the Consumer Product Safety Act (CPSA) by the 92nd Congress in 1972 was a success for the consumer movement and its legislative impact in the US. The CPSA and its implementation through the Consumer Product Safety Commission (CPSC) set up in 1973 are, however, important even outside the United States. The NY Act and its regulatory machinery has served as a model or at least a stimulus in all countries where product safety law has been further developed.<sup>330</sup> Moreover, the many amendments to the CPSA and the difficulties in applying it have been taken as an illustration of the inadvisability of increased government influence on product safety.<sup>331</sup>

Political controversies within the United States over the CPSA make an analysis aimed at deriving general conclusions for product safety law from experience with the new Act even more difficult. Whether the regulatory approach has "proved" itself, what supervisory machinery has been "successful" and what has "failed", what regulatory strategies ought therefore to be taken over at national and/or European level – all these points would be much easier to judge if implementation of the CPSA had taken a more peaceful course. But irregularities and constant amendments seem to be a typical feature of product safety policy

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<sup>328</sup> Between 1976 and 1978, 65% of medical electrical appliances tested showed numbers of severe safety defects, in part hazardous to life; cf. *Wilke*, 12 Jahre Gesetz über technische Arbeitsmittel, in: BAU (Ed.), Sicherheit '80. Heim - Freizeit - Schule, Dortmund 1980, 48 et seq., 63 et seq. In 1985 safety checks by the Bavarian Technical Control Board even showed a defect rate of 85%; cf. FR for 27 August 85, p. 18.

<sup>329</sup> Ordinance on the safety of technical medical appliances (Medical Appliances Ordinance) of 14 January 1985 (BGBl. I, p. 93). On this cf. *Nöthlich*, M., Sicherheitsvorschriften für medizinisch-technische Geräte. Kommentar, Berlin 1985; *Zimmermann*, N., Das Gerätesicherheitsgesetz, in: Brendl, E., Produkt- und Produzentenhaftung. Handbuch für die betriebliche Praxis, Bd. III, Gruppe 11, S. 123 et seq., 164-166; *idem*, Sicherheitsnormen für medizinisch-technische Geräte - die Vorschriften der neuen Medizingeräteverordnung, DIN-Mitt. 64 (1985), 337 et seq.; *Hahn*, B., Die neue Verordnung über die Sicherheit medizinisch-technischer Geräte, NJW 1986, 752 et seq.; *Held*, H., Medizingeräteverordnung - Sicherheit verbessert, BAuBl. 3/1985, 15 et seq.; *Theobald*, R., Medizingeräteverordnung soll helfen, medizinisch technische Geräte und deren Anwendung sicherer zu machen, DIN-Mitt. 65 (1986), 252 et seq.; *Hartl*, M., Die neue Medizingeräteverordnung, VersR 1986, 1050 et seq.

<sup>330</sup> This influence can clearly be seen in the relevant OECD reports: Data Collection Systems 1978; Severity Weighting of Data on Accidents, Paris 1979; Safety of Consumer Products, 1980; Recall Procedures, Paris 1981; Product Safety, 1983.

<sup>331</sup> For the most fully worked-out criticism, see *Viscusi*, W.K., Regulating Consumer Product Safety, Washington D.C./London 1984.

and product safety law, and description and interpretation have to get along with them. These considerations are taken account of in the description below by presenting the CPSA not only in its current version but also in its original one (4.1.) and by always referring when presenting the most important regulatory instruments to the changed conditions the CPSA has to operate in (4.2.-4.5.).

#### 4.1. The original version of the CPSA and amendments to it

The CPSA's adoption in 1972 was the conclusion to years of preliminary work. The most important preparatory step was the setting up of the National Commission on Product Safety,<sup>332</sup> proposed in 1967 by Senator Warren Magnuson, initiator of many consumer policy legislative acts. The fact that Senator Magnuson was not aiming directly at enactment of a general product safety act but leaving the development of suitable proposals to an independent commission did much to help make his initiative successful.<sup>333</sup> The Commission, appointed by President Johnson in 1968, was able to carry out its preliminary work and hearings unmolested by the otherwise customary pressures. In 1970 the Commission presented its voluminous final report.<sup>334</sup> The report not only submitted the findings of broad-based surveys – on product hazards, accident information systems, voluntary product standards, consumer education, the state of product safety law, the relationship between Federal law and State law, product safety policy in other countries – but also contained proposals for general product safety legislation, the core of which was to be the setting up of a new independent agency.<sup>335</sup>

##### 4.1.1. The CPSA 1972<sup>336</sup>

Two years after the National Commission on Product Safety's final report came out, the CPSA was passed by both Houses of Congress. On all major points, the Act followed the ideas of the preparatory Commission. This is all the more remarkable because the law, in both overall conception and regulatory machinery, broke new ground in many respects:

- This applies firstly to the CPSC itself. There have long been independent commissions in the area of so-called economic regulation (the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Trade Commission),<sup>337</sup> but transfer of

<sup>332</sup> Act of Nov. 20, 1967, Joint Resolution 33, Pub. L. No. 90-146, 81 Stat. 466 (1976).

<sup>333</sup> See the brief and informative description of this strategy in *Perschuk, M.*, *Revolt against Regulation. The Rise and Pause of the Consumer Movement*, Berkeley/Los Angeles/London 1982, 41 et seq.; detailed descriptions in e.g. the note on the Consumer Product Safety Commission, 1975, 1079 et seq.; *Schwartz, T.M.*, *The Consumer Safety Commission: A Flawed Product of the Consumer Decade*, *George Washington L. Rev.* 51 (1982), 32 et seq.

<sup>334</sup> National Commission on Product Safety. *Final Report Presented to the President and Congress*, Washington, D.C. 1970.

<sup>335</sup> Only one of the six commissioners, H.L. Ray, dissociated himself from the Commission's proposals (*loc.cit.*, 120 et seq.). He saw them as lacking more precise identification and consideration of incentives that could encourage industry itself to raise safety levels, and further recommended cooperation with private standardization organizations. These counsels have since been listened to. On the first point, see also the self-critical remarks by Commissioner M. *Perschuk, M.*, *Revolt against Regulation. The Rise and Pause of the Consumer Movement*, Berkeley/Los Angeles/London 1982, 141 et seq., and on the amendment to the provisions on binding standard setting, 4.1.2.1. below.

<sup>336</sup> Pub. L. No. 92-573, 86 Stat. 1207 (1972).

<sup>337</sup> See the descriptions in *Müller, J./Vogelsang, J.*, *Staatliche Regulierung*, Baden-Baden 1979, and *Weber, R.H.*, *Wirtschaftsregulierung in wettbewerbspolitischen Ausnahmebereichen*, Baden-Baden 1986, 174 et seq.

protection of consumer safety interests to an independent agency was an innovation.<sup>338</sup> In the case of the CPSC, independence was respected towards not only private interests but also governmental ones. The five Commission Members are each appointed for seven years; budget appropriations need not be approved by the Office of Management and Budget (OMB), but simply by Congress directly.<sup>339</sup>

- It is also true of the broad range of tasks of the CPSC. The CPSA covers all consumer goods, except where other agencies are involved in monitoring safety hazards as part of their competence.<sup>340</sup> Additionally, the CPSC was handed the administration of existing specific acts.<sup>341</sup> The Commission thus has a kind of general catch-all competence that always applies wherever there are no more specific regulations that take priority. But even where such priority regulations affect particularly important goods (particularly automobiles and medicaments), the scope remains significant. The jurisdiction of the CPSC is reckoned to apply to 15,000 consumer products;<sup>342</sup> the often cited estimate by the National Commission on Product Safety that some 36 million consumer product accidents occur yearly<sup>343</sup> relates to these products not covered by special regulations.
- A further innovation was the attempt at making safety regulation “scientific”. § 5 CPSA provides for systematic collection and analysis of accident data, and gives the Commission tasks and powers in the area of research.<sup>344</sup>
- Another breakthrough is the introduction of a broad palette of regulatory machinery, ranging from information policy measures through standard setting and provisions for bans up to an elaborated recall system.<sup>345</sup> This gamut of measures greatly encouraged the international debate on product safety policy<sup>346</sup> and may be regarded as exhaustive: there is probably no safety policy measure which was not at least adumbrated, and then also tried out, through the CPSA.

The CPSA’s overall conception can be reduced to the two not necessarily mutually compatible strategies of making product safety policy “scientific” and “democratic”: product safety was declared a public goal, and entrusted to a relatively independent government agency that was to set its priorities, seek effective methods and in short pursue a “rational” policy; at the same time, however, the new institution was to differ from traditional bureaucracies, to take up safety policy submissions from the general public and to promote participation by societal groups.

#### 4.1.2. Amendments

The original consensus expressed in the National Commission on Product Safety’s 1970 Report which had made enactment of the CPSA possible did not last. The controversies

<sup>338</sup> See *Scalia, A./Goodman, F.*, Procedure of the Consumer Product Safety Act, University of California at Los Angeles L. Rev. 20 (1973), 899 et seq. Creation of the CPSC completed the network of newly created agencies in the area of social regulation: the National Highway Traffic Safety Administration had been founded in 1966, the Occupational Safety and Health in Administration in 1970 and the Environmental Protection Agency in 1970.

<sup>339</sup> See §§ 4, 32 CPSA.

<sup>340</sup> See §§ 3 (a) and 31 (a) CPSA.

<sup>341</sup> Federal Hazardous Substances Act 1960, Flammable Fabrics Act 1953, Poison Prevention Packaging Act 1070, Refrigerator Safety Act 1956 and Cigarette Safety Act 1984.

<sup>342</sup> Figures from Dr. G.C. Nichols, CPSC (International Affairs Division).

<sup>343</sup> Op. cit. (fn. 334), 1.

<sup>344</sup> See also section 27 (a) CPSA.

<sup>345</sup> Specifically, see sections 7 (standards), 8 (product bans), 12 (seizures), 14 (certification), 15 (recalls).

<sup>346</sup> See only the OECD Report “Safety of Consumer Products”, 1980.

over the legal justification for a government product safety policy and its appropriate means, largely kept latent during the preparatory phase of the Act, broke out later and have not settled down even yet.

Among the most striking successes of CPSA critics are the swingeing budget cuts the Commission had to take in the 1980s. The first budget, for 1974 and still based solely on recommendations from the Food and Drug Administration, amounted to some 30 million dollars.<sup>347</sup> When the Commission then asked for its own appropriations for 1975 and 1976, it managed to secure increases to some 37 and 42 million dollars respectively from Congress.<sup>348</sup> Until 1981 the budget kept to this figure in nominal terms, and was then cut in 1982 to 33 million dollars.<sup>349</sup> It is still at this level today.<sup>350</sup> Staffing reflects this development. The Commission began in 1973 with 579 workers, reached a peak of 914 in 1977,<sup>351</sup> and then gradually shrank back to the starting point. In all this it should be borne in mind that the dollar has lost some 50% of its value by comparison with 1974<sup>352</sup> and that therefore a return in nominal terms to the 1974 budget means *de facto* halving it.<sup>353</sup> What suffered most from all these cuts were the technical and scientific sections of CPSC and its “field offices”, whose tasks lay particularly in the area of follow-up market control. Their numbers were cut from 13 to 5.<sup>354</sup>

#### 4.1.2.1. Binding standards and product bans

The most important amendments to the CPSA concerned regulations on the issue of product standards. Authoritative prescription of binding safety standards was, according to the National Commission on Product Safety’s recommendations and the concepts behind the Act’s procedures, to be the most important instrument of the new product safety policy.<sup>355</sup> Standards could according to section 7 (a) (1) and (2) CPSA 1972 refer to performance, composition, contents, design and construction, finish or packaging; however, in so far as not merely informative standards were concerned, the Commission was as far as possible to confine itself to performance standards. To develop standards, a procedure had been introduced that was supposed to offer consumer associations in particular chances of influence: the so-called offeror procedure. This made standard setting open to tender, and the Commission had the possibility of financially supporting its development by the selected offeror (section 7 (d) (2)).<sup>356</sup>

<sup>347</sup> In constant dollars, this would be equivalent to a 1985 figure of some 70 million dollars.

