The "traditional" law approximation policy approaches to removing technical barriers to trade and efforts at a "horizontal" European product safety policy[+]

Josef Falke[**] *and Christian Joerges*[*]

Introduction

The process of European integration affects the law of product safety in many ways. Every law approximation policy measure whereby the Community harmonizes its legal and administrative provisions in the interest of the "functioning of the Common Market" (Art. 100 EEC, 1st paragraph) that (also) relates to the conditions for marketing products necessarily contains substantive provisions that may in Member States act to promote or else to place restraints on product safety policy: as pre-empted decisions at the choice of regulatory instruments and as substantive definitions of the safety level to be aimed at. As well as law approximation policy, primary Community law restricts Member States' field of action. While ECJ case law on Art. 30 and 36 EEC has confirmed Member States' responsibility for product safety, it also subjects this responsibility to checks against principles of Community law. Finally, the Community has, following adoption of its consumer policy programme, developed approaches towards a "horizontal" European product safety policy of its own.

Despite these varied effects on the Community on the development of product safety law, it nevertheless remains difficult to specify the nature of these influences more exactly, recognize the consequences of the integration process for law in Member States and find answers to the questions of what product safety policy tasks the Community ought to take upon itself and what instruments it ought to employ in so doing. Jurists are accustomed to approach such questions by seeking to clarify and demarcate the competencies of Community and Member States. However obvious and unavoidable this way of doing things may be, it rapidly emerges that the legal framework set by the EEC Treaty leaves the Community with enormous latitude, and can hardly define the priorities of Community policy (1.1.). Since Community law determines the process of Europeanization of product safety policy only to a very limited extent, it is tempting to fall back on economic and political-science theories in explaining the actual course of this process. But attempts to date to reconstruct the process of European integration using economic models or political structural analyses have scarcely gone beyond the development of relatively abstract hypotheses on the effects of the general European policy framework conditions (1.2.). In view of this vagueness not only in the law but also in sociological integration research, it is

[+] This article has originally been published in 1991 as Chapter III, in: Christian Joerges (ed.), European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards – Vol. 4, EUI Working Paper Law No. 91/13.

[**] Josef Falke, Professor at the Centre for European Law and Politics at the University of Bremen; co-ordinator (with Christian Joerges) of the Project A1 "Sozialregulierung im Welthandel" (social regulation in world trade) in the Collaborative Research Centre 597 "Staatlichkeit im Wandel" (transformation of the sate). He works in the fields of European law, environmental law, labour law, world trade law and legal sociology.

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

presumably justified in analysing Community practice to start from the political programmes on a long-term basis that the Community has taken as a guide in influencing product safety law: the 1969 General Programme on removing technical barriers to trade, and the programmes to protect and inform consumers (2. and 3.). It is the fate of political programmes, and not only where the Community is concerned, to lag behind original expectations when it comes to realization. But the Community's responses to discrepancies between its original programmatic conceptions and the actual course of the integration process will be gone into further in other contributions to that special issue.

1. Framework conditions for the Europeanization of product safety policy

The Community's competencies are not all-embracing. Its legislative acts in principle operate indirectly in Member States. The Community has genuine administrative powers in only a few policy areas. All this influences both the orientation and the implementation of Community policy. All the same, these general framework conditions do not constitute insuperable legal barriers to the Community's possibilities of affecting product safety law.

1.1. The openness of the legal framework

A first indirect possibility for the Community to intervene in Member States' product safety law is offered by Art. 30 EEC. Though the ban on discriminatory import restrictions and all measures having equivalent effect is by Art. 36 EEC for measures which, among other things, serve "the protection of health and life of humans", this has not prevented the ECJ from subjecting non-discriminatory marketing regulations to substantive verification.[1] Hopes or fears that the ECJ would use this supervisory possibility in order to "deregulate" product safety law in Member States have however not been fulfilled.[2]

Accordingly, the provisions of Articles 100 and 101 EEC on approximation of laws remain the most important basis for Community policy. Article 101 EEC even provides the possibility of adopting directives by qualified majority where legal differences are "distorting the conditions of competition in the Common market". Significantly, the Community has refrained from attempting to clarify the conditions for applying this provision, which are controversial in the literature,[3] and thereby circumventing the difficulties of reaching consensus on law approximation measures under Art. 100 EEC.

[1] Cf. esp. ECJ case 120/78, judgment of 20 February 1979, ECR [1979] 649 - Cassis de Dijon; on which 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, 1.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

[2] For more details 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, 1.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

[3] Cf. *Röhling, E.*, Überbetriebliche technische Normen als nichttarifäre Handelshemmnisse im Gemeinsamen Markt, Köln/Berlin-/Bonn/München 1972, 95 et seq., and more recently *Collins, Ph./Hutching,s M*, Articles 101 and 102 of the EEC Treaty: Completing the Internal Market, ELR 11, 1986, 197 et seq.

This cautiousness is hardly surprising. It is one of the indications that the limits to Community action in fact cannot be determined purely "legally".[4]

The Community's powers to take measures to approximate laws on product safety under Art. 100 EEC cannot *de facto* be limited by binding the Commission to particular integration policy objectives. There have of course been repeated attempts to derive the limits to Community competence specifically in areas of "social regulation" (chiefly health, consumer protection and the environment) from the requirement in Art. 100 EEC that law approximation measures should have to do with the market.[5] But it cannot be denied that differences in product safety law constitute non-tariff barriers to trade and therefore "directly affect the establishment or functioning of the Common Market". This realization leads directly to the position that in order to avert emergent regulatory differences the Community can exert a shaping influence "even in anticipation of the development of new legal areas"[6]. If as is the prevailing view today the law-making competencies of Art. 100 EEC are taken in connection with the preamble and to Art. 2 EEC,[7] and further bearing in mind that in drafting directives the Community can lay claim to very wide discretion,[8] then it is hard to identify any definitive legal bounds to product safety policy harmonization at all. Moreover, in addition to the instrument of the directive, the Community has by Art. 235 EEC a second and likewise very far-reaching power to act. This provision may as the ECJ has confirmed[9] be taken advantage of where directives do not offer an "adequately effective means" to attain treaty objectives.

The demonstration that no unambiguous bounds to the Europeanization of product safety law can be derived from Art. 100 and 235 EEC does not admittedly say all that is to be said about the questions of "dynamic" interpretation of these provisions. It may be very hard to drive unambiguous criteria for the delimitation and control of European law-making activity from differences between the Community legal system and Member States' constitutions. But one indirect consequence, which is hard to grasp in formal legal terms, is equally irrefutable: entry by the Community into areas of social regulation has to lead to a conflict of objectives between a law approximation policy oriented merely towards market integration as such and a legislative policy oriented towards the substantive quality of regulations.[10]

---

[4] Cf. also the reports on the Commission's present consideration of activation of Articles 101 et seq. EEC, in *Collins, Ph/Hutchings, M*, Articles 101 and 102 of the EEC Treaty: Completing the Internal Market, ELR 11 1986, 198 et seq.; *Pipkorn, J.* Kommentar zu den Artt. 101 und 102 EWGV, in: v.d. Groeben, H./v. Boeckh, H./Thiesing J./Ehlermann, C.-D. (Eds.), Kommentar zu EWG-Vertrag, 3rd edtion, Baden-Baden 1983, Art. 101, para. 24.

[5] From the German literature, see e.g. *Kaiser, J.H.*, Grenzen der EG-Zuständigkeit, EuR 1980, 97 et seq., 102 et seq.; *Börner, B.*, Die Produkthaftung oder das vergessene Gemeinschaftsrecht, in: Grewe, W.G. (Ed.), Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, FS zum 70. Geburtstag von Hans Kutscher, Baden-Baden 1981, 43 et seq.

[6] *Taschner, H.C.*, Kommentar zu Art. 100 EWGV, in: Groeben, H./v. Boeck,H./Thiesing, J./Ehlermann, C.-D. (Eds.), Kommentar zum EWG-Vertrag, 3rd ed., Baden-Baden 1983, Art. 100, para. 23.

[7] Cf. *Close, G*, Harmonization of Laws: Use or Abuse of the Powers of the EEC-Treaty, ELR 1978, 461 et seq; *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 6 et seq., 15 et seq., and for the analogous case of environment policy *Rehbinder, E./Stewart, R.*, Environmental Protection Policy, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.), Integration Through Law. Europe and the American Experience, vol. 2, Berlin/New York 1985, 21 et seq., with other references.

[8] Cf. only *Langeheine, B.*, Kommentar zu den Artt. 100 bis 102 EWGV, in: Grabitz, E. (Ed.), Kommentar zum EWG-Vertrag, München 1986, Art. 100, para. 13, with other references.

[9] ECJ case 8/73, judgment of 12 July 1973, ECR [1973] 897 (907) - Massey-Ferguson.

[10] Cf. *Everling, U.*, Möglichkeiten und Grenzen der Rechtsangleichung in der Europäischen Gemeinschaft, in: FS Reimer Schmidt, Karlsruhe 1976, 101 et seq., 170 et seq.; *Langeheine, B.*, Kommentar zu den Artt. 100 bis

The Community's powers under Articles 100 and 235 EEC are in principle also suited for compensating for the absence of genuine powers of direct action and administration by the Community. The most obvious way to reach uniform administrative practice is to harmonize the conditions for recognizing national administrative acts.[11] The objective connection between approximation of laws and harmonization of administrative practice is undeniable, particularly in the area of product safety law. Admittedly, such coordination is enormously complicated in practice, especially since, as M. Seidel rightly stresses[12], it affects the political "quality" of the integration process: it means an "approfondissement" of the integration process, legal reservations against which are not justified, but can at the same time be perceived by Member States as a threat to their sovereignty and by national administrations as a restriction on their powers.

1.1. Excursus into integration theory

In practice, the potentially enormously broad legal framework for Community policy in product safety law could be used only extremely selectively and incompletely. The discrepancy between what is legally possible and what is politically feasible is a central theme of sociological integration research, which not only explains the difficulties of the integration process but sees to guide the choice of integration policy strategies. In this area recently the economic theory of federalism developed in the US has been taken up, and efforts at a political interpretation of the Community's legal order have been renewed.

1.2.1. The economic theory of federalism and the opposing economic interests in connection with Europeanization of product safety law

The economic theory of federalism seeks, in its normative part, to answer the question of what regulatory tasks can more rationally ("economically") be handled centrally and which better at a decentralized level. "Positive" federalism theory then tries identify the factors that actually determine the actions of those involved in politics, and bases recommendations for political strategies on this positive analysis.[13] Normative arguments for centralization (federalization) of regulatory activities apply where the costs and advantages of a measure cannot be confined to a particular jurisdiction ("externalities"), where regulatory differences can be strategically exploited by economic actors, starting off a regulatory "race to the bottom" ("prisoner's dilemma"), where duplication of

102 EWGV, in: Grabitz, E. (Ed.), Kommentar zum EWG-Vertrag, München 1986, Art. 100, para. 54; *Seidel, M.*, Grundsätzliche Regelungsprobleme bei der Verwirklichung des Gemeinsamen Marktes, in: Magiera, S. (Ed.), Entwicklungsperspektiven der Europäischen Gemeinschaft, Berlin 1985, 169 (170 et seq.); *Bruha, Th./Kindermann, H.*, Rechtssetzung in der Europäischen Gemeinschaft, Zeitschrift für Gesetzgebung 1 (1986), 293 et seq, 302 et seq.

[11] Cf. *Röhling, E.*, Überbetriebliche technische Normen als nichttarifäre Handelshemmnisse im Gemeinsamen Markt, Köln/Berlin-/Bonn/München 1972, 156 et seq.

[12] *Seidel, M.*, Grundsätzliche Regelungsprobleme bei der Verwirklichung des Gemeinsamen Marktes, in: Magiera, S. (Ed.), Entwicklungsperspektiven der Europäischen Gemeinschaft, Berlin 1985, 169 et seq.

[13] From the extensive literature, see *Rose-Ackerman, S.*, Does Federalism Matter? Political Choice in a Federal Republic, J. of Political Economy 89 (1981), 152 et seq.; *Noam, E.*, The Choice of Governmental Level of Regulation, Kyklos 35 (1982), 278 et seq.; *Mashaw, J.L./Rose-Ackerman, S.*, Federalism and Regulation, in: The Urban Institute, The Reagan Regulatory Strategy, Washington, D.C. 1984, 111 et seq; *Fix, M.*, Transferring Regulatory Authority to the States, in: The Urban Institute. The Reagan Regulatory Strategy, Washington, D.C. 1984, 153 et seq.

administrative tasks (e.g. in the area of research) causes superfluous costs ("diseconomies of scale"), where the scale advantages of uniform regulation outweigh the chances of innovative product design and where federalization weakens the influence of interest groups.[14] While such normative considerations can, *cum grano salis*, be transferred to the European situation notwithstanding the institutional differences between the Community and the US, this is much less true of the positive analysis. The current federalism debate presupposes an already economically integrated market, a parliamentary democratic constitution for the "central government" and the existence of a federal administration with a wide range of tasks. It is on this institutional framework that the assumptions about interests and about the behaviour of industry, unions, consumers and State and federal political actors are based, which in turn underlie hypotheses about the chances for a federal take-over of regulatory tasks from individual States or about the – at present more topical[15] – efforts at decentralization. The Community situation differs from the US one in several respects. This is true firstly as regards the process of political opinion-forming and decision-making. Political actors, who are according to the assumptions of economic theory oriented either to the expectations of a particular clientele ("constituency politics"), or to more general regulatory attitudes and programmes ("electoral politics") lose part of their possibilities of self-presentation and influence, which are guaranteed only nationally, if they involve themselves in dealing with regulatory task at European level.[16] Likewise different are the interests and influence possibilities of European business, which has a degree of integration comparable with the US in only a few areas and therefore finds it enormously harder to develop a uniform position on uniformization of product safety requirements. The two aspects mentioned are also connected with the different underlying assumptions of American federalism and of European integration. Explanations for the emergence of American federalism largely relate to situations concerning the introduction of new regulations or their generalization, whereas the Community as a rule finds itself facing already firmly established regulations that tend to differ in nature and intensity.[17]

The differences between the American and European situations mentioned make it hard to transfer "positive" theorems of federalism theory. They do not, however, *a priori* preclude their adaptation to the specific conditions of European integration. For the area of environment policy, which is a related one to the issue of Europeanizing product safety law, E. Rehbinder and R. Stewart[18] have tried just that. In the model they use as the basis for

[14] *Mashaw, J.L./Rose-Ackerman, S.*, Federalism and Regulation, in: The Urban Institute, The Reagan Regulatory Strategy, Washington, D.C. 1984, 115 et seq.

[15] *Fix, M.*, Transferring Regulatory Authority to the States, in: The Urban Institute. The Reagan Regulatory Strategy, Washington, D.C. 1984, 153 et seq.

[16] For more details see *Pelkmans, J*, The Assignment of Public Functions in Economic Integration, JCMSt 21 (1982), 97 et seq., 116 et seq.; *idem*, Market Integration in the European Community, Den Haag/Boston/Lancaster 1984, 173 et seq. This fits the thesis developed by *Scharpf , F.W.*, in 1985 that willingness to convey powers of action to the Community was opposed by Member States' governments "own institutional interests" (Die Politikverflechtungs-Falle: Europäische Integration und deutscher Förderalismus im Vergleich, PVS 26 (1985), 323 et seq.)

[17] Cf. *Heller, Th./Pelkmans, J.*, The Federal Economy: Law and Economic Integration and the Positive State: The U.S.A. and Europe Compared in an Economic Perspective, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.), Integration Through Law. Europe and the American Federal Experience, vol. 1, book 1, Berlin/New York 1986, 245 et seq., esp. 397 et seq.; also *Slot, P.*, Technical and Administrative Obstacles to Trade in the EEC, Leyden 1975, 153. *Scharpf, F.W.*, Die Politikverflechtungs-Falle: Europäische Integration und deutscher Förderalismus im Vergleich, PVS 26 (1985), 323 et seq., 34 et seq.) calls the Community relationships with Member States a case of "policy overlap" that is nearer to German federalism than to the American model.

[18] *Rehbinder, E./Stewart, R.* Environmental Protection Policy, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.),

their analysis of the integration process, they use the Nation State as the sole political actors. For the integration policy behaviour of the States they assume on the one hand identification with the interests of the domestic economy and on the other a loyalty towards protective standards applying in their own legal system. This hypothesis says that faced with a Europeanization of legal standards the States will weigh up its advantages and drawbacks for the competitive position of their own industries, but that they cannot simply make compromises arrived domestically between economic interests and interests in social protection available. For so-called product regulation,[19] the interest position for "protection States" and "risk States"[20] looks like this: as long as the protection States can exclude imports from risk States using Art. 36 EEC, the chances for harmonization are good. The protection States will support it if the production costs caused by their domestic standards are higher, setting up different production lines would be uneconomic and they can see opportunities on the foreign markets; the risk States will agree to the tightening up of standards where they expect advantages from access to markets in the protection States; finally, for pure "import States" the decision depends only on their own political calculations of the costs and benefits of a raised level of protection. Admittedly, the initial position changes where and to the extent that the restrictions of Art. 36 EEC have been lifted in favour of the principle of free market access in the protection State and/or products from the risk State merely need to be specially marked. On such conditions, a risk State has in principle no longer any reason to agree to the tightening up of product regulations.

E. Rehbinder and R. Stewart themselves stress the limits to the explanatory capacity of their model.[21] These limits arise firstly from the complexity of the economic interest situation. These interests are as a rule not even homogeneous within the economy of a single Member State. The effects of a harmonization measure on firms involved in each case depend on the internationalization of the economy, the size of the domestic market, their own competitive position, the costs involved in changing their output and expectations of the economic prospects – and it may, as the example of the car industry shows, even pay to exploit different product standards to seal off regional sub-markets and set up a sectorally differentiated price policy.[22] But not only the complexity of economic interests but also the "intrinsic logic" of political opinion-forming processes makes it hard to develop general hypotheses. In their negotiations at European level States need not concentrate on a particular product regulation, but can try to purchase gains in one sector through

Integration Through Law. Europe and the American Experience, vol. 2, Berlin/New York 1985, 9 et seq.; *Rehbinder, E./Stewart, R.* also apply their model as a starting point for analysing the US federal system; in the revisions of the model this necessitates (op. cit., 177 et seq., 277 et seq.), however, they do not go any further into the state of American federalism theory.

