

The need to supplement the new approach to technical harmonization and standards by a coherent European product safety policy⁺

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Introduction

The declared primary objective of the new approach to technical harmonization and standards is to overcome the stagnation in law approximation policy and thus promote the realization of the European internal market. Our survey of the most important aspects of the new approach has, however, already shown that the regulatory technique of reference to standards continually comes up against problems of product safety policy. Let us mention only the controversies about the degree of perception of the “basic safety requirements”,¹ the unsolved problems of recognition of national certification,² the decision-making powers of Member States under the safeguard clause procedure³ and the endangerment of internal market policy through the reservations in Art. 100 a (4) SEA.⁴ The following sections will go beyond these already visible points of contact to systematically consider the effects of the new approach on the beginnings of a European safety policy. It will not question the principle of the regulatory aspects of the new approach, but instead seek to bring out the ensuing problems the Community will have to solve if it is to push through its new harmonization policy.⁵

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¹ 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>.

² Falke, J./Joerges, C., The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.3.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

³ Falke, J./Joerges, C., The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.3 and 3.6. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁴ Falke, J./Joerges, C., The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 4.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁵ That the Commission is itself in principle aware of these implications as documented by the Commission communication of 23 July 1985, “A new impetus for consumer policy”, COM (85) 314 final, point 19 et seq., Commissioner Varfis’ answer to EP question N° 2778/85, OJ C 277 of 3 November 1986 and the Commission communication to the Council on “Inclusion of consumer policy in the other common policies” of 24 October 1986, COM (86) 540 final, 5 et seq.; and the ensuing Council resolution of 15 December 1986, OJ C 3, 7 January 1987, 1.

1. Product safety obligations

Wherever it harmonizes areas of law that (also) involve the safety of products the Community must lay down a binding or optional European safety level. Here, the “traditional” method of approximation of laws has led to a many-faceted range of product safety duties. The low-voltage Directive⁶ provides for protection only given “proper use”. The medicaments Directive⁷ uses the same standard. By contrast, the consumer policy programmes of 1975 and 1981 used the terms “normal” or “foreseeable”.⁸ This formulation was taken up both in the preamble to the Directive on cosmetics⁹ and in the decision on the exchange of information on product hazards,¹⁰ whereas the “new impetus for consumer protection policy” speaks only in general terms of the “need” to set “safety requirements at Community level”.¹¹ The product liability Directive,¹² finally, refers to the justified safety expectations of users “taking all circumstances into account”, in particular the “reasonably” foreseeable use. The relevant formulations in the model Directive of 4 May 1985¹³ are kept vague: “... products ...may be placed on the market only if they do not endanger the safety of persons, domestic animals or goods when properly installed and maintained and used for the purposes for which they are intended”. Furthermore, “in certain cases, in particular with regard to the protection of workers and consumers, the conditions set out in this clause may be strengthened (foreseeable use)”. The indefiniteness of this text results from the fact that “intended” use is introduced as the normal criterion, but the rule-exception relationship reversed again because the reference to protection of workers and consumers applies to almost all conceivable goods, and furthermore the tightening up of safety obligations in the areas mentioned is only a prospective possibility, and finally because such obvious differentiations as those by age of users concerned are lacking. In any case the structure of the model Directive shows the Community’s general tendency to orient the level of protection in consumer goods to “foreseeable” use. Furthermore, even the first two directives or proposals for directives submitted on the basis of the model Directive introduced an unavoidable differentiation. While the Directive for simple pressure vessels seeks to guarantee the safety of persons, domestic animals and goods only given “proper use”¹⁴, toy manufacturers have to take “foreseeable” use into account, bearing in mind the “normal behaviour of children”, and also take account of differences in children’s ages.¹⁵

⁶ OJ L 77 of 26 March 1973, 29 (Art. 2); cf. *Falke, J./Joerges, C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁷ OJ L 147 of 9 June 1975, 1.

⁸ *Falke, J./Joerges, C.*, The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review (HanseLR)* 2010, 239, 3.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf>.

⁹ OJ L 262, 27 September 1976, 169.

¹⁰ OJ L 70, 13 March 1984, 6; cf. Chapter, 3.4 above.

¹¹ Commission communication to the Council (fn. 5 above), COM (85) 314 final, point 21.

¹² OJ L 210, 7 August 1985, 29 (Art. 6); cf. for more detail *Falke, J./Joerges, C.*, The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review (HanseLR)* 2010, 239, 3.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf>.

¹³ OJ C 136, 4 June 1985, 1, Section B II.

¹⁴ OJ L 220, 8 August 1987, (Art. 2 (1)), 148.

¹⁵ Cf. Art. 2 (1) and Annex II to the proposal for a directive on safety of toys, OJ C 282, 8 November 1986, 4.

The framework of the model Directive is of fundamental importance in other respects too. It takes account of the fact that the reference method leaves the Community legislator's responsibilities for product safety unaffected and that harmonization covering broad groups of products presupposes the laying down of appropriate safety duties. The question whether this insight, still expressed in the model Directive in relatively open, and above all non-mandatory, formulations, is to lead to the positive introduction of a Community general clause on product safety will be returned to later.¹⁶

2. Internal market policy priorities and the demonstration project on accident information systems

The list of "criteria for choosing priority areas", attached to the model Directive of 7 May 1985 and aimed at explaining its intended scope,¹⁷ mentions mainly regulatory criteria. In principle, the new approach will be appropriate only where it is genuinely possible to distinguish between "essential requirements" and "manufacturing specifications" where the requirements for protecting safety make "inclusion of large numbers of manufacturing specifications" unnecessary,¹⁸ and where, as with many "engineering products and building materials" not yet covered by Community regulations, essential safety requirements can be defined for a "wide range of products". The Commission White Paper¹⁹ sets the rather legislative criteria of the model Directive in a more ambitious integration policy context. The legislative technique of reference to standards is ascribed far-reaching functions: it is to enable the Community to create an expanding and flexible internal market, to increase the competitiveness and innovative capacity of European industry and promote the introduction of new technologies. If the regulatory technique of the new approach is to be understood from the viewpoint of the ambitious policy perspectives of the White Paper, then law approximation projects brought in will be oriented towards industrial policy priorities. But even where the practice of harmonization policy is pragmatically oriented towards the chances of implementing harmonization measures, tensions between internal market policy and product safety policy priorities can be foreseen. For product safety policy, the Community has with the "demonstration project on a Community accident information system"²⁰ created a mechanism which can, by collecting and assessing data on the number and severity of accidents, supply (among other things) knowledge about hazards arising from consumer goods and therefore contribute to clarifying where safety policy action is needed.²¹ The discrepancies between internal market priorities and product safety policy

¹⁶ *Joerges, C./Micklitz, H.*, Completing the New Approach through a European Product Safety Policy, *Hanse Law Review* 2010, 383, 3.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art07.pdf>.

¹⁷ *Op. cit.* (fn. 13), 8 et seq.

¹⁸ In this connection see the Commission communication to the Council and the European Parliament "Completing the internal market: Community foodstuffs law", COM (85) 603 final of 8 November 1985, 2.

¹⁹ Completing the internal market, Luxembourg 1985, point 60 et seq.

²⁰ OJ L 109, 26 April 1986, 23; cf. *Falke, J./Joerges, C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

²¹ Cf. *Joerges, C.*, Product Safety, Product Safety Policy and Product Safety Law, *Hanse Law Review (HanseLR)* 2010, 117, 1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>, and *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>.

priorities again bring up a conflict of objectives that already marked “traditional” approximation of laws.²² The sixth recital and Art. 1 (2) of the decision on the demonstration project, however, at the same time show a way that would at least allow this conflict of objectives to be dealt with: findings of accident research should be used in defining safety objectives and drawing up standards. This might be done by, for instance, carrying out in-depth studies on product risks preferentially in areas where the Commission has ordered a new standard or in which it has been presented with objections regarding the safety conformity of standards or certifications. This kind of feedback would of course assume that the Commission and the Standing Committee already set up by the information Directive of 28 March 1983²³ and now entrusted also with the coordination tasks connected with the new standardization policy²⁴ would cooperate with the committees active in the area of product safety policy.²⁵

3. The primacy claim in the new approach and Member States’ safety interests

Even assuming the admissibility in Community law of reference to standards,²⁶ this does not mean that applicability of this regulatory technique is guaranteed. Experience shows that transposing directives into national law is a thorny process that has at all stages, from incorporation of the directives into national legislative acts up to judicial and administrative practice in Member States, to reckon with varied resistance.²⁷ In the case of the new approach to technical harmonization and standards, additionally, a regulatory technique justified on internal market policy considerations and unfamiliar to many Member States is to be pushed through against other legal traditions and political demands.²⁸ Even now a whole range of lines of resistance on safety grounds can be discerned.

3.1. Conflict potential

Following the model of the low-voltage Directive of 19 February 1973,²⁹ directives adopted on the basis of the new approach are to secure full harmonization of the areas and types of

²² Cf. *Falke, J./Joerges, C.*, The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review (HanseLR)* 2010, 239, 1.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf>.

²³ OJ L 109, 26 April 1983, 8 (Art. 5).

²⁴ Cf. *Falke, J./Joerges, C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.6. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

²⁵ Cf. apart from the Advisory Committee pursuant to Art. 7 of the decision on a demonstration project (fn. 20) also Art. 7 of the decision of 2 March 1984 on the exchange of information on hazards arising with the use products (fn. 10).

²⁶ Cf. *Falke, J./Joerges, C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

²⁷ This has been showing frequently and in detail: cf. only Eiden, *Rechtsangleichung* 1984, 76 et seq.

²⁸ Fn. 13 above; cf. also *Falke, J./Joerges, C.*, The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review (HanseLR)* 2010, 239, 1.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf>.

²⁹ Cf. *Falke, J./Joerges, C.*, The new approach to technical harmonization and standards, its preparation through ECJ

risks covered.³⁰ They are therefore to be “directly effective”, have primacy over contrary national law and “block” legislative activity. But all these doctrines on the effects of European directives, though recognized in principle, may cause considerable difficulties of application in practice. Extension of the doctrine of direct effect to directives is a reflection of shortcomings in transposition in Member States; the doctrine therefore merely states that individuals may appeal against application of national law to the anti-Community conduct of the national legislator.³¹ But the ECJ has now linked direct effect in favour of individuals with the conviction that “the relevant obligation (on the Member States) is unconditional and adequately precise”.³² Accordingly, in the case of the new approach, controversy over the functions of the “essential safety requirements”³³ can affect the applicability of the new directives. If in future the Community makes the safety objectives sufficiently precise “as to enable the certification bodies straight away to certify products as being in conformity, having regard to those requirements in the absence of standards”³⁴, the chances for the application of the European law increase; on the other hand, precise specification of safety objectives makes it harder to secure consensus when adopting new directives and weakens the attractiveness of the regulatory technique to standardization organizations.