<sup>348</sup> Figures in *Cornell, N.W./Noll, R.G./Weingast, B.*, Safety Regulation, in: Owen, H./Schultze, ch.L. (eds.), Setting National Priorities. The Next Ten Years, Washington, D.C. 1976, 457 et seq., 478.

<sup>349</sup> See table in *Viscusi, W.K.*, Regulating Consumer Product Safety, Washington D.C./London 1984, 40.

<sup>350</sup> 35 million dollars in 1984; 36 million dollars in 1985, approx. 35 million dollars in 1986 and 1987 (figures from CPSC Authorization Act 1985, 99th Congress, 1st Session, Report, 99-60 Calendar No. 138, 7 and from Statler, 1984, 93).

<sup>351</sup> See *Viscusi, W.K.*, Regulating Consumer Product Safety, Washington D.C./London 1984, 40.

<sup>352</sup> See the figures accompanying the Consumer Product Safety Amendment Act of 1983, 98th Congress, 1st Session, Report 98-114, 9 et seq.

<sup>353</sup> See the CPSC’s figures in the Hearings before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce. House of Representatives, 98th Congress, 1st Session on H.R. 2367, 6/7 April 1983, Serial No. 98-29, Washington, D.C. 1983, 413.

<sup>354</sup> See Consumer Product Safety Amendment Act of 1983, op. cit. (fn. 352), 9 et seq.

<sup>355</sup> See references in *Klayman, E.*, Standard Setting under the Consumer Product Safety Amendments of 1981 - A Shift in Regulatory Philosophy, *George Washington L. Rev.* 1982, 96 et seq., 99 et seq.

<sup>356</sup> See the detailed description in the note, The Consumer Product Safety Commission, 1975, 1121 et seq.; on the petition procedure, see also 4.3.1. below.

These provisions have undergone far-reaching amendment. In 1978, the CPSC was first of all given the possibility of refraining from the offeror procedure;<sup>357</sup> in 1981 the procedure was then completely abolished.<sup>358</sup> At the same time Congress fundamentally changed its originally critical attitude to binding standards: the Commission was henceforth to aim exclusively at performance standards and duties of information, but no longer to prescribe the “design” of a product (section 7 (a)). Still more important: “the Commission shall rely upon voluntary consumer product safety standards ... whenever such voluntary standard would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards” (cf. also section 9 (b) (2) (B)).

Additionally, the Commission was mandated to draw up a “final regulatory analysis”, setting out in detail the costs and benefits of the regulation it had in mind and the alternatives it had considered (cf. section 9 (c) (1) and (4), (f) (2) (A) and (B)). Also in 1981, the CPSC’s quasi-legislatory independence was considerably cut back. By the newly introduced section 36, Congress can now veto a product safety rule desired by the Commission.<sup>359</sup>

The amendments to section 9 CPSA did not affect only the issuing of binding standards. They also concerned regulations on the banning of products. Such bans could be promulgated under section 8 CPSA 1972, where products presented a disproportionate risk of injury, and this hazard could not be eliminated by a standard. Since Section 8 (2) requires a product ban to be promulgated “in accordance with section 9”, before a ban is ordered the possibility of “voluntary” standards must now be looked into, and above all an exact cost-benefit analysis produced.<sup>360</sup>

#### 4.1.2.2. Right of petition and public information

Among the regulatory innovations of the CPSA 1972 was the power for interested persons and organizations to call on the Commission to develop or change a product regulation, and even in some cases to compel it through the courts to take action (section 10 CPSA 1972). This possibility of influence was abolished in 1981. All that now apply are the general (more restrictive) provisions of the Administrative Procedure Act.<sup>361</sup> The practical significance of this revocation seems however, in the light of a silent transformation in function of the right of petition through the 70s, to be slight.<sup>362</sup>

Considerable effects were however produced by corrections to the CPSC’s information policy, first through the courts and then confirmed in legislation. The relevant provision of section 6 CPSA distinguishes between information concerning business secrets (section 6 (a)) and other information on product hazards (section 6 (b)). The first category of information was already according to section 6 (a) CPSA 1972, to be treated confidentially. Other information was, however, pursuant to section 6 (b) CPSA 1972, to be passed on. In

<sup>357</sup> Act of November 10, 1978, Pub. L. No. 95-631, §3 (a), 92 Stat. 3742, 3743.

<sup>358</sup> Pub. L. No. 97-35, § 1203, 95 Stat. 703, 704-13 (1981); details in *Klayman, E.*, Standard Setting under the Consumer Product Safety Amendments of 1981 - A Shift in Regulatory Philosophy, *George Washington L. Rev.* 1982, 96 et seq., 100 et seq.

<sup>359</sup> On the constitutional prerequisites for using the veto right, see the indications in *Claybrook, J.*, *Retreat from Safety*, New York 1984, 69.

<sup>360</sup> For more details see 4.3.2 below.

<sup>361</sup> 5 U.S.C. § 553 (e) (1976).

<sup>362</sup> See *Schwartz, T.M.*, *The Consumer Safety Commission: A Flawed Product of the Consumer Decade*, *George Washington L. Rev.* 51 (1982), 32 et seq., 45 et seq., 55 et seq. and 4.3.1. below.

so far as this made particular manufacturers identifiable, they had to be given a chance to state their position, and the Commission was bound to control the accuracy of information as far as possible, and verify the fairness of any publication. A liberal information policy is in any case in line with the general objectives of the CPSA (section 5 (a) (1)), as with those of the Freedom of Information Act 1972,<sup>363</sup> which in principle obliges the American authorities to comply with a request for information where not explicitly prevented by specific laws.

The CPSC thus had to face the difficulty of bringing these rights in principle to information into harmony with the restrictions contained in section 6 (b) CPSA. It used the expedient of differentiating between the mere (passive) passing on information that had come to it and unofficial (active) information: it was only in the latter case that it regarded verification as necessary before passing it on. This practice was initially partly approved and partly rejected by the courts,<sup>364</sup> but then definitively overthrown by a Supreme Court decision.<sup>365</sup> Following this, in 1981 section 6 CPSA was entirely recast. Since then, a manufacturer can, pursuant to section 6 (a) (3), designate any information concerning him as confidential, and have recourse to the courts against its being made public, should the Commission find this designation unjustified (section 6 (a) (6)). Even where business secrets are not involved, the Commission is bound to inform manufacturers before passing on any information, secure their opinion and verify the accuracy of all indications (section 6 (b) (1)); here too the manufacturer can, in case of dispute, call for a decision by the courts (section 6 (b) (4)). The Commission's possibilities of action through information policy have been severely restricted through these new requirements.<sup>366</sup> A legislative initiative<sup>367</sup> introduced by Senator H.A. Waxman in 1983 to change this position again failed.<sup>368</sup>

#### 4.1.3. The regulatory "philosophy" of the CPSA in 1972 and the American deregulation movement

The legislative and statutory history of the CPSA forms part of the whole context of the rise of the consumer protection movement in the US during the 1960s, and the subsequent "revolt against regulation",<sup>369</sup> which became official with President Reagan's assumption of office. This debate is so multilayered and at the same time so bound up with American traditions and conditions that it would be neither possible nor advisable to present it even in outline. However, in order to understand and assess the CPSA and its present significance, some indications as to the concrete repercussions of those developments on the CPSC's conceptual approach are called for. These were partly encouraged by the general political "climate", partly mediated through the influence of individual politicians, partly brought about through the legislative interventions described. However, even a description reduced

<sup>363</sup> 5 U.S.C. § 552 (1976 and Supp. II 1978).

<sup>364</sup> Cf. on the one hand *Pierce Stevens Chemical Corp. v. CPSC*, 585 F.2d 1382 (2d Cir. 1978), and on the other hand *GTE Sylvania, Inc. v. CPSC*, 598 F.2d 790 (3d Cir.), cert. granted, 100 S.Ct. 479 (1979); and exhaustively the comment on *The Consumer Product Safety Act, 1980*, 1180 et seq.

<sup>365</sup> *CPSC v. GTE Sylvania Inc.*, 447 U.S. 102 (1980).

<sup>366</sup> See submissions by S.D. Dornfield from the Society of Professional Journalists, jurist A.F. Popper and Commissioner St. M. Statler to the 1983 Congressional hearings (op. cit., fn. 553), 80 et seq., 90 et seq., 368 et seq.

<sup>367</sup> Reprinted op. cit., 3 et seq.

<sup>368</sup> Calendar No. 138, 99<sup>th</sup> Congress, 1<sup>st</sup> Session, Report 99-60 of 16 May 1985.

<sup>369</sup> The title the book: *Perschuk, M., Revolt against Regulation. The Rise and Pause of the Consumer Movement*, Berkeley/Los Angeles/London 1982.

in this way to the Commission's conceptual approaches has admittedly to risk crass simplification. By American standards, the CPSC is a very small agency, but it is not a monolithic block. Changes to its policies do not take place abruptly and uniformly, but in laborious, conflictual processes. With these reservations, three stages in the CPSC's history may be distinguished:

- The start-up phase, 1973-8: “[Chairman] Simpson and his staff have attempted to design their organization from the beginning so that its goal is clear and its method of standard setting minimizes arbitrariness. This is what political scientists have always asked heads of new agencies to do. Now, one has. It will be interesting to see what difference it makes”. These sentences end one of the first reports on the CPSC.<sup>370</sup> Its generously optimistic verdict must have been founded above all on the endeavour to make product safety policy “scientific”, and therefore in particular upon the efforts of the newly established commission to arrive, on the basis of its data surveys, at rational debate and determination of priorities.<sup>371</sup> These initial hopes were later disappointed.<sup>372</sup> The Commission did not succeed in developing and effectively applying a convincing program. It took four years before three product regulations could be adopted (on swimming pool slides, matchbooks and plate glass).<sup>373</sup> Information policy instruments and recall possibilities were not fully used. Not just industry but consumer associations too gave vent to severe criticisms.<sup>374</sup> In the 1977 congressional hearings, J.E. Moss, himself a major proponent of enactment of the CPSA, confirmed the general misgivings very clearly.<sup>375</sup>
- The Commission's public image improved following the 1978 appointment of Susan King as its new chairman.<sup>376</sup> The Commission then trimmed down its overambitious standardization programme, opened up an important new field of activity with its “chronical hazards program”<sup>377</sup> and arrived at considered use of its regulatory instruments -mainly making the recall provisions of § 15 (b) CPSA effective.<sup>378</sup>
- Not least because of its successes during the consolidation phase following 1978, the CPSC managed to survive the deregulation wave following President Reagan's assumption of office. Moves by the OMB under D. Stockman to take away the Commission's independence and integrate it into the Department of Trade were unsuccessful. However, the Commission had to accept the cuts to its budget described

<sup>370</sup> *Kelman, St.*, Regulation by the Numbers. A Report on the Consumer Product Safety Commission, Public Interest 36 (1974), 82 et seq., 102.