[19] *Rehbinder, E./Stewart, R.*, like the American literature on the whole (cf. only *Mashaw, J.L./Rose-Ackerman, S.*, Federalism and Regulation, in: The Urban Institute, The Reagan Regulatory Strategy, Washington, D.C. 1984, 129 et seq.), distinguish between product regulations and process regulations (the third usual category of industrial safety regulations can be left out of consideration of environment protection). For *Rehbinder, E./Stewart, R.*, product regulation involves only the product requirements necessitated on grounds of environment protection; but regulations motivated by consumer policy grounds also belong to this category. By "process regulations" are meant environmental provisions relating to production processes; they may be neglected for our purposes.

[20] Since they are dealing with environmental protection, *Rehbinder, E./Stewart, R.* talk about "environment States" and "polluted States".

[21] *Rehbinder, E./Stewart, R.*, Environmental Protection Policy, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.), Integration Through Law. Europe and the American Experience, vol. 2, Berlin/New York 1985, 322 et seq.

[22] Cf. *Joerges, Ch./Hiller, E./Holzscheck, K./Micklitz, H.W.*, Vertriebspraktiken im Automobilersatzteilsektor, Frankfurt/Bern/New York 1985, 345 et seq. and 2.4.1 and 2.4.3 below.

concessions in another. Political objectives within a government are just as unhomogeneous as business interests. The conduct of negotiations often depends on what department is responsible, how "high" the political value of the subject involved is rated and what influences the negotiators are exposed to. Awareness that a new regulation can in any case not be strictly monitored may facilitate acceptance. And last but not least, in agreements on product regulations the object is often a uniformization of regulatory methods, and therefore wishes for change have to deal with administrative inertia even apart from their political and ideological content.

In the meantime, integration of the viewpoints referred to a differentiated economic model that nevertheless has explanatory power has not been achieved.[23] But this finding is not a merely negative statement. What it means is instead that especially bearing the economic interest situation and political-opinion forming processes in the Community in mind, uniform behaviour patterns cannot be expected and the chances of carrying broadly based integration strategies through are slight. Instead, having regard to the economic and political starting conditions, fragmentary advance and pragmatism in negotiation, adapted to the area concerned, are to be expected. In other words, the difficult conditions of integration policy encourage an incrementalism which has a tendency to obstruct the development of a coherent European safety law.[24]

1.2.2. Legal structures and political decision-making processes

Political research into integration has an ambitious past to look back on. Looking back, it is evident that the expectation of functionalism, and of neo-functionalism too, that the political integration process would involve objective, functional interdependences and gradually extend to increasingly wider sectors, underestimated the contingencies of political developments.[25] The centre of interest in political research on Europe therefore shifted to the Community's decision-making structures[26] and analyses of individual policy areas.[27] A repeatedly confirmed finding of political analyses is, as Joseph Weiler has shown,[28] in

[23] This is *Rehbinder/Stewart's* very surprising conclusion, given the nature of their presentation of the economic integration model as the starting point for their considerations: Environmental Protection Policy, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.), Integration Through Law. Europe and the American Experience, vol. 2, Berlin/New York 1985, 315.

[24] For the – relative – success of traditional harmonization policy and on the heterogeneity of "vertical" and unsuccessfulness of "horizontal" European safety regulations see 2.7, 2.8 and 3 below.

[25] See the literature survey in *Behrens, P.,* Integrationstheorie - Internationale wirtschaftliche Integration als Gegenstand politologischer, ökonomischer und juristischer Forschung, RabelsZ 45 (1981), 8 et seq. and the references in *Rehbinder, E./Stewart, R.*, Environmental Protection Policy, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.), Integration Through Law. Europe and the American Experience, vol. 2, Berlin/New York 1985, 316 et seq. and *Krislov, S./Ehlermann, C.-D./ Weiler, J.*, The Potentical Organs and the Decision-Making Process in the United States and the European Community, in: Cappelletti, M./Seccombe, M./Weiler, J.(eds.), Integration Through Law, Europe und the American Federal Experience, vol. 1, book 2, Berlin/New York 1986, 3 et seq., 6 et seq.

[26] As an example, see *Bulmer, S.*, Domestic Politics and European Policy Making, JCMSt 32 (1983), 349 et seq.

[27] Specifically on the programme for eliminating technical barriers to trade, see *Dashwood, A.*, Hastening Slowly: The Community's Path Towards Harmonization, in: Wallace, H./Wallace, W./Webb, C. (eds.), Policy Making in the European Community, 2nd ed., London 1983, 177 et seq., and on environment policy the references in *Rehbinder, E./Stewart, R.*, Environmental Protection Policy, in: Cappelletti, M./Seccombe, M./Weiler, J. (eds.), Integration Through Law. Europe and the American Experience, vol. 2, Berlin/New York 1985, 265 et seq.

[28] *Weiler, J.*, The Community System. The Dual Character of Supranationalism, Yearbook of European Law 1 (1981), 267 et seq; *idem*, Community, Member States and European Integration: Is the Law Relevant?, JCMSt 31 (1982), 39 et seq.; *idem*, Supranational Law and the Supranational System: Legal Structure and Political Process in

striking contradiction with the developments of the Community's legal structure: whereas in political decision-making processes a replacement of supranational elements by intergovernmental bargaining processes is unmistakable, the supranational legal structures have developed into a European constitution which finds its expression specifically in the doctrines of direct effect, primacy and prior effect of European directives. The originality of Weiler's analysis is that he sees the presumed contradictions between the patterns of political decision-making and the legal structures as two characteristics of the European integration process that mutually determine each other. The discrepancies between the political and legal structures have not acted centrifugally, but created an equilibrium situation that maintains the Community.[29]

Weiler's theses are of equal importance for an understanding of the Community's legal structure and for advancing its policy programmes. They state that in order to stabilized and extend supranational legal structures, involvement of national political actors in the Community's political decision-making process is unavoidable: the Community's precarious dual structure would be endangered by either neglecting Member States' political interests in making Community law or by neglecting principles of Community law in the Member States. These warnings coincide with the reservations against a purely formal legal treatment of the Community's powers under Articles 100 or 235 EEC.[30] They have considerable practical implications for the connection between internal market policy and product safety policy that is of interest here. For if it is true that the adoption and implementation of Community legal acts must not, at any rate *de facto*, neglect to include political actors from the Member States, then a harmonization policy oriented towards the objectives of realizing the Internal Market must always also bear in mind the effects of its measures in other policy areas, and cannot overstretch the political consensus that underpins it. We shall return in more detail below to the consequences of these theses for the relationship between internal market policy and product safety policy in general and the legal significance of the "new approach to technical harmonization and standards" in particular.[31]

2. Traditional policy of approximating laws in order to break down technical barriers to trade

The ways technical barriers to trade manifest themselves and their consequences will first be gone into (2.1.), then the general programme for their removal (2.2.) and the methods of harmonization it provides (2.3.). Analysis of selected directives and proposals for directives

---

the European Community, Ph.D. Dissertation (European University Institute, Florence) 1982.

[29] *Scharpf's* 1985 characterization of the relationship between the Community and the Member States as a case of "policy overlap" very largely coincides with *Weiler's* analysis. Like *Weiler*, *Scharpf* too explains the unanimity rule on the basis of Member States' situations (and their governments "own institutional interests", see fn. 16 above). However, *Scharpf* is interested only in the political conditions, which, despite the unanimity rule, impose constraints towards consensus formation at European level (he mentions specially the density of regulation already attained, which excludes exit options and continually makes follow-up decisions unavoidable, *Scharpf, F.W.*, Die Politikverflechtungs-Falle: Europäische Integration und deutscher Förderalismus im Vergleich, PVS 26 (1985), 323 et seq, 337 et seq.), whereas *Weiler's* analysis centres around the relationship between the conditions for political agreement and the Community's legal structures.

[30] Fn. 10 in 1.1 above.

[31] Cf. *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, Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art06.pdf.

shows that while this programme is primarily aimed at removing obstacles on the path to a common internal market, by way of negative integration, it also partly contains detailed regulations on product safety (2.4.). Safeguard clauses are responses to reservations by Member States (2.5.). With the proposal for a directive on construction products, the attempt to delegate powers to the Commission failed (2.6.). Criticisms of the production of directives overloaded with technical detail (2.7.) and the considerable difficulties in converting them into law in Member States (2.8.) prepared the ground for a reorientation of integration policy that seeks in other ways to pursue the goals of free movement of goods on the one hand and safety and health for the consumer along with industrial safety and environment protection on the other (3.).

2.1. Manifestations of technical barriers to trade, and their consequences

Following abolition of customs duties and quantitative restrictions between Member States, technical barriers to trade[32] attracted public attention. The General Programme to remove technical barriers to trade in goods was aimed at removing obstacles arising from differences in legal and administrative provisions in Member States of relevance to the quality of products.

For many goods, there exist special requirements on production, import, marketing or use that may, because of their differing nature from one country to another, hamper free movement of goods. Among these are all administrative measures by Member State authorities that ensure compliance with these regulations. Of particular importance economically are the numerous, often very detailed, intercompany technical standards, aimed at both raising safety in using technical products and especially at rationalizing business processes and increasing productivity through mass production. Technical legal regulations often have decades of tradition behind them; it is often not easy to separate the objective of protecting particular legal values on grounds of public safety and order from attempts to fence off markets. This is, however, not the place to go into attempts by particular industries to take advantage of industrial property rights and technical standards to fence off their markets and avoid price and quality competition.[33]

Technical standards and trade regulations for a product that differ from one country to another may also hamper trade without having been deliberately created for protectionist reasons, but instead out of a desire to create uniformity, raise the safety of appliances or protect consumers, the environment or workers. Those particularly affected are foreign suppliers without enough economic strength to produce separate product lines to meet each set of national requirements. They are alleged to have their international competitivity notably cramped, in particular through insufficient possibility of exploiting the advantages

[32] In general on technical barriers to trade see esp. *Nunnenkamp, P.*, Technische Handelshemmnisse - Formen, Effekte und Harmonisierungsbestrebungen, Außenwirtschaft 38 (1983), 373 et seq.; *Page S.A.B.*, The Revival of Protectionism and its Consequences for Europe, JCMSt 20 (1981), 17 et seq. and *Slot, P.*, Technical and Administrative Obstacles to Trade in the EEC, Leyden 1975. See also OECD, Consumer Policy and International Trade, Paris 1986.

[33] Cf. *Pelkmans, J.*, Market Integration in the European Community, Den Haag/Boston/Lancaster 1984, 175-8. For the pharmaceutical industry see *Stuyck, J.*, Product Differentiation in Terms of Packaging, Presentation, Advertising, Trade Marks, etc. An Assessment of the Legal Situation Regarding Pharmaceuticals and Certain Other Consumer Goods, Antwerpen/Boston/London/Frankfurt 1983 and *Reich, N.*, Parallelimporte von Arzneimitteln nach dem Recht der Europäischen Gemeinschaft, NJW 1984, 2000 et seq.; for car spare parts cf. *Joerges, Ch./Hiller, E./Holzscheck, K./ Micklitz, H.W.*, Vertriebspraktiken im Automobilersatzteilsektor, Frankfurt/Bern/New York 1985.

of larger-scale mass production. Additionally, the price effects of non-tariff barriers and therefore the degree of protection for domestic suppliers are allegedly harder to estimate than for customs duties. The impenetrability and complexity of technical barriers to trade and the possibility of changing them rapidly are said to create considerable information costs and to hinder planning of production and investment. Domestic industrial firms are said to unavoidably have considerable influence on the shaping of technical standards.
A number of additional factors influence the extent to which differing technical standards and trade regulations lead to economic problems.[34] Flexibility in adaptation is greater for expanding markets and in the early stage of a product cycle. Differences in standards hit harder the more costly it is to alter a product. Suppliers with the highest turnover on given markets play more or less the role of "standards leaders".
The economic effects of protectionist measures in general, including duties, levies, quotas and technical or administrative barriers to trade[35] have frequently been discussed.[36] Among those repeatedly mentioned are higher prices to consumers, restriction of quality competition, loss of economic adaptiveness and medium- to long-term dangers to jobs protected in the short term by protectionist measures.

2.2. The General Programme for the elimination of technical barriers to trade: a survey

The General Programme of 28 May 1969 for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States[37] aims at harmonizing national regulations that have to be met in marketing and using particular important selected products, through directives under Art. 100 EEC. The mutual recognition of national regulations was out of the question as a procedure in principle, since it can be considered only for cases where regulations are more or less equivalent, particularly as regards objects of legal protection and costs of production.[38] The programme consists of four resolutions and a Gentlemen's Agreement.

[34] Cf. *Gröner, H.*, Umweltschutzbedingte Produktnormen als nichttarifäres Handelshemmnis, in: Gutzler, H. (Ed.), Umweltpolitik und Wettbewerb, Baden-Baden 1981, 143 et seq., 153-155.

[35] On 6 November 1978, in a letter to Member State governments, the Commission complained of the rising protectionism within the Community, mentioning as major examples the following restrictive measures that led principally to complaints at restrictions on free movement of goods:

- Documents on which imports or exports are dependent;
- Frontier checking procedures;
- Setting up minimum or maximum prices;
- Payments of equivalent effects to duties and inspection fees;
- Preference regulations in favour of national industry in the area of public supply contracts;
- National regulations laying down technical or quality conditions for marketing, e.g. technical standards.

Cf. EC Bulletin 10-1978, 24 et seq.

[36] More recently, see OECD, Consumer Policy and International Trade, Paris 1986; OECD, Costs and Benefits of Protection, Paris 1985; *Lorenz, D.*, Liberale Handelspolitik versus Protektionismus - Das Schutzargument im Lichte neuer Entwicklungen der Außenhandelstheorie, in: Neuer Protektionismus in der Weltwirtschaft und EG-Handelspolitik, Jahreskolloquium 1984 des Arbeitskreises Europäische Integration, Baden-Baden 1985, 9 et seq.; *Schultz, S.*, Der neue Protektionismus - Merkmale, Erscheinungsformen und Wirkungen im industriellen Bereich, in: Neuer Protektionismus in der Weltwirtschaft und EG-Handelspolitik, Jahreskolloquium 1984 des Arbeitskreises Europäische Integration, Baden-Baden 1985, 35 et seq.; *Gutowski, A.*, (Ed.), Der neue Protektionismus, Hamburg 1984; also *Hasenpflug, H.*, Nicht-tarifäre Handelshemmnisse. Formen, Wirkungen und wirtschaftspolitische Beurteilung, Hamburg 1977.

[37] OJ C 76, 17 June 1969, 1.

[38] For detail on law approximation as a procedure for eliminating technical barriers to trade, see *Seidel, M.*, Die

Two Council resolutions contain a *timetable* for eliminating barriers to trade in the industrial sector[39] and in foodstuffs[40]; the latter area will not be gone into any further below. According to this very ambitious but utterly unrealistic programme, the Council was to decide on 114 harmonization directives for industrial products in three six-monthly periods between mid-1969 and the end of 1970[41]; the decisions were each to be taken within six months of presentation of the draft. Regulations were planned above all for motor vehicles, agricultural tractors and machinery, measuring instruments, electrical machinery and equipment, pressure vessels, fertilizers, dangerous preparations, lifting equipment and lifts and other miscellaneous goods.

A further resolution[42] provided for the *mutual recognition of national inspections*, which are conditions for the marketing of many products. The principle of mutual recognition, applies, however, only in so far as national rules for marketing are equivalent or have been rendered so by Community harmonization measures.

To *adapt directives to technical progress*, two simplified procedures are provided for:[43] in cases of particular importance, the Council will decide on a Commission proposal, by qualified majority. Otherwise the Commission will be empowered to enact amending provisions, but in doing so must call in a committee on which Member States are represented. Should the committee support the Commission's proposed regulation by qualified majority, then it may be enacted; otherwise the Council will decide by qualified majority within three months. Should it not do so, the Commission itself may decide.[44]

Finally, the Member State government representatives meeting in the Council agreed, by way of a "gentlemen's agreement", on *standstill arrangements.*[45] Governments were for a particular period in principle to refrain from taking national legal or administrative measures for products covered by the programme and to supply the Commission with texts of draft national legal and administrative measures. National measures "urgently required on ground of safety or of health" are excluded. This standstill arrangement has since been replaced by the directive laying down a procedure for the provision of information in the field of technical standards and regulations.[46]

The Council resolution of 21 May 1973[47] supplemented the General Programme for the elimination of technical barriers to trade in industrial products, because of the intensification of internal Community trade and the increasingly more pressing (or

Problematik der Angleichung der Sicherheitsvorschriften für Betriebsmittel in der EWG, NJW 1969, 957 et seq.; *idem* Die Beseitigung der technischen Handelshemmnisse, in: Angleichung des Rechts der Wirtschaft in Europa, Kölne Schriften zum Europarecht, vol. 11, Köln/Berlin/Bonn/München 1971, 733 et seq.

[39] OJ C 76, 17 June 1969, 1.

[40] OJ C 76, 17 June 1969, 5.

[41] In March 1968, when the Commission proposed this programme (OJ C 48, 16 May 1968, 24), only 8 drafts of these were before the Council.

[42] Council Resolution of 28 May 1969 on mutual recognition of tests, OJ C 76, 17 June 1969, 7.

[43] OJ C 76, 17 June 1969, 8.

[44] For details on this see *Zachmann, K.*, Das Ausschußverfahren zur Anpassung der EG-Richtlinie an den technischen Fortschritt, DIN-Mitt. 56 (1977), 293 et seq.

[45] OJ C 76, 17 June 1969, 9. Cf. the Commission's recommendations of 20 August 1965 to Member States on prior notification to the Commission of particular legal and administrative provisions at the drafting stage, OJ of 29 September 1976, 2611/65.

[46] Directive 83/189/EEC of 28 March 1983, OJ L 109, 26 April 1983, 8. For details 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/Vol6No02Art06.pdf.

