EUI WORKING PAPERS IN LAW

CHRISTIAN JOERGES (ED.)

European Product Safety,
Internal Market Policy and the New Approach
to Technical Harmonisation and Standards

Volume 2

EUI Working Paper **LAW** No. 91/11

Product Safety Legislation
in France and in the United Kingdom
by
Gert Brüggemeier and Hans-W. Micklitz

European University Institute, Florence

Please note
As from January 1990 the EUI Working Paper Series is divided into six sub-series, each sub-series will be numbered individually (e.g. EUI Working Paper ECO No. 90/1).

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

CHRISTIAN JOERGES (ED.)

European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards

Volume 2

EUI Working Paper **LAW** No. 91/11

Product Safety Legislation in France and in the United Kingdom

by
Gert Brüggemeier and Hans-W. Micklitz

BADIA FIESOLANA, SAN DOMENICO (FI)

This series of Working Papers is the translation of a study carried out on behalf of the Commission of the EC (Christian Joerges *et al.*, *Die Sicherheit von Konsumgütern und die Entwicklung der Gemeinschaft*, Baden-Baden: Nomos 1988). The Translation is – with the exception of Chapters I and V – by Iain Fraser.

Printed in Italy in February 1991
European University Institute
Badia Fiesolana
I-50016 San Domenico (FI)
Italy

Editorial note

This Working Paper forms part of a series of five volumes dealing with the "Europeanisation" of product safety law. They are the result of a study carried out on behalf of the Commission of the EC which has so far been published only in German*. The publication of this English version has been made possible by a grant from Directorate General XI.

The five volumes of this series of Working Papers should thus be read in context. Volume 1 (Chapter I) aims to show why product safety law has given rise to extremely diverse regulation patterns and to provide an overview of the most important instruments for action.

Volumes 2 and 3 (Chapter II) are concerned with recent developments in the relevant legislation of the economically most important Community Member States and of the United States. Volume 2 (Chapter II, Parts 1 and 2) contains reports on France and the United Kingdom, Volume 3 (Chapter II parts 3 and 4) deals with the Federal Republic of Germany and the US Consumer Product Safety Act 1972, which is of crucial importance in the international debate.

Volume 4 (Chapters III and IV) analyses the development of the "traditional" policy of approximation of law and of efforts at a "horizontal" European product safety policy. In both policy areas it proved impossible to realise the Community's programmatic

---

* Christian Joerges, Josef Falke, Hans-W. Micklitz, Die Sicherheit von Kosnumgütern und die Entwicklung der Gemeinschaft, Baden-Baden: Nomos 1988.

goals. As far as policy on achieving the internal market is concerned, the Commission itself has pointed out the reasons and called for, and implemented, a fundamental revision of traditional legal approximation policy. This reorientation of Community policy is dealt with in Chapters IV; it describes the most important precursors of the new internal market policy, namely ECJ case law on Articles 30 and 36 EEC since the Cassis de Dijon judgment, and regulatory technique for the Low Voltage Directive and then analyses the new approach to technical harmonisation and standards, whereby the Community will restrict itself in its directives to setting "essential safety requirements", leaving it to European and national standardisation bodies to convert these safety requirements into technical specifications.

Volume 5 (Chapters V and VI) evaluates the effects of the Community's new approach to technical harmonisation and standards on product safety policy. Chapter V diagnoses a new need for action in the area of product safety policy, including in particular the internal organisation of the standardisation process, and participation by consumer associations in European standardisation. Chapter VI continues a comprehensive discussion of alternatives open for co-ordinating internal market and product safety policy. It argues that a policy of "deregulating" Member States' product safety legislation would not be feasible, and opts for a "positive" supplementation of the new approach by a horizontal Community product safety policy. This option is elaborated in a number of recommendations.

Summary of Contents

Volume 3:

Gert Brüggemeier Josef Falke Christian Joerges:
Product safety legislation in the Federal Republic of Germany and in the United States

Chapter II (Parts 3 and 4):

Examples of product safety legislation

Part 3:

Product safety policy in the Federal Republic of Germany
Josef Falke Gert Brüggemeier

Part 4:

The US Consumer Product Safety Act and its implementation by the Consumer Product Safety Commission
Christian Joerges

Volume 4:

Josef Falke Christian Joerges:
"Traditional" harmonisation policy, European consumer protection programmes and the new approach

Chapter III:

The "traditional" approach to removing technical barriers to trade and efforts at a "horizontal" European product safety policy
Josef Falke Christian Joerges

Chapter IV:

The new approach to technical harmonisation 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
Josef Falke Christian Joerges

Volume 5:

Christian Joerges Hans-W. Micklitz:
Internal market and product safety policy

Chapter V:

The need to supplement the new approach to technical harmonisation and standards with a coherent European product safety policy
Christian Joerges Hans-W. Micklitz

Chapter VI:

Summary and conclusions
Christian Joerges Hans-W. Micklitz

Annex: Recent publications

Table of Contents (Volume 2)

Chapter II: Examples of product safety legislation

Part 1:
Hans-W. Micklitz
Product safety law in France

Part 2:

Gert Brüggemeier

Consumer product safety law in Britain

Chapter II:
Examples of product safety legislation

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

Part 1:

Product safety law in France

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

1.1 French perspectives on product safety law

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

---

1 Since France can be regarded as a market economy in the German sense only conditionally; see Behrens/Korb-Schikaneder, 1984.

2 This classical approach can be found in precisely the same way in the consumer policy debate; see Calais-Auloy, 1985, 77 et seq.

Product Safety Policy

Periods	Prevention	Repression	Reparations
Starting position	- Empowerment to issue orders regulating conditions of trade - Art. 11 of the 1905 Act "fraudes et falsification")	- Penal sanctions against deceitful actions in case of *intentional* infringement - (Art. 1 of 1905 Act)	*Liability in tort*: liability for fault *Contractual liability*: guarantee liability in case of fraud (Code Civile Art. 1382/1641)
Transition to social state	- Regulation of specific areas of product safety by 1978 Act - Preventive regulation by ordinance (no general clause)	- *No* penal sanctions for manufacture or sale of unsafe products - Amendment to Art. 1 of 1905 (inclusion of product safety) - Case law makes possible criminal sentence in case of *negligence*	*Liability in tort*: supply of a defective product sufficient to prove fault (1962) *Contractual liability*: Manufacturer's and seller's knowledge of defectiveness of product assumed incontrovertibly (development of case law up to 1971)
Building up of a product safety policy	- Setting up of a Consumer safety Commission in 1983, general clause instead of individual regulation - Setting up of normal and emergency procedures for dealing with hazards - Setting up of intervention instruments (recalls, etc.) - Setting up of database on unsafe products and home and leisure accidents	Still no separate penal sanction for marketing an unsafe product - Extension of intervention powers under the 1905 Act to control, by the 1983 Act	- Interweaving of tortious and guarantee liability in the basic requirements - Opening of product safety policy for judicial control through Art. 1 of the 1983 Act
1985 proposals by Commission de la Refonte 1985	Commission de la Refonte did preliminary work for the 1983 Act - Adopted with slight departures	- New emphasis in intervention powers - Separate criminal offence of marketing unsafe products	- Adoption of proposals of the "Strasbourg Convention"* - Strict liability including development risks - No restriction as to amount

* European Convention on Products Liability in regard to Personal Injury and Death (CE, Strasbourg, 1977).

Standardization Policy

Periods	Prevention	Repression	Reparation
Starting point 1941 - 1943	- Safety standards a task for the Government Administration - Commissioner for standardization initiates and checks private (AFNOR) standard setting - Safety standards may be declared legally binding	- State supervises compliance with standards declared binding - Otherwise, no penalties for misleading use of confomity mark "NF" (Norme Française)	- If standards declared legally binding are infringed, compensation for damage even without fault
Transitional phase, 1960s	- Strengthening of AFNOR, with tendency to withdraw by Government - 1964: Commissioner for standardization abandons control of content of standards - AFNOR increasingly takes working out of standards on itself - AFNOR introduces a new category of standards (registerd standards)	- AFNOR assumes *de facto* control over observance of standards - Individual interventions by Government (Commissioners for standardization)	- Effect of AFNOR liability in the event of faulty standardization not known
Restructuring of French standardization policy in 1984	- Tendency to privatization, accompanied by opening up of procedure (democratization) - Setting up of Supreme Council on Standardization to coordinate policies - Transfer of approval procedure to AFNOR - Strengthening of consumer involvement on Supreme Council for Standardization and in AFNOR	- Possibility of declaration of bindingness - which loses importance because of the ECJ (1983)	- Tendency to open up the Court system for verification of technical standards
Further-reaching reform proposals by Minister of Industry and the Economy in 1982	- Advocacy-to-standards of adoption of reference technique (§ 3 GSG) - Introduction of a special safety mark	- Administration binds itself in compliance with standards, as in GSG - Effect on repression not systematically discussed	- Role of technical standards in liability not discussed

1.1.1 Schematic overview of French product safety and standards policy

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

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

---

3 This distinction is based essentially on the work of the Commission de la Refonte (note 2 supra) and the description of product safety law by Pizzio, 1984, 13 et seq. and 19 et seq., which is so far the sole comprehensive overall description of the law.

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

"Reparation" deals with the French version of product liability.

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

1.1.2 Product safety and standardisation side by side

The conceptual framework of French product safety policy has (from the consumer's viewpoint also and especially) led to a very narrow understanding of product safety, which has no room for a number of relevant cross-connections. Thus, there is no systematic incorporation of standardisation into product safety policy. This is even truer of certification, which is hardly discussed at all. Though product liability is included in safety policy, it is treated only as leading to individual compensation for damages, not as an instrument for controlling product safety. Fi-

4 See Calais-Auloy, 1985.

EUI WORKING PAPERS IN LAW

CHRISTIAN JOERGES (ED.)