<sup>371</sup> For more details see 4.2. below.

<sup>372</sup> Symptomatic critical assessments can be found by the mid 70s in *Cornell, N.W./Noll, R.G./Weingast, B.*, Safety Regulation, in: Owen, H./Schultze, ch.L. (eds.), Setting National Priorities. The Next Ten Years, Washington, D.C. 1976, 457 et seq and *Hoffmann, M.E.*, The Consumer Product Safety Commission: In Search of a Regulatory Pattern, Columbia J. of Law and Social Problems 12 (1976), 393 et seq; see also *Feldman, L.P.*, Consumer Protection. Problems and Prospects, St. Paul/New York/Los Angeles/San Francisco 1980, 58 et seq., 60 et seq.

<sup>373</sup> For more details see 4.3. below.

<sup>374</sup> See *Bollier, D./Claybrook, J.*, Freedom from Harm, Washington, D.C./New York 1986, 171 et seq.; much evidence also in the hearings cited in fn. 375.

<sup>375</sup> Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 95<sup>th</sup> Congress, 1<sup>st</sup> Session, No. 95-52, Washington, D.C. 1977, 1 et seq.

<sup>376</sup> In 1977, during the brief transitional period from S.J. Byington's chairmanship, the Commission had already announced a change in its policy priorities (see 42 F.R. 53953, 4 October 1977).

<sup>377</sup> For the programme and the opinion-forming process within the Commission see Merrill, 1981, 1264 et seq., 1297 et seq.

<sup>378</sup> For details see 4.5. below.



above as well as the legislative amendments between 1981 and 1983 and interventions in personnel policy<sup>379</sup>. All these corrections were, and still are, marked by a clearer orientation of the Commission towards criteria of economic efficiency and (self-) control of its activities through cost-benefit analyses. A memorandum drawn up by P.H. Rubin, Associate Executive Director of the Division for Economic Analysis,<sup>380</sup> documents this trend. The memorandum points to budget restrictions on the Commission, and recommends cost-benefit analysis as a way of using scarce resources better.<sup>381</sup> But its ambitions go further: all regulatory machinery should be verified on criteria of cost-benefit analysis, and the assessment of safety hazards implicit in individual consumer decisions should be recognized as the ultimately binding rationality criterion of safety policy.<sup>382</sup>

#### 4.2. The accident information system and the CPSC's policy priorities

Any product safety policy, whatever regulatory philosophy it may follow, is bound to set priorities. This need becomes all the more urgent, the more comprehensive is its scope and the room for manoeuvre of the safety policy agency. The collection of data on accidents and accident risks is an obvious preparatory step towards a rational priority policy.<sup>383</sup>

The CPSC has various simple and more ambitious information sources available. It collects newspaper cuttings; it accepts consumer complaints through a free telephone service ("hotline");<sup>384</sup> section 15 (b) CPSA obliges manufacturers and traders to notify the Commission of product hazards;<sup>385</sup> also noteworthy in this connection is information from the Commission's "Field Services"; and a cooperation agreement was concluded with the association of American Trial Lawyers, which systematically gathers information on product liability actions.<sup>386</sup>

However, all these sources are of secondary importance. More important is the systematic evaluation of death certificates, along with reports from the "Poison Control Centers" and especially the data from the "National Electronic Injury Surveillance System (NEISS)".

##### 4.2.1. The National Electronic Injury Surveillance System

A system for collecting accident data (the "Hospital Emergency Room Injury Reporting System") had already been developed in 1969 by National Commission on Product Safety Executive Director William V. White, and was extended in 1970 by the Food and Drug

<sup>379</sup> See *Bollier, D./Claybrook, J.*, *Freedom from Harm*, Washington, D.C./New York 1986, 173.

<sup>380</sup> P.H. Rubin, *Cost-Benefit Analysis*, 26 February 1986 (internal memorandum of the CPS).

<sup>381</sup> *Op. cit.*, 6.

<sup>382</sup> *Op. cit.*, 8 et seq., 3 et seq.

<sup>383</sup> For the Community, see the Council decision of 22 April 1986 "concerning a demonstration project with a view to introducing a Community system of information on accidents involving consumer products", O.J. No.L 109, 26 April 1986, 23.

<sup>384</sup> See 16 CFR 1003.

<sup>385</sup> According to the CPSC's 1982 Annual Report (5), in 1981 30,000 death certificates were still being assessed. The 1984 Annual Report (II, 4) points out that this programme had to be considerably cut.

<sup>386</sup> For the beginning of the cooperation, see *Statler, St.M.*, *CPCS: Only a Beginning*, Trial 1980, 77 et seq., 80 et seq.; *Johnson, L.L.*, *Cost-Benefit Analysis and Voluntary Safety Standards for Consumer Products*, Santa Monica, Cal. 1982, 63 et seq.

Administration. The Commission was able to draw on this preliminary work when it began, immediately after it had been set up, building up its own accident information system.<sup>387</sup> The specific feature of this system is its orientation towards current accident data. These data are gathered in selected (originally 119, reduced to 74 in 1979 and 64 after 1984) hospital emergency service. Specially trained workers in these stations allocate accidents associated with the use of products to 19 general and some 900 more specific categories of product, grade their severity (on a scale of originally 8, now 7 grades) and the nature of the injury (by allocating it to one of 250 categories of injury), and the age and sex of those involved. These data are put in daily to the CPSC's computers. In a Consumer Product Hazard Index, the frequency and severity of hazards associated with a product are determined, and additionally evaluated on an Age-Adjusted Frequency-Severity Index. Today the NEISS still supplies data on some 200,000 accidents per year. However, it allows only retrospective conclusions as to the involvement of products in causing accidents and/or the (co-)responsibility of product users. Accordingly, the NEISS data have always been treated as only a starting point for in-depth studies. Only these follow-up studies can and should determine typical accident patterns and where appropriate the dangers arising from a particular product.<sup>388</sup>

#### 4.2.2. Criticisms of the NEISS

The suitability of the NEISS as a source of data for determining priorities for action was never out of dispute. Objections concern partly technical, in principle correctible, factors regarding the reliability of the data collection and the differentiation of product categories, partly decisions hard to alter, such as the concentration on accident emergency services,<sup>389</sup> but partly also the suitability in principle of the data themselves. Collection of accident figures is alleged to be demonstrative of the hazardousness of a product only if it can be related to the relevant intensity of use;<sup>390</sup> the scaling of the intensity of injury according to a hazard index is said to be arbitrary;<sup>391</sup> and the precision of accident evaluation is said to

<sup>387</sup> On this see *Kelman, St.*, Regulation by the Numbers. A Report on the Consumer Product Safety Commission, Public Interest 36 (1974), 82 et seq., 92 et seq.; *Hoffmann, M.E.*, The Consumer Product Safety Commission: In Search of a Regulatory Pattern, Columbia J. of Law and Social Problems 12 (1976), 393 et seq., 397 et seq. and the Commission document "The National Electronic Injury Surveillance System: A Description of Its Role in the U.S. Consumer Product Safety Commission", April 1986.

<sup>388</sup> For more details see *Kelman, St.*, Regulation by the Numbers. A Report on the Consumer Product Safety Commission, Public Interest 36 (1974), 82 et seq., 94 et seq. According to the Commission's 1982 Annual Report (5), in financial year 1981 235,000 accidents were surveyed through the NEISS system. In at least 2,000 cases follow-up studies were done. The 1983 and 1984 Annual Reports did not give any figures; it emerges, however, from the CPSC documents cited above (fn. 387), that these figures continue to apply. For all this, though, it should be borne in mind that as the statements by Commissioner E. Sloan to the 1981 Senate Hearings (Hearing before the Subcommittee for Consumer Protection of the Committee on Commerce, Science and Transportation, 1st Dec. 1981, No. 97-87, Washington D.C. 1982, 9 et seq.) confirm, the budget cuts decided at that time had considerable effect here too. On implementation of in-depth investigations, there are detailed product-specific guidelines (CPSC order 901024, 13 January 1983).

<sup>389</sup> 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 et seq.

<sup>390</sup> Cf. already *Cornell, N.W./Noll, R.G./Weingast, B.*, Safety Regulation, in: Owen, H./Schultze, ch.L. (eds.), Setting National Priorities. The Next Ten Years, Washington, D.C. 1976, 457 et seq., 484 and now *Viscusi, W.K.*, Regulating Consumer Product Safety, Washington D.C./London 1984, 49 et seq.

<sup>391</sup> See *Cornell, N.W./Noll, R.G./Weingast, B.*, Safety Regulation, in: Owen, H./Schultze, ch.L. (eds.), Setting National Priorities. The Next Ten Years, Washington, D.C. 1976, 457 et seq., 483 and the statement by medical practitioner J. Greensher at the Re-Authorization Hearing before Congress in 1981 (Hearings before the

vary according to the type of product involved, particularly because of geographical differences in product use, to such an extent that the NEISS data allow no conclusions as to priorities for action.<sup>392</sup>

Some of these objections are unacceptable to the CPSC, for partly conceptual, partly pragmatic reasons; others have clearly influenced the development and evaluation of the data system. Here it has to be borne in mind that the NEISS was oriented when it was created to the original conception of the CPSC, and that later legislative amendments, budget restrictions and reorientations of the Commission's safety policy inevitably affected the structure of the accident information system. Thus, the decision in favour of an accident coverage system and against the time-consuming evaluation of general investigations of accidents was a result of the endeavour to secure data on product-related hazards as rapidly as possible; the concentration on hospital casualty departments took account (among other things) of the recognition that, for instance, doctors in private practice could hardly be induced to draw up accident reports.<sup>393</sup> Original ideas about the Commission's possibilities of opposing recognized hazards by producing binding standards was certainly too optimistic. As the Commission itself – notably through the “chronical hazards program”<sup>394</sup> – filled out its priorities for action and, partly on the basis of its own experience and partly because of internal restrictions, moved towards cooperation with private standardization organizations in working out standards and shifted part of its activities into the area of follow-up market control, the NEISS had to be adapted to these new tasks. On the other hand, while budget restrictions did not exclude refinements to assessment methods, they did *de facto* rule out adoption of proposed cost-intensive improvements.<sup>395</sup> Thus, in 1985 the CPSC tried out survey methods aimed at integrating data on accident causes, in particular on product defects or mistakes by product users, into the NEISS.<sup>396</sup> But this study was aimed primarily at saving costs on the in-depth investigations. Likewise, the call for the Commission's safety policy to be oriented towards economic rationality criteria was taken into account only in connection with the evaluation of accident data.<sup>397</sup>

#### 4.3. Mandatory product regulations and product bans

The original expectation that hazards arising from consumer products could primarily be combated by adopting mandatory product standards is particularly striking to a German observer. In Germany, the retreat by government to issuing general clauses in safety law

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Subcommittee on Health and the Environment House of Representatives, 97th Congress, 1st Session, H.R. 2271 and 2201, 5 and 13 March 1981, No. 97-4, Washington, D.C. 1981, 21 et seq.).