[47] OJ C 38, 5 June 1973, 1.

publicized) problems connected with environment and health protection, adding such sectors as motorcycles, packaging, toys, equipment and machinery for building sites, petrol additives and fuel oil. Finally, in its resolution of 17 December 1973 on industrial policy[48] the Council presented a thoroughly revised timetable for the elimination of technical barriers to trade in industrial product. More than 100 additional directives were to be adopted in the four-year period up to the end of 1977.[49]

2.3. The methods of harmonization provided for in the General Programme

In an annex to its original proposal for the General Programme, the Commission gave some fundamental indications on the harmonization solutions, still useful for understanding the new approach today. It distinguished the following five solutions:[50]

a) "Complete" solution: in this procedure, also known as *total harmonization*, national regulations are completely replaced by Community ones. In complete harmonization, only products that fully conform with directives may be marketed in the Community. The full harmonization approach means the biggest loss of sovereignty for Member States, places particular requirements on political consensus formation and requires comprehensive detailed regulations at Community level, but it means the furthest-reaching harmonization. This approach has so far been chosen, apart from the foodstuffs area, in directives on hazardous substances and preparations, cosmetics and medicaments.

b) "Alternative solution": this procedure, better known as *optional harmonization*,[51] leaves up to suppliers the freedom to choose between orienting their products to national law or to the Community-law requirements. Products meeting the Community requirements cannot be refused access to the market in any Member State. This approach, the prevailing one in the area of industrial products, does ease political agreement, but has drawbacks from the viewpoints of harmonization and also of product safety. The number of recognized rules is increased, so that it is harder to compare what is offered. Where safety standards differ, a manufacturer that avoids higher standards which in general mean higher costs, can secure competitive advantages.[52] Optional harmonization thus tends, given significant differences in safety and a sizeable volume of cross-border trade in the products concerned, to promote a reduction in the level of safety. The reasons adduced in favour of the Community regulation in cases of optional harmonization –

[48] OJ C 117, 31 December 1973, 1, esp. Annex 2, p. 6-14.

[49] It is noteworthy that the standstill arrangements are to apply to only 11 out of over 100 draft directives.

[50] E.P. Doc. 15/68, VI, reprinted in BT-Drs. V/2743, 22 March 1968, 13 et seq.; for details on this see *Slot, P.*, Technical and Administrative Obstacles to Trade in the EEC, Leyden 1975, 80-89; cf. also *Lauwaars, R.H.*, The Model Directive on Technical Harmonization, EUI-Colloquim Papers, DOC IUE 169/86 (COL 82), 2 et seq. Also very instructive on total and optional harmonization is Part B of the agreement between CEN and the Commission on cooperation between CEN and the Commission of the European Communities as regards the Commission's work in the area of harmonization of different technical legislation of Member States and the application of harmonized Community directives, DIN-Mitt. 53 (1974), 200.

[51] *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 79 and *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980; *Seidel, M.*, Die Beseitigung der technischen Handelshemmnisse, in: Angleichung des Rechts der Wirtschaft in Europa, Kölne Schriften zum Europarecht, vol. 11, Köln/Berlin/Bonn/München 1971, 733 et seq., 742 et seq.; *Eiden, C.H.*, Die Rechtsangleichung gem. Art. 100 des EWG-Vertrages, Berlin 1984, 61 et seq.

[52] On this see *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 79 and *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980, 45.

longer manufacturing series, better use of output, greater rationalization – do not apply to many small- and medium-size firms that market their goods only domestically. In favour of optional harmonization, it may be said that Member States have more leeway to take national peculiarities into account, and that national adaptation to technical progress is possible without amending the directive while nevertheless, because the market is opened up for products that meet the Community standard, consumer choice is increased and competition among manufacturers stepped up.

c) "Reference to technical standards": On this method, directives refer, in order to specify safety requirements, to harmonized technical standards worked out by standardization bodies.[53] This method of harmonization has so far been applied only in the low-voltage Directive,[54] though the European Parliament[55] and the ESC[56] had picked it out in their opinions on the draft general programme as the most promising solution. The Economic and Social Committee stressed that reference to technical standards was particularly suitable for sectors where there was experience in harmonizing technical standards, and offered the biggest possibilities for elastic adaptation to the demands of technical progress and for the introduction of new technical ideas. Almost pre-empting the new approach to technical harmonization and standards, the ESC says:

> *It would thus be conceivable for a Community directive first to list the safety objectives to be attained and then to state that these will be taken as having been attained where a particular standard, initially harmonized at Member State level, has been complied with. This provides a chance to show that the safety objectives can be met even without complying with the standard concerned.*[57]

The legal literature had fleshed out this method of harmonization by the early 70s, fairly clearly setting forth the outline of the new approach.[58] While sliding reference to the successively newest version of a standard was rejected as inadmissible,[59] as being a

[53] For more details on reference to technical standards see the chapter on Germany (*Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3. OOO), the discussion of the Low Voltage Directive (*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) and that of the new approach (*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 Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf).

[54] Directive 73/23/EEC, OJ L 77, 26 March 1973, 29. The draft of the Low Voltage Directive was presented by the Commission on 12 June 1968 (OJ C 91, 13 September 1968, 19), only a few weeks after the General Programme for eliminating technical barriers to trade, which it had proposed to the Council on 7 March 1968 (OJ C 48, 16 May 1968, 24). 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.

[55] See point 5 of the European Parliament's Resolution, OJ C 108, 19 October 1968, 39 et seq.

[56] See point VII (3) of the ESC's opinion, OJ C 132, 6 December 1968, 1 (4 et seq.).

[57] Op. cit. – Cf. also *Seidel, M.,* Die Beseitigung der technischen Handelshemmnisse, in: Angleichung des Rechts der Wirtschaft in Europa, Kölne Schriften zum Europarecht, vol. 11, Köln/Berlin/Bonn/München 1971, 733 et seq., 745 et seq.

[58] Cf. esp. *Starkowski, R.*, Die Angleichung technischer Rechtsvorschriften und industrieller Normen in der Europäischen Wirtschaftsgemeinschaft, Berlin 1973, 104-118, 143-160. More recently, see also *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980, 82-91.

[59] *Starkowski, R.*, Die Angleichung technischer Rechtsvorschriften und industrieller Normen in der Europäischen

conveying of law-making powers to privately organized standardization organizations, the preferred model was for directives only to prescribe compliance with basic requirements, with technical standards merely being cited to determine these basic requirements. Accordingly, manufacturers are not bounded by the technical standards, but can show compliance with the basic requirements otherwise than by meeting standards.[60] The directive should lay down the general requirements in a general clause embodying a rebuttable presumption that these requirements have been met by anyone who has complied with a particular technical standard in its latest version.[61] Where a manufacturer departs from the general clause, the onus is on him to prove that the generally formulated requirements of the general clause, which alone is *legally* binding, have nevertheless been met. Conversely, the authorities have the onus of showing that though technical standards referred to have been complied with, basic requirements set out in the general clause are not met.[62] In order that technical standards should not remain "merely a non-binding indication and aid to interpretation showing the specific content of the basic requirements in the individual case"[63] thereby bringing the success of harmonization into question, Member States should "take all necessary measures to ensure that administrative authorities recognize goods as meeting the basic requirements if they comply with the standards decided on by the Commission following consultation of the Standards Testing Committee".[64]

While its proponents presented as an advantage that standardization in this procedure in principle remains a matter for industry,[65] critics adduce constitutional reservations, complaining that in view of the existential importance of environmental and consumer protection for our society today, a regulation can be tenable that leads to industrial organizations' wide-ranging powers of decision in determining the level of safety in manufacturing and utilizing technical products.[66]

d) "Conditional mutual recognition of tests": Where harmonization fails because Member States hold to their own safety regulations, products from one Member State should be exportable to another on the following two conditions:
   - that the exported product complies with manufacturing provisions applying in the country of import;
   - that competent authorities in the country of export carry out checks according to the methods applying in the country of import[67].

Wirtschaftsgemeinschaft, Berlin 1973, 111 et seq.; *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980, 72-75. *Röhling* rejects any form of reference to technical standards as unacceptable. (*Röhling, E.*, Überbetriebliche technische Normen als nichttarifäre Handelshemmnisse im Gemeinsamen Markt, Köln/Berlin-/Bonn/München 1972, 112-132)

[60] *Starkowski, R.*, Die Angleichung technischer Rechtsvorschriften und industrieller Normen in der Europäischen Wirtschaftsgemeinschaft, Berlin 1973, 115 et seq.

[61] In the formulation by *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980, 82-91.

[62] Cf. *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980, 88.

[63] *Starkowski, R.*, Die Angleichung technischer Rechtsvorschriften und industrieller Normen in der Europäischen Wirtschaftsgemeinschaft, Berlin 1973, 116.

[64] Op. cit., 151.

[65] Op. cit., 152.

[66] *Röhling, E.*, Überbetriebliche technische Normen als nichttarifäre Handelshemmnisse im Gemeinsamen Markt, Köln/Berlin-/Bonn/München 1972, 114.

[67] BT-Drs. V/2743, 14.

e) "Mutual recognition of tests": Here checks carried out in one Member State are *automatically* recognized as valid by all Member States. This solution can be considered where in a given branch of industry there is very far reaching correspondence between technical and administrative regulations in force, so that prior harmonization of national legal provisions seems superfluous.[68]

2.4. Conversion into national law of the General Programme on elimination of technical barriers to trade

2.4.1. General survey

The programme to eliminate technical barriers to trade has to date been converted into law in only fragmentary fashion and with considerable delays[69]. Table 1 gives a picture of the number of Commission proposals for directives, Council directives and Commission directives on adjustment to technical progress for the years from 1968 to 1986.

Table 1: Programme to eliminate technical barriers to trade in industrial products - number of Commission proposals for directives, Council directives and Commission directives on adjustment to technical progress for the years from 1968 to 1986 (absolute and cumulative)[I]

Year	***Commission proposals***		***Council directives***		***Difference between cols. 2 and 4***	***Commission adaptation directives[II]***	
	abs. (1)	cum. (2)	abs. (3)	cum. (4)	(5)	abs. (6)	cum. (7)
1968	18	18	-	18	18	-	-
1969	13	31	1	1	30	-	-
1970	5	36	9	10	26	-	-
1971	7	43	11	21	22	-	-
1972	12	55	3	24	31	-	-
1973	12	67	11	35	32	1	1
1974	33	100	14	49	51	2	3
1975	15	115	12	61	54	1	4

[68] This solution should not be confused with the resolution on mutual recognition of tests (see the explanations in fn. 42 above) since there harmonization of legal provisions and equivalence of tests is assumed. Generally on the mutual recognition of certification and tests see *Seidel* who stresses that trust in other Member States' administrative actions is justified only where certification and tests are equivalent. (*Seidel, M.*, Die Beseitigung der technischen Handelshemmnisse, in: Angleichung des Rechts der Wirtschaft in Europa, Kölne Schriften zum Europarecht, vol. 11, Köln/Berlin/Bonn/München 1971, 733 et seq., 748-750); see also *Röhling, E.*, Überbetriebliche technische Normen als nichttarifäre Handelshemmnisse im Gemeinsamen Markt, Köln/Berlin-/Bonn/München 1972, 142-160.

[69] On this see also *Pelkmans, J./Vollebergh, M.*, The Traditional Approach to Technical Harmonization: Accomplishments and Deficiences, in: Pelkmans, J./Vanhenkelen, M. (eds.), Coming to Grips with the Internal Market, Masstricht 1986, 9 et seq.

[I] Determined from data on elimination of technical barriers in Community trade in the annual general reports, especially the tables in the annexes.

[II] Including four Commission directives on methods of analysis for verifying the composition of cosmetics and the Commission directives on sampling and analysis methods for fertilizers of 22 June 1977 (OJ L 213, 22 August 1977, 1) and on procedures for verifying the characteristics, threshold values and explosion resistance of ammonia fertilizers with high nitrogen content of 8 December 1986; OJ L 38, 7 February 1987, 1.

1976	13	128	21	82	46	4	8
1977	6	134	15	97	37	1	9
1978	11	145	15	112	33	5	14
1979	8	153	11	123	30	9	23
1980	25	178	10	133	45	1	24
1981	22	200	7	140	60	5	29
1982	5	205	7	147	58	14	43
1983	6	211	8	155	56	7	50
1984	8	219	16	171	48	7	57
1985	5	224	4	175	49	12	69
1986	11	235	19	194	41	5	74

By the end of 1986 the Council had adopted 194 directives on the adaptation of Member States' legal and administrative provisions on trade in industrial products. Since 1974 it has had average "arrears" of some 50 Commission proposals for directives. By the end of 1970 only 10 directives had been adopted. According to the original 1969 Programme, the figure should have been over 100. It was not till June 1978 that adoption of the hundredth directive on elimination of technical barriers to trade in industrial products could be hailed.[70] The directives adopted as a "package" in September 1984[71] had on average been before the Council for decision for nine and a half years.

Most directives contain minutely technically detailed regulations[72] and do not differ significantly in content from technical standards. This entails long preparatory periods, considerable possibilities of influence by the expert industrial circles involved, overloading the high-level political decision-making procedure in the Council with technical details and a pressing compulsion to adapt the directives to technical progress (or sometimes to advances in knowledge). By the end of 1986 the Commission had already adopted 74 directives on adaptation to technical progress.[73]

Table 2 gives a survey of the sectors covered by the Council directives and the Commission directives on adaptation to technical progress.

Table 2: Programme to eliminate technical barriers to trade in industrial products - Number of Council directives and of Commission directives on adaptation to technical progress in individual areas (as at 31 December 1986).[I]

Area	***Council***	***Commission***

[70] Bull. EG 6-1978, 7 et seq.

[71] OJ L 300, 19 November 1984, 1-187.

[72] A particularly crass example was the recent 80-page (!) long Commission proposal for a Council directive on the harmonization of the legal regulations in Member States on "steering wheels placed in front of the driver's seat on narrow-gauge machinery with pneumatic tyres", OJ C 222, 22 September 1985, 1. Directives adopted in the automotive sector up to 1985 total - excluding the numerous amending directives and directives on adaptation to technical progress - 602 pages mainly containing technical specifications and testing instructions.

[73] Including 4 Commission directives on the testing of constituents of cosmetics and Commission directives on testing and analysis methods for fertilizers of 22 June 1977 (OJ L 213, 22 August, 1977, 1) and on procedures for testing the characteristics, threshold values and explosion resistance of ammonia fertilizers with high nitrogen content of 8 December 1986, OJ L 38, 7 February 1987, 1.

[I] Derived from data on elimination of technical barriers in Community trade in the annual general reports, especially the tables in the annexes.

	directives	***adaptation directives***
Vehicles	58	23
Chemical products[II]	33	16[III]
Measuring devices	30	10
Agricultural tractors	24	2
Construction machines and appliances	11	5
Electrical appliances	8	5
Textile products	5	1
Pressure vessels	5	0
Motorcycles	4	0
Lifts and lifting devices	3	2
Cosmetics	3	10[IV]
Miscellaneous	8	0
TOTAL	192	74

Of 192 directives, 145 are in the four areas of motor vehicles, agricultural and forestry vehicles, measuring devices and chemical products. The first three sectors mentioned are particularly favourable for approximation of laws. In the area of measuring devices, the Community can in its harmonization work call upon far-reaching international agreement regarding and measurement.[74] In the vehicle sector, it can largely refer back to technical directives from the ECE in Geneva - the Economic Commission for Europe, a United Nations regional organization. This means not only a saving of time for the Commission but a possibility for European vehicle manufacturers to offer their products on a market wider than just the Community without costly special adoptations.[75]

2.4.2. Total harmonization – directives on hazardous substances

A special place is occupied by the directives that follow the principle of total harmonization, on hazardous substances and also on fertilizers and cosmetics. By contrast with most of the directives, they concern areas not normally regulated by technical standards. The directives in the area of classification, packaging and labelling of dangerous substances and preparations[76]

[II] Hazardous substances, lacquers and paints, medicaments, planthealth products, fertilizers, detergents; except for cosmetics.

[III] Including Commission directives on sampling and analysis methods for fertilizers of 22 June 1977 (OJ L 213, 22 August 1977, 1) and on procedures for verifying the characteristics, threshold values and explosion resistance of ammonia fertilizers with high nitrogen content of 8 December 1986; OJ L 38, 7 February 1987, 1.

[IV] Including four Commission directives on methods of analysis for verifying the composition of cosmetics.

[74] Cf. *Lukes, R.*, Die Zulässigkeit nationaler Rechtsvorschriften für technische Gegenstände und Stoffe nach Gemeinschaftsrecht, 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, 194 et seq., 196.

[75] Cf. *Henssler, H.*, Einige Aspekte des Abbaus technischer Handelshemmnisse im Kraftfahrzeugsektor, in: Götz, V./Rauschning, D./Zieger, g. (Ed.), Umweltschutz und internationale Wirtschaft, Köln/Berlin/Bonn/München 1972, 173 et seq., 175 et seq.; *Lukes, R.*, Die Zulässigkeit nationaler Rechtsvorschriften für technische Gegenstände und Stoffe nach Gemeinschaftsrecht, 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, 194 et seq., 196.

[76] Starting with Council Directive 67/548/EEC of 27 June 1967 on the classification, packaging and marking of

were based on preliminary work done by the ILO, the Council of Europe and the OECD but not yet reflected in national legislation. Here the Community has given Member States a lead.[77] This is true particularly of the sixth amendment to Directive 67/548/EEC[78], which is the basis for chemicals laws in the Member States.

In contrast, the regulations restricting marketing and use of certain dangerous substances and preparations,[79] much more detail in application, almost always go back to initiatives by Member States barring dangerous substances on grounds of health protection or public safety, or introducing restrictions on their use. Quite clearly, these are ad hoc regulations, though made with considerable delays:[80] The underlying Directive 76/779 contains no criteria for including substances in the annex to the Directive. If hazards appear (and bans or restrictions are issued in Member States), a unanimous Council resolution, on a Commission proposal and following opinions from the European Parliament and the Economic and Social Committee, must be adopted, though speedy mandatory measures would really be necessary to ward off severe health risks.[81] A ban issued by one Member State and a Commission proposal for a ban give manufacturers and traders enough time to sell off the dangerous substances quickly in countries that have not yet applied the protective clause.[82]

2.4.3. Optional harmonization – Directives in the automotive sector

The most detailed regulations at Community level are for the vehicle market,[83] which is also of paramount economic importance for internal trade.[84] All directives are based on the

hazardous substances, OJ L 196, 16 August 1967, 1. On this there were by the end of 1986 a total of 7 amending directives from the Council and 6 Commission directives on adjustment to technical progress. Additionally there were specific directives on the classification, packaging and marking of solvents, pesticides and paints, lacquers, print colors, adhesives etc.