In applying the doctrine of primacy and blocking effect and also in connection with actions for breach of treaty brought by the Commission under Arts. 169 and 30 EEC, similar difficulties are foreseeable. The ECJ has given to understand that primacy of European law cannot depend on whether the primary motivation was internal market policy or safety policy,³⁵ and it follows from the judgment in the *Cremonini v. Vrankovich* case³⁶ that Member States must if they wish to assert their interests keep to the procedures provided in the directives. These directives can and should, however, provide only a presumption of safety conformity of products bearing the relevant certifications. Controversy on the appropriate level of safety of products is therefore ultimately to be decided on the basis of the criteria laid down in the directives.³⁷ The wider is the leeway for interpreting objectives

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>.

³⁰ Cf. Section B II 1 of the Model Directive (fn. 13).

³¹ Cf. e.g. ECJ case 9/70, judgment of 6 October 1970, ECR [1970], 825/Traunstein Finance Office; case 33/70, judgment of 17 December 1970, ECR [1970] 1213/Italian Ministry of Finance; case 41/74, judgment of 4 December 1974, ECR [1974] 1337/Home Office; case 102/79, judgment of 6 May 1980, ECR [1980] 1473/Commission v. Belgium. A full description of the case law up to 1982 can be found in Oldenbourg, 1984, 50 et seq.; on the interpretation of the doctrine of direct effect taken as a basis here, see also Karoff, 1984, 659 et seq.

³² According to the formula in case 148/78, judgment of 4 May 1979, ECR [1979] 1629, 1642, para. 23/Ratti; on the more generous tendencies in earlier judgments see Karoff, 1984, 663.

³³ Cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review* (HanseLR) 2010, 289, 3.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

³⁴ Section B III 1 of the Model Directive (fn. 13).

³⁵ Case 148/78, op. cit. (fn. 31), 1644.

³⁶ Case 815/79, judgment of 2 December 1980, 3583.

³⁷ On the procedure 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, 3.4. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>, and on the similar situation with 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, 2.3.3. Online available at:

left in the new directives, the greater is the chance for Member States to secure their safety policy positions in substance in the new procedures even once they have formally transposed a directive. Explosive problems can continue to arise where a Member State takes additional measures to protect safety interests and decisions therefore have to be taken on the “blocking effect” of the new approach. The ECJ decisions *in rebus* Ratti³⁸ and Grunert³⁹ indicate that the Court wishes to base the “blocking effect” of Community law primarily on specific contradictions between the content of directives and Member States’ legal provisions, and the ban on legislative action in an area dealt with by the Community assumes that the Community has also actually pursued its policy.⁴⁰ This again raises the question whether the Community ought not, in the interest of applicability of the new approach, to develop a more comprehensive product safety policy.

3.2. Functions of the safeguard clause procedure

All situations of dispute mentioned always ultimately come down to the same point, namely whether the regulatory technique of reference to standards can establish itself not only as a strategy for internal market policy but also as a safety policy concept. The procedural provisions in the model Directive guarantee that disputes about the European level of product safety can be brought in not only “preventively” in determining safety objectives and recognizing standards and conformity certificates, but also “responsively” through subsequent objections to decisions taken at Community level, via the safeguard clause procedure.

The safeguard clause procedure, introduced by the model Directive, had to go beyond the usual type of safeguard clause, given the merely presumptive effects of recognition of standards and of conformity certifications. Its function is, though the typical wording of the safeguard clause may not make this explicit, to give Member States possibilities for action in the event of hazards not yet recognized when a Community standard was adopted.⁴¹ The practice has become that Member States are through their representatives on the administrative or regulatory committees being allowed decision-making powers in safeguard clause procedures.⁴² The model Directive departs from these examples in both

<http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>. On recourse to Art. 36 EEC see also *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>.

³⁸ *Op. cit.* (fn. 32).

³⁹ Case 88/79, judgment of 12 June 1980, ECR [1980] 1827.

⁴⁰ Cf. Waelbroeck, 1982, 548 et seq.; *Weiler, J.H.H.*, *Supranational Law and the Supranational System: Legal Structure and Political Process in the European Community*, Ph.D. Thesis (European University Institute, Florence) 1982, 79 et seq.; Reh binder/Stewart, 1985, 40 et seq. On the corresponding interpretation of Art. 36 EEC by the ECJ cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 1.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁴¹ Cf. *Falke, J./Joerges. C.*, The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review (HanseLR)* 2010, 239, 2.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf> and Krämer, 1985, para. 246, who describes and criticizes the contrary practice in the case of the Directive on cosmetics (fn. 9).

⁴² Cf. for more Krämer, 1985, para. 236 and *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

respects: not only new objections can be considered in the safeguard clause procedure, but also all findings already arrived at can be questioned, and the Commission is alone to decide as to the justifiability of any objections.⁴³ This means that all the difficulties of reaching agreement that the Council was to free itself of according to the new approach must under the safeguard clause procedure be solved by the Commission, which is to undertake the actual fine tuning of product safety policy differences among Member States. Even setting aside legal reservations regarding such broad delegation of decision-making powers to the Commission,⁴⁴ it seems scarcely conceivable that the safeguard clause procedure in the model Directive can be developed into a routine measure with short periods of decision and that Member States will rely on its possibilities for protecting their rights. These as consequences for both follow-up market controls⁴⁵ and the cooperation between the Standing Committee and committees at Community level in the area of product safety policy.⁴⁶

3.3. Majority decisions pursuant to Art. 100 a (4)

As a scratch test of the applicability of the reference technique of the new approach to Member States' product safety law we may take the power given to Member States, following ratification of the Single European Act,⁴⁷ by Art. 100 a (4) to keep to their own safety law against harmonization measures adopted only by qualified majority. The Commission can presume "arbitrary discrimination" or "disguised restraint of trade" pursuant to Art. 100 (4), second sentence, and the ECJ establish misuse of the rights under Art. 100 a (4), first sentence, pursuant to Art. 100 a (4), third sentence, only where the Community regulations in fact take account of Member States' interests in protection. Harmonization measures decided by qualified majority must therefore apply the relatively highest standard if the unity of the common market is not to be endangered. The Single European Act's provisions on environment protection may have the same effect, in so far as product regulations simultaneously take account of environmental and consumer policy interests. By Art. 130 t, Member States may take more stringent protective measures even where the Council has decided unanimously, as long as the measures are "compatible with the Treaty".

clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 5.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁴³ On the more restrictive shape given to the Commission's powers in the safeguard clause procedure 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>.

⁴⁴ On the objections 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, 5.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁴⁵ See 4 below.

⁴⁶ Cf. *Joerges, C./Micklitz, H.*, Completing the New Approach through a European Product Safety Policy, *Hanse Law Review* 2010, 383, 3.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art07.pdf>.

⁴⁷ Bull. EEC, Suppl. 2/86; cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 4. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

Controversies as to the meaning of Art. 100 a (4) will seem hypothetical only on the assumption that only outvoted Member States may assert their rights arising out of this provision,⁴⁸ and that at any rate in the case of directives laying down only essential safety objectives the unanimity principle will *de facto* not be departed from. Irrespective of this, however, it is possible to link systematic conclusions with Art. 100 a (4). If even qualified majority decisions of the Council do not bind Member States, or only to a very limited extent, how are the Commission's sole rights of decision under the safeguard clause procedure to be justified? Such objections can be refuted only with the argument that Art. 100 a (4) is a special arrangement not in itself compatible with the supranational structures of Community law, which does not change the binding effect of directives adopted pursuant to Art. 100 (1) EEC and leaves the Council's powers of delegation pursuant to Art. 155, fourth indent, EEC unaffected. In its decision-making practice, the Commission will nevertheless not be able to avoid taking account of the sensitivity of Member States to interventions in their safety law on grounds of internal market policy, expressed in Art. 100 a (4).

3.4. Compliance with standards

Probably the most problematic aspects in practice of the reference to standards favoured by the model Directive as a regulatory instrument for safety policy arise from the difficulties of imposing standards that are not legally binding. A comparison with the move from mandatory to voluntary standards in the US is instructive. The American Consumer Product Safety Commission plays an active part in developing voluntary safety standards; it pays attention to their effects on competition and to the involvement of consumer organizations in standardization procedures, and verifies the content of standards produced and compliance with them.⁴⁹ The model Directive and the agreement between the Commission and the European standards organizations admittedly contain a number of procedural guarantees (in part still in need of precise specification).⁵⁰ But the only control mechanisms the Commission can use preventively to affect actual compliance with standards are the recognition procedures for standards and for conformity certificates; it can affect the practice of national certification centres only indirectly through the provisions contained in the directives or proposals for directives on simple pressure vessels, toys and construction products.⁵¹ These limited possibilities of influence are in line with the internal market policy perspectives of the new approach, according to which the point is to ensure free

⁴⁸ However, 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, 4.1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁴⁹ Cf. *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, *Hanse Law Review (HanseLR)* 2010, 137, 4.4. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁵⁰ Cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁵¹ 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, 3.3.2. Furthermore, on the lacunae in protection that may result from diverging certification practices, see the opinion of the Consumer Advisory Committee of 22 March 1985, *STO/7/85*, 5.

movement of goods in the Community, so that what matters is only the equivalence of standards and conformity certificates recognized by the Community. But this internal market policy perspective neglects the decisive question from the product safety policy viewpoint, namely how a move to voluntary standards can be combined with actual guarantees of safety interests.

4. Regulatory lacunae in the model Directive in the case of emergency measures and follow-up market controls

The model directives and the directives or proposals for directives on simple pressure vessels, toys and construction products explicitly recognize Member States' power to take directly effective measures in the interests of protecting safety.⁵² A Member State that takes advantage of this possibility has to have recourse to the safeguard clause procedure. But the legally critical cases are not those where a Member State loses, since then it must accept the Commission decision, but instead the Commission's possibility of imposing measures it finds justified Europe-wide.