<sup>392</sup> Heiden, E.J./Pittaway, A.R./O'Connor, R.S., Utility of the U.S. Consumer Product Safety Commission's Injury Data System as a Basis for Product Hazard Assessment, *J. of Product Liability* 5 (1982), 295 et seq.; cf. J. Waksberg's reply, CPSC's Hazard Data System: Response to Critique, *J. of Product Liability* 6 (1983), 201 et seq., and the rejoinder by Heiden, E.J./Pittaway, A.R./O'Connor, R.S., Utility of the U.S. Consumer Product Safety Commission's Injury Data System as a Basis for Product Hazard Assessment, *J. of Product Liability* 5 (1982), 295 et seq.

<sup>393</sup> See Verhalen, R.D., The NEISS, in: Commission of the EC, Proceedings of the European Symposium on Product Safety in the EC, Amsterdam 1985, 61 et seq. Brief descriptions which also show the NEISS's further development are contained in each of the CPSC's annual reports (in Part II).

<sup>394</sup> See fn. 377.

<sup>395</sup> See Verhalen, R.D., The NEISS, in: Commission of the EC, Proceedings of the European Symposium on Product Safety in the EC, Amsterdam 1985, 61 et seq., 67 et seq.; J. Greensher, loc. cit. (fn. 391).

<sup>396</sup> See the Commission document Results of a Pilot Study to Collect Causal Data from Victims Treated in Emergency Rooms for Product-Related Injuries from April 15, 1985 to April 28, 1985, (1985).

<sup>397</sup> The 1983 Annual Report (II, 6) for the first time contained detailed estimates of accident costs.

and shifting the tasks of regulation and monitoring on to privately organized institutions took place in the 19th century.<sup>398</sup> The ramification of institutions of “private-governing” is so firmly established and their professional competence so undisputed that consumer policy initiatives always aim only at reorganization of the cooperative relationships between government agencies and non-governmental self-regulatory bodies and at some pluralization of standard-setting procedures.<sup>399</sup> From the viewpoint of German developments, therefore, the CPSA appears as an extraordinarily ambitious project: the private economy’s technological and scientific capability lead was to be compensated for by setting up an independent agency, while at the same time the standard-setting process was to be opened up pluralistically and all those involved were to be offered comprehensive legal protection.

The regulations embodying the original conception of standard setting concern firstly the involvement of the public in determining action priorities through petitions under section 10 CPSA 1972 and tendering for standardization contracts by the offeror process under section 7 (d) - (e) CPSA 1972, and secondly the verification and development of regulations within the Commission pursuant to section 9 CPSA 1972.

#### 4.3.1. Public participation

Section 10 (a) CPSA 1972 gave all interested parties, i.e. individual consumers and consumer organizations, and firms, the right to call upon the Commission to enact, amend or withdraw a product safety regulation. By section 10 (d), such petitions have to be responded to within 120 days. section 10 (e) further provided for enforcement actions in the event of rejection of petitions – though this right was to become available only three years after the CPSA’s entry into force (section 10 (e)). The draftsmen of the bill hoped that these provisions would both cope with the phenomenon of organizational “inertia” and promote the Commission’s readiness to pay attention to publicly expressed safety interests.

In the first three years the number of petitions (and the Commission’s readiness to take all motions – concerning e.g. regulations on earrings, umbrellas and platform shoes – seriously into account) was so great that the petition process proved to be extremely resource-intensive, and at the same time petitioners were in the main disappointed.<sup>400</sup> Under the impact of the petitions and of the declared objective of section 10 CPSA, the Commission was in four cases prepared to set about setting standards, though the products concerned would not, according to its own scale of priorities based on the NEISS data, have deserved this attention.<sup>401</sup> This readiness led to the Commission’s first spectacular failure.<sup>402</sup>

Under the second chairman, S.J. Byington, the petition procedure was tightened up in 1977. By that time the difficulties of working out mandatory product standards had become apparent. The petition process had therefore lost its attractiveness, especially to the consumer side. Only business remained active; it used the procedure to secure amendments

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<sup>398</sup> See *Wolf, R.*, *Der Stand der Technik. Geschichte, Strukturelemente und Funktion der Verrechtlichung technischer Risiken am Beispiel des Immissionsschutzes*, Opladen 1986, 71 et seq., 99 et seq., 114 et seq.

<sup>399</sup> See *Brinkmann, W.*, *Die Verbraucherorganisationen in der Bundesrepublik Deutschland und ihre Tätigkeit bei der überbetrieblichen technischen Normung*, Köln/Berlin/Bonn/München 1976.

<sup>400</sup> For details 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 et seq., 412; *Schwartz*, 1982, 47 et seq. and the statements by Commissioner R.D. Pittle to the 1977 Congressional Hearings (*loc. cit.*, fn. 375), 248 et seq., 358 et seq.

<sup>401</sup> See above 4.2.1.

<sup>402</sup> See below 4.3.2.1.

to and exceptions from regulations in force.<sup>403</sup> The legislative reaction in 1981 was inevitable: section 10 CPSA was deleted. Since it was now the general provisions of the Administrative Procedure Act that applied, abolition of the special right of petition meant only formal ratification of a change that had already come about.<sup>404</sup>

The same fate was in store for the offeror process pursuant section 7 CPSA 1972. According to the ideas of the National Commission on Product Safety, incorporated in the Senate bill, the tendency by the Commission to follow the industries' ideas too much in working out regulations was to be averted by giving groups not themselves economically interested the opportunity to develop a product standard. section 7 (b) (4) CPSA 1972 complied with these ideas by obliging the Commission to make its intention to adopt a product standard public and call upon "any person" to present suitable proposals. section 7 (d) (2) further provided for the possibility of supporting such work financially.

In four cases, the offeror process led to product regulations (swimming-pool slides, matchbooks, plate glass materials, motor lawnmowers). In only one of these cases, namely lawnmowers, was a consumer organization (the Consumer's Union) active; in two other cases (televisions, Christmas-tree lights) in which non-industrial organizations (the Underwriters Laboratories and the National Consumers' League respectively) were involved, the procedures ended with improvement to the voluntary standards, so that in the Commission's view adoption of a binding rule became superfluous<sup>405</sup>.

The offeror process proved extraordinarily time-consuming, costly and frustrating for all concerned. Commissioner R.D. Pittle openly admitted all these shortcomings in the 1977 Congressional hearings.<sup>406</sup> But he saw ways of making the procedure effective: through more precise guidelines from the Commission, improved cooperation with the offeror in working out standards, and adequate financial support for the work of non-commercial organizations. According to the testimony of D.A. Swankin, who headed standardization work on Christmas-tree lights for the National Consumers' League, in this case Pittle's ideas were largely realized, with great practical success.<sup>407</sup> However, no further testing of these improvements presented itself. The provisions on the offeror process were withdrawn in 1981.<sup>408</sup>

#### 4.3.2. Individual standards and typical regulatory problems

In the years 1973-1984, the CPSC issued only some 22 binding product regulations (only 7 of them based on the CPSA), some three regulations on information requirements and some 7 product bans.<sup>409</sup> These figures look rather modest. Whether they in fact reveal the Commission's inefficiency and/or the inadequacy of the act itself could be decided only from a comparison with the cost and time incurred by private standardization organizations,

<sup>403</sup> See *Schwartz, T.M.*, *The Consumer Safety Commission: A Flawed Product of the Consumer Decade*, *George Washington L. Rev.* 51 (1982), 32 et seq., 54.

<sup>404</sup> Cf. 4.1.2.2. above and the observations in Merrill, 1981, 1360, 1363 et seq. on the role of petitions in the area of carcinogenic substances.

<sup>405</sup> See *Schwartz, T.M.*, *The Consumer Safety Commission: A Flawed Product of the Consumer Decade*, *George Washington L. Rev.* 51 (1982), 32 et seq., 61 et seq.

<sup>406</sup> *Loc. cit.* (fn. 375), 270 et seq., 281 et seq., 285 et seq.

<sup>407</sup> *Loc. cit.*, 259 et seq.

<sup>408</sup> See 4.1.2.1. above, at fn. 358. Standards and bans in force can be found from CFR 16, 1000.

<sup>409</sup> Figures in *Viscusi, W.K.*, *Regulating Consumer Product Safety*, Washington D.C./London 1984, 58 et seq. G.C. Nichols (fn. 342 above) mentions 36 procedures for binding standards and over 100 for voluntary ones.

and a qualitative comparison of results. Account would further have to be taken of the fact that since standards are part of the public (though not purely governmental) system, additional potential for conflict arises, which can continue to act through the judicial controls over standards by the authorities. A generalized evaluation of the CPSA provisions is made still more difficult by the fact that every standard was a response to specific regulatory problems, and that patterns of conflict also varied. There would be no point in retelling the history of every individual standardization process, since any attempt to derive general evaluations from this would inevitably fail. That notwithstanding, the description below should illustrate some problems in setting mandatory standards, on the basis of two well-known spectacular cases.<sup>410</sup>

*4.3.2.1. The pool slide debacle and the CPSC's product safety philosophy*

The legal conditions on which a product rule may be laid down and the criteria it has to meet follow from sec. 9 (b) and (c) CPSA. In their original version, these provisions referred to “unreasonable risk of injury” and “reasonable necessity” for a standard (sec. 9 (c) (2) and (7) CPSA 1972); before issuing a product rule, the Commission was additionally to consider its likely effect on the utility, cost and availability of the products concerned (sec. 9 (f) (1) (C) CPSA). On the basis of these vague expressions, the Commission first of all sought legitimation for its decisions essentially in hazard analyses, rejecting a legal obligation to quantify risks and costs.<sup>411</sup> In *Aqua Slide 'N Dive Corp. v. CPSC*,<sup>412</sup> the leeway claimed by the Commission was significantly cut down. The Aqua Slide decision concerned the first product standard put through by the Commission, following painful, peculiar experience. The initiatives for regulating swimming-pool slides had been begun by the National Swimming Pool Institute (NSPI, an industry group concerned) and the plaintiff itself (by far the biggest producer) using the petition procedure.<sup>413</sup> Although according to NEISS survey data the slides were far from being among the riskier groups of products, the Commission decided to embark on a regulatory procedure, in view of the severity of accidents that did occasionally occur. It was at the same time showing what its product safety philosophy was: accidents were attributable to clumsy or incautious but foreseeable types of use. In the offeror process, the NSPI was mandated to work out a standard. Three years went by before it could be announced.<sup>414</sup> In relation to design of slides, the Commission, doubting its own competence, refrained from binding provisions and merely made recommendations. All that was bindingly required was a ladder chain and warning

<sup>410</sup> Comprehensive analyses taking the CPSC's work as touchstone to test divergent regulatory theories are not available. A general survey, primarily from a legal viewpoint, is offered by *Lammantina, L.J.*, *The Consumer Product Safety Act, J. of Product Liability* 4 (1981), 275 et seq; see also *Schwartz, T.M.*, *The Consumer Safety Commission: A Flawed Product of the Consumer Decade*, *George Washington L. Rev.* 51 (1982), 32 et seq., 57 et seq., 73 et seq. An assessment oriented to criteria of cost-benefit analysis, but kept very brief, can be found in *Viscusi, W.K.*, *Regulating Consumer Product Safety*, Washington D.C./London 1984, 71 et seq., 88 et seq. For an illuminating political-science analysis, see *Feldman, L.P.*, *Consumer Protection. Problems and Prospects*, St. Paul/New York/Los Angeles/San Francisco 1980, 58 et seq., 73 et seq. The most comprehensive approach, though confined to the Commission's “chronical hazards program” is in *Merrill, R.A.*, *CPSC Regulation of Cancer Risks in Consumer Products: 1972-81*, *Virginia L Rev.* 67 (1981), 1261 et seq.