[77] Cf. *Braun, F.*, Nationale Rechtsvorschriften für Anlagen, Geräte und Stoffe in der Gemeinschaft, in: Recht und Technik. Rechtliche Regelungen für Anlagen, Geräte im deutschen und im europäischen Recht, Studienreihe des Bundesministers für Wirtschaft, Nr. 53, Bonn 1985, 176 et seq., 179 et seq.

[78] OJ L 259, 15 October 1979, 10. This directive in turn follows the US Toxic Substances Control Act, Japanese chemicals legislation and relevant OECD proposals.

[79] Starting with Council Directive 76/769/EEC of 27 July 1976 on restrictions to the marketing and use of certain hazardous substances and preparations, OJ L 262, 27 September 1976, 201. Here by the end of 1986 there were a total of 7 amending directives, including those on PCB, PCT, Tris, PBB, particular substances in joke articles, benzole in toys and asbestos.

[80] For the seven amending directives, it took an average of 30 months between Commission proposal and Council Decision – quick as procedures for directives go, but far too slow considering the imminent risks.

[81] Accordingly, the Commission undertook a new advance in 1983, in order to make amendments to the annex possible using the Regulatory Committee Procedure, COM (83) 556 final of 26 September 1983. In the meantime, with strengthening of the Commission's implementing powers by the Single European Act (for details 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, 4.3. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf) it has proposed the even quicker and more flexible procedure of the Advisory Committee, which provides only for informative consultation of Member States' representatives, COM (87) 39 final of 30 January 1987. Cf. also the corresponding proposal for a directive on the classification, packaging and labeling of hazardous preparations, OJ C 41, 19 February 1987, 17 et seq. See also *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 239-241.

[82] See the EAC's opinion on the proposal for a Council directive on the seven amendments to Directive 76/769/EEC, OJ C 112, 3 May 1982, 42 et seq. See also Written Question No. 650/79, OJ C 74, 24 March 1980, 6 et seq.

[83] On this see Table 3 below and Annex 13 to the Commission's Report on the European automobile industry, EC Bulletin, Supplement 2/81, 71-76, with a survey of the directives adopted for motor vehicles.

[84] Automobile exports between Member States amounted in 1980 to almost 2.78 million units.

principle of optional harmonization. In 1982, the Commission checked the extent to which Member States had bindingly prescribed compliance with Community standards domestically and to which manufacturers voluntarily followed the Community provisions.[85] The finding was that except in Italy, where Community standards are mandatory, and in The Netherlands, manufacturers still largely have a choice between domestic provisions and Community directives. Manufacturers largely apply about half the directives, especially those on environment protection and active safety. Otherwise, they apparently prefer national provisions. The Community standards have practically no effect where technical specifications are not legally regulated by national standards. Accordingly, manufacturers are only partly exploiting the oft- proclaimed advantages of longer production runs. The differing national provisions are apparently advantageous for dividing up and fencing off markets and preventing parallel imports.[86]

Harmonization directives in the vehicles sector are summarized in Table 3. Often considerable delays, even behind the revised programme, clearly emerge. The large number of directives is to be explained because directives have been issued for practically all vehicle components. This concerns all the technical provisions that vehicles must meet in order, after securing EEC type approval in one Member State, to be marketed without further checks in other Community countries.[87] As Table 3 shows, since October 1978 all that remains to be done in order for EEC type approval to come into force is to produce directives for windscreens, tyres and the weights and dimensions of particular vehicle components.

The delays are attributed to the so-called Third Country problem;[88] which being interpreted signifies the fear that goods from third countries might take advantage of EEC type approval to secure easier to the common market. In the Council, even after adoption of 15 directives long blocked because of this problem[89] and after adoption of the regulation on the strengthening of the common commercial policy and in particular on protection against prohibited commercial practices,[90] it was not possible, on the same day, to overcome differences of opinion in the vehicle sector as to whether third-country products should secure access to the Community type-approval systems introduced by the harmonization directives. By its international undertakings, the Community is obliged where reciprocity is guaranteed to give imported products equally favourable treatment with Community products.[91]

[85] Commission activities and Community regulations for the automobile industry in 1981-3, COM (83) 633 final of 9 January 1984, 22 et seq.

[86] In general on market delimitation in the automotive sector see *Joerges, Ch./Hiller, E./Holzscheck, K./Micklitz, H.W.*, Vertriebspraktiken im Automobilersatzteilsektor, Frankfurt/Bern/New York 1985. See also the report on behalf of the Committee for industry, currency and industrial policy on the automotive industry of the European Communities of 8 December 1986, EP-Doc A2-171, 86, point 7. This product differentiation despite optional harmonization should be separated from the "Third country problem" which arises particularly clearly in the automotive sector; on this see the references in fn. 88-91 below.

[87] Directive 70/150/EEC on licences for motor vehicles and their trailers, OJ L 42, 23 February 1970, 1, as last amended by Council Directive of 25 June 1987 on the harmonization of the legal provisions in Member States on licences for vehicle trailers, OJ L 192, 11 July 1987, 51.

[88] See Commission activities (op. cit., fn. 85), 21; report on the Community automotive industry (op. cit., fn. 86), points 10 and 18; written questions No. 1498/81, OJ C 85, 5 April, 1982, 4; No. 1345/83, OJ C 52, 23 February 1984, 26; No. 1146/85, OJ C 341, 31 December 1985, 31 et seq.; No. 1291/85, OJ C 29, 10 February 1986, 13 et seq.

[89] OJ L 300, 19 November 1984, 1-187. Cf. Bulletin EC 9-1984, points 2.1.9 and 2.1.70.

[90] OJ L 252, 20 September 1984, 1.

[91] Cf. the Council Decision of 15 January 1980 on provisions for applying technical regulations and standards, OJ L 14, 19 January 1980, 36, following approval of the GATT agreement on technical barriers to trade, OJ L 71, 17 March 1980, 29.

While harmonization work in the vehicle sector was initially aimed mainly at advantages of long production runs, for a long time now other aspects have been coming to therefore, since new production techniques allow flexible adaptation to different technical requirements. These aspects include noise levels, air pollution, fuel consumption and passenger safety. On 30 March 1984 the European Parliament adopted a resolution introducing a programme of Community measures to promote road traffic safety, and also called for an integrated programme including measures regarding vehicle construction and equipment, road construction and road signs and road traffic regulations.[92] Among proposals are the obligatory equipping of all private cars with laminated windscreens, headrest and fog glass, anti-lock braking systems in all lorries and other safety devices, and the laying down of minimum standards on a large number of safety aspects, including quality of car tyres and rigidity of the passenger compartment, mandatory technical checks by independent test centres, and measures to remove vehicles with design faults from the market. It is clear that the originally largely commercially oriented policy to guarantee free movement of goods is gradually being overshadowed by an integrated policy on road traffic safety and aspects of environment and consumer protection, even though the Council still remains closed to the idea of an integrated programme to promote road traffic safety.[93]

Table 3: Directives on the approximation of Member States' legal provisions regarding vehicles

Regulatory object of directive	***Date of proposal[I]***	***Date of Adoption of directive (planned)[II]***	***Date of Adoption of directive (achieved)***	***Lag in months[III]***
Type approval	7/68	1/70	2/70	1
Admissible noise level and exhaust equipment	7/68	1/70	2/70	1
Measures against air pollution by petrol engines	10/69	7/70	3/70	0
Containers for liquid fuel and its safe transport	7/68	1/70	3/70	3
Licence plate fixtures	un-published	1/70	3/70	3

[92] OJ C 104, 16 April 1984, 38; cf. also the report by the Committee on transport on the introduction of a programme of Community measures to promote road traffic safety, EP-Doc. 1-1355/83.

[93] The Council merely took note of the Commission's plans, very modest by comparison with the European Parliament's ideas (OJ C 95, 6 April 1984, 2 et seq.); presentation of a programme is no longer being talked off (OJ C 341, 31 December 1984, 1 et seq.). According to the time-table in the White Paper on Completion of the Internal Market (COM (85) 310 final of 14 June 1985, 17), in the automotive sector, beside five environment-related measures, only three safety-related ones are listed.

[I] Sometimes a directive was preceded by several drafts; the date here is that of the last draft.

[II] Determined from the timetables in the General Programme to eliminate technical obstacles to trade of 28 May 1969 (OJ L 76, 17 June 1969, 1) and the Council resolution of 17 December 1973 on industrial policy (OJ C 117, 31 December 1973, 1). Figures in brackets are the earlier dates sometimes specified in the 1969 General Programme. In every case the implication is either 1 January or 1 July.

[III] Figures in brackets indicate the lag behind the original date in the 1969 General Programme.

Steering equipment	2/69	7/70	6/70	0
Doors	12/68	7/70	7/70	1
Equipment for sound- level marking	8/68	1/70	7/70	7
Rear-view mirrors	8/68	1/70	3/71	14
Brakes	12/68	7/70	7/71	13
Radio interference removal for petrol-driven vehicles	un-published	1/70	6/72	29
Measures against the emission of pollutants by diesel engines	12/71	7/70	8/72	25
Internal equipment	12/71	7/74 (7/70)	12/73	0 (42)
Security equipment against unauthorized use	7/72	New	12/73	-
Behaviour of steering gear in collisions	9/72	7/74 (7/70)	6/74	0 (48)
Strength and anchoring of seats	5/73	1/75	7/74	0
Projecting edges	12/73	1/75	9/74	0
Reverse gears and speedometers	8/74	1/76 (1/70)	6/75	0 (66)
Number plates	8/74	1/76	12/75	0
Safety belt anchorage	8/74	1/76	12/75	0
Lighting and signalling installations	6/74	1/75 (1/70)	7/76	19 (79)
Rear lapms	1/74	1/75	7/76	19
Contour lights, side lights, rear lights and brakelights	12/74	1/75	7/76	19
Direction indicators	12/74	1/75 (1/70)	7/76	19 (79)
Rear-numberplate lighting	12/74	1/75	7/76	19
Main-beam and dipped headlights	12/74	1/75	7/76	19
Fog lights	12/73	1/75	7/76	19
Towing equipment	12/74	1/77 (7/70)	5/77	5 (83)
Rear fog lamps	12/76	1/75	6/77	30
Reversing lights	12/76	1/77	6/77	6
Parking lights	12/76	1/77	6/77	6
Safety belts and restraints	12/74	1/76	6/77	18
Driver view field	12/75	1/77 (1/70)	9/77	9 (93)
Marking of starting equipment, telltale lights and indications	11/76	1/77	12/77	12
Defrosting and demisting equipment for glass surfaces	11/76	1/77	12/77	12
Windscreen wipers and washers	11/76	1/77 (1/70)	12/77	12 (96)
Internal heating	12/76	1/77	6/78	18
Wheel covers	12/76	1/77	6/78	18
Headrests	12/74	1/76	10/78	34
Fuel consumption	1/80	New	12/80	-
Engine performance	1/80	New	12/80	-

Safety windscreens[IV]	9/71	7/74 (7/70)	not yet adopted	-
Pneumatic tyres[V]	12/76	1/76 (7/70)	not yet adopted	-
Weights and dimensions of particular vehicles[VI]	12/76	1/77	not yet adopted	-

2.5. Safeguard clauses – Response to Member States reservations

A number of directives contain safeguard clauses[94] allowing Member States to intervene should despite compliance with Community standards a hazardous situation suddenly arise calling for immediate action. Such safeguard clauses are necessitate to the extent that the Community provisions lay down rules for marketing and handling products Community-wide that take from Member States the right to appeal to Art. 36 EEC and take measures to protect the health and safety of persons.[95] The relevant provision usually runs:

> *(1) If a Member State has good grounds for believing that an item of equipment represents a hazard to safety or health, although satisfying the requirements of this Directive and the relevant separate Directives, it may temporarily prohibit the marketing and use of that item of equipment in its territory or make them subject to special conditions. It shall immediately inform the other Member States and the Commission thereof, giving the reasons for its decision.*
> *(2) The Commission shall consult the other Member States concerned within six weeks, then give its opinion without delay and take the appropriate steps.*
> *(3) If the Commission considers that technical modifications to the Directive or the relevant separate Directives are necessary, such modifications shall be adopted, by either the Commission or the Council (...); in this event the Member State which has taken the safeguard measures may retain them until such modifications come into force.*[96]

[IV] Commission proposal of 20 September 1971, OJ C 119, 16 November 1972, 21.
[V] Commission proposal of 31 December 1976, OJ C 37, 14 February 1977, 1.
[VI] Commission proposal of 31 December 1976, OJ C 15, 20 January 1977, 4. This proposal relating to private cars should not be confused with the directive on the weights, dimensions and certain other technical characteristics of particular goods vehicles, OJ L 2, 3 January 1985, 14.
[94] A comprehensive survey is given by *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 242-246.
[95] This is the ECJ's consistent case law; for more 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, 1.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.
[96] Thus Art. 20 of Directive 84/532/EEC (common provisions on machines and appliances for use in construction), OJ L 300, 10 November 1984, 111. Identical or similar formulations can be found in Art. 21 of Directive 84/530/EEC (common provisions for gas installations), OJ L 300, 19 November 1984, 95; Art. 24 of Directive 84/528/EEC (provisions for lifting and conveying equipment), OJ L 300, 19 November 1984, 72; Art. 23 of the sixth amendment to Directive 67/548/EEC on the classification, packaging and marking of hazardous substances, OJ L 259, 15 October 1979, 10; Art. 10 of Directive 78/631/EEC (pesticides), OJ L 206, 29 July 1978, 13; Art. 12 of Directive 75/117/EEC (electrical equipment for use in explosive atmospheres), OJ L 462, 30 January 1976, 45; Art. 12 of Directive 76/768/EEC (cosmetics), OJ L 262, 27 September 1976, 169. Member States' temporary measures are confined to a maximum duration of 6 months, unless the Commission finds adjustment of the Directive necessary, as with Art. 9 of

The safeguard clauses are thus designed for cases where after a Community provision has been enacted a hitherto unknowable or unrecognized hazard appears. The Member State, as responsible for the safety and health of its citizens and for other objects of legal protection, is allowed to take the necessary quick action. At the same time, the notification of the Commission and other Member States and the involvement of the Committees to adapt the relevant directives to technical progress is aimed at securing amendment of the latter to cope with the hazard situation and bring Community law up to date with the hazardous situation that has emerged, so as to avoid obstacles to trade. A Member State that reacts more critically than others to hazardous situations can thus provide an impetus for the tightening up of Community standards. However, it must supply justification for temporary departure from Community law, and accept the fact that its intervention may not be lastingly confirmed by the Commission or in the committee procedure. Where despite contrary decision by the relevant Community bodies a Member State maintains its special measures, the Commission may bring it before the ECJ for infringement of Art. 30 EEC. Those who doubt that exercise of national police intervention powers is accessible to subsequent coordination through a binding Community procedure[97] are refuted by the fact that Member States, in agreeing to the directive, have also agreed to verification of any further-reaching protective measures that may be necessary in accordance with the procedure laid down in the safeguard clause, so as to maintain the stock of Community law already arrived at. There is much to suggest that this question of principle remains hidden in the background and that the safeguard clause procedure can be used pragmatically in a political negotiating process to adapt Community law to new hazard situations.

2.6. Proposal for a directive on construction products – a failed attempt to delegate powers to the Commission

With its proposal for a directive on construction products,[98] the Commission embarked in 1978 on the since abandoned attempt to develop an alternative to the cumbersome policy of harmonization through vertical, product-related Council directives.[99] A framework directive

Directive 73/173/EEC (solvents), OJ L 189, 11 July 1973, 7; Art. 9 of Directive 74/150/EEC (licences for agricultural and forestry tractors), OJ L 84, 28 March 1974, 10; Art. 9 of Directive 70/156/EEC (licences for motor vehicles), OJ L 42, 23 February 1970, 1. On the protection clause in 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, 2.3.3. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

[97] Thus *Seidel, M.*, Die Beseitigung der technischen Handelshemmnisse, in: Angleichung des Rechts der Wirtschaft in Europa, Kölne Schriften zum Europarecht, vol. 11, Köln/Berlin/Bonn/München 1971, 733 et seq., 754.

[98] OJ C 308, 23 December 1978, 3. For details on the basic problems raised by this proposal for a directive see *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980. See also *Bub, H.*, Internationale Harmonisierung im Bauwesen, DIN-Mitt.58 (1979), 669 et seq.; *idem*, Normung und Zulassung der Baustoffe und Bauteile aus europäischer Sicht. Güteanforderungen, Prüfungen, Kennzeichnung, Güteüberwachung, DIN-Mitt. 61 (1982), 63 et seq.; *Blachère, G.*, Normung und gesetzliche Bestimmungen auf dem Gebiet des Bauwesens, sofern sie die nationalen, europäischen und internationalen Normen betreffen, DIN-Mitt. 61 (1982), 284 et seq.; *Lindemann, G./Reihlen, H./Seyfert, H.J.*, Bauvorschriften im Wandel. Technische Bestimmungen - Baunormen und EG-Richtlinien, DIN-Mitt. 63 (1984), 179 et seq.; *Börner, B.*, Die Harmonisierung der Regeln der Technik in der EWG, in: Studien zum deutschen und europäischen Wirtschaftsrecht, vol. 1, Köln/Bonn/München 1973, 231 et seq., 245 et seq., was already proposing basic directives from the Council with implementing directives from the Commission as a transitional solution until European standardization bodies are in a position to produce recognized European standards.

[99] The 1978 proposal has since been replaced by the proposal for a directive on construction products following the

from the Council was to contain common definitions for all construction products and lay down general rules on the form of implementing directives; these implementing directives were, pursuant to Art. 155 EEC, fourth indent, to be enacted by the Commission, with feedback through a committee made up of Member State representatives (regulatory committee procedure). Implementing directives were to lay down more specific requirements for individual products or types of product, and guarantee that buildings produced using materials complying with the implementing directives would meet the generally recognized requirements, including safety requirements. These requirements relate to reliability, safety, hygiene, comfort and economy of buildings, and to specific properties of products.[100] Conformity of construction products with implementing directives was to be verified and established through an EEC type approval certificate (Art. 8-12), an EEC type examination certificate (Art. 13-17), EEC type conformity checks (Art. 18-21) or through EEC self-certification (Art. 22-26); procedures were to be laid down in the individual implementing directives.[101]

The reasons for the failure of this ambitious project are not entirely clear. Besides Member States' reservations at such far-reaching transfer of powers to the Commission[102] and Parliament's mistrust of the excessive influence for Government representatives in the committee procedure,[103] rejection of central bureaucratic detailed regulation by industrial circles involved was not that also important, as well as special characteristics of the construction industry which, by comparison with other technical areas, is relatively localized and displays special local and regional traditions. As well as these political reasons, there were legal reservations regarding the proposed delegation arrangements, since all essential basic decisions were not left to the Council, but would be given over to the Commission without its having any specific, detailed framework.[104] It is noteworthy that the Commission did not seek to follow the model of the Low-Voltage Directive,[105] but wanted to lay down the specific products standards itself in implementing directives. Here, however, it can always

principles of the new approach to technical harmonization and standards, OJ C 93, 6 April 1987, 1. On this proposal 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. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

[100] Annex II to the 1978 proposal for a directive. Cf. the rather more detailed basic requirements formulated as performance requirements in Art. 2 and in Annex I in the 1987 proposal for a directive, relating to mechanical stability, fire protection, safety in use, durability, acoustic protection, energy saving, hygiene, health and the environment.