European Product Safety,
Internal Market Policy and the New Approach
to Technical Harmonisation and Standards

Volume 2

EUI Working Paper **LAW** No. 91/11

Product Safety Legislation
in France and in the United Kingdom
by
Gert Brüggemeier and Hans-W. Micklitz

European University Institute, Florence

Please note
As from January 1990 the EUI Working Paper Series is divided into six sub-series, each sub-series will be numbered individually (e.g. EUI Working Paper ECO No. 90/1).

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

CHRISTIAN JOERGES (ED.)

European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards

---

Volume 2

EUI Working Paper **LAW** No. 91/11

Product Safety Legislation in France and in the United Kingdom

by

Gert Brüggemeier and Hans-W. Micklitz

BADIA FIESOLANA, SAN DOMENICO (FI)

This series of Working Papers is the translation of a study carried out on behalf of the Commission of the EC (Christian Joerges *et al.*, *Die Sicherheit von Konsumgütern und die Entwicklung der Gemeinschaft*, Baden-Baden: Nomos 1988). The Translation is – with the exception of Chapters I and V – by Iain Fraser.

Printed in Italy in February 1991
European University Institute
Badia Fiesolana
I-50016 San Domenico (FI)
Italy

Editorial note

This Working Paper forms part of a series of five volumes dealing with the "Europeanisation" of product safety law. They are the result of a study carried out on behalf of the Commission of the EC which has so far been published only in German*. The publication of this English version has been made possible by a grant from Directorate General XI.

The five volumes of this series of Working Papers should thus be read in context. Volume 1 (Chapter I) aims to show why product safety law has given rise to extremely diverse regulation patterns and to provide an overview of the most important instruments for action.

Volumes 2 and 3 (Chapter II) are concerned with recent developments in the relevant legislation of the economically most important Community Member States and of the United States. Volume 2 (Chapter II, Parts 1 and 2) contains reports on France and the United Kingdom, Volume 3 (Chapter II parts 3 and 4) deals with the Federal Republic of Germany and the US Consumer Product Safety Act 1972, which is of crucial importance in the international debate.

Volume 4 (Chapters III and IV) analyses the development of the "traditional" policy of approximation of law and of efforts at a "horizontal" European product safety policy. In both policy areas it proved impossible to realise the Community's programmatic

---

* Christian Joerges, Josef Falke, Hans-W. Micklitz, Die Sicherheit von Kosnumgütern und die Entwicklung der Gemeinschaft, Baden-Baden: Nomos 1988.

goals. As far as policy on achieving the internal market is concerned, the Commission itself has pointed out the reasons and called for, and implemented, a fundamental revision of traditional legal approximation policy. This reorientation of Community policy is dealt with in Chapters IV; it describes the most important precursors of the new internal market policy, namely ECJ case law on Articles 30 and 36 EEC since the Cassis de Dijon judgment, and regulatory technique for the Low Voltage Directive and then analyses the new approach to technical harmonisation and standards, whereby the Community will restrict itself in its directives to setting "essential safety requirements", leaving it to European and national standardisation bodies to convert these safety requirements into technical specifications.

Volume 5 (Chapters V and VI) evaluates the effects of the Community's new approach to technical harmonisation and standards on product safety policy. Chapter V diagnoses a new need for action in the area of product safety policy, including in particular the internal organisation of the standardisation process, and participation by consumer associations in European standardisation. Chapter VI continues a comprehensive discussion of alternatives open for co-ordinating internal market and product safety policy. It argues that a policy of "deregulating" Member States' product safety legislation would not be feasible, and opts for a "positive" supplementation of the new approach by a horizontal Community product safety policy. This option is elaborated in a number of recommendations.

Summary of Contents

Volume 3:

Gert Brüggemeier Josef Falke Christian Joerges:
Product safety legislation in the Federal Republic of Germany and in the United States

Chapter II (Parts 3 and 4):

Examples of product safety legislation

Part 3:

Product safety policy in the Federal Republic of Germany
Josef Falke Gert Brüggemeier

Part 4:

The US Consumer Product Safety Act and its implementation by the Consumer Product Safety Commission
Christian Joerges

Volume 4:

Josef Falke Christian Joerges:
"Traditional" harmonisation policy, European consumer protection programmes and the new approach

Chapter III:

The "traditional" approach to removing technical barriers to trade and efforts at a "horizontal" European product safety policy
Josef Falke Christian Joerges

Chapter IV:

The new approach to technical harmonisation 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
Josef Falke Christian Joerges

Volume 5:

Christian Joerges Hans-W. Micklitz:
Internal market and product safety policy

Chapter V:

The need to supplement the new approach to technical harmonisation and standards with a coherent European product safety policy
Christian Joerges Hans-W. Micklitz

Chapter VI:

Summary and conclusions
Christian Joerges Hans-W. Micklitz

Annex: Recent publications

Table of Contents (Volume 2)

Chapter II: Examples of product safety legislation

Part 1:
Hans-W. Micklitz
Product safety law in France

Part 2:

Gert Brüggemeier

Consumer product safety law in Britain

Chapter II:
Examples of product safety legislation

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

Part 1:

Product safety law in France

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

1.1 French perspectives on product safety law

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

---

1 Since France can be regarded as a market economy in the German sense only conditionally; see Behrens/Korb-Schikaneder, 1984.

2 This classical approach can be found in precisely the same way in the consumer policy debate; see Calais-Auloy, 1985, 77 et seq.

Product Safety Policy

Periods	Prevention	Repression	Reparations
Starting position	- Empowerment to issue orders regulating conditions of trade - Art. 11 of the 1905 Act "fraudes et falsification")	- Penal sanctions against deceitful actions in case of *intentional* infringement - (Art. 1 of 1905 Act)	*Liability in tort*: liability for fault *Contractual liability*: guarantee liability in case of fraud (Code Civile Art. 1382/1641)
Transition to social state	- Regulation of specific areas of product safety by 1978 Act - Preventive regulation by ordinance (no general clause)	- *No* penal sanctions for manufacture or sale of unsafe products - Amendment to Art. 1 of 1905 (inclusion of product safety) - Case law makes possible criminal sentence in case of *negligence*	*Liability in tort*: supply of a defective product sufficient to prove fault (1962) *Contractual liability*: Manufacturer's and seller's knowledge of defectiveness of product assumed incontrovertibly (development of case law up to 1971)
Building up of a product safety policy	- Setting up of a Consumer safety Commission in 1983, general clause instead of individual regulation - Setting up of normal and emergency procedures for dealing with hazards - Setting up of intervention instruments (recalls, etc.) - Setting up of database on unsafe products and home and leisure accidents	Still no separate penal sanction for marketing an unsafe product - Extension of intervention powers under the 1905 Act to control, by the 1983 Act	- Interweaving of tortious and guarantee liability in the basic requirements - Opening of product safety policy for judicial control through Art. 1 of the 1983 Act
1985 proposals by Commission de la Refonte 1985	Commission de la Refonte did preliminary work for the 1983 Act - Adopted with slight departures	- New emphasis in intervention powers - Separate criminal offence of marketing unsafe products	- Adoption of proposals of the "Strasbourg Convention"* - Strict liability including development risks - No restriction as to amount

* European Convention on Products Liability in regard to Personal Injury and Death (CE, Strasbourg, 1977)

Standardization Policy

Periods	Prevention	Repression	Reparation
Starting point 1941 - 1943	- Safety standards a task for the Government Administration - Commissioner for standardization initiates and checks private (AFNOR) standard setting - Safety standards may be declared legally binding	- State supervises compliance with standards declared binding - Otherwise, no penalties for misleading use of confomity mark "NF" (Norme Française)	- If standards declared legally binding are infringed, compensation for damage even without fault
Transitional phase, 1960s	- Strengthening of AFNOR, with tendency to withdraw by Government - 1964: Commissioner for standardization abandons control of content of standards - AFNOR increasingly takes working out of standards on itself - AFNOR introduces a new category of standards (registerd standards)	- AFNOR assumes *de facto* control over observance of standards - Individual interventions by Government (Commissioners for standardization)	- Effect of AFNOR liability in the event of faulty standardization not known
Restructuring of French standardization policy in 1984	- Tendency to privatization, accompanied by opening up of procedure (democratization) - Setting up of Supreme Council on Standardization to coordinate policies - Transfer of approval procedure to AFNOR - Strengthening of consumer involvement on Supreme Council for Standardization and in AFNOR	- Possibility of declaration of bindingness - which loses importance because of the ECJ (1983)	- Tendency to open up the Court system for verification of technical standards
Further-reaching reform proposals by Minister of Industry and the Economy in 1982	- Advocacy-to-standards of adoption of reference technique (§ 3 GSG) - Introduction of a special safety mark	- Administration binds itself in compliance with standards, as in GSG - Effect on repression not systematically discussed	- Role of technical standards in liability not discussed

1.1.1 Schematic overview of French product safety and standards policy

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

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

---

3 This distinction is based essentially on the work of the Commission de la Refonte (note 2 supra) and the description of product safety law by Pizzio, 1984, 13 et seq. and 19 et seq., which is so far the sole comprehensive overall description of the law.

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

"Reparation" deals with the French version of product liability.