<sup>411</sup> See z. B. *Merrill, R.A.*, *CPSC Regulation of Cancer Risks in Consumer Products: 1972-81*, *Virginia L Rev.* 67 (1981), 1261 et seq., 1279 et seq., with references.

<sup>412</sup> 569 F.2d 831 (5<sup>th</sup> Cir. 1978).

<sup>413</sup> The grounds for the petition are illuminating: Aqua Slide wanted to avoid a product ban or a compulsory recall under the Federal Hazardous Substances Act (see 569 F.2d 835).

<sup>414</sup> 42 F.R. 2751 (19 January 1976).

notice: “careless slides can cause paralysis”, “careless slides can cause injury”. The Aqua Slide ‘N Dive Corp. opposed these requirements, fearing marketing disadvantages due especially to the indication of the nature of possible, though improbable, injuries.<sup>415</sup>

The key legal question in judicial review of the standard was the interpretation of the provisions just cited of sec. 9 CPSA 1972. The Court accepted that the Commission had to assume an “unreasonable risk” even in the case of extremely unlikely but severe injuries; but it reproached it for not having shown “reasonable necessity” for the regulation adopted. The Commission had not, it said, ascertained the economic effects of its regulation,<sup>416</sup> nor tested the effectiveness in practice of chain and warning.<sup>417</sup> Judge Wisdom’s concurring opinion treated the relationship between economic cost and benefit much more decidedly: he agreed with the Commission that the warning signs helped to reduce risks; but these benefits were out of proportion to the costs they would cause.<sup>418</sup> In other respects, the effects on competition had proved considerable, contributing to a monopoly position which was, ironically, now held by the plaintiff itself.<sup>419</sup>

The differences in style between the majority opinion and Judge Wisdom’s arguments show how problematic it is to adduce the Aqua Slide decision in calling for the CPSA to be oriented more towards economic rationality criteria. In practice, though, the decision did have this effect,<sup>420</sup> contributing to the 1982 amendment to sec. 9 CPSA.<sup>421</sup>

#### 4.3.2.2. Lawnmowers and the indefiniteness of cost-benefit analyses

The regulation of “walk-behind power mowers” too was taken up on petition from an industry group (Outdoor Power Equipment Institute, OPEI) in 1973. In this case, the initiative was aimed at securing official blessing for an already worked out voluntary standard.<sup>422</sup> The Commission, however, took the chance to make the award in the offeror process to a consumer organization that had distinguished itself by its activities in this area (the Consumers’ Union, CU). CU finished its work in July 1975. The outcome was controversial: the OPEI criticized all the major technical proposals, as well as the cost-benefit analysis added by the CU.

This essentially explains the duration and intensity of verification of the proposals by the CPSC: the standardization work was practically repeated yet again, with renewed official involvement, and not completed until 15 February 1979<sup>423</sup>. In the “findings” justifying the regulations,<sup>424</sup> the effects of the Aqua Slide judgment are clearly recognizable. They

<sup>415</sup> 569 F.2d 842.

<sup>416</sup> 569 F.2d 840.

<sup>417</sup> On the effect of warning notices, observations were carried out for two days (loc. cit., 841 ); the ladder chain was tested by a Commission consultant on his neighbour’s children; “This is not the stuff of which substantial evidence is made” (op. cit., 843).

<sup>418</sup> 569 F.2d 845.

<sup>419</sup> *Schwartz, T.M.*, The Consumer Safety Commission: A Flawed Product of the Consumer Decade, *George Washington L. Rev.* 51 (1982), 32 et seq., 51, fn. 130. The Commission’s attempt to withdraw the regulation in 1981 was opposed by Aqua Slide and not pursued because of the cost of withdrawal proceedings.

<sup>420</sup> See also *D.D. Bean & Sons Co. v. CPSC*, 574 F.2d 643 (1st Cir. 1978) on the partial review of the matchbook standards, and for the history and economic analysis of this regulation *Kafoglis, M.Z.*, Matchbook Safety, in: *Miller III. J.C./Yandle, B.* (eds.), *Benefit-Cost Analysis of Social Regulation*, Washington, D.C. 1979, 75 et seq. Additionally, see *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

<sup>421</sup> 4.1.2.1. above.

<sup>422</sup> On this see *Schwartz’s* case study, *The Consumer Safety Commission: A Flawed Product of the Consumer Decade*, *George Washington L. Rev.* 51 (1982), 32 et seq., 77 et seq.

<sup>423</sup> 44 F.R. 10024 (15 February 1979), 16 CFR 1205.

<sup>424</sup> 16 CFR 1205. 8.

contain a review of estimated numbers and costs of accidents with lawnmowers, an analysis of the effects of the regulation on product costs and an account of the likely effects on accident figures and product costs of the most important safety requirements. This regulation has stood up to judicial review, with one marginal exception.<sup>425</sup> What is remarkable here is that the Commission's "safety philosophy", showing in its readiness for "paternalistic" protection of the consumer against his own foreseeable mistakes, was explicitly confirmed, while at the same time cost-benefit analysis acquired more importance.

The risks bound up with lawnmowers are widely known. Accordingly, use leading to injury can be treated as misuse, and the existing safety level taken as a "proper" outcome of consumer demand.<sup>426</sup> However, the Court of Appeals, when it was called in, did not accept this argumentation: "Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risks ... There is no evidence ... that (consumers') presumed willingness to defeat protective measures is reasonable".<sup>427</sup> This safety philosophy has effects on the basis for cost-benefit analysis. If consumer behaviour were declared to be the criterion for justifying regulatory intervention, then economic analysis as such would be superfluous; willingness to take risks when mowing lawns may very well be "unreasonably" high, having regard to accident insurance and to health protection provisions.<sup>428</sup> But leaving these difficulties aside, and comparing merely the (estimated) increase in product cost with the (estimated) effects of the standard on accident figures and the (estimated) savings (though here delay in making a new purchase of a mower made according to the new regulations and the concomitant use of old, hazardous machines would be particularly hard to estimate)<sup>429</sup> then again broad room for discretion in decision arises. The CPSC thus saw itself confronted with divergent cost-benefit analyses from the CU and the OPEI. It did a study of its own, which was revised once more following criticisms by the Standard Research Institute, called in by the OPEI<sup>430</sup>. The Court of Appeals declared itself satisfied with these efforts.<sup>431</sup> Since on CPSC estimates the cost-benefit analysis came out in favour of adopting the regulation, its legal significance ultimately remained undetermined, and the question whether measures were no longer "reasonably necessary" when their effects on product costs exceeded savings on treating accident victims unanswered. Admittedly, the CPSC success before the courts was wiped out on one important point through a legislative amendment to the regulation by Congress.<sup>432</sup>

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<sup>425</sup> *Southland Mower Co. et al. v. CPSC*, 690 F.2 d 499 (5th Cir. 1980).

<sup>426</sup> Cf. esp. *Viscusi, W.K.*, *Regulating Consumer Product Safety*, Washington D.C./London 1984, 94.

<sup>427</sup> 619 F.2d 513.

<sup>428</sup> See 4.1.3. above, end.

<sup>429</sup> See *Lenard, Th.M.*, *Lawn Mower Safety*, in: Miller III, J.C./Yandle, B. (eds.), *Benefit-Cost-Analyses of Social Regulation*, Washington, D.C. 1979, 61 et seq., 69, 71, 73.

<sup>430</sup> 690 F.2d 523 et seq.

<sup>431</sup> 619 F.2d 524 et seq.; for a criticism, see *Viscusi, W.K.*, *Regulating Consumer Product Safety*, Washington D.C./London 1984, 94 et seq.; *Johnson, L.L.*, *Cost-Benefit Analysis and Voluntary Safety Standards for Consumer Products*, Santa Monica, Cal. 1982, 28 et seq., explicitly praises the CPSC's analyses and recommends it to private standardization organizations for imitation.

<sup>432</sup> See 16 CFR 1205.5, fn. 1.



### 4.3.3. Product bans

According to sec. 8 CPSA 1972, products giving rise to an “unreasonable risk of injury” could be “banned” unless some product standard promised appropriate protection. The banning procedure came under the provisions of sec. 9 CPSA 1972 applying to standard setting, but not those of sections 7, 10 CPSA 1972 on petitioning and the offeror process. The possibility of putting through regulations on its own account does much to explain the Commission’s inclination, once the standard-setting procedure had proved unexpectedly complex and conflictual, to opt for the banning procedure. In fact, in at least two cases where issuing or tightening up a standard might have been conceivable, the Commission decided on product bans.<sup>433</sup>

The most important field of application of sec. 8 CPSA, however, became the hazards analyzed under the “chronical hazards” program, from health-threatening, especially carcinogenic, chemicals, a case where recourse to sec. 8 CPSA 1972 immediately suggests itself.<sup>434</sup> The expectation that product bans might become an important regulatory instrument has however since been deceived, an outcome contributed to by both the outcome of the formaldehyde controversy and the 1981 legislative amendments.

The formaldehyde controversy began in 1976 with initial reports on health complaints from people living in houses treated with urea formaldehyde (UF) foam insulation for energy conservation. A veritable consumer movement developed against UF dangers, further stimulated by medical studies on the possible carcinogenicity of the product.<sup>435</sup> The CPSC initiated wide-ranging additional scientific studies, and initially suggested a regulation to oblige manufacturers to provide information on general (not carcinogenic) hazards.<sup>436</sup> It was not till 1981 that the Commission threatened to ban urea formaldehyde.<sup>437</sup> The proposal for a regulation, which takes up 23 closely printed pages, first of all describes the state of the medical studies and goes on to discuss the economic consequences of a ban. Avoidance of 23 cancer deaths yearly, and of other health risks, were said to be in line with the requirements emerging from the Aqua Slide and Southland Mower decisions and to be

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<sup>433</sup> Cf. *Merrill, R.A.*, CPSC Regulation of Cancer Risks in Consumer Products: 1972-81, Virginia L Rev. 67 (1981), 1261 et seq., 1277, fn. 74 and *Schwartz, T.M.*, The Consumer Safety Commission: A Flawed Product of the Consumer Decade, George Washington L. Rev. 51 (1982), 32 et seq., 68 and the example of the “ban on unstable refuse bins”, 42 F.R. 30300, 13 June 1977, amended by 46 F.R. 55925, 13 November 1981, 16 CFR 1301; the refuse bins had according to the Commission's findings led to 21 deaths (20 of them children); the product ban specified the nature of the bins concerned in detail (loc. cit., 1301.1.(b) and (e); cf. also the ban on particular types of children's bicycles under 16 CFR 1500.18 (a) (12), which in turn refers to the requirements for bicycles (43 F.R. 60034, 22 December 1978, 16 CFR 1512); for an illuminating and critical discussion of bicycle regulations cf. *Cornell, N.W./Noll, R.G./Weingast, B.*, *Safety Regulation*, in: Owen, H./Schultze, ch.L. (eds.), *Setting National Priorities. The Next Ten Years*, Washington, D.C. 1976, 457 et seq., 493 et seq.; the standard was essentially confirmed by the decision in *Forester v. CPSC*, 559 F.2d 774 (D.C. Cir. 1977).