[101] On conformity certificates cf. Art. 13-15 and Annex IV in the 1987 proposal for a directive. By this, the relevant standards or technical approvals should lay down the nature of the conformity certification (certification of product conformity, or quality control in the factory by an accepted office, manufacturer's own conformity declaration based on own initial checks or initial checks by a licensed testing centre), preference to be given in each case to the simplest procedure.

[102] Cf. *Braun, F.*, Nationale Rechtsvorschriften für Anlagen, Geräte und Stoffe in der Gemeinschaft, in: Recht und Technik. Rechtliche Regelungen für Anlagen, Geräte im deutschen und im europäischen Recht, Studienreihe des Bundesministers für Wirtschaft, Nr. 53, Bonn 1985, 176 et seq., 181.

[103] Cf. the European Parliament's opinion on the proposal for a directive on construction products, points 4 and 5, OJ C 140, 5 June 1979, 28 et seq. (29).

[104] In detail, see *Grabitz, E.*, Die Harmonisierung baurechtlicher Vorschriften durch die Europäischen Gemeinschaften, Berlin 1980, 48-55.

[105] As for instance e.g. *Bub, H.*, Internationale Harmonisierung im Bauwesen, DIN-Mitt.58 (1979), 669 et seq., 673-675.

point to the fact, by contrast with electrical sector, only a few construction products are covered by international or European technical standards.[106]
Quite parts from the failed attempt to secure far-reaching powers to issue implementing directives, the Commission is working on bringing out Eurocodes for the construction industry, a set of European regulations based on result of work by major international technical and scientific associations for the design, dimensioning and construction of buildings and engineering structures.[107] By contrast with the failed proposal for a directive on construction products of 1978, the 1987 proposal for a directive on construction products, with its strengthening of standardization committees and of the procedure of conformity certification, implies above all a strengthening of industrial circles involved. Because of the comprehensive competence of the proposed Standing Committee for the construction industry, the position of Member States ought if anything to be strengthened, even though from the purely legal point of view they can assert their influence only through an advisory committee rather than a regulatory committee.

2.7. Criticisms of the classical concept of integration

Along the road towards the new approach to technical harmonization and standards, criticism of the classical Community concept of integration were an important step. As described, the Community has for years pursued the aim of eliminating barriers to free movement of goods through vertical directives laying down uniform standards for particular products or groups of products, thereby providing firms with a broader area of action and at the same time creating uniform protective standards. By Art. 36 EEC, individual Member States may, as long as they comply with the principle of proportionality and non-discrimination, take measures to protect the health and life of people, and other objects of legal protection. These measures may have restrictive effects on free movement of goods. Harmonization directives pursuant to Art 100 EEC were intended to "communitarize" these protective policies, since if they continued to be on a national basis market integration might be hampered. Along these lines the Community, in its endeavour to create the internal market, pursued a highly fragmented product safety policy, structurally subordinated to internal market policy.[108] The criticisms of the classical integration concept[109] related mainly to the following points:

- The results of harmonization work concerned only a few areas of industry[110] and had in some sectors remained practically insignificant, considering the enormous number of

[106] Cf. *Lindemann, G./Reihlen, H./Seyfert, H.J.*, Bauvorschriften im Wandel. Technische Bestimmungen - Baunormen und EG-Richtlinien, DIN-Mitt. 63 (1984), 179 et seq., 184 et seq. See also point 11 of the explanatory statement on a proposal for a directive on construction products, COM (86) 756 final/3 of 17 February 1987, 6, according to which 15% of national draft standards reported under the information directive on standards and technical regulations related to construction products, but only 3% of existing international standards.
[107] For more on this see *Breitschaft, G.*, EUROCODES für das Bauwesen, DIN-Mitt. 63 (1984),136 et seq. In general on European standardization in the construction industry see *Kiehl*, Der Beitrag der europäischen Normung zur Harmonisierung im Bauwesen in Europa - Stand und Zukunftsaussichten, DIN-Mitt. 66 (1987), 467 et seq.
[108] On the uneven harmony between internal market and product safety policy cf. *Reich, N.*, Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften, Baden-Baden 1987, para. 116.
[109] A first comprehensive criticism can be found in the ESC's opinion on the issue of barriers to movement of goods and harmonization of relevant legal provisions, of 21 November 1979, OJ C 72, 24 March 1980, 8 et seq.; a balance sheet of the criticisms precedes the new approach, COM (85) 19 final of 31 January 1985, 3 et seq.; cf. also *Pelkmans, J./Vollebergh, M.*, The Traditional Approach to Technical Harmonization: Accomplishments and Deficiences, in: Pelkmans, J./Vanhenkelen, M. (eds.), Coming to Grips with the Internal Market, Masstricht 1986, 9 et seq., 25 - 27.
[110] Cf. Table 2 above.

technical regulations and standards in all Member States. For the Federal Republic of Germany, France, Britain and Italy alone, technical standards are estimated to total some 50,000.[111] In 1984 alone, 1,418 DIN standards[112] and 609 British Standards[113] appeared, while in the same year – one of the most successful – the Council, under the programme to eliminate technical barriers to trade, adopted 16 directives and the Commission a further 7 on adaptation to technical progress.[114] Clearly, the figures are not simply comparable, since some of the national standards served to take over international or European standards[115] and as a rule national standards have, at any rate by comparison with European standards and with the relevant directives, a much narrower area of application.[116] It is nevertheless clear that the Community cannot, even if it concentrates on a few industries of particular importance to Community internal trade, keep up with the speed and intensity of regulation in the Member States. This is particularly true where it tries to go into technical, detailed regulations, specific to particular products.

- Even where directives were adopted, they often, as in the automotive sector,[117] regulated only particular aspects, whereas other aspects largely continued to get in the way of a genuine internal market.
- The procedure for developing and testing draft directives, and particularly the decision-making procedure, is extremely cumbersome and time-consuming. According to ESC indications,[118] it takes more than three years between publication of a draft in the Official Journal and final adoption. The 15 directives adopted by the Council as a "package" on 17 September 1984 had been before it for decision for an average of nine years, much too long a period to be able to respond quickly and flexibly to new needs and to steadily accelerating technological advance. This criticism must of course be qualified by the observation that even at national or European level the conclusion of standardization procedure often takes a considerable time.[119] Conversion of directives in Member States takes at least another year and a half, and is often delayed still further.[120]
- The frequently used procedure of optional harmonization, while it facilitates compromise in the Council, is often not enough to bring about a genuine internal market. Here the ESC made the suggestion, apparently never taken up, that optional harmonization solutions should in general be time-limited and be regarded as only a halfway house on

[111] *Lukes, R.,* Die Zulässigkeit nationaler Rechtsvorschriften für technische Gegenstände und Stoffe nach Gemeinschaftsrecht, 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, 194 et seq., 198.
[112] DIN in Zahlen, DIN-Mitt. 65 (1986), 314.
[113] BSI, Annual Report, 1984 to 1985, 3.
[114] Cf. Table 1 above.
[115] Of the 609 British standards adopted in 1984, for instance, 146 were identical to ISO standards, 49 to IEC ones and 37 to CEN or CENELEC ones; BSI, Annual Report, 1984 to 1985, 3.
[116] To clarify this, in 1986 there were in the electrical engineering area 6, 463 DIN standards, but "only" 501 standards or harmonization documents from CENELEC, and beside the 3 blanket CEN standards on toy safety 151 DIN standards for sport and leisure equipment; DIN-Geschäftsbericht 1986/87, 24-33.
[117] See the comments under 2.4.3 above.
[118] OJ C 72, 24 March 1980, 9.
[119] According to the procedure for producing DIN standards, some three years go by between an application for standardization and submission of finished DIN standard: DIN (ed.), Handbuch der Normung, 5th ed., Berlin/Köln 1981, vol. 1, 2-5.
[120] See the comments under 2.8 below.

the road to full harmonization, in order to allow certain Member States and manufacturers enough time to adjust gradually.[121]

- Only part of the barriers to trade that actually exist can be dealt with by directives, since Art. 100 EEC presupposes that legal or administrative provisions in the area exist in at least one Member State, or that there are plans likely to lead to the creation of a trade barrier. Harmonization of inter-company technical standards by directives is possible only where technical norms are referred to by at least one Member State in legal or administrative provisions.[122] The Commission summarized the position in 1980 as follows:[123]

> *All the national standards being drawn up by the national standardization authorities at the rate of dozens every week are not in fact provisions of law, regulation or administrative action. These national standards are not designed deliberately in order to create obstacles but are generally meant to serve worthy aims: rationalization of production, improvement of product quality, protection of workers, users, consumers or the environment, more economic use of energy and the like. Be that as it may, the way they are drawn up ... gives the national manufacturers a twofold advantage over their competitors: they can be sure that in the preparation of these standards due consideration will have been given to their views and their manufacturing processes; they are aware of the intended pattern of development and modification in advance of their competitors, and therefore have time to prepare for it.*

- If directives are not confined to setting forth results to be achieved, but bindingly prescribe detailed technical specifications of design, they may hamper technical progress.[124]
- The unanimity requirement of Art. 100 EEC is indivisible, and therefore applies not only to the laying down of basic safety requirements in respect of the protective policies Member States may legitimately pursue under Art. 36 EEC, but also to the regulation of detailed technical requirements. The unanimity requirement is suspended only where adaptation of directives to technical progress has been entrusted to the Commission, in collaboration with a committee of Member State representatives. But is well known that the attempt to give the Commission the power, pursuant to Art. 155 EEC, fourth indent, to enact implementing regulations failed.[125] This solution would have meant both gaining time and giving the Council the needed leeway to work out the underlying political principles more clearly. A prominent feature of work in the regulatory committees is the common endeavour of specialists and technicians represented not to let failure to agree in committee leave the decision to politicians and diplomats on the Council with no

[121] OJ C 72, 24 March 1980, 12.

[122] *Langeheine, B.*, Kommentar zu den Artt. 100 bis 102 EWGV, in: Grabitz, E. (Ed.), Kommentar zum EWG-Vertrag, München 1986, Art. 100, para. 18-23; *Starkowski, R.*, Die Angleichung technischer Rechtsvorschriften und industrieller Normen in der Europäischen Wirtschaftsgemeinschaft, Berlin 1973, 54-56.

[123] Cited from the Commission communication to European Parliament and Council; extracts in EC Bulletin 1-1980, 12 et seq. (13).

[124] *Pelkmans, J./Vollebergh, M.*, The Traditional Approach to Technical Harmonization: Accomplishments and Deficiences, in: Pelkmans, J./Vanhenkelen, M. (eds.), Coming to Grips with the Internal Market, Masstricht 1986, 9 et seq., 25.

[125] This is provided for in the draft Directive on construction products, OJ C 308, 23 December 1978, 3; on this cf. the comments under 2.6 above. This solution of delegation was once again suggested by the ESC, OJ C , 24 March 1980, 11.

technical competence. In votes, there is strikingly high proportion of concurring opinions, and in most cases even unanimity.[126]

2.8. Difficulties with conversion into international law

The Commission's greater reluctance to enact new directives results in no small measure from the considerable difficulties in monitoring application of directives in Member States, and the amount of effort required to adapt them continually to technical progress.[127] Since the Commission intensified its monitoring activity in 1977,[128] or one might say started paying more attention to implementation of Community law, it has often seen itself compelled to take action against several Member States simultaneously after expiring of the time limit for conversion,[129] in order to preserve what has been accomplished and not let approximation of laws remain on paper, turning enactment of directives into purely symbolic politics.
Tables 4, 5 and 6 give a picture of the actions for treaty breaches brought by the Commission under Art. 169 EEC[130]. The actions start with a letter to the governments of Member States concerned calling on them to take a position on the non-conversion of a directive in into national law, or else on an alleged breach of the EEC Treaty or of a regulation. The number of such letters grew from 97 in 1978 to 503 in 1985, that is, they quintupled.[131] If the accusation hereupon eliminated, the Commission presents a recent opinion: here the rise was threefold, from 68 in 1979 to 233 in 1985. Whereas on the long-term average six out of ten cases were resolved in the initial clarificatory stage before presentation of the reasoned opinion, in around four out of ten cases the Court of Justice had to be called in because the Member State involved had not complied with the Commission's reasoned opinion. In all procedural stages, some 40% of cases concern the sector of the internal market and industry, i.e. the conversion of directives on elimination of technical barriers to trade or on infringement of free movement

[126] For details see *Schmitt von Sydow, H.*, Organe der erweiterten Europäischen Gemeinschaften - Die Kommisssion, Baden-Baden 1980, 157-172.
[127] Op. cit., fn. 123, 14.
[128] For details see *Ehlermann, C.D.*, Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten durch die Kommission, in: Grewe, W./Rupp, H./Schneider, H. (Ed.), Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, FS zum 70. Geburtstag von Hans Kutscher, Baden-Baden 1981, 135 et seq. On implementation of Community law using the breach of treaty procedure see above all *Krislov, S./Ehlermann, C.D./Weiler, J.*, The Potentical Organs and the Decision-Making Process in the United States and the European Community, in: Cappelletti, M./Seccombe, M./Weiler, J.(eds.), Integration Through Law, Europe und the American Federal Experience, vol. 1, book 2, Berlin/New York 1986, 3 et seq., 59-88 and *Weiler, J.*, The European Community System. Legal Structure and Political Process, Ph.D.Thesis, EUI Florence 1982. See also *Hartley, T.C.*, The Foundation of European Community Law. An Introduction of the Constitutional and Administrative Law of the European Community, Oxford 1981, 283-323; *Everling, U.*, Die Mitgliedstaaten der Europäischen Gemeinschaft vor ihrem Gerichtshof, EuR 18 (1983), 101 et seq., 105-109, 124; *Evans, A.C.*, The Enforcement of Article 169 EEC: Commission Discretion, ELR 4 (1979), 442 et seq.; *Ortlepp B.Ch.*, Das Vertragsverletzungsverfahren als Instrument zur Sicherung der Legalität im Europäischen Gemeinschaftsrecht, Baden-Baden 1987.
[129] See the impressive list of actions for breach that appears monthly in the Community bulletins. It has even happened that the Commission has had to take action simultaneously against all Member States for non-conversion of a particular directive.
[130] Following H. Sieglerschmidt's report to the European Parliament on Member States' responsibility for application of Community law, EP-Doc. 1-1052/82, the Commission submits annual reports to Parliament on verification of application of Community law, 1983: COM (84) 181 final of 11 April 1984, 1984: COM (85) 149 final of 23 April 1984, 1985: OJ C 220, 1 September 1986, 1, 1986: OJ C 338, 16 December 1987, 1.
[131] The decline in 1983 is because in that year the Commission terminated many old actions in order, on grounds of legal security, to replace them by more specific notifications of time-limits.

of goods. Table 5 shows that all Member States have been involved in actions for breach of treaty at all procedural stages, though to differing extents, with Italy, France and Belgium being to the fore as well as Greece, considering its short membership. Table 6 shows that just 70% of actions for breach of treaty relate to faulty conversion or non-conversion of directives.[132] The breach actions for 1985 relate to 219 different directives, 64 of them laying down standards for industrial products.[133] In recent years the number of actions concerning breaches of the EEC Treaty has risen very considerably. Singling out the area of the internal market and industry, these are almost always cases where the Commission complains of breach of Art. 30 et seq. EEC.[134]

Table 4: Actions for breach of treaty begun in the years from 1978 to 1985 by procedural stage, and specifically for questions of the internal market and Industry[I]

Year	***Letter of challenge***		***Reasoned opinions***		***Recourse to Court of Justice***	
	Total	Internal Market	Total	Internal Market	Total	Internal Market
1978	97	60	68	49	15	9
1979	187	104	75	51	18	7
1980	227	140	68	41	28	25
1981	256	92	147	79	50	22
1982	335	97	157	92	45	21
1983	289	111	83	40	42	21
1984	454	172	148	46	54	23
1985	503	152	233	93	113	23
Total	*2,348*	*928*	*979*	*491*	*365*	*162*

Table 5: Actions for breach of treaty begun between 1978 and 1985 (number of letters of challenge) by Member State[II]

Member State	***Letters of challenge***	***Reasoned opinions***	***Recourse to Court of Justice***
Belgium	285	134	62
Germany	173	81	29
Denmark	129	32	11

[132] In 81% of cases (1978-85) conversion measure had not yet been notified - which mostly indicates that the directive was not yet converted; in 9% measures notified were not in line with a directive, and 10% of actions were brought for faulty application of directives, OJ C 220, 1 September 1986, 16.

[133] See OJ C 220, 1 September 1986, 50-77. These figures covered only actions brought, recent opinions and letters setting time-limits because of failure to notify national conversion measures.

[134] For 1983 see: COM (84) 181 final of 11 April 1984, 32-39, for 1984: COM (85) 149 final of 23 April 1985, 34-43, for 1985: OJ C 220, 1 September 1986, 33-40, for 1986: OJ 338, 16 December 1987, 41-47.

[I] Source: Commission, Third Annual Report to the European Parliament on the verification and application of Community Law - 1985, OJ C 220, 1 September 1986, 15.

[II] Source: Commission, Third Annual Report to the European Parliament on the verification and application of Community law - 1985, OJ C 220, 1 September 1986, 14.