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

1.1.2 Product safety and standardisation side by side

The conceptual framework of French product safety policy has (from the consumer's viewpoint also and especially) led to a very narrow understanding of product safety, which has no room for a number of relevant cross-connections. Thus, there is no systematic incorporation of standardisation into product safety policy. This is even truer of certification, which is hardly discussed at all. Though product liability is included in safety policy, it is treated only as leading to individual compensation for damages, not as an instrument for controlling product safety. Fi-

4 See Calais-Auloy, 1985.

nally, there is no discussion of the relationship between product liability and technical standard setting. The research approach pursued here, of bringing product safety and technical standards into relation with each other, meets in France, partly with rejection and partly with misunderstanding. It is rejected because the administration continues to be seen as the best guarantor of product safety; it is misunderstood because the connecting lines are not clearly seen, due to the absence of intermeshing between product safety and standards; indeed, perhaps they do not even exist. The last point is true, at any rate, for the sphere of product liability, which seems not to refer to technical standardisation at all.

The French government is responsible for the regulation of product safety[5]. Standards are set by order. The administration's responsibility for product safety has remained unshaken even after the reform attempts of the 1980's. The setting up of a Consumer Safety Commission[6] was fitted seamlessly into an administrative product safety policy, for all that was done was to shift tasks from the administration, without at all limiting ultimate administration responsibility and control. Looking closely from the French viewpoint, at the distribution of roles among the three powers, the cautious inclusion of the courts appears to be the most desicive change in the newly introduced product safety law[7]. Still existing legislative and executive mistrust of inclusion of the judiciary can be seen from the fact that though Art.1 is conceived as a general clause, it is not directed explicitly at the courts. Accordingly, until the significance of Art. 1 has become clear, more importance should be attached to the courts' power, newly introduced in 1983, to issue a banning order or withdraw products from the market by emergency procedure on application

5 For details see 1.4 infra.

6 See 1.3 infra.

— and not just to the relevant secretary of state or consumer minister, or certain administration officials[8]. The 1978 law still saw product safety policy entirely from an administrative point of view, and was explicitly aimed at excluding the courts from prevention[9].

French standardisation is a governmental task[10]. AFNOR has been incorporated into the governmental organisation of standardisation, with the duty of drawing up technical standards, which, however, must be supervised and checked by the Commissioner for Standardisation as representative of the State. AFNOR has discretion only insofar as it is allowed by the French administration. The essentially governmental and administrative organisation of standardisation also means that the reforms of the 1980's changed nothing.

Nevertheless, the reform of 1983 is bringing shifts that might in the long run, lead to a change in the division of responsibilities between government and the economy. The keywords are privatisation and politicisation of standardisation. Privatisation has come in since the reform made the administration yield some of its tasks to the privately organised standards body AFNOR; politicisation because creation of the Supreme Council for standardisation makes the guidelines for standardisation policy into a topic of public debate. The parallel with the standardisation agreement reached in 1975 between DIN and the Federal Government is self-evident[11]. No intermeshing of the reform attempts in product safety law and in standardisation, which were pushed forward in parallel, took place, at least openly. With some

7 Pizzio, 1984.

8 See point 1.4.1 infra.

9 Calais-Auloy, 1980, 113 et seq.

10 See point 1.7 infra.

exageration, one might say that product safety was discussed without standardisation, and standardisation without product safety. Para. 3 of the GSG (reference to standards) constitutes, from the German viewpoint, the bridge between the two policy areas. C. Germon and P. Marano[12] proposed the "German solution" in their report to the French Ministry for Industry. No discussion of the advantages and drawbacks of the German approach took place. However, there were some hints at it. The rearrangement of French standardisation was aimed primarily at strengthening the French economy's competiveness; expansion of consumer protection and the setting up of a supreme council for standardisation were to enhance acceptance of French standards in public awareness. Though the German GSG and consumer trust in standards were taken by C. Germon and P. Marano as shining examples, the French plainly went their own way towards increasing national competiveness. Comparison of the reform proposals with the law shows that the French government ultimately shrank from copying the German method of reference.

1.2 The "safety philosophy" of the 1983 law

While Art. 1 of the French law on product safety[13] does lay down a general obligation on the manufacturer to bring only safe products to the market, reference to the "generally recognised rules of the art" (allgemein anerkannten Regeln der Technik) is lacking:

---

11 Cf. Chapter II, 3.4.2.

12 Germon/Marano, 1982.

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

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

The constitutive elements of this general clause are (1) the "autres conditions prévisibles par le professionnel" and (2) "la sécurité à laquelle on peut légitimement s'attendre". It is sometimes disputed that these are indeed two constitutive elements, since the "safety one may legitimately expect" also covers admissible use. This is not so[14]. The "other reasonably foreseeable conditions" describe the safety requirements on product manufacture. The addressee is the manufacturer. The "safety one may legitimately expect", on the other hand, defines the consumer's justified expectations of safety. Though the two viewpoints can theoretically be separated, they are in practice very similar. For the actual safety level must include requirements covering both the manufacturer and the consumer's expectations.

1.2.1 The general clause in Art. 1

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

---

14 Schmidt-Salzer, 1986, Art. 6, Nos. 13 et seq., 116 et seq., 138 et seq.

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

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

According to the general clause, the Commission can itself consider almost any question and is not dependent on special authorisation by any order or provision. This was the specific weakpoint of the 1978 law[16]. Here there is no doubt that administrative cumbersomeness helped bring back the courts into the process of State standard setting. Yet even these changes do not alter the main thrust of product safety regulation. As before, the chief addressee is the administration, which alone can give the safety obligation legal bindingness, by specifying the general clause through the enactment of orders, or by a ministerial decree[17].

Since the French legislator has rejected adoption of the method of reference to standards, the question remains open as to how safety standards can be made specific.

Technical standards can be adduced as aids to interpretation, but their observance does not offer the French manufacturer any protection against action under Art. 1[18]. In practice, the manufacturer's main fear must be of the activities of the Consumer

16 Pizzio, 1984, 14-15.

17 More details in 1.4 infra.

Safety Commission, which has explicitly stated that the safety requirements of Art. 1 may well lie higher than those of the technical standards drawn up by AFNOR[19].

1.2.2 Determination of safety levels

The shift in French safety philosophy emerges clearly from the change in wording from the 1978 safety law's "conditions normales d'utilisation" to the 1983 "autres conditions raisonnablement prévisibles par le professionnel (qui doivent présenter) la sécurité à la quelle on peut légitimement s'attendre". The 1983 safety law for the first time separated the distinct standpoints of consumer and manufacturer, and at the same time heightened the requirements on the manufacturer. The criterion is not proper use, but reasonably foreseeable use; this is what the manufacturer has to use as a guide in design and production.

Not many problems are presented by the consumer's position. The definition states clearly that it is not the individual viewpoint that should be decisive, but the position of the average consumer[20].

Far greater difficulties of interpretation are presented by the intensification of the safety obligations on manufacturers[21]. The elementary political significance of the change in safety policy becomes clear from the stormy parliamentary debate. Admittedly,

18 Pizzio, 1984, 17, No. 13.

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

20 Pizzio, 1984, 15.

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

It is hard to give any meaningful summary of experience with the new product safety law of 1983. The fact remains that France is the only EC-country where a "safety philosophy" that explicitly includes foreseeable "misuse" does exist.

21 On all this see Pizzio, 1984, 15-17.

1.3 Information policy and the Commission for Consumer Safety

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

1.3.1 Information from regulatory bodies

The Commission has the task of gathering, analyzing and (within limits) informing the public of necessary data on product safety[24]. The establishment of a database is onbly possible if all authorities and institutions concerned with consumer goods and safety problems inform the Consumer Safety Commission of eventual infractions[25]. Theoretically, therefore, all authorities nationwide would be obliged to notify the Consumer Safety Commission of all damage, accidents, and suspicions that might have to do with the manufacture or use of an unsafe consumer item. The courts are included in the obligation of notification. In practise, this is a compromise in the dispute over the setting up a national accident surveillance system. Just as with other European Community Member States, France, too, in the early 1980's, gave out contracts for research into the feasibility of a national accident surveillance system to combat accidents and unsafe prod-

22 Op. cit., 14-15.

23 See supra, note 13.

24 Pizzio, 1984, 19-20. and the two annual reports of the Consumer Safety Commission (note 19 supra).

25 Art. 14 (2) of the 1983 Act (note 13 supra).

ucts[26]. The arguments adduced against the setting-up of a national accident surveillance system more or less coincide with the German stance against a Community one[27]. In fact, the Community directive on setting up an accident surveillance system has overtaken developments in France[28]. The Consumer Safety Commission has, since its creation, done the necessary preliminary work to permit a nationwide accident surveillance system. To date, four hospitals have declared their willingness to co-operate. The question of how far the notification obligation on French supervisory authorities is suitable for the establishment of a wider, or different, data picture is still open to debate. At any rate, the French courts have been *de facto* refusing co-operation[29]. The Commission's 1985-6 annual report allows no conclusion as to whether the authorities furnish the Commission with information, or as to whether the information that does come in is at all of technical use to these authorities.

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

---

26 Accidents Domestiques, 1981; cf. esp. the ministerial position on this report: Ronze, 1981.

27 See esp. Ronze, 1981, in his "Resumée et Conclusions".

28 See the Council decision of 22 April 1986 concerning a demonstration project with a view to introducing a Community system of information on accidents involving consumer products, OJ L 109, 26 April 1986, 23; for details on this see Chapter III, 3.3.

29 For a criticism see Commission, 1985, 13.

30 Thus Commission, 1986, 12-14.

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

1.3.2 Consumer information

The Consumer Safety Commission can also approach the public itself[32]. Though it is forbidden from sending reports or opinions to the press, it does have the possibility of publishing a summary. This has in fact been done and without objection. This means that the Commission has opened up a way of bringing safety problems in handling consumer goods to the attention of consumers. The Commission is at present considering how it can reach consumers more effectively. A quarterly publication of its findings, a safety bulletin as it were, might serve this end. For direct contact with the consumer, however, it has not yet been determined to whether the videotext system TELETEL, widespread in France (1.8 million users) can be successfully used to disseminate information. A pilot study has furnished conclusions about the prospects by the end of 1987[33].