<sup>434</sup> On the structure of the program, see *Merrill, R.A.*, CPSC Regulation of Cancer Risks in Consumer Products: 1972-81, Virginia L Rev. 67 (1981), 1261 et seq., 1981, 1296 et seq., 1310 et seq. Among the most prominent “victims” of the Commission was the chemical TRIS, which had since 1971, following a standard set by the Commerce Department, been used to treat nightwear to reduce fire dangers. In this case the Commission presented its action as an interpretation of § 2 (q) (1) (A) Federal Hazardous Substances Act (on the dramatic background, see *Merrill, R.A.*, CPSC Regulation of Cancer Risks in Consumer Products: 1972-81, Virginia L Rev. 67 (1981), 1261 et seq., 1323 et seq.). For the losses resulting from the Commission's action, firms involved received, through the 1982 “Tris Act”, compensation amounting to 56 million dollars (references in *Bollier/Claybrook*, 1986, 180).

<sup>435</sup> See *Bollier, D./Claybrook, J.*, *Freedom from Harm, Washington, D.C./New York 1986.*, 180 et seq.

<sup>436</sup> 45 F.R. 39434 (1980); on this see again *Merrill*, 1981, 1354 et seq. and *Ashford/Ryan/Caldart*, 1983.

<sup>437</sup> 46 F.R. 11188 (5 February 1981).

in “reasonable proportion” with the economic drawbacks of a ban.<sup>438</sup> On 2 April 1982 the definitive ban was issued,<sup>439</sup> which was praised for its scientific justifications, once again spelled out, whereas the Commission’s economic analysis was found to be heavily flawed.<sup>440</sup>

The Court of Appeals, called in by a number of manufacturers concerned,<sup>441</sup> did not go into calculations of the economic benefit of preventing cancer deaths against the cost of banning urea formaldehyde. The Court was able to avoid taking a position on this regulatory aspect because it already regarded “unreasonable risk of injury” as not proven. Measurements of UF burdens had not been effected by random sampling, and where this had been the case, they were often due to installation errors and therefore controllable by a standard. The experimental scientific basis for the assumption of carcinogenic effects was on the whole too narrow, and could not justify the Commission’s risk estimates. The Commission’s 1983 Annual Report<sup>442</sup> has a brief note on the outcome of the trial, which is very illuminating for its present position: “the Commission voted 3-2 to seek an appeal in the Supreme Court, but the US Solicitor General decided not to ask the Supreme Court to take the case”. But it is not only the outcome of the formaldehyde controversy and the resulting requirements to demonstrate product risks that made the instrument of product bans become unattractive. Legal amendments in connection with the 1981 reauthorization acted in the same direction: product bans could henceforth be issued only under the conditions introduced in sec. 9 CPSA for the binding setting of standards.

#### 4.4. Updating of “voluntary” standards

The explicitly critical attitude to “voluntary” standards that characterized the NCPS Report (“chronically inadequate, both in scope and permissible levels of risk”)<sup>443</sup> and was to have determined the regulatory approach in the CPSA 1972 had already changed by the mid-70s; it was finally reversed with the legislative amendments of 1981.<sup>444</sup> To understand this development and the CPSC’s present support for voluntary standard setting, a few indications as to the structures of private standard setting in the US might be of assistance.

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<sup>438</sup> 46 F.R. 11200 et seq.

<sup>439</sup> 47 F.R. 14366 (2 April 1982).

<sup>440</sup> On the first aspect see *Ashford, N./Ryan, C.W./Caldart, Ch.*, A Hard Look at Federal Regulation of Formaldehyde: An Assessment of its Health Effects, *Harvard Environmental L. Rev.* 7 (1983), 297 et seq., 360 et seq.; *Fox, E.M.*, Urea Formaldehyde Foam Insulation, *American J. of Law and Medicine* 11 (1985), 81 et seq., 84 et seq., and for an economic analysis *Merrill, R.A.*, CPSC Regulation of Cancer Risks in Consumer Products: 1972-81, *Virginia L. Rev.* 67 (1981), 1261 et seq., 1358 et seq.

<sup>441</sup> *Gulf South Insulation et al. v. CPSC*, 701 F.2d 1137 (5th Cir. 1983).

<sup>442</sup> II, 103; see also, for a criticism of the judicial critique, *Ashford, N./Ryan, C.W./Caldart, Ch.*, A Hard Look at Federal Regulation of Formaldehyde: An Assessment of its Health Effects, *Harvard Environmental L. Rev.* 7 (1983), 297 et seq., 363 et seq. and *Fox*, 1985, 88 et seq.

<sup>443</sup> *Op. cit.*, (fn. 334), 62; see *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 et seq., 1371 et seq.

<sup>444</sup> See 4.1.2.1. above.

4.4.1. Standardization organizations and procedures<sup>445</sup>

There are no less than 580 groupings in the US concerned with developing standards, but the number of organizations of national importance is very small. For some influential agencies, standardization activities are part of general representation of professional or economic interests. This is true of the engineering societies (“American Society of Civil Engineers”; “American Society of Mechanical Engineers”; “Institute of Electrical Electronics Engineers”; “Society of Automotive Engineers”); they are “non-profit” organizations with individual memberships, though their standardization activities are supported and influenced by contributions from industry. By contrast, the trade associations represent manufacturers in individual industries. Both the engineering societies and the trade associations not only develop standards themselves but additionally participate in the activities of the most important standardization organizations: the American Society for Testing and Materials (ASTM) and the National Fire Protection Association (NFPA). In view of its particular reputation, special mention should be made of Underwriters Laboratories (UL), an institution promoted by American insurers, dealing among other things with electrical hazards, fire protection and the development of test procedures. The activities of all these organizations are coordinated - which often means stimulated - by the American National Standards Institute (ANSI), which also represents the US in international contexts.

The standardization organizations reacted to public criticism of the quality of voluntary standards in the 1970s by reviewing their procedural arrangements. Thus, standards brought before the ANSI must before being recognized as an “American National Standard” go through a procedure to check whether all those primarily involved have had a chance to express views and raise objections, on whether the standard is “unfair” or ignores “the public interest”; additionally, all standardization proposals are published and, where of direct relevance to consumers, passed on to a “Standards Screening and Revision Committee of the Consumer Council”.<sup>446</sup> The ANSI’s procedural rules are more specific, and stricter, when it organizes standardization procedures itself. For safety standards, inclusion of workers, authorities, insurers, consumers, and other groups is supposed to guarantee balanced representation of interests (“A consensus does not necessarily mean unanimous acceptance. Votes are weighted rather than counted”),<sup>447</sup> as well as guaranteeing that standards would actually be applied. All big standardization organizations have similar procedural guarantees. This is the case in particular for the ASTM, which develops detailed “due process” requirements, and has, like, for instance, the NFPA and the UL, set up “consumer sounding boards”.<sup>448</sup>

<sup>445</sup> On the following, cf. *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 et seq., 1336 et seq.; *Hemenway, D.*, Industry-wide Voluntary Product Standards, Cambridge, Mass. 1975, 81 et seq.; *Johnson, L.L.*, Cost-Benefit Analysis and Voluntary Safety Standards for Consumer Products, Santa Monica, Cal. 1982, 6 et seq.

<sup>446</sup> *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 et seq., 1365 et seq.

<sup>447</sup> For more on the consensus principle see *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 et seq., 1361 et seq., and the critical remarks in *Hemenway, D.*, Industry-wide Voluntary Product Standards, Cambridge, Mass. 1975, 89 and in *Opela, M.P.*, The Anatomy of Private Standards-Making Process: the Operating Procedures of the USA Standards Institute, Oklahoma L. Rev. 22 (1969), 45 et seq., 45.

<sup>448</sup> See *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 et seq., 1349 et seq., 1384.

#### 4.4.2. The CPSC attitude

In parallel with these reorganization efforts of private standardization associations, attitudes towards “self-regulatory” measures in general changed,<sup>449</sup> as did the CPSC’s position on voluntary standards in particular. In 1975, the CPSC was already developing forms of cooperation with private standardization organizations<sup>450</sup> and regulating “employee membership and participation in voluntary standards organizations”.<sup>451</sup> In the statement on the regulation on “Commission involvement in voluntary standard activities” of 1978, the Commission explicitly dissociated itself from the National Commission on Product Safety’s critical observations on voluntary standards,<sup>452</sup> and at the 1981 Congressional hearings this attitude was confirmed by then Commission Chairman Stuart Statler, who pointed out that in 83 cases the Commission had already collaborated on developing or revising voluntary standards.<sup>453</sup> The Underwriters Laboratory additionally stressed that passing on of accident figures by the Commission had already often led to private standardization activity.<sup>454</sup>

The 1978 Regulation just mentioned distinguishes between two forms of official involvement. “Monitoring” of the development of voluntary product standards involves observing the process and influencing it through directed questions and by providing accident figures and the results of in-depth studies. In the case of “participation”, a Commission worker takes part in sessions of the private Standardization Committee, and technical assistance is sometimes provided. The first form of involvement requires approval only from the Commission Executive Director, the second from the Commissioners themselves.<sup>455</sup> The object of both forms, and the type of support that the Commission can provide,<sup>456</sup> is fully in line with the CSPA’s general safety policy objectives. Support is accordingly also bound up with particular conditions on the standardization procedure: it should be open to all interested parties and guarantee genuine involvement of consumers and/or small business; it must provide for revisions of standards; actual compliance is important; certification provisions should be worked out and standards themselves be confined to “performance” regulations.<sup>457</sup> The Commission always keeps its option to issue a mandatory product regulation open, whether to make a voluntary standard generally binding or because a voluntary standard is inadequate from the safety policy viewpoint.<sup>458</sup>

The 1981 legislative amendments did not formally cancel this policy statement, but they did reduce its practical significance, for many reasons. By the new version of sec. 9 (b) CPSA, the Commission must always give preference to voluntary standards where they eliminate or “adequately reduce” the hazards concerned and “substantial” compliance is to be expected. This already guarantees that the Commission will await efforts at voluntary

<sup>449</sup> See *Katz, R.N.* (ed.), *Protecting the Consumer Interest. Private Initiative and Public Response*, Mass. 1976; Reich, 1984, 123 et seq.

<sup>450</sup> See e.g. the references in *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 et seq., 1404 and the testimony by Commission Chairman S.J. Byington to the 1977 Congressional Hearings, loc. cit. (fn. 375), 363 et seq., 373 et seq.

<sup>451</sup> 40 F.R. 26025, 20 June 1975 (for the form in force at present, see 46 F.R. 29930, 4 June 1981, 16 CFR 1031).

<sup>452</sup> 43 F.R. 19216 (4 May 1978), 16 CFR 1032.1.

<sup>453</sup> Op. cit., (fn. 391), 321 et seq., 338 et seq.

<sup>454</sup> Op. cit., 816 et seq., 823.

<sup>455</sup> 16 CFR 1032.2 (b) and 1032.3 (a) and (b).

<sup>456</sup> See 16 CFR 1032.4.

<sup>457</sup> See 16 CFR 1032.5.