The pressure for action arising in such cases is irresistible, for both economic and legal policy reasons. Unilateral measures by a Member State encroach on the unity of the internal market which is the very point of the new harmonization policy. Unilateral measures are, moreover, admissible only in accordance with the safety objectives of directives. Where the Commission has found such measures to be legally justified, this implicitly means that Member States that do not share the Commission's interpretation and do not follow the measures it recommends are disregarding the product safety duty under Community law.

The model directive's laconic formulation that the Commission has to "remind" such Member States of their duty to act⁵³ in no way guarantees, even if taken over into individual directives,⁵⁴ a uniform application of follow-up market controls within the Community. In the case of such controls Member States apply administrative powers that the Community can influence only indirectly.⁵⁵ As with mutual recognition of administrative acts in general and of national conformity certificates in particular,⁵⁶ the Community must seek to bring about uniform practice by Member States in follow-up market control.

The more recent relevant directives or proposals for directives have in principle taken account of this perception. The proposal for a Directive on "products which, appearing to be other than they are, endanger the health or safety of consumers"⁵⁷ had provided for

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

⁵³ Section B VII 2 of the Model Directive (fn. 13).

⁵⁴ In the Directive on simple pressure vessels (fn. 14, Art. 7) not even this was done; cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.4. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁵⁵ Specifically on technical safety law see Seidel, 1971, 753 et seq. and in general Rengeling, 1977, 19 et seq. 25 et seq.

⁵⁶ Cf. *Falke, J./Joerges. C.*, The new approach to technical harmonization and standards, its preparation through ECJ case law on Articles 30, 36 EEC and the Low-Voltage Directive, and the clarification of its operating environment by the Single European Act, *Hanse Law Review (HanseLR)* 2010, 289, 3.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁵⁷ OJ C 272, 28 October 1986, 10.

implementation of a Community-wide prohibition (Art. 2), obligations on Member States to apply such bans (Art. 3) and provisions for Europeanizing nationally decided bans (Arts. 4 and 6). However, the since adopted directive⁵⁸ lacks these provisions, as does the Directive on simple pressure vessels.⁵⁹ The Directive of 1 December 1986 on airborne noise emitted by household appliances⁶⁰ differentiates in the monitoring of national decisions between objections by Member States to European standards and disputes as to national standards and regulations (Art. 9); this differentiation shows what resistance the Europeanization of control measures has to reckon with even when “only” the enforcement of Community provisions is involved.⁶¹ The proposal for a Directive on toys,⁶² finally, must, in addition to provisions on bans and recalls (Art. 7 (1), first sentence) and on Europeanization of such decisions by Member States (Art. 7 (1), second sentence, (2) - (4)), contain criteria for the recognition of national test centres (Annex III). The danger of “subsequent” splitting of the common market through single-handed administrative action in implementation of Community regulations can be opposed by the Commission only if it moves to bring about intensive cooperation among competent centres in Member States and in the Community. From all this, the recall issue provides the plainest proof that realization of the European internal market must involve Europeanization of product safety law. The more decisively the Community applies the conditions for the free marketability of products by making product safety obligations uniform, the more pressing becomes the need to harmonize control measures whereby Member States comply with these duties. We shall return to the practical consequences of these connections.⁶³

5. Reference to standards and manufacturer liability

For manufacturer liability in accordance with the Directive of 25 July 1985,⁶⁴ the new harmonization policy is not of direct legal importance. The legal liability duty of product safety in Art. 6 of the Directive is to be interpreted autonomously by the civil courts. It will neither be tightened up nor slackened off through the product safety obligations of new directives. European or national standards a manufacturer must comply with to market his products do not exclude liability in civil law pursuant to Art. 7 d of the Directive. Nor is this “state of science and technology” which by Art. 7 e limits manufacturer liability, identical with the state of European and national standards.⁶⁵

The legal independence of product liability and product regulation does not, however, in any way rule out *de facto* mutual influence, which can indirectly have considerable legal

⁵⁸ Op. cit. (fn. 14), Art. 4.

⁵⁹ Cf. fn. 53.

⁶⁰ OJ L 344, 6 December 1986, 24.

⁶¹ On the question of the differentiations in Art. 9 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, 5.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁶² Fn. 15 above.

⁶³ *Joerges, C./Micklitz, H.*, Completing the New Approach through a European Product Safety Policy, *Hanse Law Review* 2010, 383, 3.4. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art07.pdf>.

⁶⁴ OJ L 210, 7 August 1985, 29.

⁶⁵ Cf. *Falke, J./Joerges, C.*, The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review (HanseLR)* 2010, 239, 3.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf>.

effects. American law provides the clearest example of this, as being the furthest developed both in the area of product liability and in that of standard setting by federal agencies. Thus, detailed concepts for taking safety aspects into account in product planning have been extrapolated from the exhaustive case law on design faults.⁶⁶ It is indisputable that product liability procedures offer information of relevance not only legally but also technically, which can be used by Government agencies,⁶⁷ standardization organizations and individual firms. Admittedly, empirical studies have shown that while firms react to the excessive damages imposed under American law, these reactions concentrate often on developing strategies to deal with damage suits.⁶⁸ Standardization organizations seem neither ready nor able to make use of the dynamic development of manufacturer liability systematically in their work.⁶⁹ Conversely, both the standards set by federal agencies and voluntary standards of the standardization organizations play a considerable part in product liability actions, both to establish the state of the art and to demonstrate technically feasible alternatives.⁷⁰ Comparably intensive interactions between product liability law and product safety law are unknown in Community Member States⁷¹ and cannot be expected even after the product liability Directive is converted into national law.⁷² Nevertheless, directed measures to increase the degree of effectiveness of the product liability Directive for European product safety policy are entirely conceivable. Thus, systematic exploitation of the case law and of documents of relevant actions in Member States could clarify whether the safety law demonstrated by European conformity certifications is accepted or whether the case law is questioning the integrative objectives of the new approach through autonomous and/or divergent safety requirements. It is however equally conceivable to use them in the direction of Europeanizing standards, in the procedures for recognition of standards and conformity certificates and finally in the bringing of recall actions.

6. Involvement of consumers in technical standardization

The new approach to technical standardization confers on the European standardization organizations CEN/CENELEC the task of defining the European safety standards, or *de facto* “the European level of safety”, on the basis of defined safety objectives which have to

⁶⁶ Weinstein/Twerski/Piehler/Donaher, 1978, esp. 136 et seq.

⁶⁷ Cf. Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., Examples of Product Safety Legislation, *Hanse Law Review* (HanseLR) 2010, 137, 4.2 in fn. 57. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁶⁸ Eads/Reuter, 1983, VIII et seq., 21 et seq., 24 et seq., 69 et seq., 92 et seq., cf. Joerges, C., Product Safety, Product Safety Policy and Product Safety Law, *Hanse Law Review* (HanseLR) 2010, 117, 3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁶⁹ Cf. Johnson, 1982.

⁷⁰ For a systematic evaluation of the American case law in this connection see Hoffman/Hoffman, 1980-81, 283 et seq.; cf. also Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., Examples of Product Safety Legislation, *Hanse Law Review* (HanseLR) 2010, 137, 4.4.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁷¹ The German debate, still the relatively the most fruitful, is confined to legal and normative considerations (cf. Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., Examples of Product Safety Legislation, *Hanse Law Review* (HanseLR) 2010, 137, 3.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>; about France cf. Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., Examples of Product Safety Legislation, *Hanse Law Review* (HanseLR) 2010, 137, 1.6. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>; and England Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., Examples of Product Safety Legislation, *Hanse Law Review* (HanseLR) 2010, 137, 2.7. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>).

⁷² Cf. Falke, J./Joerges, C., The “traditional” law approximation policy approaches to removing technical barriers to trade and efforts at a “horizontal” European product safety policy, *Hanse Law Review* (HanseLR) 2010, 239, 3.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art04.pdf>.

be converted into specific mandates. The privatization of the law-making process goes hand in hand with opening up of the standardization procedure for interested circles, including consumers. Consumer involvement is aimed at providing democratic legitimacy for the new regulatory approach.⁷³ Participation can only succeed where the consumer interest is brought in to actual standardization. The organization of this involvement thus stands in the centre of interest. However, conceptual and organizational weaknesses of consumer involvement suggest a rather pessimistic view regarding the attainment of the ambitious goal. Conversely, it would be false to draw the conclusion from foreseeable difficulties, which are perhaps removable only conditionally, that consumer involvement at Community level should be rejected. For the possibilities that have been opened up offer chances to influence the standard-setting process that did not so far exist. Consumer involvement has to live with the constant dilemma of on the one hand being measured against expectations it can perhaps never meet, and therefore having a sort of alibi function, and on the other of grasping the opportunity offered, however limited are the resources.

6.1. Basic questions of consumer involvement

Consumer involvement in standardization exists in some Member States, such as the Federal Republic of Germany, France and Britain, and has done for several decades.⁷⁴ Without seeking to define the exact starting point for consumer involvement,⁷⁵ all three countries have points in common which take on importance in assessing consumer involvement under the new approach. All three have in the course of the consumers' movement intensified involvement in the 1970s, and all three are at the same time the only countries in the European Community that have "organized" involvement, namely the DIN Consumer Council,⁷⁶ the AFNOR Consultative Committee and the Consumer Advisory Committee. Studies on whether the opening up of the procedure to consumers has led to different contents for standards are not available. The only so far known study on consumer involvement was done in the Federal Republic of Germany.⁷⁷ Questions to groups involved in standardization – industry, government and consumers – indicated a basically positive (self-) image. The consumer involvement was felt to have led to a change in the content of standards. Nevertheless, the authors diagnose structural defects that ought to be removed.

⁷³ Micklitz, *Produktsicherheit* 1986, 109 et seq. The question was discussed on 4/5 June 1987 at a meeting of the Community's "European Forum on Consumer and European Standardisation", cf. Bosserhoff, 1987, *Europäisches Forum*.

⁷⁴ Survey in Lukes, 1979, 48 et seq. (France), 123 et seq. (Great Britain); see also Reich/Micklitz, 1981, 99 et seq.; Bosma, 1984, 34 et seq.