---

31 See Commission, 1986, 16-17.

32 On this cf. Commission, 1985, 15.

33 Commission, 1986, 5.

1.4. Preventive regulation of product safety[34]

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

1.4.1. The normal procedure for product regulation

For removing unsafe products from the market, the law[35] provides for a still relatively cumbersome procedure, justified on grounds of finality and of possible heavy damages for the industries concerned. In formal terms, the procedure can be split into two sections. The first phase takes place before the Consumer Safety Commission, which is called on by either the minister, a consumer organisation, the industry, trade or individual, to take up a problem. The Commission may also examine a matter itself. Once the procedure has begun, the Commission calls on experts from laboratories and other scientific institutions to evaluate the product. At the same time firms involved are consulted[36]. They can present their position and may make proposals for removing the hazard by modifying the product. The Commission has wide discretion as to how it acts during such negotiations. Only if it is convinced that the product fails to offer the safety required by

34 The following account is based on the final report of the Commission de la Refonte (note 2 supra) and the explanations by Pizzio, 1984.

35 Art. 2 of the 1983 Act (note 13 supra).

36 As stressed by Commission, 1985, 5.

Art.1 does it furnish a recommendation as to how the ministries should respond to the hazardous aspects of the product.

The *second phase* then takes place within the administration. The ministry or ministries are in no way bound by the Commission's suggestions. Their importance will ultimately depend on whether the relevant ministries tend to follow the recommendations, or to incorporate them into measures to be taken. According to the text of the law, two categories are available:

— firstly, general measures laid down by way of regulation, that concern a wide range of products or of services. These regulations require agreement among several ministries as to whether there is, in fact the need to adopt a regulation;

— secondly, specific measures, referring to a named product or service which may be laid down by ministerial order. Agreement among ministries is necessary before action can be taken.

By contrast, there are no differences as to the ministries' available means for banning a risk. The 1983 law considerably

expanded the arsenal for combatting hazards with respect to the 1978 law[37].

1.4.2 The emergency procedure for product regulation

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

— the minister, or secretary of state, responsible for consumer protection may adopt a provision, without involving the Consumer Safety Commission. This kind of measure is valid for at most one year: long enough for decision-taking within the normal procedure as to whether a definitive regulation should replace the provisional one;

— a judge too can issue a injunction order for recall of a product. He makes his decision on application from a consumer organisation or a ministry. The provisions upon rights to take action derive from the Loi Royer[39]. The injunction order may not have a duration of more than six months. The normal procedure has then to be used to decide whether the

37 On this see 1.5.2 infra.

38 Art. 3 of the 1983 Act (note 13 supra).

39 Calais-Auloy, 1980, 205 et seq.

measure is to be maintained or suspended. Firms are no longer allowed, as hitherto, to market the products again after this period has expired. If penal proceedings are embarked on, the examining judge or the criminal court is competent. The judge can take only specific measures relating to a particular product;

— various administration officials specifically mentioned in the law[40] may seize products and even have them destroyed. Such measures will lead to the commencement of court proceedings, with involvement of the public prosecutor within 24 hours. A prerequisite is that the urgency of the measure be beyond all doubt. In cases of mere suspicion, the officials can only block the product for 14 days pending results of scientific and technical tests. Whatever the outcome of the measure, a copy of the record of proceedings is to be sent to the Consumer Safety Commission.

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

1.5 Post Market controls

Any description of French safety law has to go thoroughly into the administration's role in follow-up market controls. Neglecting the whole repressive control machinery would give a completely distorted picture of French product safety law, since this is the area where control is centred[41]. The repressive powers will first be described (1.5.1), and then a special description of recall given (1.5.2).

40 Art. 4 of the 1983 Act (note 13 supra).

41 On this see the account by Pizzio, 1984.

1.5.1 Repressive product regulation

Scarcely anywhere else in French safety law does the fragmentary nature of its provisions emerge more clearly. This concerns, in part, the substantive legal requirements for action by way of post market control. There is nothing in the 1983 law that makes marketing unsafe products a criminal offence[42]. Were that so, the control authorities could engage in post market controls without first having to specify their powers by ordinance or ministerial decree. In the absence of any ordinance laying down specific penal sanctions for the manufacture and distribution particular products or groups of products, the only grounds for intervention have to be based Art. 1 of the 1905 law in its 1978 version. Since that date, the scope of Art. 1 has included acts of deception in connection with the use of the item to be sold[43]. Thus, for instance, sale of a hazardous product can be punished if the risks ought to have been previously brought to the buyer's attention. The fragmentariness of the 1983 Act in regulation is still more striking when it comes to the question of who enforces the law. The 1983 Act creates no administrative infrastructure, no special safety authority with hundreds of inspectors, but merely extends the area of action of the "Direction Générale de la Consommation et de la Répression des Fraudes" (DCRF)[44]. Admittedly, the 1905 law [45] also extended that body's powers of intervention; in part, to specific controls on products, but in a more general sense, i.e. to the whole area of application of the 1905 law. This composite makes it hard to understand the control machinery, for outsiders and authorities as well.

---

42 Significantly, the Commission de la Refonte (note 2 supra, 82) calls for precisely this general penal clause.

43 Calais-Auloy, 1980, 128.

44 Pizzio 1984, 19 et seq.

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

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

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

If breach of the law has been found, a broad range of sanctions is available. The prerequisite is either that a decree provides for punishment for the manufacturing or marketing of an unsafe product, or that the intervention requirements of Art. 1 of the 1905 Act are present. Sanctions available under the 1983 Act centre around a range of measures besides punishment that can be ordered at the time of sentencing. This requires the issuing of a decree in the normal procedure or else the issuing of a ministerial order in the emergency procedure. Three types can be distinguished: the court may order publication of the decision or require specific information of the public; it may order recall or destruction of the product at issue; it may confiscate illegally acquired gains.

In addition to the new provisions on measures accompanying punishment, mention should also be made of the codification of long-standing case law of the Higher Criminal Court, accord-

46 This account is based on Pizzio, 1984, 19 et seq.

ing to which the manufacturer of a product infringes upon Art.1 of the 1905 Act if he brings a product to market without first checking that it complies with safety and health provisions in force. The Higher Criminal Court had viewed criminal responsibility of the manufacturer as established when, against the explicit tenor of Art. 1, he could be accused merely of gross negligence[47]. The regulations take over the case law, but do not extend it to mere dealers. That does not mean, however, that dealers can escape their responsibility. French case law[48] has long recognised that they can be made responsible under the provisions of Art. 1 of the 1905 Act if they have neglected any of their specific duties (unsuitable storage, inadequate conservation, inadequate labelling). Indeed, a trader has even been condemned for breach of Art.1 of the 1905 Act because he had distributed goods whose nonconformity with the legal provisions was clear.

The closeness in content to comparable efforts at differentiation of product liability in German case law is evident. But while in the FRG breach of duty by the manufacturer or trader as a rule leads to entitlement to compensation for damage, France relies more intensively on an administrative solution to the problem. The parallel is interesting above all from the viewpoint of allocation of the burden of proof. German civil case law considers infringement of safety provisions in force (or non-compliance with technical standards) as a *prima facie* indication of the defectiveness of a product and therefore also of fault. But *prima facie* rules of this kind are not enough to justify *criminal* condemnation of the manufacturer. In principle, the administration has to show that the manufacturer had not carried out the necessary checks. This seemingly clear burden of proof is however brought into question by Art. 7 of the 1983 Act. Art. 7 states that a manufacturer who has not officially observed prescribed checks on

47 Calais-Auloy, 1980, 129, and references from the case law.

verification of compliance with the law has, unless the contrary is shown, infringed Art. 1 of the 1983 Act. But there is a difference between Art.1 of the 1983 Act and Art. 1 of the 1905 Act insofar as the 1983 Act lacks a criminal law general description of an offence, allowing condemnation merely because a product does not comply with the requirements of the general clause. Nevertheless, one may envisage types of cases in which the presumption under Art. 7 of the 1983 Act leads to condemnation under Art. 1 of the 1905 Act[49].

1.5.2 Product recalls

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

> Art. 2 says: "These *regulations* may likewise specify that products be removed from the market or recalled for modification, that the purchase price be reimbursed in whole or in part or products be exchanged, and that consumer information obligations be laid down". Art. 6 says: "They (the Ministers responsible for consumer protection or the departmental Minister concerned) may also order the publication of warnings and precautionary measures for use, as well as recalls for exchange, repair or full or partial reimbursement of the purchase price".

To avoid misunderstandings, it should be clear that the Courts, too, can order recalls on the basis of Art. 1 of the 1983 Act, without being empowered by a regulation or ministerial or-

---

48 On this Pizzio, 1984, 25, No. 47.

49 Op. cit.

der. To date, no use has been made of the regulatory powers of Art. 2.

Conversely, it would be wrong to conclude on the basis of the formal absence of regulations that product recalls with involvement of governmental bodies do not take place in France. O. Dellenbach[50] has presented a case study that draws a strict distinction as to whether the safety threshold appearing in technical standards was demonstrably set too low, or whether a safety standard existed at all. In the first group of cases, Dellenbach has concentrated on three cases that caused much furore in France in the second half of the 1970's: (1) crash helmets that were subject to material fatigue; (2) fan heaters that easily caused fires; (3) electrically unsafe automatic egg boilers. In spite of all the differences in detail, the three cases took an almost identical course. The unsafeness of the products was discovered after a series of product tests. Attempts by consumer organisations to negotiate an agreement with the manufacturers on possible recall and its terms were to no avail. The consumer organisations then went before the public, while informing the competent authorities of the safety risk. Under public pressure, the French administration saw itself compelled to put pressure on the firms to ensure recall of the products.