<sup>458</sup> See 16 CFR 1032.6; cf. 1032.1 (c).

solution and cannot without further ado ignore their outcome. Additionally, the new version of section 9 (c) and (f) CPSA links announcement, and above all enactment, of binding rules with additional requirements. The Commission has not only to show that a product hazard will not be adequately reduced or that observance of a standard would be inadequate; it has further to provide a detailed “regulatory analysis” that must contain cost-benefit analyses of its regulatory proposal and of all alternatives contemplated. The Commission initially responded in 1984 to this change in the framework for its cooperation with standardization organizations through a proposal to supplement the 1978 regulations concentrating on involvement in developing voluntary standards with a procedure to give special recognition to voluntary safety standards already being applied.<sup>459</sup> The declared aim of this proposal was to encourage application of safety standards and improve consumer orientation towards safety aspects of consumer products. But response to the proposal was discordant, and mainly negative. Industry feared distortions of competition and restrictions on innovation; standardization organisations recalled the Commission’s limited resources for implementing recognition procedures; the Consumer Federation of America protested against the Commission being converted into a sales promotion agency. The Commission decided to withdraw its proposal.<sup>460</sup> But this did not end efforts to develop standardization policy further. A memorandum of 22 April 1985<sup>461</sup> incorporating suggestions from Commission departments and from public hearings describes and discusses a range of options going from voting rights in setting voluntary standards via systematic announcements of regulatory procedures pursuant to sec. 9 CPSA, up to the conclusion of cooperation agreements with standardization organizations. The Commission decided to use only three of these possibilities: to intensify its involvement in standardization work on products particularly important in its view; to make direct contact with individual manufacturers before producing or amending standards; to refer to standards in its public information.<sup>462</sup> The practical importance of all these activities is hard for the outsider to estimate. However, thanks to its accident information system and its own technical competence, the Commission should continue to have considerable possibilities of influencing the production and promotion of standards of relevance to safety.<sup>463</sup>

#### 4.4.3. Standards and product liability

The intensification of “voluntary” standardization in the US cannot be explained solely on the basis of the CPSC’s original powers and its current encouragement of voluntary standards, but is to be attributed essentially to the influence of American liability law. American case law punishes neglect of a binding standard, but also non-compliance with a safety level laid down in a voluntary standard, as in principle “negligence *per se*”.<sup>464</sup> This

<sup>459</sup> 49 F.R. 25005, 19 June 1984.

<sup>460</sup> 50 F.R. 19699, 10 May 1985; the hearings and discussions that led to this decision are documented in the “Briefing Package on Proposed Amendment to Commission Policy Involvement in Voluntary Standards Activities”, 14 December, 1984.

<sup>461</sup> Alternatives for Support of Voluntary Standards.

<sup>462</sup> Commission Guidance on Voluntary Standards Activities, Memorandum, 28 April 1986.

<sup>463</sup> According to a memorandum from D.L. Noble of 14 May 1986, in 1986 15 participation projects and 31 monitoring projects were pursued. The memorandum specifies in each individual case the nature of the hazards involved, and documents advantages and drawbacks to each individual project.

<sup>464</sup> See *Weinstein, A.S./Twerski, A.D./Pieller, H.R./Donaker, W.H.*, *Product Liability and the Reasonably Safe Product: A Guide for Management, Design and Marketing*, New York/Chichester/Brisbane/Toronto 1978, 56.

sanction manifestly explains industry's willingness to follow voluntary standards;<sup>465</sup> it likewise explains the interest in having standards recognized by ANSI and making the standardization procedure itself "fair".<sup>466</sup>

On the other hand, compliance with a standard in no way rules out product liability. section 25 CPSA explicitly confirms this principle for binding standards: "Compliance with consumer product safety rules ... shall not relieve any person from liability at common law ..." However clear this position, court practice nevertheless responds in different ways when manufacturers appeal to their compliance with voluntary or with mandatory standards in product liability actions. Standards may, for instance, be adduced to establish the "state of the art" in product safety, or to support or confute expert testimony.<sup>467</sup> All these forms of observance of standards, however, leave the principle that the courts autonomously determine the level of product safety intact; this principle is not questioned either by efforts at legislative channeling of product liability law.<sup>468</sup>

#### 4.5. Recalls

The recall provisions in the CPSA initially stood in the shadow of preventive standard setting, but soon developed into an important instrument for the CPSC, and took on additional importance after the 1981 restrictions. For European product safety policy, the American example deserves particular attention not only because the New Approach to technical harmonization and standards delegates preventive product safety policy very largely to private standardization organizations, but also because the need for European framework legislation on follow-up market control seems irrefutable.<sup>469</sup>

##### 4.5.1. The CPSA legislative framework

Two provisions in the CPSA deal with response to hazards arising from already marketed products. By sec. 12, the Commission may order seizure and/or public warnings, recalls, repairs, exchange or replacement of "imminently hazardous consumer products". However, the significance of this provision remained marginal.<sup>470</sup> The Commission has developed its follow-up market policy entirely on the basis of sec. 15. This preference is not surprising: the criteria for intervention in sec. 15 are broadly formulated, the potential for sanctions is rich in alternatives and can be treated flexibly.

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<sup>465</sup> See *Eads, G./Reuter, P.*, *Designing Safe Products. Corporate Responses to Product Liability Law and Regulation*, Santa Monica, Cal. 1983, 40.

<sup>466</sup> See 4.4.1. above and *Hoffman/Hoffman*, 1980/81, 293, 295.

<sup>467</sup> See *Hoffmann, S.D./Hoffmann, M.E.*, *Use of Standards in Products Liability Litigation*, *Drake L. Rev.* 30 (1980-81), 283 et seq., 288 et seq., and specifically on automobile standards *Holley, St. C.*, *The Relationship between Federal Standard and Litigation in the Control of Automobile Design*, *New York University L. Rev.* 57 (1982), 804 et seq., 813 et seq.

<sup>468</sup> See *Dworkin, T.M.*, *Federal Reform of Product Liability Law*, *Tulane L. Rev.* 57 (1983), 602 et seq., 612 et seq.

<sup>469</sup> See *Joerges, C.*, *Product Safety, Product Safety Policy and Product Safety Law*, *Hanse Law Review (HanseLR)* 2010, 117, 3.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>, and for more details *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, 4. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art06.pdf>.

<sup>470</sup> See *Schwartz, T.M./Adler, R.S.*, *Product Recalls: A Remedy in Need of Repair*, *Case Western Reserve L. Rev.* 34 (1984), 401 et seq., 429.

Sec. 15 (a) CPSA provides sanctions against all “substantial product hazards” arising either from failure to comply with a binding rule or from product defect. Every manufacturer, distributor and retailer must by sec. 15 (b) immediately inform the Commission if they obtain information that reasonably supports the conclusion that such hazard is present. On the basis of such reports and/or other sources of information (NEISS accident figures, consumer complaints, in-depth studies etc.), a hearing is held to which all interested circles, including consumers, are invited (see sec. 15 (c) and (d)).

Should the Commission determine after such consultation that a “substantial product hazard” is presented, two measures are possible:

- “notification” under sec. 15 (c), whereby a manufacturer, distributor or retailer may be ordered to inform the general public, notify all manufacturers, distributors or retailers, or mail notice to every person they know to have been sold or delivered the product;
- the further-reaching possibilities of sec. 15 (d), where it seems necessary in the public interest to repair a product, make it fit applicable standards, exchange it or replace it. Additionally, a “corrective action plan”, showing how the order is to be implemented, may be required.

#### 4.5.2. Application of sec. 15 CPSA

The administration of this legal framework has been interpreted and refined by the Commission in its rules on “substantial product hazard reports”<sup>471</sup> and in a number of internal (though publicly accessible) documents. Some elements of this policy have already been brought out:

- (1) the general clause of sec. 15 (a) (2) on defects that lead to “substantial product hazards” has been clarified by the Commission using exhaustive circumlocutions (“a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function”), differentiations (design, manufacture, instructions), examples (“a knife does not contain a defect insofar as the sharpness of its blade is concerned”) and assessment criteria (“... the Commission and staff will consider: the utility of the product involved; the nature of the risk of injury which the product presents; the population exposed to the product and its risk of injury; the Commission’s own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of product liability; and other factors ...”).<sup>472</sup>
- (2) The obligation laid down in sec. 15 (b) on manufactures, distributors and retailers to report product hazards is regarded by the Commission as an indispensable precondition for its recall policy. It exhaustively commented on this obligation in 1978, defending it against criticism from firms involved.<sup>473</sup> The objections are quite understandable. There are fears in particular of negative effects of such reports on product liability suits, and also of deterioration of image and hence of competitive position. The rule dating from 1978 sought to allay these doubts by explicitly treating the report itself as not constituting admission of a product defect.<sup>474</sup> In 1981 the legislator came to meet the interests of firms involved by making the new version of sec. 6 (b) (5) CPSA provide that in principle

<sup>471</sup> 43 F.R. 34998 (7 August 1978), 16 CFR 1115.

<sup>472</sup> 16 CFR 1115.4; and exhaustively *Madden, M.S.*, Consumer Product Safety Act, Section 15 and Substantial Product Hazards, *Catholic University L. Rev.* 30 (1981), 195 et seq., 202 et seq.

<sup>473</sup> 43 F.R. 34988-34998, 7 August 1978 (on the subsequently adopted rule, cf. in detail *Madden*, 1981, 211 et seq.).

<sup>474</sup> 16 CFR 1115.12 (a).

information secured under sec. 15 (b) be no longer published.<sup>475</sup> This legislative amendment, and probably also the Commission's budget difficulties,<sup>476</sup> led in 1980-2 to a notable decline in the number of reports received. But the Commission's position was not lastingly affected. In 1984 it once more gave detailed justifications for the importance of the reporting duty,<sup>477</sup> and managed to reverse the trend of the years 1980-2 again.<sup>478</sup>

This strictness cannot be explained by the information function of the reports alone. Procedures under sec. 15 CPSA were inevitably always largely based also on other information sources.<sup>479</sup> Assuredly, closer observance of the reporting duty would facilitate the identification of hazards. But the importance of the reporting duty seems also to lie in its largely compensating the indefiniteness of the general clause in sec. 15 (a) (2), thus also strengthening the Commission's negotiating position vis-à-vis firms involved when negotiating a recall plan.

- (3) As with all product safety policy instruments, with follow-up market control too priority setting is essential. A 1981 document,<sup>480</sup> instructive for the Commission's attitude, differentiates three types of injury and of likelihood, in order to set up three types of urgency based on combinations of severity of injury and likelihood of occurrence, to which cases arising can be allocated. But these classifications show that the Commission sees follow-up market control as implementation of the statute, and orients use of its resources towards the objective of preventing hazards; consistent orientation of its policy to the criteria of cost-benefit analysis<sup>481</sup> would give another scale of priorities.
- (4) The great flexibility that sec. 15 (c) and (d) allow the Commission in its response to product hazards is exploited both in notification and in recalls and the drawing up of a "corrective action plan". The intensity of response, its specific shape and its monitoring go according to the type of product and the urgency of the hazard.<sup>482</sup> A noteworthy point

<sup>475</sup> See 4.1.2.2. above.

<sup>476</sup> See *Schwartz, T.M./Adler, R.S.*, Product Recalls: A Remedy in Need of Repair, Case Western Reserve L. Rev. 34 (1984), 401 et seq., 434.

<sup>477</sup> 49 F.R. 13820, 6 April 1984; see also *Statler, St.M.*, Reporting Guidelines Under Section 15 of the Consumer Product Safety Act. J. of Product Liability 7 (1984), 89 et seq.