⁷⁵ In France consumers were included following the first major restructuring of standardization during the Second World War, see Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., *Examples of Product Safety Legislation*, *Hanse Law Review (HanseLR)* 2010, 137, 1. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>; specifically on consumer involvement, Art. 5 of the decree of 24 May 1941, printed in Germon/Marano, 1982, 111. In Britain the Advisory Committee was set up in 1946; see Bosma, 1984, 41. On consumer involvement in DIN see Brinkmann, 1976, and Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., *Examples of Product Safety Legislation*, *Hanse Law Review (HanseLR)* 2010, 137, 3.4.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁷⁶ On the work of the Consumer Council see Bosserhoff, 1980, 670 et seq.; *idem*, 1984, 1 et seq.; cf. also Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H., *Examples of Product Safety Legislation*, *Hanse Law Review (HanseLR)* 2010, 137, 3.4.5. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁷⁷ See Schatz, 1984, 178 et seq.

6.1.1. Privatization and participation

In its agreement on cooperation with CEN/CENELEC⁷⁸ the Commission transferred the cooperation between State and business begun with the agreement between DIN and the German Government to European level.⁷⁹ Since the Community is not a State and since CEN/CENELEC merely brings together the national standards organizations, specific Community problems arise about which there is no experience at national level. While the Commission is by Council decision of 16 July 1984⁸⁰ formally legitimated to reach agreement with standardization organizations, it cannot conclude any legally binding agreements providing for delegation of Community powers to private standardization organizations, since this is not provided for by the Rome treaties. The “general guidelines on cooperation” were therefore arrived at, and could *de facto* develop the same legal quality as an international treaty or a “memorandum of agreement”.⁸¹ CEN/CENELEC are being asked to do too much in applying the general guidelines, since the representatives of the European economy in fact do not sit on them.⁸² Specifically, the question arises whether consumer involvement should be brought about through national contributions in the CEN/CENELEC standardization committees or at European level through the European consumer organizations existing there.

The general guidelines contain no specifications on this. All that is laid down is that “the Commission will as appropriate contribute to the establishment of suitable arrangements”. But the agreement between the German Government and DIN⁸³ does not contain any provisions on involvement of interested circles either. In para. 1 (2) DIN merely undertakes to take the public interest into account. It is only the notes that make it clear that this provision is among other things aimed at an increase of consumer protection in standardization.⁸⁴

What the new forms of cooperation at national and European level have in common is not only that the functional delegation of legislative powers is bound up with the decision not to set substantive regulations,⁸⁵ here in connection with consumer safety and health, but that the opening up of the procedure to particular interested circles (consumers) is not bound up with any formally guaranteed rights.⁸⁶ The “suitable arrangements” mentioned in the

⁷⁸ Printed in DIN-Mitt. 64 (1985), 78 et seq.

⁷⁹ Micklitz, Perspectives, 1984, published in a revised version in CMLR 23 (1986), 617 (621 et seq.).

⁸⁰ Printed in DIN-Mitt. 63 (1984), 681.

⁸¹ See *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 2.6. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁸² On the prospects for this sort of restructuring see Reihlen, 1984, 7.

⁸³ Printed in DIN-Normenheft 10, Grundlagen der Normungsarbeit des DIN, 1982, 49 et seq.; for more details in the agreement between DIN and the Federal Government of Germany see *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3.4.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁸⁴ Grundlagen der Normungsarbeit des DIN (op. cit. fn. 80), 54.

⁸⁵ On the function of reference to standards in the GSG see *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, Hanse Law Review (HanseLR) 2010, 137, 3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf> and on safety objectives under 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, 3.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art05.pdf>.

⁸⁶ In the Federal Republic of Germany procedural rights were laid down following the standards agreement when setting up the DIN Consumer Council, which leads Bopp-Schmehl/ Heibült/Kypke, 1983, 172 et seq. to make the

general guidelines are worked out in a procedure that involves only the Community administration and the standards organizations (CEN/CENELEC). Those whose right to speak is at stake may, to be sure, be heard, but have a weak position in the negotiating process. For what requirements can be deduced from “real involvement” and from support from the Commission “as appropriate” for the establishment of “suitable arrangements”? That sequence of phrases shows the openness of a process the object of which is no less than to legitimize the new approach.

On 11 December 1987 the Commission took an official position on consumer involvement in standardization.⁸⁷ It pressed for strengthening of consumer participation at national level, in order to ensure that consumer interests could be input into the position of national representations on CEN/CENELEC. What the way forward is to be at European level is on the other hand left open. The Commission wishes to arrive at “an agreement with CEN/CENELEC on a new way of working”. Whatever this may mean, institutionally solid consumer participation does not at any rate seem to be within immediate grasp. One year later on 4 November 1988 the Council confirmed the Commission’s position by enhancing the necessity to push for an effective consumer participation at the Member States level and by watering down consumer participation at the Community level*. The conclusion of an “agreement” is no longer mentioned; instead reference is made to a priority programme for consumer fairs and to seminars. We can safely assume that this type of activity will strengthen the consumer input at best marginally should be held to increase the consumer input in standardization.

Involvement understood in this way, without substantive provisions and without procedural guarantees, cannot remain without consequences for the consumer input to standards. For if the conditions of consumer involvement are partly determined by the standards organizations, the obvious thing to do is channel the consumer interests in standardization in accordance with the criteria set by business of the proportionality of consumer representatives, the technical relevance of their contributions and feasibility,⁸⁸ in order to exclude alternative (non-professional as being lay, non-technical as being sociological, and non-feasible as being economically expensive) product concepts from standardization.⁸⁹ The whole of consumer protection thus becomes subordinated to the existing goals of standardization and can be brought about only in a piggyback procedure unless other vehicles can be found, in other words, unless the goal is necessary for other reasons than those of health or safety protection. In this way, safety policy becomes integrated into internal market policy. Alternative product concepts, humanized technology as the object of product safety law, are placed institutionally under a constraint to provide justification. Safety objectives that go beyond the “generally accepted state of the art” will be accepted only where consumers can show that existing practice has led to severe accidents. This sets the framework for consumer involvement in private standardization. The privatization does not mean participation truly worthy of the name.

following statement: “The demonstration that this function has been carried out did not follow substantive criteria of assessment of standards, but compliance with particular procedural rules ...” Conversely it should be borne in mind that the standards agreement could not have been concluded before the parties had agreed on consumer involvement.

⁸⁷ COM(87)617 final, 11 December 1987.

* OJ No. C 293, 1, 17 November 1988.

⁸⁸ Convincingly, Kypke, 1983, 213.

⁸⁹ See Brüggemeier/Falke/Holch-Treu/Joerges/Micklitz, 1984, 8 et seq.

6.1.2. The consumer interest in standardization⁹⁰

Consumers want better products, safer products. Consumer demands regularly lengthen the manufacturer's proceedings. They call for a little "more" than the manufacturers are prepared to give. This is in line with the institutional framework for consumer involvement. Separate product concepts, in order to avoid the word "alternative", could be brought about only in an offeror process,⁹¹ but not as an appendix to standardization oriented towards the needs of business. The slight experience with the American offeror process has at any rate shown that consumers can if given the chance arrive at their own conceptions of product safety. In Community Member States there have not so far been many attempts to develop technical standards from the consumer's "own" point of view. Even differentiated models of the determination of the consumer interest concentrate on the manufacturer's perspectives and seek to load their position with consumer policy significance.

Bosma⁹² has dealt comprehensively with the issue. She demands that an adequate consumer orientation in standards answer three questions:

- (1) Should the final consumer be directly involved in standardization, and if so, how can such a commitment effectively be organized? Who can adequately represent the consumer, or also, who speaks "for" the consumer in the relevant bodies?
- (2) Where is the needed scientific background to come from for choosing priorities that take account of individual households or society as a whole?
- (3) Where is the necessary scientific mechanism to come from in order to analyse the needs, wishes and behaviour of individual consumers?

In order to arrive at an answer on the basis of these three questions, Bosma splits consumer interest into three categories:⁹³ consumer interest and marketing, consumer interest and product technology, consumer interest and product information. Bosma includes under marketing, among other things, requirements on consideration of foreseeable misuse in design, but also for possible recall or else liability in the event of defectiveness of a product.⁹⁴ Consumer requirements on product technology would be expressed through the requirement for a technology assessment (especially with new technologies), an estimate of the social consequences of the introduction of new or modified products and a quality assessment by the relevant testing agencies.⁹⁵ The interest in adequate product information is stated to require provision of special safety marks.⁹⁶

This ambitious concept of determination of the consumer interest is in Bosma's view too much for the individual consumer.⁹⁷ The latter, as often not being able at all to articulate wishes or sometimes even know what they are, far less being in a position to set priorities, would have to be represented on the relevant bodies by experts. Bosma does not fail to see the problems facing realization of this kind of concept, but feels that an intensive process of

⁹⁰ See Bosma, 1984, 16 et seq.

⁹¹ *Brüggemeier, G./Falke, J./Joerges, C./Micklitz, H.*, Examples of Product Safety Legislation, *Hanse Law Review (HanseLR)* 2010, 137, 4.1.2.2. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art03.pdf>.

⁹² As well as Bosma, 1984, 16 et seq., see Bosma, 1985, 9 et seq.

⁹³ Bosma, 1984, 17, 19, 22.

⁹⁴ *Op. cit.*, 18.

⁹⁵ *Op. cit.*, 20 et seq.; similar considerations by Venables, 1982.

⁹⁶ Bosma, 1984, 23.

⁹⁷ *Op. cit.*, 25.

scientific study (processing of surveys, etc.)⁹⁸ could permit adequate establishment of the consumer interest in standardization.