Greece[III]	163	63	16
France	421	175	62
Ireland	190	64	21
Italy	420	235	112
Luxembourg	192	66	17
Netherlands	189	66	16
United Kingdom	186	63	19
Total	*2,348*	*979*	*365*

Table 6: Actions for breach of treaty begun between 1978 and 1985, by legal bases (directives – non-notification, non-correspondence, improper application – or treaty/regulations) in total and specifically for questions of the internal market and industry.[IV]

Year	***Total Directives***	***Internal Market and Treaty/Regs.***	***Industry Directives***	***Treaty/Regs.***
1978	55	42	38	22
1979	150	37	82	22
1980	194	33	126	14
1981	196	60	75	17
1982	253	82	58	39
1983	186	103	65	46
1984	285	169	108	64
1985	301	202	92	60
Total	*1,620*	*728*	*644*	*304*

Between 1978 and 1985 the lion's share of Court of Justice rulings in treaty breach actions, 122 out of 135, were in the Commission's favour, with only 13 in favour of the Member State involved. The Commission boasts the same successful score sheet in the group of cases that is quantitatively by far the largest, and the one of interest here, namely the internal market and industry: 42 cases were decided in its favour, and 5 in favour of Member States involved.[135]

2.9. The GATT agreement on technical barriers to trade

The trade-restricting effect of technical standards is the object of the GATT agreement on technical barriers to trade (the so-called GATT Standards Code) of 12 April 1979, which entered into force on 1 January 1980 and was acceded to by the Community, as well as the most important industrial countries.[136] The agreement is aimed not only at bringing about a

[III] Only after 1982.

[IV] Source: Commission, Third Annual Report to the European Parliament on the verification and application of Community law - 1985, OJ C 220, 1 September 1986, 16.

[135] OJ C 220, 1 September 1986, 19-21.

[136] The GATT agreement on technical barriers to trade is reprinted in OJ L 71, 17 March 1980, 29. By its resolution of 10 December 1979 on the conclusion of multilateral agreements negotiated as part of the trade negotiations from 1973 to 1979, the Council approved the agreement; OJ L 14, 19 January 1980, 36 et seq. To convert the GATT agreement,

universal, equal level of safety, but at eliminating non-tariff barriers to trade caused by different technical requirements or different certification and monitoring procedures. Fair, open application of technical regulations and standards is to be secured through renunciation of mutual discrimination, increased transparency in standard-setting and certification systems, enhanced cooperation in the area of technical standardization and a conciliation procedure. Goods from the territory of one contracting party may not be treated less favourably as regards technical standards and regulation or certification and control procedures than similar goods from another contracting party or goods of domestic origin (Art. 1, 5.1, 7.2). The contracting parties undertake to use relevant international standards, in so far as they exist, as a basis for their own standardization work (Art. 2.2). This may be regarded as a reference to the international state of the art as embodied in international technical standards. However, the technical standards produced by the ISO and IEC are not explicitly mentioned. As with Art. 6 EEC, the contracting parties are allowed wide-ranging autonomy in the area of safety regulations: "... for reasons of national security, to prevent misleading practices, to protect the safety and health of the person, the life and health of animals and plants or the environment, because of significant climatic or other geographical factors or because of fundamental technological problems" (Art. 2.2).

The contracting parties undertake to take part in producing international standards (Art. 2.3.) and to lay down technical requirements where possible in relation to fitness for use and not in relation to design or descriptive characteristics (Art. 2.4). This leaves room for differing technical solutions as long as they meet the performance requirements. The contracting parties are obliged to publicize the introduction of technical standards departing from international standards, to allow their trading partners adequate time to comment and adjust, and to maintain an information office (Art. 2.5, 2.7, 2.8). Special importance attaches to the attempt to arrive at mutual recognition of test results, conformity certificates or conformity marks. By Art. 5.2 the contracting parties guarantee that

> *their central government offices will recognize test results, conformity certificates or conformity marks from competent offices in the territories of other contracting parties, or accept certificates made out by manufacturers on the territories of other contracting parties even where test methods differ from their own, as long as they are convinced that the methods applied on the territory of the manufacturing contracting party are adequately suitable for determining correspondence with relevant technical regulations and standards.*

According to the GATT standards code, furthermore, each State that accedes to it guarantees that there is a central information office on technical regulations, standards and marking systems (Art. 10). Particularly in favour of developing countries, mutual technical support in producing technical standards and in setting up standards organizations and certification systems is provided for (Art. 11).[137]

---

the Council decision of 15 January 1980 on the provisions for laying down and applying technical regulations and standards, OJ L 14, 19 January 1980, 36, was adopted. On the GATT standards code cf. esp. *Middleton, R.W.*, The GATT Standards Code, J. of World Trade Law 14 (1980), 201 et seq. and *Nusbaumer, J.*, The GATT Standards Code in Operation, J. of World Trade Law 18 (1984), 542 et seq.; also *Sweeney, R.E.*, Technical Analysis of the Technical Barriers to Trade Agreement, Law and Policy in International Business 12 (1980), 179 et seq. and *Bourgeois, J.H.J.*, The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective, CMLR 19 (1982), 5 et seq., 7-11.

[137] In the interests of industrialized countries, performance-oriented standards, by comparison with design requirements, impede too speedy transfer of technology. Cf. also *Middleton, R.W.*, The GATT Standards Code, J. of World Trade Law 14 (1980), 201 et seq., 207.

By mid-1984 37 signatories had acceded to the GATT standards code, including 14 developing countries. By then some 1,000 standardization projects had been notified for which departure from relevant international standards was planned.[138] The importance of the GATT agreement on technical barriers to trade lies in the strengthening of international and regional standardization, in the equal prominence given to certification besides standardization, in the stress on the principle of mutual recognition of test results and conformity certificates and marks, in the setting up of an information system on technical standards and certification and in the consideration given to developing countries' special environmental, financial and commercial needs.

3. Approaches to a horizontally oriented product safety policy

The programme to eliminate technical barriers to trade has seen its initial industrial policy orientation increasingly linked with consumer policy objectives. The replacement of national product standards by the establishment of Community ones always meant two things: removal of barriers to trade in goods (negative integration) *and* establishment of a more or less effective protective standard for the health and safety of consumers (positive integration). In addition to vertical product safety policy, aimed at individual products, Community consumer policy has developed horizontal approaches, embracing more than one product or group of products, for guaranteeing product safety.

3.1. Consumer protection and information programmes

The fundamental guidelines for a horizontally based product safety policy can be found in the two action programmes on consumer protection and information,[139] specifically in the section on protection of consumer health and safety. The principle set down there is:

> *Goods and services offered to consumers must be such that, under normal or foreseeable conditions of use, they represent no risk to the health and safety of consumers. There should be quick and simple procedures for drawing them from the market in the event of their presenting such risks.*[140]

As well as many indications on the promotion of consumer safety and health in harmonizing legal regulations for individual products, the second programme contains a basis for a horizontal product safety policy which – against the background of increasing awareness of the limits to interventionist interference at the policy formation and programme implementation stage[141] – stresses informative guidance and the provision of incentives to

[138] *Nusbaumer, J.*, The GATT Standards Code in Operation, J. of World Trade Law 18 (1984), 542 et seq., 545.

[139] First and second programmes on consumer protection and information policy (OJ C 92, 25 April 1975, 1; OJ C 133, 3 June 1981, 1). For the survey see *Krämer*, Verbraucherpolitik, in: Groeben, H./Thiesing/Ehlermann, C.-D. (Ed.), Kommentar zum EWG-Vertrag, vol. 2, 3. Aufl., Baden-Baden 1983, 1631 et seq. An interim report can be found in: Commission of the European Communities, Zehn Jahre Verbraucherpolitik der Gemeinschaft. Ein Beitrag zum "Europa der Bürger", Luxembourg 1985.

[140] First programme (op. cit., fn. 139), point 15.1; Second Programme (op. cit., fn. 139), point 12.1.

[141] The first clear, and portentous, signal was given by the Commission in 1978 when at the meeting in Comblain-la-Tour, in drawing up a balance sheet of its work and redefining its course, it made new harmonization measures dependent on the following four conditions being met:

- Community action already requisite and not replaceable by measures by other actors;
- positive effects on Community internal trade;
- contribution to the economic and monetary integration of Europe;

cooperation over intervention. As regards product safety, in part to facilitate identification of priorities, two information systems are proposed: a Community system of information on accidents in connection with the use of particular products, other than in occupational activity or road traffic, and one for rapid exchange of information on hazards arising in the use of consumer goods.[142]

In broad areas, Community consumer protection policy has had results that lag far behind the programmatic intentions. Among reasons given for this are economic decline, the view that consumer protection is part of Member State rather than Community competence, the unanimity requirement for law approximation pursuant to Art. 100 and 235 EEC, and the concentration on vertical harmonization.[143] For a long time successes were achieved essentially only where product-specific regulations were issued to guarantee free movement of goods that also involved protection of consumer health and safety.[144] The principle of pursuing consumer policy "piggyback" fashion to other policies cannot immediately be transferred to horizontal product safety policy. This is one explanation for why it was only fairly late that the Community developed systems to survey accidents and hazards in handling products, and adopted the product liability directive.

In continuation of the two consumer protection programmes of 1975 and 1981, the Commission, in its communication to the Council entitled "A new impetus for consumer protection policy", proposed the following four components of its future product safety policy: [145]

- Laying down of binding health and safety standards for manufacturers and suppliers, introduction of a general safety duty;
- cooperative action among national authorities responsible for consumer product safety;
- creation of Community institutions to monitor health and safety hazards arising in using consumer products;
- Community information and education on home and leisure product safety.

- adequate staffing and financial resources.

On this see *Bourgoignie, T./ Trubek, D.*, Consumer law, common markets and federalism in Europe and the United States, Berlin, Walter de Gruyter, 1987. On criticism of the production and implementation of directives in connection with the programme on eliminating technical barriers to trade cf. 2.7 above.

[142] Second Programme (op. cit., fn. 139), point 25-27.

[143] Commission communication to the Council on a new impetus to consumer protection policy, COM (85) 314 final of 23 July 1985, points 4-9. For an exhaustive analysis *Bourgoignie, T./ Trubek, D.*, Consumer law, common markets and federalism in Europe and the United States, Berlin, Walter de Gruyter, 1987, 200-219.

[144] Of the 28 most important texts adopted by the Council on consumer protection in the 10 years after 1975, not less than 24 under the programme to eliminate technical barriers to trade referred to very specific products (vertical product safety policy), with only 4 that could be regarded as constituting horizontal product safety policy (indication of prices for foodstuffs, pilot experiment on accident information, rapid exchange of information on hazards arising in use of consumer products, misleading advertising). By contrast, of the 8 most important consumer protection proposals before the Council for discussion in early 1985, not less than 6 were on aspects of consumer protection applying to many products (product liability, "door-to-door salesmen", consumer credit, advertising, price indications, accident information system). Calculated from Zehn Jahre Verbraucherpolitik (op. cit., fn. 139), Annexes III and IV. For a critical account, specifically on product safety, see BEUC, Manifest für die Sicherheit in Europa, BEUC-Nachrichten 47/1985.

[145] New impetus (op. cit., fn 143), points 19-28. On the Commission communication, cf. the Council resolution of 23 June 1986, OJ C 167, 5 July 1986, 1 et seq., and Stellungnahme von BEUC, BEUC-News, No. 46/1985, 7-10 and *Héloire, M.-Ch.*, Gemeinschaftspolitik in bezug auf die Verbraucher: die Konditionen eines neuen Impulses, Europäische Zeitschrift für Verbraucherrecht 1987, 1 et seq., 7-10.

In pursuance of this new programmatic approach, explicitly identified as a complement to the new approach to technical harmonization and standards, the Commission and Council have already adopted a number of measures:

- Amended proposal for a directive on the safety of toys;[146]
- directives on products which appearing to be other than they are, endanger the health or safety of consumers;[147]
- intensification of cooperation and information exchange with and among national authorities responsible for consumer product safety;[148]
- interim report on the system for the rapid exchange of information on dangers arising from the use of consumer products, and initial proposals to extend the system[149];
- extension of the demonstration project on a Community accident information system[150];
- communication to the Council on the integration of consumer policy in the other common policies[151];
- communication to the Council on safety of consumers in relation to consumer products[152];
- communication from the Commission on a Community information and awareness campaign on child safety.[153]

3.2. Proposal for a directive on the safety of toys – search for product-specific integration of internal market and product-safety policies

Some peculiarities are displayed by the proposal for a framework directive on safety of toys of 1983,[154] which replaced an initial proposal from 1980.[155] The toy industry is characterized by considerable international integration, and markets an extraordinarily varied range of products. Over 60,000 types of toys are at present marketed. These often have very short development periods, so that there is only a very limited time between development and

[146] In OJ C 282, 8 November 1986, 4, on 2 October 1987 the Commission presented another amended version, COM (87) 467 final. See also the observations in 3.2 and 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, 3.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

[147] OJ L 192, 11 July 1987, 49. See also the observations in 3.4.

[148] The first conference took place in May 1984 in Montpellier, and dealt with national and Community provisions in force on implementation and monitoring of consumer product safety. The effects of Community directives on the conversion of standards and technical regulations and the monitoring of accidents caused by consumer products in the home were also discussed. Cf. Proceedings of the First European Conference on Inter-Administrative Cooperation in the Field of Consumer Product Safety in the Community, Montpellier, 28-30 May 1984, DG XI, -233-86. The second conference took place in June 1986 in The Hague, and dealt with the involvement of consumers in standardization work, the development of a research programme on accidents in the private sphere, Community framework provisions on consumer product safety and the rapid information system on product hazards; cf. Bulletin EC 6-1986, No. 2.1.166. The third conference was held in September 1987 in Warwick.

[149] COM (86) 562 final, 24 October 1986. For more on this see 3.4 below.

[150] For more on this see 3.3 below.

[151] COM (86) 540 final, 24 October 1986. Cf. the Council resolution of 15 December 1986 on the integration of consumer policy in the other common policies, OJ C 3, 7 January 1987, 1 f.

[152] COM (87) 209 final, 8 May 1987.

[153] COM (87) 211 final, 11 May 1987.

[154] OJ C 203, 29 July 1983, 1-11.

[155] OJ C 228, 8 September 1980, 10-42.

marketing of a product, thus intensifying safety problems. Community-wide, some 2 million children per year have accidents when playing with toys.

What is aimed at is total harmonization, since children's health and safety ought not to be protected to different extents in different Member States. Toys must meet a detailed catalogue of safety requirements which – in line with the variety of risks – relate to physical and mechanical risks, flammability, chemical hazards, explosion risks, electrical risks, hygiene and radioactivity (Annex II). If it is not proper use that is to be taken as a basis, but the usual mode of use and foreseeable misuse by children under normal circumstances (Art. 2 (1)).

A notable feature of the proposal, now abandoned, is that it not only aims at removing barriers to trade, but above all at protecting children's safety and health, for which it brings in some special instruments. Thus, Member States are to report every three years on experience in safety checks carried out and in particular on accidents that have occurred when using toys (Art. 7 (3)). They must ensure that toys not complying with the general safety principles and therefore hazardous to consumer safety and health are removed from the market without delay (Art. 9). Toy advertising should be subject to minimum conditions to prevent consumers from being deceived as to the characteristics and safety level of toys, and to enable them to draw conclusions as to cautionary provisions in their use and as to the minimum age-limits applying to particular types of toys (Art. 10).

However, what makes the various proposals for directives on toy safety particularly interesting is that they document the regulatory shift from product-specific directives with detailed technical specifications up to the new approach, with its reference to technical standards.[156] The core of all the drafts is an annex containing general objectives on toy safety – or in the terminology of the new approach, the basic safety requirements.

According to the 1980 first draft,[157] the technical standards to be observed for individual risks among those mentioned in the general safety objectives should be laid down in guidelines from the Council itself. The proposal for a directive contained general safety objectives and at the same time detailed annexes with Community technical safety standards, on testing of physical and mechanical properties and on the flammability of toys (Annexes V and VI); further directives on common technical standards concerning chemical, toxicological, electrical and other risks were contemplated (Art. 4 (1)). The initial attempt at broad reference to technical standards failed because no satisfactory technical standards for toy safety existed at European level, and because European standardization bodies did not get on with their work quickly enough, and were exposed to criticism from Member States regarding the quality of their work.

The European Parliament in particular wanted reference to technical standards instead of a description of technical characteristics and test methods in the annexes to the directives.[158]

The Commission thereupon split its proposal, bringing three proposals before the Council in July 1983 for directives on toy safety. These were a framework directive containing general objectives for toy safety from all viewpoints[159] and two specific implementing directives on the mechanical and physical properties[160] and the inflammability of toys.[161] The proposed

[156] For information on the various stages of this "regulatory odyssey" see the general explanatory statement to the proposal for a directive on safety of toys, 1986, COM (86), 541 final, 16 October 1986, 2-4.
[157] OJ C 228, 8 September 1980, 10.
[158] COM (86) 541 final, 16 October 1986, 2.
[159] OJ C 203, 29 July 1983, 1-11.
[160] OJ C 203, 29 July 1983, 12-14.
[161] OJ C 203, 29 July 1983, 14-16.

implementing regulations referred – subject to particular amendments – to two European standards. Compliance with them was to be made binding (Art. 4 (1)). Departure was to be possible where toys were manufactured according to new technologies and the general safety regulations were complied with (Art. 5 (1)).
The October 1986 proposal,[162] finally, fully adopts the regulatory concept of the new approach to technical harmonization and standards. The safety requirements, taken over essentially unchanged, are (rebuttably) to be presumed to be complied with if their bearing the Community mark confirms that the toys meet particular harmonized technical standards converted into national standards or, where the harmonized standards are not or only partly applied or no standard exists, meet the basic requirements of a Community design test. The proposal still contains a few features attributable to a general product safety policy: where toys jeopardize the safety and health of users or third parties, Member States are called on to take all appropriate measures to remove them from the market, forbid their marketing or restrict it (Art. 7 (!)). While initially there was explicit provision for an obligation on other Member States to withdraw toys from the market and prohibit their being marketed where such a measure proved justified, now all that is planned is information of other Member States by the Commission (Art. 7 (4)). Member States are instructed to ensure that random checks on toys marketed are done to verify their safety (Art. 12 (1)).