<sup>478</sup> Exact figures can be found in the memorandum from the divisions for "corrective action" and "administrative litigation" of 13 May 1985 and 11 May 1986; for previous years see *Schwartz/Adler*, 1984, 433, fn. 221; *Statler, St.M.*, Reporting Guidelines Under Section 15 of the Consumer Product Safety Act. J. of Product Liability 7 (1984), 89 et seq., 93. However, the courts have cut down on sanctions for breach of the reporting duty. In *Advance Machine Co. v. CPSC*, 666 F.2d 1166 (8th Cir. 1981) and in *Athlone Industries, Inc. v. CPSC*, 707 F.2d 1485 (D.C. Cir. 1983) it was found that the Commission had to impose the fines provided for in sec. 20 CPSA through the courts (on the importance of this decision see *Zollers, F.E.*, The Power of the CPSC to Levy Penalties, American Business Law J. 22 (1985), 551 et seq.). In *Drake v. Honeywell, Inc.* 797 F.2d 603 (8th Cir. 1986) it was decided that breach of the reporting duty did not justify any right of private action.

<sup>479</sup> See *Schwartz, T.M./Adler, R.S.*, Product Recalls: A Remedy in Need of Repair, Case Western Reserve L. Rev. 34 (1984), 401 et seq., 433 and for the Commission's information sources CPSC Order 9010.34, 4 June 1984, 8 et seq.

<sup>480</sup> Hazard Priority and Corrective Action Guidelines, 19 January 1981; see also the detailed description of the decision-making procedures in the "Report on Recall Effectiveness Task Force", 25 August 1980, Tab. D and *Madden, M.S.*, Consumer Product Safety Act, Section 15 and Substantial Product Hazards, Catholic University L. Rev. 30 (1981), 195 et seq., 234 et seq.

<sup>481</sup> See 4.1.3. above, end.

<sup>482</sup> For details see *Madden, M.S.*, Consumer Product Safety Act, Section 15 and Substantial Product Hazards, Catholic University L. Rev. 30 (1981), 195 et seq., 238 et seq. and *Schwartz, T.M./Adler, R.S.*, Product Recalls: A Remedy in Need of Repair, Case Western Reserve L. Rev. 34 (1984), 401 et seq., 437 et seq. (on recalls), 411 et seq. (on notice), as well as, specifically on recalls, the detailed CPSC Order 9010.34 (fn. 478 above).



is the high rate of mutual agreement in the resolution of recalls.<sup>483</sup> This can be explained by industry's interest in avoiding adverse publicity and product liability actions, and the Commission's interest in rapidly eliminating product hazards ("safety delayed is safety denied"). Willingness to compromise manifestly did not suffer from the 1981 legislative amendments.

#### 4.5.3. The function of follow-up market control

The history of implementation of follow-up market control under sec. 15 (b) CPSA is one of success. The figures are indeed impressive. Former Commission Chairman S. King reports that between 1973 and 1980 some 2,500 recall actions were carried out, covering 100 million products.<sup>484</sup> At the 1983 Congressional hearings, Chairman N.H. Steorts was able to point to 3,174 actions on 293 million products.<sup>485</sup> Commissioner Stuart M. Statler in 1980 called the provisions of sec. 15 CPSA one of the Commission's most effective instruments, that could be used even to solve general product safety problems<sup>486</sup> – e.g. for an industry-wide recall because of a universally occurring design defect.<sup>487</sup> But there are limits to this kind of remodelling of sec. 15 CPSA. The primary safety objective of recalls, namely to eliminate hazards arising from already marketed products, can never be fully achieved. The CPSC's implementation studies show this very clearly. Though the success or failure of a recall action cannot simply be read off from the percentage of returned products,<sup>488</sup> it is nevertheless indisputable that the effectiveness of such actions calls for hard strategic decisions. The type of consumer information must depend on whether manufacturers or retailers have customer lists available; where necessary, suitable public media must be used. The intensity of information must take account of the hazards of the product concerned, but also of the attitudes, inhibitions and efforts of the final consumer. For all the doubts about the achievability of recalls arising from these problems, it should nevertheless be borne in mind that recall actions can be used both to raise standards and to improve safety controls within firms. These feedback effects are also to be taken into account in assessing the "success" of recall arrangements.

#### 4.6. Evaluation of the CPSC

Assessments of the CPSC's performance are as controversial as product safety policy itself. The analyses presented by consumer organizations arrive at positive results: on calculations

<sup>483</sup> See *Madden, M.S.*, Consumer Product Safety Act, Section 15 and Substantial Product Hazards, Catholic University L. Rev. 30 (1981), 195 et seq., 227 et seq.; *Schwartz, T.M./Adler, R.S.*, Product Recalls: A Remedy in Need of Repair, Case Western Reserve L. Rev. 34 (1984), 401 et seq., 434. According to figures from former Commission Chairman S. King given to the 1981 Congressional Hearings, loc. cit. (fn. 391), 22, over 90% of procedures under sec. 15 CPSA were settled by mutual agreement.

<sup>484</sup> S. King, loc. cit.

<sup>485</sup> Op. cit. (fn. 353), 302, 310, cf. 320 et seq.; see also *Statler, St.M.*, Reporting Guidelines Under Section 15 of the Consumer Product Safety Act. J. of Product Liability 7 (1984), 89 et seq. 92.

<sup>486</sup> *Statler, St.M.*, CPCS: Only a Beginning, Trial 1980, 77 et seq., 79.

<sup>487</sup> *Schwartz, T.M./Adler, R.S.*, Product Recalls: A Remedy in Need of Repair, Case Western Reserve L. Rev. 34 (1984), 401 et seq., 439, fn. 260.

<sup>488</sup> As stated again in the Recall Effectiveness Study, Loren Lange, Office of Strategic Planning, May 1978; the 1980 Report (fn. 479 above) additionally points to a number of other relevant factors: the significance of the proportion returned depends on how many products are still being used at all, how many have been privately repaired following a warning and how many have been simply thrown away.

by A.K. Lower/A. Averyt/D. Greenberg,<sup>489</sup> the falling trend in home and leisure accidents has been speeded up (twofold) by the Commission's activities; in the years from 1978 to 1983 alone, the CPSC is said to have prevented 1.25 million serious injuries and deaths, and saved consumer's costs of some 3.5 billion dollars. W.K. Viscusi<sup>490</sup> arrives at an opposite finding: the falling accident figures merely continued (even though more strongly) a trend that has not been significantly influenced by the CPSC. It is hardly surprising that there are also studies with findings in between the two results cited.<sup>491</sup>

The problems with evaluations like this arise because they have to identify and quantify factors, which allow the trend in accident figures and the way the CPSC's activities influence them to be explained. All the studies mentioned use simplifying, if not speculative, assumptions for this. More illuminating, though likewise controversial, are analyses of individual measures and of them put together. The Commission itself undertakes these analyses of results, which however largely use estimates for the period after full implementation of a measure. Thus, for instance, the rule on children's cots is supposed to have prevented 50 deaths per year, the ban on TRIS in children's nightclothes to have averted 500 possible cancer cases, and the lawnmower regulation to have reduced annual injuries by 60,000.<sup>492</sup> For the CPSC's cooperation with standardization organizations and for recall actions<sup>493</sup> there are similarly impressive figures.<sup>494</sup> Critics of the Commission have questioned these success claims in individual studies. The careful analysis of the Mattress Flammability Standard 1973<sup>495</sup> by P. Linneman<sup>496</sup> finds that a reliable pronouncement on the standard's effects is impossible. Admittedly, this is a case of adoption of a voluntary standard, already 80% observed by the industry, and moreover the Commission seems to have been prevented from adopting an alternative solution to the problem (namely implementation of a standard on self-extinguishing cigarettes).<sup>497</sup> W.K. Viscusi has checked all binding standards, in part summarily and in part in detail, for their effects. His analysis of the 1973 Poison Preventive Packaging regulation<sup>498</sup> concentrates on figures for child poisonings by aspirin. He disputes the success claimed by the Commission for compulsory childproof containers; the poisoning rate, he says, fell generally, and the relatively better figures for the product covered by the regulation could be attributed to counterproductive side effects of the regulation in other areas (on the use of non-regulated medicines and "lulling" effects in handling them).<sup>499</sup> The phenomena mentioned by Viscusi

<sup>489</sup> Lower, A.K./Averyt, A./Greenberg, D., *On the Safe Track: Death and Injuries Before and After the CPSC*. A Consumer Federation Report, Washington, D.C. 1983.

<sup>490</sup> Viscusi, W.K., *Regulating Consumer Product Safety*, Washington D.C./London 1984, 271 et seq. and *idem*, *Consumer Behaviour and the Safety Effects of Product Safety Regulation*, *J. of Law and Economics* 28 (1985), 527 et seq.

<sup>491</sup> Zick, C.D./Mayer, R.N./Snow, L.A., *Does the Consumer Product Safety Commission Make a Difference? An Assessment of Its First Decade*, *JCP* 9 (1986), 25 et seq.

<sup>492</sup> CPSC figures to the 1981 Congressional Hearings, loc. cit. (fn. 391), 431; also 419, 426.

<sup>493</sup> For 1981 cf. loc. cit. (fn. 492), 427; cf. also the 1983 Congressional Hearings, loc. cit. (fn. 353), 318 et seq.

<sup>494</sup> The individual estimates may be added together. Thus, for 1981, the Commission arrives at a reduction, in relation to mandatory and voluntary standards, by 300 deaths and 125,000 injuries (loc. cit., fn. 391, 412); for 1983, 450 deaths and 248,000 injuries are claimed (loc. cit., fn. 353, 309).

<sup>495</sup> 38 F.R. 15095 (8 June 1973).

<sup>496</sup> Linnemann, P., *The Effects of Consumer Safety Standards: The 1973 Mattress Flammability Standard*, *J. of Law and Economic* 23 (1980), 461 et seq., 469.

<sup>497</sup> Bollier, D./Claybrook, J., *Freedom from Harm*, Washington, D.C./New York 1986, 173; the standard has since been supplemented, see 16 CFR 1632 (1985).

<sup>498</sup> 38 F.R. 21247 (7 August 1973), 16 CFR 1700.

<sup>499</sup> Viscusi, W.K., *Regulating Consumer Product Safety*, Washington D.C./London 1984, 77 et seq.; see also *idem*,

certainly exist; however, it seems speculative to use them as evidence in an argument like his. The Commission's positive findings are, at any rate, supported by studies by the American Academy of Pediatrics.<sup>500</sup> In the case of the standard for children's cots,<sup>501</sup> even Viscusi has to admit an improvement in accident figures by 10%;<sup>502</sup> a demonstration that this is in line with a trend operating in any case can scarcely be provided.

These conflicting analyses cannot and will not be definitively assessed here. The controversies at any rate show how ambitiously research on effects must be designed if it is not only to determine involvement of the regulated products in accidents, but also clarify other possible influencing factors and take side effects of regulation into account. The CPSC can at any rate show that such complex analyses of effects as lastingly to question its results have not so far been presented.

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Consumer Behaviour and the Safety Effects of Product Safety Regulation, *J. of Law and Economics* 28 (1985), 527 et seq., 539 et seq.

<sup>500</sup> See figures by *Greensher/Mofenson* to 1981 Congressional Hearings, loc. cit. (fn. 391), 81.

<sup>501</sup> 38 F.R. 129 (21 November 1973), 16 CFR 1508.

<sup>502</sup> *Viscusi, W.K.*, Consumer Behaviour and the Safety Effects of Product Safety Regulation, *J. of Law and Economics* 28 (1985), 527 et seq., 552.