It would be attractive to differentiate the model proposed still further or even develop it towards an (alternative) consumer concept of consumers themselves. It is attractive because the proposed categories for including sociological findings as to the behaviour of consumers, the acceptance of environmental technologies, etc. are very inviting. The job is valuable and necessary and should be done, but there are a number of structural problems that should be borne in mind. The concept does not so far take account of the specific conditions for determining the consumer interest at European level. If even nationally it is hard to determine “the” consumer interest, then at European level differences in familiarity with technical dangers also enter in, as well as differences in technical solutions to deal with the danger. These social and technical differences have led to different safety philosophies in the Community which now have to be combined within the standards organizations. Consumers are afraid, and can cite examples, that standardization oriented towards creation of an internal market will lead to a reduction in the level of safety.⁹⁹ Though effective consumer involvement might help to avert this risk, there should still be consideration of whether it is all desirable to make the various safety philosophies in the Member States uniform. Thinking by both political and technical bodies is only at its outset. Already, however, it can be seen that work in standardization bodies does not aim at levelling out differing safety philosophies and regulatory approaches, but wishes to let them continue to exist side by side.¹⁰⁰

Another thing that seems problematic from the European viewpoint is the scientific presentation of consumer participation favoured by Bosma. In a European organization of consumer involvement this would lead to a predominance of the industrial countries, Germany, France, and Britain, while southern European countries, with their experiences of handling technology, would be excluded.¹⁰¹ The opening up of the prospect reveals the internal contradictoriness of the idea of making consumer involvement scientific. Consumer organizations have to meet the requirements on professionalism in contributions in standardization bodies; this is only the way they can stand up in argument. At the same time, this necessity cuts them off from their rank and file, since consumer organizations in developed industrial countries derive their body of experience also from sources that do not meet the demand to be scientific, or do so only partly. The tendency to make it scientific may in the long term affect the very foundations of consumer work, and lead in Germany, France and Britain to more technology-oriented consumer advice, but at European level the differences are liable to continue for a long time. What should be done therefore is to develop a model that does not rule out non-professional experience, particularly in the southern European countries, in handling technology, but includes it in an integrated concept of involvement in standardization.

⁹⁸ Bosma, 1985, 9.

⁹⁹ Bosma, 1984, 12.

¹⁰⁰ On this see 6.3.3 below.

¹⁰¹ At the same time the non-inclusion of southern European countries in the decision-making process was used as an argument against the admission of consumer observers; see 6.3.1 below.

6.1.3. Chances of consumer involvement

In view of the multiplicity of tasks assigned to European consumer involvement in standardization, the question arises where consumers are to get the ability to do the job in substantive terms. Questionnaires to national consumer representations in standardization organizations in European Community Member States have recently confirmed what will surprise no one: even at national level there is a shortage of experts and of the requisite financial resources.¹⁰² Experts are likely to be available in significant quantity only if consumer organizations start having more recourse to technicians in their field work. But this would lead to a fundamental restructuring of the direct contact between the organizations and consumers. Consumer organizations are traditionally bound up with personal product consultancy. The use of new media promises a considerable lightening of the burden, but at the same time offers opportunities for conflicts among organizations. For ecotrophologists would be replaced by technicians who not only handle media control product consultancy but at the same time have a broad range of work on handling complaints.¹⁰³ At the same time, only a step like this can create the conditions for gradually increasing the number of experts. However, even this kind of restructuring cannot solve the financial problems of consumer organizations. Effective consumer involvement in standardization will always remain dependent on governmental subsidies.

The present problems arising for standardization from the involvement of consumers have been summarized by the DIN Consumer Advisory Council's office in a manual.¹⁰⁴ Honorary work on behalf of consumers in standardization committees continually impinges on the recurrent structural pattern of "reasons for standardization – person – object of standardization – asserting of interest". In detail:

Whether there are *grounds* for standardization is decided ultimately by the manufacturers. Consumers are therefore dependent on the goodwill of the other side if they wish to encourage standardization of a particular product. The situation looks somewhat brighter in the area of safety standards, since the Appliances Safety Act has given consumers the necessary stiffening to push safety standardization forward. For this very reason, there is a need to press at European level for stronger obligations on manufacturers, importers and traders to market only safe products.¹⁰⁵ Even inside safety standards, consumer representatives ought to take priority decisions in order to make it possible to find a standardization project that will pay. It is in this very decision that the scarcity of resources comes into play.

The manual then sets out clearly the compromises that the DIN Consumer Council has to engage in so as even to find *consumer representatives* that would commit themselves to standardization work. Accordingly, the DIN Consumer Council has even accepted people not employed in a consumer institution. The principle applied is that people must have sufficient technical knowledge, which is not to be understood as actual specialization, be motivated, be legitimated to speak on behalf of consumers and be able to defend their position in DIN working committees.

¹⁰² Bosma, 1984, 34 et seq. carried out a survey of those involved in standardization and continually came to the same findings.

¹⁰³ On such considerations see Micklitz, 1985, 177 et seq.

¹⁰⁴ Printed in Bosserhoff, 1984, 7 et seq.

¹⁰⁵ See Joerges, C./Micklitz, H., Completing the New Approach through a European Product Safety Policy, *Hanse Law Review* 2010, 383, 3.3. Online available at: <http://www.hanselawreview.org/pdf10/Vol6No02Art07.pdf>.

The requirements on the person in each case depend quite largely on the *object of standardization*. However, consumer representatives rarely get beyond the position of “informed laymen”, measured by the standards of the other side. In order to meet the requirements on the professionalism of contributions, the manual provides methodological indications for working out a consumer standpoint. If the problem is localized (safety, health), consumer protection objectives have to be defined in detail. Consumer representatives should have recourse here to complaints, accident statistics, tests of goods, etc. Particular difficulties face consumers when it comes to determining the actual level of safety. This is where the shortcomings of making things scientific become particularly clear. For empirical studies and scientific assessments are often replaced by mere exchange of experience, reference to test reports or comparable standards from other countries. If the grounds for standardization are present, the right people found and the object for standardization specified, the question still arises how the consumer side is to assert its position in the relevant committees.

Experience in DIN confirms the need to utilize the procedural rights formally allowed to the full. The DIN manual could act as a model for working out procedural guarantees at European level.

Experience with consumer involvement at national level and the structural problems of consumer involvement pointed out by the DIN Consumer Council suggest the conclusion that the chances for European consumer involvement should be regarded rather skeptically. If experts are lacking even at national level, where are they to be got from at European level? The financial problems are considerably increased by the high travel costs. The structural problems of consumer involvement diagnosed in the DIN manual must each be increased by the dimension of coordinating consumer interests Europe-wide so that at every level – reason for standardization, person, object of standardization, strategies to follow – mechanisms have to be provided to ensure that national consumer interests are reconciled. Nevertheless, it would be over-hasty to deny consumer involvement in European standardization work all prospect of success *a priori*. European involvement at the same time offers consumers chances to assert their interests that cannot be found in the same way at national level. A decisive step in this direction would be to break into the organizational structure of CEN/CENELEC by involving *European* consumer organizations in the standardization process. This kind of direct influence from the European angle would give consumers something of an edge over business, which must first coordinate its interests through national organizations. Moreover, consumer involvement ought not to be incorporated in the organizational structure CEN/CENELEC but the opposite: it should be established independently of the standardization organizations. This very trend is emerging in the development of involvement so far.¹⁰⁶

But the institutional advantages can be fully utilized by consumer representatives at European level only if they divide up tasks and capacities and concentrate their forces to take advantage of the resources from twelve Member States that they can now draw on. This means setting up a “professional organization” of consumer representatives at European level, since this is the only way to guarantee an adequate definition of the consumer interest in the sense of Bosma’s idea. This kind of professionally organized consumer involvement would have to take measures to ensure adequate taking of the interests of South European consumers into account.

¹⁰⁶ See 6.2 below.

6.1.4. Consumer access to public information

The chances for effective consumer involvement depend largely on how far consumer representatives can back up their position in the relevant committees with information. As well as mobilizing information sources of their own, they will have to depend here on access to information compiled either nationally or by Community institutions. The Commission has now considerably expanded its information policy in this very area of standardization of product safety, so that direct access by consumer representatives here is of considerable importance. The information procedure in the field of technical standards and regulations¹⁰⁷ might provide consumer representatives in the area of safety standardization with an overview of national differences and at the same time give them ideas as to which national safety standard should be favoured as the European solution.¹⁰⁸ The Community system for rapid exchange of information on hazards arising from consumer products¹⁰⁹ and the Community information system on accidents caused by consumer goods¹¹⁰ theoretically create the conditions for bringing statistically supported information into the standardization process.

In fact, all three projects hinder consumer access to the information. The information procedure in the field of technical standards and regulations treats information received as confidential.¹¹¹ The European consumer representatives have no access to the CEN/CENELEC database. At most they can secure information from the national representations of consumers on the standards organizations. The Community system for rapid exchange of information on dangers arising in using consumer goods excludes the consumer from the beginning. Where a national authority so desires, information is treated confidentially in justified cases.¹¹² The accident information system, which is perhaps even more important, does not provide for any possibility of using accident statistics in standardization procedures before the end of the model project in 1989.¹¹³ This may change, especially if sources of danger that suddenly arise make Community-wide regulation necessary. It is, though, very striking that all three projects bar consumers from access to the information.

6.2. The existing organization structure of consumer involvement¹¹⁴

Since December 1982 and April 1983 respectively, the four organizations represented on the Consumer Consultative Committee (CCC) (BEUC, the European Trade Union Conference, the Association of Community Family Organizations and the European Community of Consumer Cooperatives) have been sending observers to various technical committees of the European standardization bodies CEN and CENELEC. This started with exhaustive discussions between the Commission, CEN and CENELEC and the European

¹⁰⁷ OJ L 109, 26 April 1983, 8 et seq.

¹⁰⁸ On the chances for the information project see Micklitz, *Perspectives*, 1984, 33 et seq.

¹⁰⁹ OJ L 70, 13 March 1984, 16 et seq.

¹¹⁰ OJ L 109, 26 April 1986, 23 et seq.

¹¹¹ Fn. 103 above, Art. 8 (4).

¹¹² Fn. 105 above, Art. 6.

¹¹³ Fn. 106 above, Art. 8.

¹¹⁴ The following statements are based on two reports drawn up by the BEUC for DG XI today Consumer Policy Service, to give an account of the utilization of contributions: report on the involvement of European consumers in European standardization, BEUC/2111/84, 26 October 84 (cited as BEUC 1984) and report on standardization, STD/20/85, 31 December 1985 (cited as BEUC, 1985, Report).

consumer organizations on the form of possible involvement by European consumers. Ultimately those involved agreed to direct collaboration of European consumers in standardization, although it long seemed as if CEN/CENELEC would not be prepared to accept direct involvement since this would mean a brake in CEN/CENELEC's organization structure. Without pressure from the Commission it would not have come to direct involvement of European consumer representatives in standardization. The Commission pays some of the expenses: its contribution was 60,000 ECU in 1984, 40,000 in 1985 and 90,000 in 1986. In October 1983 the Commission (DG XI) and BEUC signed an agreement on the involvement of European consumers in European standardization.¹¹⁵

6.2.1. Consumer Advisory Committee, working group on standards and secretariat for coordination

The Consumer Consultative Committee (CCC) has for many years had a working group on standards that was brought into negotiations between the Commission and CEN/CENELEC. The way towards a financing of European consumer involvement by the Commission became free only when the four members of the CCC had agreed to locate coordination of European consumer involvement in BEUC. The coordination secretariat is formally independent, with BEUC merely providing the institutional framework.