3.3. Pilot experiment for a Community accident information system

The first important foundation stone towards the establishment of a horizontal Community product safety policy was the Council's decision of 23 July 1981 on the "implementation of a pilot experiment relating to a Community system of information on accidents involving products outside the spheres of occupational activities and road traffic".[163] The pilot experiment was carried out from 1 January 1982 onwards for a period of 30 months and was to cover accidents in the home and its immediate proximity requiring medical treatment, and supply information on identification of the accident, its location, products involved, type of accident, type of injury, activity in progress at time of accident, its outcome and arrangements relating to the victim. The intention was to cover 320,000 cases per year, distributed proportionately over Member States according to population, from hospitals, poison emergency centres and doctors. The object was to set up a Community system to collect information on home accidents in order to establish priorities for appropriate proposals to prevent accidents involving products.[164] All the States that have an information system for the systematic assessment of accidents in fact understood the setting up of the system as a building-block towards a more comprehensive product safety policy.[165]
The pilot experiment, which left Member States free as to the mode of their participation (Art. 2 (2)), ended with a relative failure,[166] because only Britain, the Netherlands and Denmark

[162] OJ C 282, 8 November 1986, 4 in the amended version of 2 October 1987, COM (87) 467 final. For more details see the comments 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, 3.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.
[163] Council Decision 81/623/EEC, 23 July 1981, OJ L 229, 13 August 1981, 1.
[164] Op. cit., fn. 162, 3rd and 4th recitals.
[165] Cf. *OECD*, Data Collection Systems Related to Injuries Involving Consumer Products. Report by the Committee on Consumer Policy, Paris 1978.
[166] The final report on the results of the pilot experiment –published as an annex to the Commission's proposal for a

really took part,[167] while other Member States either did not take part at all[168] or supplied only fragmentary information.[169] Given the extremely tight financing, a representative data survey was never in question. Nevertheless, the pilot experiment did, taking experience acquired in the US with the NEISS into account[170] and including data from Member States that have an appropriate survey system, allow a more or less well founded estimate of home and leisure accidents. It was that there are in the European Community annually more than 30,000 deaths and some 40 million injuries from accidents outside work and traffic. Hospital treatment costs and sickness insurance costs alone amount to more than 30 million ECU annually.

On the basis of experience with the pilot experiment, the Commission once again, on 7 January 1985, proposed the setting up of a "Community system of information on accidents in which consumer products are involved".[171] Despite the favourable opinions from the Economic and Social Committee[172] and the European Parliament[173], all the Council managed to arrive at with its decision of 22 April 1986 concerning a "demonstration project with a view to introducing a Community system of information on accidents involving consumer products"[174] was to introduce a further demonstration project, this time limited to 5 years. Basic information is to be obtained from the casualty departments of hospitals selected by Member States in agreement with the Commission; in full operation, between one (Luxembourg) and 13 (Federal Republic of Germany) hospitals per Member State are to be covered. The object is involvement of 90 hospitals and collection of data on 400,000 to 900,000 cases per year, distributed over Member States in proportion to population.[175] In duly justified circumstances, the Commission may accept information from alternative sources of an equivalent value. Member States may also forward *additional* information from poison antidote centres, family doctors, insurance companies or other information sources. The Commission is responsible for assessing data from the whole Community, uniformly coded; it may carry out detailed studies on the most serious and/or most frequent accidents (Art. 4 (1)). A maximum amount of 7 million ECU is provided for implementing the demonstration project for the first three years.[176]

Council decision introducing a Community system of information on accidents in which consumer products are involved, COM (84) 735 final, 7 January 1985 – rather complacently glosses over this. But see the report by the European Parliament Committee on the environment, public health and consumer protection on this Commission proposal, PE DOC A 2-183/85, 12 December 1985, p. 10.

[167] That is, the Member States that already had a more or less developed system for monitoring accidents arising in using products; Britain has been running the "Home Accident Surveillance System" (HASS) since 1976 (cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.5. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf), the Netherlands have been doing studies since 1981 for the "Privé Ongevallen Registratie Systeem" (PORS, in force since 1983), and Denmark has since 1978 been involved in Scandinavian projects for surveying home and leisure accidents. A survey is provided by the Commission of the European Communities, Proceedings of the European Symposium on "Product Safety in European Community", Brussels, 17-18 May 1984, 60-120.

[168] The Federal Republic, Greece and Luxembourg. For the justifications see the answer to written question No. 2194/84, OJ C 203, 12 August 1985, 3.

[169] Belgium, France, Ireland and Italy.

[170] Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 4.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[171] OJ C 117, 11 May 1985, 4.

[172] OJ C 188, 29 July 1985, 9.

[173] OJ C 68, 24 March 1986, 189.

[174] OJ L 109, 26 April 1986, 23.

[175] Op. cit., fn. 105, Annex I.

[176] This amount is regarded by the ESC (loc. cit., fn. 103), point 1.7, as utterly inadequate – understandably, since ignoring initial costs one arrives at less than 8 ECU per case, assuming coverage of only 300,000 cases per year on

The Council adopted the Commission's objective of using the information for "promoting improvements in product features, their standards, their proper use by consumers and consumer information and education aimed at preventing accidents"[177], but decided against the proposed documentation and information centre to make all non-confidential information accessible to those interested, which would have been important for achieving its goal,[178] and instead of annual reports called only for a final report.[179] This decisively restricts the possibilities of arriving at any specific action during the again extended test period. The conveying of as speedy as possible information to circles involved, possible withdrawal of goods from the market and in general the urgency of action on an accident information system had been underlined by the European Parliament[180] and the Economic and Social Committee in their opinions, the latter putting it particularly emphatically.[181]

Indeed, it has to be said that today the link-up between accident surveys and other areas of product safety policy has not yet been achieved. Priority ought to go not to the building-up of the most perfect possible accident information system in the 1990s, but to rapidly converting already available data into Community-wide action before completion of the demonstration project. This would mean making all non-confidential information collected available to interested circles, namely public authorities, manufacturers, traders, users, standardization bodies and the Standing Committee on standardization questions. Funds for the necessary in-depth studies on particularly hazardous areas found should already be made available.

It is well known that only a small proportion of home and leisure accidents surveyed have causes attributable to use of consumer products.[182] Such accident-causing products[183] ought where possible to be recorded, along with any marks they may bear, their condition at the time of the accident and detailed information on how it happened, if improvement of hazardous products on a voluntary basis, or the establishment of suitable safety standards with priority in proven hazard areas or where necessary the publication of warnings or the commencement of recall campaigns is to be achieved. In designing the in-depth studies, representatives of standardization workers should be brought in, to guarantee that information of importance to standard setting is in fact collected.[184]

---

average, for data collection, evaluation and administration.

[177] Council Decision 86/138/EEC, 22 April 1986 (op. cit., fn 173), sixth recital; cf. also Art. 1 (2).

[178] Art. 7 of the Commission proposal (loc. cit., fn. 170).

[179] Cf. Art. 8 of the Council Decision (loc. cit. fn. 173) and Art. 8 of the Commission proposal (loc. cit. fn. 170).

[180] Op. cit., fn. 172, points 4 and 9.

[181] Loc. cit., fn. 171, point 1.6.

[182] Even though the much played up finding of the HUK study for the Federal Republic (*Pfundt,* , Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985, 190 - for more details see *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf), that 99% of home and leisure accidents result from more or less serious mistaken actions, is not entirely confirmed by the other information systems.

[183] Cf. the list drawn up by the HASS of products, articles and characteristics in the household area with most frequent involvement in accidents requiring hospital treatment, described in the Commission's preliminary draft, submitted in May 1986, for a multi-year action programme on consumer safety and on measures to prevent home and leisure accidents (1987-91), 20 et seq. For a comparison see *Pfundt, K.*, Bedeutung und Charakteristik von Heim- und Freizeitunfällen. Ergebnisse von 90.000 Haushaltsbefragungen, Köln 1985, 163-5.

[184] On the above see *Falke, J.*, What Should Be the Content of an E.E.C. General Directive on the Safety of Technical Consumer Goods, BEUC Legal News No. 16 (Nov./Dec. 1986), 16 et seq., 19. On the connection between accident information systems and technical standardization cf. also *Micklitz, H.W.*, Perspectives of a European Directive on Safety of Technical Consumer Goods, Report to the ECRSA Conference on "Product Safety in the European Community", Amsterdam 1984, 17.

The Commission intends as part of its research and development programme for 1987 to 1991 to coordinate and promote in-depth research work on the following priority areas: poisonous substances (especially child-proof seals), articles for children, playground devices and amusement parks, sport articles, do-it-yourself appliances, fire safety and products developed specially for the elderly and the handicapped.[185]

3.4. Information exchange on product hazards – approach to Community follow-up market control

To date there is not at Community level any "simple but effective system allowing products and services hazardous to consumer health to be removed from the market".[186]
The Community has through its measures to eliminate technical barriers to trade, and still more through the new approach to technical harmonization and standards with its reference to standards and mutual recognition of certificates[187] and also through ECJ case law on freedom of movement of goods – namely that a product legally manufactured and marketed in one Community country must in principle be admitted into all other Community countries, irrespective of contrary national regulations, which cannot be legitimated by Art. 36 EEC[188] – contributed to the marketability of products. However, with a few exceptions,[189] it is not taking any measures for Community-wide intervention against product hazards. Altogether, it is left up to Member States to restrict or prohibit trade in suitable fashion on their territory where serious hazards arise from a product. For products to which Community safety standards apply, they must here use the safeguard clause procedure.[190]
The reverse side of the Cassis de Dijon principle, according to which anything legally manufactured and marketed in one Member State may be marketed without restriction everywhere in the Community, leads to the political maxim that a product must be removed from the market in all Member States where serious risk has been found in one Member State,

[185] Commission, preliminary draft multi-year action programme on consumer safety and measures to prevent home and leisure accidents (1987-91), Brussels, May 1986, 29 et seq.
[186] Thus the European Parliament's proposed amendment to the proposed system for information exchange on product hazards, OJ C 182, 19 July 1982, 116 et seq. (117); it takes up a formulation from the first and second programmes on consumer protection and information. On the legal position in the Community and the individual Member States cf. *Stuyck, J.*, Withdrawal and Recall of Dangerous Products in the EEC, in: Commission of the European Communities Proceedings of the European Symposium on Product Safety in the European Community, Brussels, 17-18 May 1984, 35 et seq.; *Krämer, L.*, Zum Rückruf von Produkten in der Europäischen Gemeinschaft, DAR 1982, 37 et seq.; *idem*, Product Recalls in the European Community, BEUC, Legal News 2/(1982), 2 et seq. On the legal position in the OECD countries and the OECD's position, cf. *OECD*, Recall Procedures for Unsafe Products Sold to the Public. Report to the Committee on Consumer Policy, Paris 1981.
[187] For details see the comments 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, 3.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.
[188] More details 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. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.
[189] Cf. the directives restricting the marketing and use of certain hazardous substances and preparations, on which see 2.4.2 above, esp. fn. 79; cf. also the Directive on products which, being other than they appear to be, endanger consumer health and safety, OJ L 192, 11 July 1987, 49. See also *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 239-241.
[190] Cf. 2.5 above.

leading to a recall or a marketing ban.[191] Behind this lies the general idea that free movement of goods should benefit only products that do not constitute a hazard to consumer safety or health.[192] If a product could be recalled or banned from the market in one Member State but simultaneously freely marketed in others, this would be incompatible with the objective of creating a Community-wide level of comparable product safety and of guaranteeing free movement of goods only where this does not adversely affect the rightful protection of consumer safety and health.[193] A common market for products necessitates, if new border controls are not to be introduced because of the possibility of resale and parallel imports, a Community instrument for eliminating hazards arising from products.[194]

The Council decision of 2 March 1984 "introducing a Community system for the rapid exchange of information on dangers arising from the use of consumer products"[195] does not aim at introducing this sort of Community follow-up market control. Instead, all Member States are to be informed as rapidly as possible of urgent steps taken by one Member State (if possible only after consulting the producer, distributor or importer)[196] to prevent, restrict or attach particular conditions to the marketing or use on its territory of a product, or product group, because of a serious and immediate risk which that product or product group presents for the health or safety of consumers when used in normal and foreseeable conditions (Art. 1 (1)). The information system applies to all products intended for use by consumers except those intended exclusively for professional use or those subject under other Community instruments to equivalent notification procedures (Art. 2). It has since been clarified that only medical specialties falling under Directives 75/319/EEC and 81/851/EEC and notifications on animal diseases and residues in foodstuffs and fresh meat pursuant to Directives 64/432/EEC

[191] For details on this, discussing it as a legal principle, see *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 247-251. See also *Kögler, G./Krämer, L.*, Brauchen wir ein Gesetz über den Rückruf gefährlicher Produkte?, ZRP 1982, 320 et seq.; *Domzalski, Y.*, The Interpol of the Consumer Association, in: Commission of the European Communities, Proceedings of the European Symposium on Product Safety in the European Community, Brussels, 17-18 May 1984, 18 et seq., 28.

[192] The present position is bitterly described by *Domzalski, Y.*, (The Interpol of the Consumer Association, in: Commission of the European Communities, Proceedings of the European Symposium on Product Safety in the European Community, Brussels, 17-18 May 1984, 30) as follows: "If there is one field in which the Community principle of 'free movement' is fully implemented, then it is without a doubt that of dangerous products".

[193] *Krämer, L.*, (EWG-Verbraucherrecht, Baden-Baden 1985, para. 250) describes examples where recalls remain restricted to individual Member States. On the related problem of banning particular hazardous substances, cf. 2.4.2 above.

[194] For details on this see *Joerges, C./Micklitz, H.*, The need to supplement the new approach to technical harmonization and standards by a coherent European product safety policy, Hanse Law Review (HanseLR) 2010, 251, 3.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art06.pdf.

[195] OJ L 70, 13 March 1984, 16 et seq. For details on this see *Milas, R.*, La signification juridique de l'institution d'un système communautaire d'échange rapide d'informations sur les dangers découlants de l'utilisation de produits de consommation, RMC 1984, 71 et seq. See also *Pauli, A.*, EG-weites Informationssystem über gefährliche Konsumgüter, PHI 1984, 130 et seq.; *Falke, J.*, What Should Be the Content of an E.E.C. General Directive on the Safety of Technical Consumer Goods, BEUC Legal News No. 16 (Nov./Dec. 1986), 16 et seq., 20 et seq. The European Parliament, which initially took a negative attitude to the Commission proposal (OJ C 172, 13 July 1981, 135 et seq.), indicated its agreement only once the existing informal information exchange among European countries under OECD auspices proved in the case of the denatured Spanish oil, from which hundreds of people died and thousands were poisoned in summer 1981, to be inadequate. See the European Parliament resolutions on the Commission proposal, OJ C 182, 19 July 1982, point 3. In July 1985 the Commission, pursuant to Art. 4 of the decision, decided the details of its implementation, communicated as Annex II to the interim report on the system for the rapid exchange of information on dangers arising from the use of consumer products, COM (86) 562 final, 24 October 1986.

[196] Cf. point 4 of the detailed description of the procedure.

and 82/894/EEC have an equivalent Community notification procedure[197]. The safeguard clause procedure contained in many product-related directives[198] cannot be regarded as an equivalent notification procedure, as not being aimed at equally rapid exchange of information, as applying only to products complying with the harmonized standards, and finally as being intended, over and above urgent temporary intervention, to lead to revision of the Community standards themselves. The point of the system is rapid exchange of information in the case of serious, immediate danger requiring immediate action, not long-term risks in the case of which the adjustment of product-specific requirements has to be considered.[199] For foodstuffs, which formally fall under the scope of the decision, the informally introduced and, according to report, well-functioning system has been retained and not administratively blended with the non-food area.[200]

The Commission, under which an advisory committee is set up to implement the decision (Art. 7), is the central relay station for information. It receives notification of emergency measures taken, verifies it and telexes it to the competent authorities of the other Member States (Art. 1 (3)). These have to inform it without delay of any measures they may have taken following receipt of the information; the Commission in turn forwards this information to the competent authorities of other Member States (Art. 3). At the request of authorities supplying the information, it may in justified cases be treated as confidential (Art. 6). By March 1988 the Council is to decide in the light of experience obtained whether to continue or revise the system, initially restricted to 4 years (Art. 8 (2)).

Between March 1985 and September 1986, 34 cases were reported in the foodstuffs area and 33 in the non-foodstuffs area. In the latter area, communications overwhelmingly concerned electrical appliances, but also toys, and were concentrated almost exclusively in the last-half year;[201] now that initial difficulties have been overcome, a further increase in notifications is to be expected. It is at present being considered whether and to what extent European consumer organizations should be given the information received and whether information should be exchanged on a voluntary basis even before such a decision is taken.[202] The Commission has commendably announced its intention to include information for third countries in the early warning system, so as to prevent export of hazardous products or substances banned in the Community.[203]

One point that should be verified is whether the information exchange should remained confined to sovereign governmental urgent measures. It is likely that voluntary recall or warning campaigns by manufacturers and importers, not infrequently in response to pressure from government agencies[204] or consumer organizations or the media, are commoner than governmental marketing bans or restrictions. Government agencies more often act in an advisory capacity rather than with repressive police measures in monitoring the safety of

[197] See interim report (op. cit., fn. 194), section VI.
[198] Cf. 2.5 above.
[199] See interim report (op. cit., fn. 194), section IV and point 2 in the detail description of the procedure.
[200] See interim report (op. cit., fn. 194), section II.
[201] Cf. the lists of cases notified since March 1985, printed as an annex to the interim report (op. cit., fn. 194).
[202] See interim report (op. cit., fn. 194), section VIII.
[203] New impetus (op. cit., fn. 143), point 25. Cf. also the European Parliament resolution instructive in this context, on the export of pesticides to third countries, OJ C 307, 14 November 1983, 109 et seq.
[204] In this connection, cf. the cooperation between manufacturers and the Institute for Research and Standards in Ireland and the Consumer Safety Unit of the Department of Trade and Industry in Britain, and above all the British Code of Practice on action concerning vehicle safety defects.

technical consumer products.[205] Agencies responsible for monitoring product safety in Member States ought to exchange information regularly on their experience in this area of their work. Whether other Member States in turn act when they have received the information and what functionally equivalent measures they take and after how long is an important preliminary question for the setting up of Community follow-up market controls.[206]
Important supplementary functions or initiatives, correction and information are performed by the efforts of the consumer associations to set up information networks on product hazards.[207] All too often the authorities merely react to public pressure or else keep important information from the public or minimize hazardous situations. Since 1981 the BEUC has, with its BEUC Communications, set up a sort of Interpol system for hazardous products. By mid-1985 some 140 different products had been indicated as hazardous, though without distinction as to whether the case concerned a ban or warning from a public body, a voluntary recall by a manufacturer or a comparative test of goods.[208] In view of the practice by multinational concerns of selling off hazardous products and chemicals in Third World countries that have been banned in industrialized countries, the worldwide activities of the IOCU (International Organization of Consumers' Unions)[209] deserve particular attention.