The picture is less clear cut in areas where the technical standards contain no safety requirements: carry-cots and child-proof seals on cleaning products. Once again it were consumer organisations that discovered the problem. The campaign for child-proof seals gained additional weight through the involvement of anti-poison centres[51]. The campaign against unsafe carry-cots led, after six years, to the establishment of a technical standard, which was however declared non-binding and did not

50 For an account of the issues, see Dellenbach, 1984, 32-44.

cover other similar dangerous products. French consumer organisations had asked for the passing of a relevant regulation, on the basis of the Act of 10 January 1978 (the predecessor of the 1983 Act). The fight for child-proof cleaning product containers ultimately led to adoption of a regulation on the basis of the Council Directive of 18 September 1979; this concerned the harmonisation of legal and administrative provisions for the classification, packaging and labelling of dangerous substances (Art.15(2))[52]. Far more interesting than the course of proceedings in this group of cases is an international comparison of delays in making a regulation. In Britain a safety standard for carry-cots has been in existence since 1965, and child-proof seals have been compulsory in the U.S. since 1970[53].

1.6 Liability[54]

Following the development of contractual guarantee liability and of liability in tort virtually irrespective of fault between 1962 and 1972[55], French case law in the next ten years went on to make a considerable contribution towards bringing the two types of liability closer together[56]. While the rule of non-cumulation (of

51 Activité des Centres Anti-Poisons, 1982.

52 OJ L 259, 15 October 1979, 10.

53 On issues connected with this regulation see Viscusi, 1985, 537 et seq.; see also Chapter II, 4.6.

54 The following account is based essentially on Viney, 1975; Ghestin, 1983 and Lamy Commercial, Concurrence-Distribution-Consommation, 1985, 1286 et seq., Nos. 4678 et seq.; a description from a German viewpoint is given by Weber/Rohs, 1984.

55 See Ghestin, 1983, 244 et seq. (esp. 251 et seq.), who follows the stages in the case law on the development of guarantee liability irrespective of fault. There is no key decision like the German Hühnerpest judgment (BGHZ 51, 90 et seq.) in the law of contract. The case is different in law of tort. Here the decisive judgment that altered the burden of proof in favour of the consumer was Cour de Cassation Civile, 21

claims based on contract and tort) continues to apply, the case law has nevertheless *de facto* developed a unitary concept of fault for both law of tort and law of contract. This unitary concept of fault is based in law of contract on liability of the professional vendor, or else through direct liability of the manufacturer, while in law of tort it leads to liability irrespective of fault as the outcome, at least where the injured party was demonstrably supplied with a faulty product[57]. The injured party to the contract has the burden of proving that the defect had arisen before supply. This allocation of the burden of proof may lead to problems, particularly in supply chains where it can no longer be determined where the defect arose. Liability in tort presupposes, as in German law, that the injured party can show the defectiveness of the product.

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

The approximation of the two types of liability has been considerably strengthened by adoption of the product liability directive[58]. The typically French problem of two types of liability according to whether the contractual partner or an uninvolved

March 1962, Bull. Civ. I, 155. Other decisions in this connection are in Viney, 1975, 76, note 19.

56 Much information can be found in Lamy Commercial (note 54 supra), 1286 et seq., Nos. 4678 et seq. A description of the legal position from a German viewpoint is offered by Weber/Rohs, 1984.

57 References in Lamy Commercial (note 54 supra), 1288, No. 4683.

third party is the injured party was eliminated at the preparatory stage of the Community directive in favour of a unitary type of liability for injured contracting parties or an uninvolved third party. Though national law on contractual liability continues to exist, the classical distinction loses significance in practice.

An admittedly cursory survey of French case law seems to conclude that consumer disputes are of prime importance, but also points out that the most significant cases of injuries were involving specifically French peculiarities. Since no central gas supply was provided in France into the 70's (and to some extent is still not today), many households need to store propane gas containers. The explosion of these containers during transport, on consignment or in use, have much concerned the French courts and made their contribution to the development of manufacturer liability in tort. A second specifically French variant in the development of manufacturer liability is the great importance of liability cases connected with the production, supply and use of agricultural products. Characteristically, French case law has transferred strict contractual liability to agriculture, without any beating about the bush[59]. Correspondingly, the French bill to implement the product liability directive is likely to include agricultural products[60].

France is ahead of all Member States in almost fully unifying the concept of defect in the area of prevention and repair. Art. 1 of the 1983 Act and Art. 6 of the Product Liability Directive, in the French version, are very similar, and in part identical in tenor.

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

59 Lamy Commercial (note 54 supra), 1289, No. 4687 b).

60 Directive on liability for defective products of 25 July 1985, OJ L 210, 7 August 1985, 29; more in Chapter III, 3.5. An official French bill converting the Directive is not yet available.

Throughout negotiations on the Product Liability Directive, France largely managed to push through its notion of defect[61].

1.7 Technical standardisation and product safety[62]

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

---

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

62 A fundamental account in German is Lukes, 1979, 5 et seq.; the description is based on his account. Much information on the history is also in Rasera, 1980, 28 et seq.

63 The relevant acts, decrees and orders are reprinted in Germon/Marano, 1982, 109 et seq.

1.7.1 Privatisation trends

A multiplicity of ministerial decrees and orders over the decades has not shaken the basic division of tasks. The decree of 26 January 1984[64] on the status of standardisation also maintains the basic structure. At the same time, one may note a shift in responsibilities within the fixed framework from the State towards AFNOR, i.e. the private standardisation organisation. This development was actually already introduced with the 1941 Decree. Until last year, France had pursued the intention of organising standardisation governmentally[65]. Accordingly, AFNOR had no standardisation powers. It was only to encourage the drawing up of standards, verify the proposals from the standardisation associations and propose them for recognition by the Comité Supérieur de Normalisation. The 1941 Decree clearly cut back administrative *standardisation* activities. This continues to be possible formally, but the emphasis in governmental activity has since been on the supervision exercised by the Minister for Trade and Industry or the Minister for Agriculture over all technical standardisation above company level. In practice, this control is exercised by a high official in the Ministry of Trade and Industry, the Commissaire à la Normalisation (Commissioner for standardisation). The Standardisation Commission is at the top of the French administrative hierarchy. Only five people work in it: the Commissioner himself, a deputy and three clerks. This small staff contradicts glaringly with the broad tasks assigned to the Commissioner by the 1941 Decree. He is not only to lay down general guidelines for the drawing up of standards, supervise the application of standards and decide on applications stemming from them, and supervise the work of the French standardisation agencies, but also — at any rate theoretically — to verify the content of each individual standard. In this he was supported at the time

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

by the Comité Consultatif, which was later absorbed by the Comité Supérieur de Normalisation. The wide range of tasks led to manifold difficulties, which the Commissioner sought in 1964 to eliminate by abandoning practically all technical control[66]. But the Commissioner was unable to perform the other control tasks. In practice, what emerges as its most important task is the organisation of communication between ministers interested in standardisation and AFNOR, or the Branch Standardisation Committees. The relationship between the Commissioner for Standardisation and AFNOR as newly regulated in the 1984 Decree, takes account of developments over the last 20 years. Registration of technical standards had de facto been transferred to AFNOR before 1984, and it now decides on homologation as well[67]. All that remains of the former wide powers of the Commissioner for Standardisation is the duty of supervision and the right to veto. The Commissioner has also given up his arbitration role in standardisation committees, which had often given grounds for criticism[68].

1.7.2 Democratisation tendencies

The stepwise privatisation of standardisation — from governmental standardisation pre-1941 to comprehensive supervision and control over privately organised standardisation, from recognition of privately organised standardisation subject to an ultimate governmental veto — has run parallel with a process of democratisation of the guidelines of standardisation policy[69]. The

65 Rasera, 1980.

66 On this Lukes, 1979, 22.

67 See 1.7.4 (1) infra.

68 Germon/Marano, 1982, 69 et seq.; Annex 2, "Rapport du groupe de travail — Normalisation et sécurité des travailleurs".

term democratisation is justified in so far as the circles of participation in policy formation have been steadily enlarged. While in the Comité Supérieur de Normalisation, the State had dominated policy formulation; the economy was already given a place in the consultative activity of the Comité Consultatif. Creation of the Standardisation Supervisory Board[70] completed the opening to consumers and trade unions, which now have a seat and a say in a body with an important political role. "The Standardisation Supervisory Board shall propose to the Minister for Industry, taking account of national and international economic requirements, of the major national programmes and of the special needs of both sides of industry as expressed in the economic plan, the general orientation for standardisation work"[71]. Though without powers of decision, the Standardisation Board is to provide assistance in setting French standardisation policy guidelines. In other words, the French State is trying to compensate for its retreat from standardisation by strengthening the participation of consumer organisations and trade unions. Democratisation of policy formation cannot therefore simply be equated with greater orientation of standardisation policy towards the needs of consumer organisations and unions.

---

69 This process was introduced by Germon/Marano, 1982. On the "new" French standardisation policy, however, see also Marano, L'avenir de la normalisation, 1982; Marano, Quelle normalisation pour de nouveaux enjeux, 1982 and Antonmattei, 1982. Deux grands principes animent la réforme: concertation et décentralisation, entretien avec Laurent Fabius, Ministre de l'industrie et de la recherche, Enjeux No. 44, 2/1984, 48 et seq. (in which the political objectives are very clearly expressed). From a German viewpoint, Schulz, 1983, and the German translation of the address by Laurent Fabius at the first meeting of the Supreme Council on Standardisation, DIN-Mitt. 63 (1984), 610 et seq.