To give a closer definition of the tasks of the coordination secretariat, it is needful to keep the three organizations involved, BEUC (as the contractual partner of the Commission), the CCC and the coordination secretariat separate. The BEUC has taken over merely formal competence. It has given an undertaking to the Commission to: coordinate the positions of European national standardization organizations in the area of standardization; secure information on standardization from European and national consumer organizations and pass it on; pay travel expenses for experts taking part in CEN/CENELEC meetings; hold coordination meetings on standardization in order to arrive at a common position for European consumers on standardization questions, provide for contacts between Commission offices, the standardization organizations and consumer organizations in order to secure active and effective cooperation of European consumers on questions of European standardization; take other measures suitable for contributing to the efficiency of consumer involvement in the work of CEN and CENELEC. Similarly, BEUC is obliged to bring interim reports and annual reports before the Commission. *De facto*, however, this work is done not by BEUC, but by an employee paid by the Commission who directs the coordination secretariat.

The CCC's interest is to draw as clear a demarcation line as possible between the area of work of the European coordination secretariat and the work of the CCC working group on standards.¹¹⁶ The coordination secretariat is to coordinate participation by consumer representatives in CEN/CENELEC (selection, appointment, reimbursement of expenses, training, coordination) and in national standardization bodies, to give technical support to the CCC in its discussions and supply technical reports on specific topic at the request of Commission offices. The work of the working group on standards is to concentrate on the following three fields: verification of new Commission initiatives in the area of standardization policy; verification of proposals for directives in the area of standardization and any setting of minimal requirements in the area of consumer protection; evaluating the

¹¹⁵ Printed in BEUC, 1984, Annex I.

¹¹⁶ See XI/371/86, 22 May 1986, ccc/17/86 "Beteiligung der Verbraucher an den Normungsarbeiten".

annual report of the coordination secretariat. In other terms, the CCC working group on standards formulates policy and the coordination secretariat (BEUC) implements it. The working group on standards would thus as hitherto, and like the other CCC working groups, also prepare opinions for subsequent adoption by the plenary sessions. In addition to policy formulation, the working group on standards also wishes to exercise a supervisory function over the coordination secretariat, which cannot necessary be reconciled with the CCC's range of tasks to date.

6.2.2. Consumer observers on technical committees

Only representatives of test institutes or members of independent research institutes act as consumer observers on the technical committees of CEN/CENELEC. Without this ever having become public, it seems to be clear inside the CCC that representatives of consumer committees in national standards organizations can at any rate not act as observers.¹¹⁷ This does not rule out their inclusion as experts in coordination meetings. However, this prior decision by the CCC illustrates a certain skepticism regarding the independence of consumer representations institutionally involved in national standardization organizations. The differing perspectives of testing and scientific institutions may be decisive here. For while consumer representatives on national standardization organizations are supposed to find generally accepted solutions together with the manufacturers, the testing and scientific institutes may take the product standardized into consideration relatively free from such economic compulsions. The number of consumer observers on CEN/CENELEC technical committees has steadily risen since work began.¹¹⁸ In 1984 European consumer representatives were sending four observers to nine technical committees. In 1985 it was eight to ten committees. Of these, however, only four committees were really active in 1985. Altogether, their 58 committees in CEN, eight of which do not work, in seven of which consumers are involved and 34 of which would be of interest to consumers. CENELEC has 34 committees on 3 of which consumers are involved, while seven would be of interest. This assessment is based in a selection according to the following criteria:¹¹⁹ safety considerations, influence of standards on competition, consumer information, performance criteria, energy aspects. In fact the possibilities for European consumer associations to send observers are considerably restricted. First of all, one has to find an observer prepared to take the job on. This observer has to provide information on the state of work on a particular CEN/CENELEC committee, name the most important points for discussion, reflect the various standpoints of manufacturers and the national standardization organizations, form an opinion of his own and above all send a report to the coordination secretariat after each meeting.¹²⁰

To avoid misunderstandings, it would seem appropriate to give some further explanations of the number of committees set up by CEN/CENELEC. Behind each technical committee there is a whole range of products. When European consumer associations send an observer to TC 61 (safety of household appliances), he has to cover the whole product range of

¹¹⁷ BEUC, 1984, 9 and Annex II (minutes of the meeting on problems of consumer involvement in European standardization work of the Consumer Advisory Council, BEUC 162/83, 15 November 1983, 6(g)).

¹¹⁸ As well as the BEUC report (fn. 111 above) see Consumer Participation in Standards Work, STD/17/86, 15 May 1986.

¹¹⁹ BEUC, 1984, Annex II (fn. 114 above), 6 (f).

¹²⁰ Op. cit., 3.

electrical appliances to be found in the home. The gamut runs from washing machines, dryers, electric cookers, toasters, refrigerators, freezers, coffee mills, clocks and irons to massage appliances, sunray lamps and sewing machines. And this list is by no means complete. A comparison with national sets of standards might lead to the result that European standards are much broader in content than differentiated national standards.

6.2.3. Observers' coordination meetings

One of the most important tasks of the Coordination Secretariat is to hold coordination meeting with consumer observers and national consumer experts on the individual committees.¹²¹ Since it is incumbent on the consumer observer to represent the interests of consumers in individual Member States, he must be informed and advised by national consumer experts in order to be able to intervene appropriately in CEN/CENELEC meetings. Accordingly, the coordination meetings are the core of European consumer participation. Theoretically, there is an entitlement to raise new projects for CEN/CENELEC standardization through the coordination meetings. In practice, the coordination meetings serve mainly to tackle problems "brought back" by the observer from meetings of the technical committees. The Coordination Secretariat then has the task of drawing up an agenda, inviting the experts from the various Member States and distributing the necessary papers in advance. Since the national experts' work is honorary, the success of the coordination meetings depends largely on voluntary commitment by the experts. At the same time, the greatest commitment is useless if the information flow among national consumer experts is not adequately organized.

6.3. Practice to date with consumer participation in CEN/CENELEC

European consumer representatives can now look back on two and a half years of practical experience. The reporting duty placed upon BEUC by the Commission offers a good basis for making an initial analysis from an internal viewpoint. This seems all the more important because thinking is at present going on in DG XI about how consumer involvement is to be organized in future.

6.3.1. Procedural questions

Observers on CEN/CENELEC technical committees meet a number of procedural obstacles at the start of their work that do not yet seem to have been removed. This annoyance can ultimately be removed only by written procedural guarantees, a conclusion that can be confirmed from experience with the DIN Consumer Council.¹²²

The first appearance of consumer observers on the technical committees regularly led to the question of what status the observer ought to have on the technical committees.¹²³ This was even though CEN/CENELEC had informed the relevant committees of the inclusion of consumers in standardization through a circular. *De facto*, the consumer representatives faced the burden of justifying why they wanted to take part in the work.

¹²¹ BEUC, 1984, 4 et seq.; BEUC, 1985, Report, 14 et seq.

¹²² 6.1.3 above.

¹²³ BEUC, 1984, Annex II (fn. 113 above), 2.

While these problems were more or less rapidly solved in course of time, much more complex obstacles faced consumer representatives when it came to putting forward their position in discussion. Two areas proved particularly important: involvement in drawing up the agenda and inclusion of consumer positions set down in writing in the organized information flow within CEN/CENELEC. An example may illustrate this.

The commitment of the consumer representatives on the CENELEC Committee on Safety of Household Appliances (TC 61) very quickly brought out the need to think about the extent to which technical standards ought in principle to take account of the fact that children are not always under supervision (the so-called exclusion clause).¹²⁴ At the coordination meeting in May 1984, the decision was taken to set a debate going in TC 61. At the next TC 61 meeting in June 1984, the Coordination Secretariat's request was however rejected. Observers had according to the Committee Chairman no possibility of bringing forward a paper in the Technical Committee. According to CENELEC procedural rules this was open only to the Secretariat and to national delegations. An exception might be made for consumer observers if the Commission asked CENELEC to consider a corresponding proposal.¹²⁵ Despite this unpromising beginning, the Coordination Secretariat, at the request of the observer, went further into the question. At the January 1985 coordination meeting a letter to the Chairman of TC 61 was drafted. The next meeting of TC 61 in May 1985 showed, however, that the paper had not been distributed.¹²⁶ The Coordination Secretariat thereupon decided to approach the President of TC 61 and urge that the letter be distributed. This letter was distributed to Committee members, with the agreement of the CENELEC Executive Secretary. At the next meeting of TC 61 in October 1985 the President then made it clear that henceforth written comments of the consumer observer would automatically be passed on to TC 61 members.¹²⁷ Altogether, then, it took more than a year in order merely to secure formal access to the debating forum, without a single substantive word yet having been spent on the actual issue.

More fundamental in nature are the problems arising from the low participation by consumer observers, from only four Member States. For the committees ask observers for legitimation of their claim to speak on behalf of the European consumer when only four, or even three, consumer delegations out of 12 Member States were involved in coordinating a consumer standpoint.¹²⁸ The structural weaknesses are imputed to the consumers themselves and additionally the task is imposed on them of specifically insuring inclusion of South European countries. This position may be used positively as an argument for asking the Commission for suitable financial contributions in order to organize this process. The remaining point is the difficulties that have arisen in the case of contracts issued to CEN/CENELEC by the Commission. With one exception,¹²⁹ consumers have not been included in the terms of the contract. And even this one Community measure happened more or less by chance, because the European Consumer organizations had got wind of the Commission's intention in time. Practical problems with the technical committees arose particularly because the remit given by the Commission was often so imprecisely worded

¹²⁴ For details on the substantive issue see 5.3.3 (2).

¹²⁵ BEUC, 1984, Annex VIII: Protocol of the meeting of CENELEC, Oslo, 18-22 June 1984.

¹²⁶ BEUC, 1985, Report, Annex 1 d: Co-ordination Meeting on Electrical Household Appliances TC 61, Brussels, 12 September 1985.

¹²⁷ BEUC, 1985, Report, Annex II b: Minutes of the Meeting of CENELEC TC 61, Athens, 1-3 October 1985.