3.5. The product liability Directive

Almost a decade after submission of the Commission's first proposal,[210] the Council arrived on 25 July 1985 at adoption of the Directive on defective products.[211]
The main lines of the Directive can be summarized as follows.[212] The manufacturer[213] of a product – except for primary agricultural products and game (Art. 2) – is liable, even without

[205] Thus in the German Land of North Rhine-Westphalia in 1984 tests under the GSG showed 5,393 defects out of 18,997 appliances tested; in only 27 case (i.e. 0.5% of the appliances found defective) was marketing or exhibiting prohibited; Jahresbericht 1984 der Gewerbeaufsicht des Landes Nordrhein-Westfalen, 232.
[206] More details in *Joerges, C./Micklitz, H.*, The need to supplement the new approach to technical harmonization and standards by a coherent European product safety policy, Hanse Law Review (HanseLR) 2010, 251, 3.4. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art06.pdf.
[207] On the activities of BEUC and IOCU, see *Domzalski, Y.*, The Interpol of the Consumer Association, in: Commission of the European Communities, Proceedings of the European Symposium on Product Safety in the European Community, Brussels, 17-18 May 1984, 18 et seq.
[208] CF. *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 154.
[209] A particular strongpoint of IOCU's activities is in the area of medicaments (Health Action International – HAI) and pesticides (Pesticide Action Network – PAN).
[210] OJ C 241, 14 October 1976, 9. Following opinions from the ESC (OJ C 114, 7 May 1979, 15) and the European Parliament (OJ C 127, 21 May 1979, 61), the Commission submitted an amended version in September 1979 (OJ C 271, 26 October 1979, 3).
[211] OJ L 210, 7 August 1985, 29.
[212] On the product liability directive in general see *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, 54 et seq; *Schmidt-Salzer, J.*, Kommentar EG-Richtlinie Produkthaftung, vol. 1: Deutschland, Heidelberg 1986; *Taschner, H.C.*, Die künftige Produzentenhaftung in Deutschland, 1986; *Hollmann, H.H.*, Die EG-Produkthaftungs-Richtlinie. DB 1985, 238 et seq., 2439 et seq.; *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq.; *Reich, N.*, Product Safety and Product Liability. An Analysis of the EEC Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, J. of Consumer Policy 9, (1986), 133 et seq.; *Reich, N.*, Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften, Baden-Baden 1987, para. 86-112; *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 320-330; *Schmidt-Salzer, J.*, Die EG-Richtlinie Produkthaftung, BB 1986, 1103 et seq.; *Schlechtriem, P.*, Angleichung der Produktehaftung in der EG. Zur Richtlinie des Rates der Europäischen Gemeinschaften vom 25.7.1985, VersR 1986, 1033 et seq.; *Storm, P.M.*, Rechtsangleichung durch die EG-Produkthaftungs Richtlinie?, PHI 1986, 112 et

fault, for damages caused by a defect in the product (Art. 1). The requirements as to proof are strict: the injured person has to prove the damage, the defect and the causal relationship between defect and damage (Art. 4).[214] Liability cannot be excluded by contractual provision and is unlimited in extent, though Member States may set a limit, of at least 70 million ECU for a given producer, for deaths or personal injuries caused by identical items with the same defect (Art. 16 (1)). The Directive does not apply to property damage in the industrial sphere; even property damage to non-commercial consumers is not compensated for fully, but only above a threshold of 500 ECU (Art. 9 (b)). Member States' provisions relating to non-material damage remain unaffected (Art. 9, last sentence). Manufacturers are not liable where the product complies with mandatory regulations issued by the authorities (Art. 7 (d)). Liability does not extend to development hazards, that is, to defects that could not be discovered given the stage of scientific and technical knowledge at the time of its manufacturing (Art. 7 (e)), unless a Member State explicitly so provides (Art. 15 (1)(b)). Liability is extinguished 10 years after marketing of the specific product causing the damage (Art. 11). Having regard to the latency period of up to 30 years between the action of chemicals and other harmful substances such as asbestos and the manifestation of damage and other after-effects, this is a very significant exclusion of liability, especially since in that sort of situation the conditions for tortious liability ought normally to be absent.

The central provision for the directive's safety concept, Art. 6 (1), says:[215]

> *A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:*
>
> *a) the presentation of the product;*
>
> *b) the use to which it could reasonably be expected that the product would be put;*
>
> *c) the time when the product was put into circulation.*

Accordingly, defectiveness of a product follows not from its lack of fitness for use, but from a lack of the safety that the public is entitled to expect.[216] The use of the "informed public" as the reference point provides courts in Member States with considerable leeway in putting the

---

seq.; *Pauli, A.*, Die EG-Produkthaftpflicht-Richtlinie und ihre Umsetzung in der BR Deutschland, PHI 1986, 153 et seq.; *Lorenz, W.*, Europäische Rechtsangleichung auf dem Gebiet der Produzentenhaftung. Zur Richtlinie des Rates der Europäischen Gemeinschaften vom 25. Juli 1985, ZHR 151 (1987), 1 et seq.; *Frietsch, E.*, EG-Richtlinie über Produkthaftung und deren Umsetzung in das deutsche Recht, DIN-Mitt. 66 (1987), 135 et seq.; *Budde, E./Reihlen, H.*, Die EG-Richtlinie zur Produzentenhaftung aus der Sicht der Ersteller technischer Regeln, DIN-Mitt.66 (1987), 63 et seq.; *Whittaker, S.*, The EEC Directive on Product Liability, Yearbook of European Law 5 (1985), 233 et seq.

[213] By Art. 3 of the directive, a "producer" is the manufacturer of the final product, a raw material or a partial product, or any person describing themselves as a producer, the so-called quasi-producer, and importers bringing product, from Third Countries into the territory of the Common Market. If the producer of a product cannot be established, then any supplier may be liable on certain conditions.

[214] This distribution of the onus of proof is called by *Taschner, H.C.*, in Die künftige Produzentenhaftung in Deutschland, NJW 1986, 611 et seq., 613 et seq., a "Magna Charta to protect industry against unjustified claims". For criticism see *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 153 et seq.; *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 328, with references to the potentially considerable effects in the area of regulatory practice outside the Courts.

[215] Cf. the tenor of Art. 1 of the French law No. 83-660 of 21 July 1983 on consumer safety: "Products and services must under normal conditions of use or any other conditions of use reasonably foreseeable by the expert offer the level of safety that can legitimately be expected, and may not endanger the health of persons". - Cf. the comments in *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 1.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[216] As the sixth recital in the product liability Directive explicitly says.

norm into practice. "The relevant safety expectations within the meaning of Art. 6 (1)", conclude Brüggemeier and Reich,[217] "are precisely what the courts find to be necessary in the individual case in terms of hazard protection, in the interest of protecting the integrity of the citizen of the Common Market".

Different definitions of safety expectations by courts in individual States cannot be ruled out.[218] In view of the differing legal traditions and divergent safety philosophies in Member States, any farther-reaching attempt at harmonization would probably be in vain. Consideration should however be given to whether an information system on relevant decisions by national courts[219] might not restrain excessive divergence. Such an information system would also help with deciding in 1995 on a secure basis of knowledge as to the inclusion of agricultural products and development risks, and as to the liability restrictions for damage resulting from deaths or personal injury (cf. Art. 15 (3) and Art. 16 (2)). Even before this second stage of the harmonization process, it would also provide further indications of product hazards, possibly useful for setting standards.

The directive's concept of defect is, even though this terminology[220] is not used, oriented towards foreseeable misuse. Accordingly, a manufacturer cannot get off with the defence that the specific use of the product did not correspond with proper use; otherwise, by restrictively defining use he could decide as to the defectiveness of his product and thus as to his own liability. Conversely, not every misuse counts against the manufacturer, but only misuse that could be foreseen.[221]

A product which at the time it was marketed met ordinary safety expectations does not subsequently become defective because an improved product is marketed later (Art. 6 (2)). Accordingly, tighter technical standards do not make a previously marketed product meeting all safety standards defective.

Among the grounds for exclusion of liability, the provisions of Art. 7 (d) are significant for our purposes. A manufacturer of a defective product that has caused damage can exculpate himself by showing that the defect is due to compliance of the product with mandatory regulations issued by the authorities. This does not include technical standards from private standardization organizations, since they are not issued by the public authorities and compliance is not mandatory. Nor does this change where technical standards have by way of sliding reference, such as under the German Appliances Safety Act or the Low Voltage Directive or the new approach to technical harmonization and standards, been made an integral part of a product safety regulation. In this case all that is legally relevant for the manufacturer are the basic safety requirements, or the general safety obligation of the

[217] *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 150.

[218] *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 6, para. 5-7, regards the danger of divergent decisions by the courts of different Member States as rather a theoretical one. He bases himself not only on the possibility of preliminary rulings from the ECJ, which favours uniform practice (op. cit., para. 7), but also on an exhaustive list of examples of product defects from Member States' case law (op. cit., p. 88-96).

[219] *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 150 et seq.

[220] Cf. *Joerges, C.*, Product Safety, Product Safety Policy and Product Safety Law, Hanse Law Review (HanseLR) 2010, 117, 2.1. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf.

[221] Cf. *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 6, para. 16-18; *Schmidt-Salzer, J.*, Kommentar EG-Richtlinie Produkthaftung, vol. 1: Deutschland, Heidelberg 1986, Art. 6, para. 141-148; *Hollmann, H.H.*, Die EG-Produkthaftungs-Richtlinie. DB 1985, 238 et seq., 2393 et seq.

Appliances Safety Act;[222] compliance with the relevant technical standards merely justifies the rebuttable assumption that the binding safety requirements have been met. In order not to hamper technical progress, when sliding reference is used departure from technical standards is allowed, sometimes explicitly, if the same safety is achieve in other ways.[223] In this case the onus of proof that products meet the basic safety requirements is on the manufacturer.[224] In other words, compliance with particular European or national technical standards to which the Community or Member State legislator has referred does not allow the manufacturer to apply the exclusion of liability under Art. 7 (d).[225] As an argument for this, Taschner[226] adds:

> *Manufacturers in a particular industry, normally the authors of such technical standards, may not, by issuing standards that exclude liability, make themselves the masters of their own liability.*

The ground of exculpation in Art. 7 (d) applies only where statute or ordinance has bindingly prescribed one particular method of production, to which the product defect is causally to be attributed. Compliance with a statutorily prescribed minimum standard is not enough, since nothing prevents the manufacturer from going beyond this minimum standard and increasing the safety of his product. Compliance with the basic safety requirements under the new approach to technical harmonization and standards is not automatically enough to free the manufacturer from liability.[227]

Positive and negative lists issued by the authorities do not constitute grounds for exclusion from liability under Art. 7 (d). Use of an admissible food additive (in the case of positive lists), or of a non-prohibited additive in the case of cosmetics (in the case of negative lists) is freely open to the manufacturer, but not bindingly prescribed; positive and negative lists are

[222] § 3 (1) (1) GSG.

[223] Thus § 3 (1) (2) GSG.

[224] On the above cf. the 3rd and 4th basic principles in the new approach to technical harmonization and standards, OJ C 136, 4 June 1985, 1 et seq. (3). See further the comments 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, 3.2. Online available at: http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf.

[225] So also *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 7, para. 24-35; *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 152 et seq.; *Reich, N.*, Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften, Baden-Baden 1987, para. 95a; *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 325; *Frietsch, E.*, EG-Richtlinie über Produkthaftung und deren Umsetzung in das deuschte Recht, DIN-Mitt. 66 (1987), 135 et seq., 137; *Hollmann, H.H.*, Die EG-Produkthaftungs-Richtlinie. DB 1985, 238 et seq., 2394 et seq.; *Schlechtriem, P.*, Angleichung der Produktehaftung in der EG. Zur Richtlinie des Rates der Europäischen Gemeinschaften vom 25.7.1985, VersR 1986, 1033 et seq., 1036 et seq.; *Lorenz, W.*, Europäische Rechtsangleichung auf dem Gebiet der Produzentenhaftung. Zur Richtlinie des Rates der Europäischen Gemeinschaften vom 25. Juli 1985, ZHR 151 (1987), 1 et seq., 12. The only divergent view as far as can be seen is from *Budde, E./Reihlen, H.*, Die EG-Richtlinie zur Produzentenhaftung aus der Sicht der Ersteller technischer Regeln, DIN-Mitt.66 (1987), 63 et seq., 66, who however generously overlook the characteristic of the bindingness of standards and *Schmidt-Salzer, J.*, Kommentar EG-Richtlinie Produkthaftung, vol. 1: Deutschland, Heidelberg 1986, para. 99-104, for the case where interpenetration or statutory regulation with various intercompany sets of regulations and administrative practice put manufacturers concerned into a position that is identical with a mandatory statutory norm.

[226] *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 7, para. 26.

[227] *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 7, para. 25 and 33.

aimed merely at ruling out the use of particular hazardous substances, but not at bindingly prescribing a particular way of producing a product.[228]

According to Art. 7 (e), a manufacturer is not liable where he shows that the "state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered". The manufacturer cannot exculpate himself by showing that he complied with the state of scientific and technical knowledge.[229] The state of scientific and technical knowledge is in Art. 7 (e) a criterion not for the manufacturer's action but for the recognizability of the defect. What is decisive is not the individual manufacturer's actual possibilities of knowledge but whether anyone at all could recognize the defect because the scientific and technical aids objectively existed.[230] Since scientists and technologists exchange information worldwide, it is not the scientific and technical expertise available in the manufacturer's country that accounts.[231] Nor is it relevant whether the science and technology are generally recognized and generally available.[232] Science lives on the methodical encouragement of doubt, and constantly re-defines technical risks; to see it as the administration of presumably established stocks of knowledge is to misunderstand it. Accordingly even potential hazards expressed in outsider views but scientifically justified are to be taken into account.[233] Before marketing a hazardous substance – development risks are relevant above all for the chemical and pharmaceutical industries – all investigations into the state of science and technology that may provide information to determine side-effects and after-effects are to be employed, or to be taken into account. This does not of course remove the dilemma that the research laboratories of industry, which frequently have a monopoly of knowledge, do not necessarily see their task as being the publication of scientific knowledge and the advancement of science.[234]

All in all, this probably means that the product liability directive's contribution to harmonizing the level of product safety will remain limited.[235] Important questions of liability

[228] Particularly incisive is *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 325; see also *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, 1986, Art. 7, para. 31; *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 153; *Reich, N.*, Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften, Baden-Baden 1987, para. 95.

[229] But see *Kretschmer, F.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie, PHI 1986, 34 et seq., 35; by contrast *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, 54 et seq., 55.

[230] *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 7, para. 44; *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 153.

[231] *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 7, para. 45.

[232] But see *Taschner, H.C.*, Die EG-Richtlinie zur Produzentenhaftung und die deutsche Industrie. Eine Erwiderung, PHI 1986, Art. 7, para. 45. Cf. also *Schmidt-Salzer, J.*, Kommentar EG-Richtlinie Produkthaftung, vol. 1: Deutschland, Heidelberg 1986, Art. 7, para. 133-148, who wishes to go further and focus on whether knowledge of the relevant hazard has become general knowledge among experts in the area concerned. He however takes it that the legal meaning and purpose of Art. 7 (e) is to clarify that in principle tortious liability should continue to apply to development risks (op. cit., Art. 7, para. 139-142).

[233] Cf. *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 153; *Reich, N.*, Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften, Baden-Baden 1987, para. 106.

[234] Instructive examples in *Krämer, L.*, EWG-Verbraucherrecht, Baden-Baden 1985, para. 326.

[235] On this see *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 155; *Schmidt-Salzer, J.*, Die EG-Richtlinie Produkthaftung, BB 1986, 1103 et seq.; *Schlechtriem, P.*, Angleichung der Produktehaftung in der EG.

law are not harmonized; apart from the non-material damages and development risks already mentioned, and property damage in the commercial area, this also applies to recalls and to product monitoring. This means that the harmonization of product liability aimed at in the Directive has remained largely unachieved; it was regarded as necessary because "existing divergences may distort competition and affect the movement of goods within the Common Market and entail a different degree of protection of the consumer"[236]. The exclusion of compensation claims for damage to commercially used property means, in view of the fact that the major proportion of product liability cases handled through insurance companies falls into the commercial sector,[237] that the differing cost burden on manufacturers in individual Member States because of differing liability regulations remains unaffected. In the case of damage to non-commercial users too, the goal of harmonization has been achieved only in embryo. In the case of property damage the injured person will, in order to get around the excluded own risk, which is anything but a petty amount, have recourse to the general law of tort. In the case of personal injury too, in order to assert claims to a solatium, he will likewise have to proceed under the relevant general law of tort.[238] One should not however lose sight of the fact that the product liability directive ought to lead to an improvement in consumer safety especially in countries where today product liability is still regulated on a pure basis of tortious liability, with a corresponding burden of proof on the injured person.

Zur Richtlinie des Rates der Europäischen Gemeinschaften vom 25.7.1985, VersR 1986, 1033 et seq., 1043; *Storm P.M.*, Rechtsangleichung durch die EG-Produkthaftungs Richtlinie?, PHI 1986, 112 et seq., 116-218; *Pauli, A.*, Die EG-Produkthaftpflicht-Richtlinie und ihre Umsetzung in der BR Deutschland, PHI 1986, 153 et seq., 154 et seq.; Lorenz, Europäische Rechtsangleichung auf dem Gebiet der Produzentenhaftung. Zur Richtlinie des Rates der Europäischen Gemeinschaften vom 25. Juli 1985, ZHR 151 (1987), 1 et seq., 36 et seq. The limited success of the harmonization is explicitly admitted in the second-last recital to the Directive: "Whereas the harmonization resulting from this cannot be total at the present stage but opens the way towards greater harmonization".

[236] First recital to the Product Liability Directive.

[237] According to a letter from the HUK Association to the Federal Minister of Justice of 15 November 1979, p. 3, 75% of damage involving liability for industrial products is accounted for by claims from industrial contractual partners, mainly because of subsequent damages arising because of defects in preliminary products supplied.

[238] *Brüggemeier, G./Reich, N.*, Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB, WM 40 (1986), 149 et seq., 155.