70 See note 64 supra.

71 From Art. 1 of the German translation of the Decree (note 64 supra).

1.7.3 AFNOR

The stepwise shift of standardisation work from the State towards AFNOR has considerably affected its range of action and tasks[72]. Today, centralisation and co-ordination of all French standardisation activity is incumbent on AFNOR. It passes instructions from the Minister's authority on standardisation or the Commissioner for standardisation to the Bureaux de Normalisation and verifies their implementation. It is responsible for supporting technical standardisation committees in working out draft standards, and for homologation procedure.

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

1.7.4 Categories of standardisation

The shift in powers from Government to AFNOR can be most clearly seen in the various categories of standardisation, only two of which are, however, important for our purposes: approved and registered standards[73].

---

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

73 The account in Lukes, 1979, 23-25, continues to be pertinent.

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

The 1941 Act also allows approved standards to be declared universally binding. Branches of the economy involved are then obliged to take the binding technical standards into account. The 1941 Act, however, fails to clarify the conditions in which this declaration of universal bindingness can be made. With the restructuration of standardisation, the decision on approval of technical standards was transferred to AFNOR. AFNOR has to check

74 Figures in Lukes, 1979, 24.

a proposed standard to see whether it is in line with the general interest and does not offer grounds for objections that might prevent its adoption (as a government-approved norm). Approval as a norm is declared by AFNOR's Administrative Board, after the proposed standard has passed the verification and control procedures. The Commissioner for standardisation can however oppose AFNOR's decision on approval of a draft standard. Decree No. 84/74 of 26 January 1984[76] contains no provision for the case where the Commissioner for standardisation makes use of his veto right. In particular, no procedure for taking up the conflicting interests is provided for.

At the same time, the Decree of 26 January 1984 once again confirms the bindingness of approved standards on public procurements by the State, public bodies or state-subsidised firms. Therefore, the previous legal position has basically remained unchanged. What is unusual, though, is the way in which the French Government seeks to stress this intention.

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

As before, approved standards can be declared universally binding. But the conditions under which a declaration of univer-

75 Circulaire du 15 janvier 1971 relative à une recommendation de la section technique de la commission centrale des marchés publics convenant les spécifications techniques dans les marchés.

76 J. O., Février 1984, N. C. 1127.

77 Circulaire du 26 janvier 1984 portant sur la référence aux normes dans les marchés publics et dans la réglementation, J. O., février 1984, N. C. 1127, reprinted in German in DIN-Mitt. 63 (1984), 257-58.

sality can be made are now specified. Art. 12 of the 1984 Decree says:

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

This clarification was a response from the French Government to frequent criticism by the European Court of Justice and the Commission of the EC, of the general provisions allowing standards to be declared universally binding[78]. The links with European law will be more specifically dealt with below.

(2) *Registered standards* were introduced in 1966[79]. They have since enjoyed a steady increase in popularity. This is shown *inter alia* by the fact that by 1972, 33% of all French standards were already in this category, whereas in 1968 the figure had been only 18%. This popularity is closely connected with the simpler procedure for bringing out a registered standard. This category of standard is favoured above all in areas of rapid technical change. Registered standards have not been the object of governmental regulation to date. A change has taken place in practice, since registration initially took place through the Commissioner for Standardisation but has gradually passed into the hands of AFNOR. Registration is not bound up with any verification of contents. It takes place when the technical standards

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

committees consider the standardisation procedure to be complete and wish to make their results available to the economy. There is a link with approved standards to the extent that registered standards often constitute a preliminary stage towards government-recognised standards.

1.8 Certification and product safety

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

1.8.1 NF mark of conformity

The conditions for awarding the French mark of conformity, NF, are regulated by a decree of 1942[81]. To that extent, certification was an integral part of the overall reorganisation of standardisation in 1941-43. The mark of conformity can in principle be issued for any product but is in practice more important for household appliances. The mark testifies that the product bearing it has met the standards drawn up by AFNOR or the standardisa-

79 Lukes, 1979, 25.

80 1982, 52.

81 Reprinted in Germon/Marano, 1982, 124 et seq.; described in Lukes, 1979, 50 et seq.

tion associations, and subsequently been given approval. It is incumbent on AFNOR to check whether the product in fact meets the standard. From this standpoint, the NF conformity mark provides objective information. However, this information is often misunderstood by the consumer. Consumers believe that the conformity mark indicates a particularly high quality of product, whereas in fact the standard merely lays down a kind of minimum[82]. This problem is quite common and arises in other countries too. The safety of a product can theoretically be checked by the legally prescribed procedure where the underlying norm regulates important elementary characteristics of the product. This is exactly what happened with the technical standard on durability of crash helmets, since the French Government has by decree, obliged all crash helmet manufacturers to put their product through certification procedures. This is, however, a unique exception[83].

Criminal penalties can be derived from Art. 1 of the 1905 Act, if the manufacturer uses the NF conformity mark without authorisation. The civil-law position is not as clear[84]. The purchaser can, referring to the absence of conformity, terminate the contract and perhaps even claim compensation for damages. But the purchaser may also by Art. 1382 of the Code Civile claim damages from the Certification Office itself, if it has neglected to exercise its control powers. Such a claim for damages is a purely hypothetical case, as even AFNOR is not in a position to set up an all-embracing control network to guarantee disclosure of infringements. Moreover, in the event of unauthorised use of the conformity mark NF, it would have to be clarified to what extent

82 Calais-Auloy, 1980, 94, No. 65.

83 For an account of the issues see Dallenbach, 1984.

84 On the possible legal consequences see Calais-Auloy, 1980, 95 f., note 13.

Art. 6 of the 1942 Decree ruling out such liability by the Certification Office, still applies.

1.8.2 Certificates of qualification

The conditions for issuing certificates of qualification are regulated in the 1978 Act[85], the predecessor of the 1983 Safety Act. The relevant passages have not been abrogated by the new Act. The motivation for the legal regulation of the issuing of certificates of qualification was the growing enthusiasm of industrial associations to pump up sales of their products by creating a quality mark for their association and regulating the certification procedure internally. Familiar examples are "Coton Flor" or "Qualité France". A problem, and not only from the consumer's viewpoint, was that neither minimum nor quality requirements existed for awarding the certificates. A 1976[86] commissioned by the French Government called for an end to this confusion. (for the sake of a properly functioning market).

The object of the 1978 legal regulations was to allow certificates of qualification only where they gave the consumer *objective* and *comprehensible* information on the characteristics of the product. This was to be secured partly by allowing certifications henceforth only by Government-recognised bodies. The competent Ministry, the Ministry for Industry, must verify the institution's impartiality during approval procedures, and guarantee in objective (technical) and personal terms, that the certification procedure can be properly carried out. By early 1984, 18 institu-

85 On this see Calais-Auloy, 1980, 95 (No. 9); Repussard, 1984 and Bonhomme, 1984; and comprehensively Schroeder, 1984.

86 Repussard, 1984, refers to this in his account, though without mentioning the exact title.

tions had been accepted, AFNOR foremost among them. This seemed to have put a stop to the practice of self-certification of products to promote sales, but only on paper, since self-certified products have not yet disappeared from the French market.

In order to meet the self-set goal of providing the consumer with objective information, the legislature, would through the certification procedure, have to set minimum requirements for "quality". The difficulties of such an endeavour are obvious. The French legislature has dodged the issue by speaking merely of "certains caractéristiques" (certain characteristics), conveniently avoiding a more explicit definition of quality. Industry associations and consumer organisations were given the task of specifying through negotiations what the "certain characteristics" might mean in specific cases. These negotiations are given formal shape in an Advisory Commission to the Ministry for Industry. It is not hard to see the opposing positions of the parties to the negotiations. The consumer side sees the chances of objective information as maximised, if quality is standardised. Standardisation must, on this view, cover the functional and utilitarian characteristics of the product. Industry rejects the idea that quality can be standardised. Standardisation would allegedly eliminate differences between products and threaten the mechanism of competition. The debate closely resembles the discussions in the Federal Republic of Germany on the meaning and purpose of comparative product information on quality[87]. The German legislature, too, declined to define quality and handed over the task to both sides of the market. This road seems, in both countries, to have ended in a blind alley. Neither has arrived at any noteworthy amount of comparative quality information. Theoretically, the French model could also be applied to the issuing of safety certificates. But this aim would be obstructed by the one-sided sales-

87 On this see Micklitz, Three Instances, 1984.

oriented regulation of certificates of qualification. The safety of a product can be used only to a limited extent to boost sales.

1.9 The 1983 Act in the light of European Community law

The object of this analysis is to bring the French viewpoint into the debate on European safety law. The sole basis for a treatment of the French position to date is the study by J.-P. Pizzio[88]. His whole portrayal is adapted to the French way of looking at things, to the extent that European Community law is also considered and analysed from the viewpoint of whether administrative means of sanction are available to implement product safety. European Community policy has always allowed Member States much leeway in their implementation of the substantive law. The report keeps to this premise[89]. Community intervention with French administration arouses considerable mistrust. The inclusion of the Single European Act in the description gives Pizzio a chance to dive into the relationship between internal market policy and product safety policy in more detail. Since by contrast with environmental and labour protection, consumer protection was not included in the treaties as a policy objective, product safety must be subordinated to the goal of creating free movement of goods[90].

The analysis of the relationship between the Product Safety Act and European Community Law has been done in two stages. The 1983 Act is first checked for its interaction with free move-

88 Pizzio, 1986.

89 Op. cit., 9-10.

90 Op. cit., 15.

ment of goods, and then specifically for the effects of the new approach on French safety policy, and on the 1983 Act itself.