¹²⁸ CCC's observers report on meeting of CEN TC 62 – Gas Convector Heaters, London 12-13 March 1986.

¹²⁹ BEUC, 1985, Report, 19; what is meant is TC 48 Safety of Gas Water Heaters, on which see Note for file, op. cit., Annex III a.

that the Technical Committee saw itself compelled to give the decision on what the remit involved back to the Community.¹³⁰ It should be noted in passing that the Commission is giving contracts to CEN/CENELEC before safety objectives under the new approach have yet been specified.

6.3.2. Information and coordination

Since consumers are cut off at European level from Community information sources, the need to build up an internal information network and coordinate incoming information Community-wide takes on even greater importance. The importance of this task was just as clear to the CCC working group on standards as it was to BEUC when it set up the Coordination Secretariat. But the Coordination Secretariat has neither the financial nor staff resources to build up this information and coordination network itself. Instead, it is dependent on cooperation by national experts on coordination committees and on their information sources in their home organizations.

A clear tendency to professionalization¹³¹ has emerged, which pursues more or less the following course: if an observer has been found for a technical committee of importance to European consumers, the Coordination Secretariat assembles the information to put the observer in a position to get a picture of the state of work in the technical committee. This is the only guarantee that the observer can recognize his possibilities of influencing the ongoing procedure.¹³² If problems arise in the technical committee, the observer approaches the Coordination Secretariat and asks for the calling of a coordination meeting. The Coordination Secretariat prepares the meeting, sends round all necessary material and/or asks for it from members of the coordination meeting. While in the initial stages the members of the coordination meeting sought to assess the problems arising on the basis of their experience, a procedure has now been developed in which one of the members undertakes to produce a background paper which, according to the topic, assesses either specific scientific research or ad hoc surveys within national consumer organizations.¹³³ This background paper is used by the observer, following decision in the coordination meeting, for submission to the technical committee.

The intensity of information exchange between the observer and the national representatives or experts in the coordination committee depends strongly on the activity of the technical committee. In other terms, CEN/CENELEC determines the rate of the consumer work. Besides current information and coordination needs, the Coordination Secretariat has begun a number of in-depth studies. These serve on the one hand the objective of proceeding in product-related fashion, as was the case with the study by the

¹³⁰ BEUC, 1985, Report, 11; *op. cit.*, Annex II f: Report by Mr. Bosserhoff on CEN/TC Gas Water Heaters, which seeks to specify the requirements on the wording of terms of reference; Bosserhoff put his criticism into practice and drew up a proposal of his own for giving a Community remit to CEN/TC 48; *op. cit.*, Annex III b: Resolutions taken at the 1st Meeting of CEN/TC 52/WG in Berlin, 1985-09-25/27, which lists the shortcomings of the terms of reference in specific form.

¹³¹ Cf. e.g. the minutes of the first coordination meeting, BEUC, 1984, Annex II (fn. 114 above) and of the meeting of 10 June 1986: Minutes of the CCC Coordination Meeting June 10, 1986. In both meetings a number of problem areas were touched on; the later minutes show the growth in self-confidence by their precise listing of relevant material questions.

¹³² This had at the outset proved a great obstacle, BEUC, 1984, Annex II (fn. 114 above) 2.

¹³³ BEUC, 1985, Report, Annex VI: STD/12/85, Maximum Surface Temperatures of Heating Appliances by D. Grose, Consumer Association, June 1985 and BEUC, 1985, Report, Annex VII: STD/33/85 Analysis of a Survey concerning Electrical Functional Toys by A. Lange - Stümpfig, DIN-Verbraucherrat, 1985.

Consumer Association on the “bicycle market in the Community”¹³⁴ but also through work directed at making up for shortcomings in knowledge on consumer participation, particularly in Southern European countries.¹³⁵ Attempts were also made to provide regular information through a newsletter on the state of standardization work.¹³⁶ However, this proved difficult, for two reasons. Firstly, the circle of interest is small, so that it appeared better to incorporate this newsletter into the general BEUC journal,¹³⁷ and secondly this path was blocked because the CCC insists on independence of the Coordination Secretariat. Despite all the tendencies towards professionalization, so far there is no intact infrastructure to which the Secretariat can have recourse. Accident studies are not recorded centrally, nor can the Secretariat have access to the specific knowledge of safety standards accumulated particularly in test institutions. The only internal information network available to date – BEUC Interpol¹³⁸ – is not included in the work,¹³⁹ which would in any case be possible only if an overall concept for building up an information and coordination network were available.

6.3.3. Material questions

The intention is not to provide a stock-taking¹⁴⁰ of work to date, but merely to illustrate the points at dispute in the individual technical committees.

- (1) The starting point for the CEN TC 100 working group is a remit from the Commission to CEN:¹⁴¹

Initially, to determine the requirements for tactile hazard indications on packages intended as containers for substances and preparations classed as hazardous by national authorities; further, to work out standards for means to permit the perception of hazards by touching, in order in particular to comply with Art. 15 (2) and (3) of Directives 79/831 and 78/63.

These terms of reference from the Community are aimed at combating accident risks from chemicals in the household using the safety technique of instruction, specifically through a tactile indication of hazard. But this safety philosophy was opposed not only by the consumer side, but also by some national standards organizations that called for special protective devices – child resistant closures.¹⁴²

This conflict was resolved when the members of the technical committee agreed to treat special protective devices as a separate thing from tactile hazard indication systems, requiring separate standardization.¹⁴³ This compromise was facilitated by

¹³⁴ AGV, Der Fahrradmarkt in der Europäischen Gemeinschaft, 1986.

¹³⁵ So far, reports are available on consumer participation in Italy and Greece.

¹³⁶ The first edition is printed in BEUC, 1984 as Annex XI.

¹³⁷ Due to scarce resources BEUC stayed away from the further publication of the journal.

¹³⁸ See the description of the system by Domzalski, 1984.

¹³⁹ Interestingly enough, this has on several occasions been called for by the Germans, BEUC, 1984, Annex II (fn. 114 above), 3 (a) on the part of the AGV.

¹⁴⁰ This attempt is made indirectly by Bosserhoff, who presented a strategy paper to the working group on standards of the Consumer Advisory Council: Consumer-orientated proposal for a priority programme for the drawing-up of European Standards within the competence of CEN/CENELEC, printed in BEUC, 1985, Annex VIII a, STD/22/85. Bosserhoff presented his ideas in a revised version at the European Forum on consumer standardization (op. cit., fn. 70), cf. Bosserhoff, 1987, Prioritätenprogramm.

¹⁴¹ BEUC, 1984, Annex VI: Reports of meetings of CEN TC 100, Doc. IV; Report Brussels 25-27 June 1984, 1.2.

¹⁴² BEUC, 1984, Annex VI (fn. 137 above), Doc. I: Report Paris 26-28 January 1983 (without naming the countries).

¹⁴³ BEUC, 1984, Annex VI (fn. 137 above), Doc. III: Report of the fifth meeting of CEN TC 100 (without figures).

the need to develop a marking system as rapidly as possible in the specific interest of the poorly sighted. Ultimately, however, no agreement could be reached on the basis of this compromise either. It proved impossible from the industry viewpoint to develop a uniform method,¹⁴⁴ which had always been the priority goal of the consumer organizations. The latter had carried out a survey through the CCC that had brought out the interest in a uniform method guaranteeing the unambiguous nature of the information.¹⁴⁵ The working group temporarily suspended its work and asked the Commission to lay down the requirements for standardization in precisely worded terms of reference. The consumer side drew the conclusion from the failure of TC 100 that technical committees themselves were not in a position to secure compromises as to safety philosophy (safety technique of instruction versus protective devices). Only a suitably precisely worded remit that the consumer side would play a part in drawing up could prevent safety policy from failing to advance because “commercial circles involved” cannot agree.¹⁴⁶

- (2) One of the important points at dispute in Technical Committee 61 (safety of electrical household appliances) is the so-called exclusion clause.¹⁴⁷ This states that electrical safety standards do not take account of the special hazards arising in children’s rooms, kindergartens, etc. in which small children or old and infirm people are present without supervision. In such cases additional requirements are necessary:¹⁴⁸

Except in so far as this standard deals with electric toys, it does not take into account the special hazards which exist in nurseries and other places where there are young children or aged or infirm persons without supervision; in such cases additional requirements may be necessary.

The consumer side has now raised the question of the extent to which safety standards meet additional requirements, or whether the protection of children or old people is no longer guaranteed where they are present without supervision in kitchens or other rooms in the home where there are electrical appliances.¹⁴⁹ The suppliers’ side sought to downplay the accusation by referring to standardization practice, in which safety is guaranteed even without such supervision.¹⁵⁰ Consumers again found themselves in a position of having to offer proof that the level of safety was not sufficient. In fact the consumer representatives managed to find that the exclusion clause had been adduced in a number of cases as an argument against the introduction of comprehensive protection measures.¹⁵¹ Thus, protection against access to current carrying parts is tested with the “standard test

¹⁴⁴ BEUC, 1984, Annex VI (fn. 137 above), Doc. III, 2.3.

¹⁴⁵ BEUC, 1984, Annex VI (fn. 137 above), Doc. III, 3.3.

¹⁴⁶ BEUC, 1984, 11 et seq. and Op. cit., Annex IV: CEN TC 100 - Tactile danger warning systems STD/17/85, 1 August 1985.

¹⁴⁷ BEUC, 1984, Annex IX: Minutes of the Co-ordination Meeting of Consumer Experts on CENELEC TC 61 - 8 May 1984, 122/84, 3.

¹⁴⁸ Scope of HD 254:S:3, printed in: Draft letter from the CCC observer to CENELEC TC 61 to the Chairman of CENELEC TC 61, in: BEUC, 1985, Annex V.

¹⁴⁹ 1. Entwurf eines Briefes, BEUC, 1984, Annex X 2.

¹⁵⁰ BEUC, 1985, Report, Annex II a: Report of the Meeting of CENELEC 61, Copenhagen, 7-9 May 1985. The representative of the DIN Consumer Council adopted the standpoint of the German industry, BEUC, 1984, Annex IX (74), 3.