1.9.1 The 1983 Act and free movement of goods

(1) *Scope of the 1983 Act*: Art. 8 is aimed at regulating cases of conflict between Community law and the 1983 Act. The wording seems to make it clear that the 1983 Act is no longer applicable where the products concerned are already covered by a Community directive. An interpretation *au pied de la lettre* would have the consequence of excluding only regulation by *Statute*, while the French government would be free to regulate product safety by decree even in the event of conflict. This rather dishonest version is however immediately abandoned, and for all forms of regulation the substantive focus is whether the products have already been the object of a Community provision. It follows that in cases of total harmonisation France retains competence only in emergency cases, provided for in the 1983 Act. But even here Community law can retain primacy over French national safety law as long as the harmonisation measure includes a special safeguard clause explicitly covering such emergency measures[91].

(2) *The duty to notify regulatory measures under the 1983 Act*: If these are measures to be taken as part of a normal procedure, then the objective scope of the Directive of 28 March 1983[92] covers a comprehensive obligation of notification including now agricultural products, foodstuffs, medicaments and cosmetics[93]. To date (1986) the duty of notification has become relevant on two occasions, when the French legislature embarked on

91 Op. cit., 19 et seq.

92 OJ L 109, 26 April 1983, 8. For details on this see Chapter IV. 3.1.

specifying the general clause in the 1983 Act by issuing special decrees[94]. In the first case, Pizzio notes a delay of nearly two and a half months, but the proposed decree has not yet come into force in France. The second case is more interesting, above all because it involves the first decree issued on the basis of the 1983 Act[95]. It forbids the manufacturer, sale and importation of erasers that look like foodstuffs. The Community has since, in response to various national measures banning imitations of edible products, adopted a wide-ranging directive on products of misleading appearance that are liable to endanger consumer health or safety[96].

The notification obligation becomes more problematic in the case of an emergency measure[97]. Certainly, the Information Directive provides for an abbreviated procedure, but localised bans, withdrawals from sale and the like, are not covered by the obligation of notification. However, since the French "Commissaires de la République" have wide-ranging competencies regionally, there is a loophole here for measures regulating safety that might escape Community notice.

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

---

93 OJ L 81, 26 March 1988, 75.

94 Pizzio, 1986, 31 et seq.; and basically Lecrenier, 1985.

95 Of 18 février 1986, published in J. O., 28 février 1986.

96 OJ L, 11 July 1987, 49.

97 Pizzio, 1986, 32.

98 Council decision of 2 March 1984 introducing a Community system for rapid exchange of information on hazards in using consumer products, OJ L 70, 13 March 1984, 16-17.

Pizzio[99] regards the notification procedure as extremely effective, since prior experience reveals that the Commission's consultation procedures offer adequate possibilities for making national safety regulations compatible with Community Law.

(3) *Compatibility of the 1983 Act with Articles 30 and 36 of the EEC Treaty*: "Measures having equivalent effect" discussed in Art. 30 EEC also include technical standards drawn up by AFNOR. A specifically French possibility of conflict results from the possibility of declaring standards legally binding by decree. Action was brought for breach of treaty, because of the legal bindingness of a technical standard on the manufacturing of refrigerators[100]. Following the Commission's intervention, France changed the scope and coverage of the standard but kept its legal bindingness[101]. Nevertheless France feels quite confident of its chances of justifying national health and safety provisions through Art. 36 EEC or the Cassis de Dijon Case Law on Art. 30 EEC.

1.9.2 The 1983 Act and the new approach to technical harmonisation and standards

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

---

99 Pizzio, 1986, 33-34.

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

101 See J. O., Novembre 1984, N. C. 10307; and in general Pizzio, 1986, 38.

102 Op. cit., 52 et seq.

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

— Member States should be banned from subjecting technical products to prior approval procedures.

— Should consumer protection necessitate the inclusion to any large extent of technical specifications in the fundamental requirements, recourse to the new approach would, he says, not be appropriate. Deciphered, this means that Pizzio doubts the effectiveness of reference to standards in this very area of the safety and health of persons.

— The problem of certification could be solved following the example of the Franco-German bilateral model; i.e. mutual recognition of certification institutes and their certificates, and also mutual recognition of safety marks (though one would have first to be created in France).

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

At the end of the report, Pizzio[103] asks the decisive question: What happens when the Community has adopted a directive defining the safety requirements in principle but a Member State nevertheless wants to take national measures that go beyond the defined goal? The problem already arises with the Directive on simple pressure vessels[104], which, in departure from Art. 1 of the

103 Op. cit., 65.

104 OJ L 220, 8 August 1987, 48.

1983 Act is based on a safety concept that does not include foreseeable misuse. By a circuitous route through a treatment of the Cremonini v. Vrankovich ruling[105] of the European Court of Justice, Pizzio[106] arrives at the following conclusions:

— The primacy of Community law makes it compulsory to allow even products that would not comply with Art. 1 of the General Clause of the 1983 Act to circulate freely. (Although Pizzio does not say this explicitly, the differing safety concepts in the Community Directive on simple pressure vessels (usage in accordance with instructions) and in the 1983 Safety Act would not be an obstacle to the capacity of their circulation).

— Recourse to Art. 36 would be open to Member States only when the basic requirements have not been fully defined.

— It would follow that where the Community has adopted particular directives on the basis of the model Directive, a Member State would be able to pursue a national safety policy only in the context of the safeguard clause procedure.

1.10 The bilateral agreement between the Federal Republic of Germany and France on the removal of technical barriers to trade[107]

In July 1983 Chancellor Kohl and French Prime Minister Mauroy agreed to the following measures on a reciprocity basis[108]:

---

105 ECJ [1980] 3583, case 815/79, judgment of 2 December 1980. For details on the Low VoltageDirective, see Chapter IV, 2.

106 Pizzio, 1986, 68 et seq.

107 On this see Laurent, 1984; Winckler, 1984; Strecker, 1984; joint declaration by AFNOR and DIN on standardisation, DIN-Mitt. 63 (1984), 194 f.; Becker, 1985; Winckler, 1985, Beauvais, 1985.

108 Thus Becker, 1985, 37.

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

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

1.10.1 Background to the bilateral agreement

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

a) the French standards would have to be available in German translation.

109 Strecker, 1984, 123.

b) the French standards would have to contain specifications on the safety of persons.

c) the French standards would have to be individually verified by an expert committee.

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

From the mid-70's onward, German technical standards and therefore the Appliance Safety Act as well were increasingly under fire from French critics[110]. There were reports of difficulties for French industry in exhibiting their goods at trade fairs in the Federal Republic. These obstacles to trade in themselves would hardly have been sufficient to make the technical standards into an object of high-level politics. But the issue acquired greater importance when in the late 70's and early 80's, the French made a connection between their growing current account deficit and technical standards. In fact, according to Commission statistics, German consignments to France more or less doubled between 1977 and 1982, thus rising by 100%, while in the opposite direction, the rate of increase was only around 75%[111]. We need not go into here whether there is indeed a connection between the balance of payments deficit and German standards as potential technical obstacles to trade. In any case, the French succeeded in moving in the European Community, in the person of DG III Director-General Braun. In a lecture to a German audience, Braun more or less adopted the French version as his own, by calling the Germans the secret sinners in the setting-up of non-tariff barriers to trade. Encouraged by the press, the equation 40,000 German standards = 40,000 technical obstacles to trade began to circulate.

110 Laurent, 1984, 117,

111 Winckler, 1984, 120.

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

These mutual reproaches led in 1983 to the surprising outcome of a bilateral agreement. Apparently, following the controversially pursued public debate, pressure to negotiate was so great on both sides that action had to follow. The exchange of ideas and information between the authorities and the relevant institutions intensified. One product of the intensified relationships was the colloquium organised in Strasbourg in June 1984 by the Franco-German society for science and technology on co-operation between German and French testing and standardisation institutions[114]. At this conference, competent experts discussed the areas that the Community had mentioned in the preliminary work on the model directive as deserving priority in harmonisation : construction, measuring equipment, materials testing and welding techniques.

But the bilateral agreement did not fully meet with acceptance. The joint declaration by AFNOR and DIN makes reservations about the need for a bilateral level of standardisation clear[115]. Bilateral agreements might, from the viewpoint of the standardisation institutions, serve a transitional function only as

112 Strecker, 1984, 123.

113 On this see Becker, 1985, 34 and Table I.

114 AFAST, 1984.

an interim solution for relevant problem areas, while in principle, standardisation at European or international levels was a goal. It is hard to say how far the commencement of an action for breach of the Treaty against the French decrees on admission of woodworking machines was directly or indirectly induced by the bilateral agreements[116]. It is, in any case, conceivable that through its action, the Community wished to pull the rug from under the bilateral agreements between France and the Federal Republic. One indication in this direction is the almost complete identity in the thrust of the German and European criticisms of French administrative practice. In the action for breach of treaty, the European Community attacks precisely those market admission regulations on woodworking machines that had been the basis for the German attacks on the French Government[117]. On the other hand, the Commission's bill of complaint was not submitted to the ECJ until July 1984, by which time the bilateral agreement had long been concluded.

1.10.2 Results

Following the end of the political talks, AFNOR in an initial phase, checked at the highest level, 281 DIN standards in 19 branches of industry (excluding electrical engineering) to compare them with the 295 corresponding French standards[118]. This list was the starting point for initial activities by the competent authorities in both countries facilitating the circulation of goods. The conference organised by the Franco-German Society for Sci-

115 Joint declaration by DIN and AFNOR (note 104 supra).

116 ECJ [1986] 419, case 188/84, judgment of 28 January 1986 — woodworking machines. On this judgment see also Chapter IV, 1.2.3.

117 It is sufficient to compare the decrees attacked by the Commission in case 188/84 (note 116 supra) with the survey in Becker, 1985, 35.