¹⁵¹ BEUC, 1984, Annex X, 5-7, from which the examples are taken.

finger”, based on an “average” adult finger. This test may well not constitute adequate protection for many adults, but certainly does exclude children. This leads to considerable hazards from ventilator heaters or other flow heaters accessible to children. Nevertheless, CEN/CENELEC continues to reject the introduction of a child-sized test finger. No special child resistant closure is provided for in the case of spindryers and washing machines. Sockets on the front of electric cookers likewise have no protection for children, though this is already prescribed in the case of gas cookers. Surface temperatures of electrical appliances are another problem area. A large number of appliances provide no protection even against severe burns. The consumer side is not claiming that all appliances ought to be so hazard free that no parental supervision is necessary. However, avoidable hazards ought to be removed and electrical safety standards ought to take foreseeable conditions of use (not merely proper use) of particular appliances into account. On the basis of these considerations, the consumer observer, following consultation with national consumer experts in several coordination meetings, proposed a revision that positively asks for foreseeable misuse to be covered in the design of electrical appliances that might present a danger to children and old people.¹⁵²

This standard takes account of foreseeable misuse (other than gross misuse) of equipment by users of all ages and also, so far as is reasonable, of the fact that the equipment covered by the standard may be used where there are young children and elderly persons.

The suppliers’ side rejected this proposal, but at the same time had to admit that the present text of the exclusion clause did not at any rate reflect practice in safety standardization. It therefore seems to be possible that the consumer side may at least partly succeed with its move. At present, the wording proposed by the British Consumer Advisory Committee is before TC 61 for debate:¹⁵³

So far as practicable, this standard deals with the common hazards presented by appliances which are encountered by all persons in and around the home. However, except in so far as this standard deals with electric toys, it does not in general take into account the use of appliances by young children or infirm persons without supervision; for such use additional requirements may be necessary.

It is not yet clear whether the compromise proposal will be adopted. At any rate, the compromise formula, also supported by the IOCU Testing Committee,¹⁵⁴ means a considerable step back from the original position. For the consumer side gives up the inclusion of foreseeable misuse and contents itself with the much softer formulation “common hazards”, which is in turn in need of interpretation. On the positive side, there is now a much clearer formulation of the circumstances in which safety standards provide *no* protection for unsupervised persons. The scope has been reduced to children only, to avoid discrimination of old people. The arguments over the exclusion clause make clear the need at European level for a safety philosophy along the lines of DIN 31000. This project, which has been

¹⁵² BEUC, 1985, Report, Annex V (fn. 144 above).

¹⁵³ BSI Technical Committee LEL/161 Safety of electrical appliances, STD 18/86.

¹⁵⁴ See its letter of 21 July 1987 to the Chairman of the working group IEC TC 61.

worked on since April 1985, has involved European consumer representatives since June 1986.¹⁵⁵

- (3) Often, however, difficulties arise even among national consumer representatives in agreeing on a uniform safety philosophy. Thus, the consumer's protection against electric shock must be weighed against his interest in being able to do repair and maintenance work himself.¹⁵⁶ Even if one in principle supports a right of access by consumers, it remains to be decided whether consumers are to be explicitly encouraged to do work themselves and what protective measures are at all possible if consumers are to be allowed to do repairs or maintenance. Likewise, the question of the protective level for surface temperatures of household electrical appliances remains open. The British consumer representatives want the maximum limit brought below 50 degrees, while the German side does not even support a maximum of 80 degrees.¹⁵⁷ The list of examples could be extended, though the conclusion ought not to be drawn from the disagreements that the consumer side is unable to develop a uniform European safety philosophy.

6.4. Proposals for extending consumer involvement in standardization

The present organization of technical standardization is regarded by all those involved, the Commission, CEN/CENELEC and also the Consumer Consultative Committee and the Coordination Secretariat, as a transitional stage. The policy of the new approach seems to have led to the insight by all those involved that in the long term consumer involvement in standardization must be institutionalized. It is not yet foreseeable, however, how it will end up looking. Several proposals are available, but discussions have barely begun.

6.4.1. The Bosma proposal¹⁵⁸

In her report for DG XI, Bosma proposed the setting up of a consumer advisory committee for technical standardization, to be attached to the Standing Committee. The object is to guarantee access to European standardization activities by consumer interests, through institutional collaboration between the Consumer Advisory Committee for Technical Standardization and the Standing Committee. The committee is to be made up of representatives of European consumer organizations (though it is not said, this probably means CCC members) and European consumer research institutions such as Swoka, INC, Swoka, INC, Stiftung Warentest, Husholdningsrad, CRIOC.¹⁵⁹ While European consumer organizations should provide the *political* input, Bosman assigns to the research institutions listed the task of making the necessary technical know-how available. Accordingly, the Consumer Advisory Committee on Technical Standardization would in this conception

¹⁵⁵ However, since June 1986 an observer has been sitting on CEN TC 144, Minutes of the CCC Coordination Meeting, June 19, 1986 STD/28/86, 3 July 1986.

¹⁵⁶ BEUC, 1985, Report, Annex I d: Co-ordination Meeting 12 September 1985 (fn. 124 above), 2 and Annex II b: Minutes of the meeting of CENELEC, Athens 1 - 3 October 1985, STD/40/85, 23 October 1985, 6.

¹⁵⁷ See the background paper by D. Grose, BEUC, 1985, Report, Annex VI (fn. 130 above) and the letter from the German Consumers Association to the coordination meeting in London, 16/17 1985, 10 January 1985. BEUC, 1985, Report, Annex I d: Co-ordination Meeting 12 September 1985 (fn. 124 above), 2 and Annex II b: Minutes of the meeting of CENELEC, Athens 1 - 3 October 1985, STD/40/85, 23 October 1985, 6.

¹⁵⁸ See Bosma, 1984, 60 et seq.; and esp. Bosma, 1985, 22 et seq., especially the organigram, 29.

¹⁵⁹ Bosma, 1985, 23.

represent the collective European political and technical expertise of the consumer side. It should among other things have the following tasks:¹⁶⁰

- To point out to the Standing Committee developments of special interest to the consumer side, and make the necessary expertise available to the Standing Committee for it to assert the consumer interest;
- to develop consumer priorities in European standardization;
- to formulate a consumer safety policy, taking particular account of technical standards;
- to list special research studies needed for consumer desires and needs to be recognized in standardization;
- to make contacts with consumer representations on national and international standards organizations.

To be able to cope with the multiplicity of tasks, the Advisory Committee would in Bosma's view¹⁶¹ have to have especial technical committees assigned to it: (1) food and nutrition; (2) household chemicals; (3) transport, in particular cars; (4) house and building materials including furniture; (5) electrical and electronic products. These technical committees are to provide the Advisory Committee with the necessary technical information, draw up background reports and develop specific proposals, in other words, do the hard technical work.

Correspondingly, these technical committees should also include experts with relevant experience in those areas. Bosma¹⁶² is thinking, apart from test institutions, above all of independent research institutes dealing with specific aspects of a product (ergonomics, safety). She then raises the question whether it would not be advisable also to include specialists from industry in the work of the technical committees. Though she does not ultimately answer the question, she is clearly thinking of an "ideology-free discussion" since the technical committees are to have the task only of supporting the Advisory Committee on standardization in its work. It would be incumbent on the Advisory Committee for standardization to delegate observers to the technical committees of CEN/CENELEC and to maintain contacts with the Standing Committee.

Bosma wishes to locate the Secretariat of the Consumer Advisory Committee on standardization in DG XI. At the same time, she advocates formalization of the consultative relationships between the Standing Committee and the Consumer Advisory Committee on Technical Standardization.

6.4.2. The thinking in DG XI¹⁶³

DG XI has put forward a proposal of its own for the organization of consumer participation in standardization. It is similarly contemplating setting up a special consumer advisory committee for technical standardization. This is, however, to consist of CCC members, and no subdivision into special technical committees is contemplated. As before, actual administrative work is to be done by a secretariat to be located outside DG XI. "Political control" of the Consumer Advisory Committee for technical standardization is to be handled by the CCC working group on standards. DG XI is thinking of a division of tasks

¹⁶⁰ Op. cit., 23 et seq.

¹⁶¹ Op. cit., 25 et seq.

¹⁶² Op. cit., 27.

¹⁶³ Annex to the Minutes of the Meeting of the CCC Working Group on Standardization, June 30, STD/27/86, 3 July 1986.

as already similarly proposed by the CCC.¹⁶⁴ This would give the CCC working group on standards the task of formulating policy, while the Consumer Advisory Committee for technical standardization would flesh out these outlines with technical content, with assistance from the Secretariat. There are no plans for formalizing the relationships between the Standing Committee and the CCC.

6.4.3. Assessment

It is striking that neither proposal takes account of the outstanding importance of safety standards at European level. Consumer safety problems appear as only *one* conceivable case of technical standardization, although experience over the last two years shows that consumer observers on the technical committees overwhelmingly concentrate on safety questions. Bosma's model allows the importance of product safety to be accommodated, since it would be possible to set up a technical subcommittee on product safety that might also possibly involve manufacturers. This way out would not be possible on the DG XI proposal.

Structural problems of consumer involvement arise in each proposal. Firstly, it is unclear why Bosma is so insistent on having the secretariat located in DG XI. This skepticism is all the more important since DG XI evidently has no interest in accommodating the secretariat. Bosma's concept completely lacks any discussion of the CCC as such and its working group on standards. Yet there is an important field here for conflict in the future shaping of consumer participation. DG XI seeks to take account of the institutional framework for consumer participation by seeking to bring the Consumer Advisory Committee on technical standardization under the political control of the CAC working group on standards. But this division of tasks means that the Commission is opening up the possibility of potential conflict between the working group on standards and the new committee. Moreover, the DG XI proposal would ultimately lead to duplication of the work of the CCC, since the Consumer Advisory Committee for technical standardization would have the same expert representatives of the four consumer organizations sitting on it as deal with standardization questions. In the long term, however, thinking the matter through to the end, hiving off standardization issues from the CCC's range of tasks might lead to its weakening. Accordingly, Bosma's proposal seems more convincing: the Consumer Advisory Committee on technical standardization should, alongside the four consumer organizations, also have a place for institutions with years of experience in the area of technical standardization. A final striking point is that neither Bosma nor DG XI in their proposals provide for procedural rules to be laid down in writing concerning either the Standing Committee's relationship to the Consumer Advisory Committee for technical standardization or the Consumer Advisory Committee on technical standardization's relationship to CEN/CENELEC. But this would be one of the major pillars of a formal guarantee structure for consumer participation in European standardization.

¹⁶⁴ See fn. 113 above.