118 Laurent, 1984, 118.

ence and Technology supplies further illumination as to the chances and difficulties for the bilateral agreement. In relation to the three objects of the agreement mentioned at the beginning, the following provisional balance sheet can be drawn up: (1) the chances for mutual recognition of standards differ considerably from one branch of industry to another. The Strasbourg conference brought out highly differentiated findings in the branches discussed there. The situation in the construction industry is so different in both countries that necessary research work would first of all have to be done in order to be able to define political goals. By contrast, the situation as regards measuring instruments is relatively clear. While there are considerable formal differences, in substance the two systems largely overlap. Harmonisation seems possible if the political will to break down the formal distinctions is present. The situation is different again in the area of welding techniques and material testing. Here the need for removal of existing obstacles to trade seems to be very great, but the objective meets with both political and technical difficulties. Experts all agreed when it comes to electrical engineering. Here the international network of technical standards and testing centres is so widely developed that a bilateral agreement could at most have negative effects.

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

The BMA has, according to information from the French Ministry for Foreign Trade and Industrial Development, published an initial list C of 118 French standards[119] on the general

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

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

(2) To improve the relationships between applicant and test centre particularly in the case of small and medium-sized enterprises, both governments have decided to explain the bases of the test centres' activities and the relationship between test centre and applicant. In the meantime, circulars for the test centres, in accordance with the Appliance Safety Act, and general guidelines for applying the conformity tests in accordance with the French decree on standards, have been published[122]. Both publications

120 Op. cit., 37.

121 Op. cit., 37.

122 Op. cit., 38. The German paper was published in BArbB1. 11/1984, 52. Cf. also Chapter II, 3.3.4.

explain the administrative, technical and financial aspects of the national conformity tests.

(3) There is still a long way to go politically, before test centres are mutually recognised. Although there is agreement that certificates or test marks probably cause greater technical obstacles to trade than do different technical standards, the bilateral agreement has so far shown hardly any effect. Nevertheless, inclusion of the LNE (Laboratoire Nationale d'Essais) in the list of test centres under the Appliance Safety Act has begun. Information on this procedure is provided by the Joint Declaration by AFNOR and DIN[123].

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

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

123 Joint declaration by DIN and AFNOR, DIN-Mitt. 63 (1984), 194-95.

German safety mark GS, if full mutuality is guaranteed "with the maintenance of the usual reservations"[124].

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

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

---

124 Strecker, 1984, 124.

Yet there are positive things about the bilateral agreement, too. Mutual recognition of standards in special Franco-German committees is objectively nothing other than political harmonisation. Franco-German preliminary work, as done for instance at the Strasbourg colloquium in 1984, might thus accelerate procedures in the Standing Committee. Possibly even more important, however, is the attempt to achieve mutual recognition of test centres. The model directive did not cover this issue[126] and the standardisation organisations themselves have hardly made any progress outside the field of electrical engineering. A bilateral solution to this extremely important question might serve as a model for European regulations on mutual recognition. In very general terms, the bilateral agreement seems in relevant technical and political circles to have aroused considerable response and not only in Germany and France.

125 On this see Germon/Marano, 1982, throughout.

126 See Chapter IV, 3.3.2.

Part 2:

Consumer product safety law in Britain[1]

1 The account is confined to England and Wales.

2.1 Introduction

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

2.2 The Consumer Protection Act 1961

2.2.1 Pre-history

Technical safety law in England and Wales stands unchanged within the tradition of the heroic age of the 19th-century factory acts. This command and control model of government regulation of safety as a rule consists in a broad definition of goals by the legislator. To achieve the goal, an administrative structure is set up. To a great extent, the administrative body autonomously determines measures to be taken in order to secure the legal objective. Implementation and verification is incumbent on an inspectorate on the spot. Accordingly, there is relatively wide freedom of action. Informal conflict settlement and co-operation are clearly to the fore. Recourse to the criminal courts constitutes the ultimate — rarely used — legal means of sanction against safety infringements. While the Health and Safety at

Work Act 1964 — the first comprehensive regulation of British safety-at-work law — still largely follows this regulatory model (with a separate administrative structure), consumer product safety law took a different road from the outset[2].

Until the end of the 1950's, there were legal regulations only for individual cases of particular consumer products [Fabrics (Misdescription) Act 1913; Heating Appliances (Fireguards) Act 1952; Oil Burners (Standards) Act 1960][3]. In 1959 the Committee on Consumer Protection was set up and in 1960 submitted an interim report, followed by a comprehensive final report in 1962[4]. The main impetus for this initiative came from the "consumer sovereignty fallacy", which could no longer be overlooked. The Committee's proposal aimed at institutionalising consumer power in the form of a governmental Consumer Council made up of independent persons[5]. Its main tasks were to be: gathering information, verifying the existence of a need for political action and influencing the public to take specific consumer-protection policy measures. Fifteen years later, the 1976 Green Paper on consumer safety again advocated the setting up of a Consumer Committee[6]; 21 years later a consumer protection committee of this type was set up in France[7]. In Britain, by contrast, legislation took a different course. In 1961 — before the Committee on Consumer Protection had finished its work but in implementation of some of the recommendations from its interim

2 On the development of consumer protection law in Britain in general, see Borrie, 1984.

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

4 Final Report of the Committee on Consumer Protection, 1962.

5 Op. cit., 278 et seq.

6 Consumer Safety. A Consultative Document, Cmnd. 6398, London HMSO, 28.

report — a safety law covering all consumer products was enacted for the first time: the Consumer Protection Act (CPA).

2.2.2 The content of the CPA 1961

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

— Section 1 implements the main recommendations of the 1960 Interim Report of the Committee on Consumer Protection[8]: the executive (the competent Secretary of State) is empowered to enact binding safety requirements for particular types of product where this appears advisable. The safety requirements relate to two things: 1) requirements on composition, content, planning, design, manufacture and packaging of products, to avoid danger to life and limb; 2) requirements on instructions and warnings to potential purchasers.

— Section 2 contains the *general obligation* on every professional seller of the product in question, at all stages of trade, to observe the safety requirements formulated in the Safety Regulations. This duty of observance does not apply to *inter alia* private sellers (Section 2 (3) (a) CPA) or exporters (Section 2 (3) (b) CPA).

— Section 3 regulates the sanctions for infringing the Safety Regulations. Infringements of the duty of observance pursuant to Section 2 are subject to criminal proceedings (Section 3 (2) CPA). In the event of damage, *any* person damaged by the unsafe product can raise criminal compensation claims against the seller (offence of breach of statutory duty — Section 3 (1) CPA). General common-law enti-

---

7 Cf. Chapter II, 1.3 supra.

8 Interim Report of the Committee on Consumer Protection, Cmnd. 1011, London HMSO 1960.

tlements to compensation remain untouched (tort and contract)[9].

2.2.3 Assessment

All in all, the CPA 1961 keeps to the approach of individual case regulation in safety law. Competence to regulate the individual cases is simply shifted from the legislature to the executive. For enactment of safety regulations, the CPA makes no formal approval by either House of Parliament necessary. Usually, though, the Joint Committee on Statutory Instruments, a joint committee of both Houses of Parliament, is involved. Section 1 (5) lays a duty on the Secretary of State to consult "such persons or bodies of persons as appear to him requisite" before issuing a regulation. A safety regulation can be suspended at any time by decision of either House of Parliament ("negative resolution procedure" — Section 1 (6) CPA). The CPA 1961 is innovative in its consumer protection policy effect in two ways: by extending the power of legal regulation to *all consumer products* and by making safety regulation *dynamic* through delegating power to issue safety regulations to the executive without involvement of Parliament. One weakness is implementation. No separate hierarchical administrative structure was set up to apply the CPA. Verification of observance of safety requirements was instead left to the local authorities, the trading standards officers of the local Weights and Measures Authorities. These are entitled — but not obliged (!) — to carry out inspections within the area of application of safety regulations, and to take random samples of goods for further investigation. They are not given any further powers. In particular, the local implementing bodies cannot issue any prohibition orders. Over and above formal sanction, the CPA trusts to voluntary observance of the safety regulations and to the market-complementary method of consumer information or sen-

9 Cf. 2.7 infra.

sitisation. Altogether, between 1961 and 1978, eighteen safety regulations on the basis of the CPA were issued[10]. There do not, however, seem to be any indications as to how many sellers had

10 Regulations made under the Consumer Protection Act 1961, Section 1, now in force.

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

proceedings brought against them in that period for breach of safety regulations.

2.3 The Consumer Safety Act 1978

2.3.1 Background

A further stock-taking of consumer product safety law in Britain came fifteen years after enactment of the CPA, in the form of the 1976 Government Green Paper on "Consumer Safety"[11]. This summarised the existing prospects for a British consumer product safety law, which in the later White Papers of 1982, 1984 and 1985 where merely taken up again in part and given new emphasis. Four main points have been chosen to demonstrate shortcomings of consumer protection policy[12]:

— Lack of regular systematic *information* on product-related accidents and of in-depth studies on the exact involvement in accidents of such products, or on cumulative causes of accidents; lack of international exchange of information;

— Lack of *BSI standards* for consumer products, and difficulties in developing and/or updating them;

— *Cumbersomeness* and *procedural restrictions* of safety regulations, in particular the absence of any possibility outside the regulations to respond to new hazards, issue banning orders, or have products recalled;

— Weaknesses in implementing safety regulations.

Among the proposals for improving consumer protection, we shall here deal only with the set of technical standards. In or-

11 Consumer Safety (loc. cit, note 6).

12 Loc cit., 11-12.

der to secure a wider range of specific technical standards, the Government is contemplating the following possibilities[13]:

- Introduction of special safety standards;
- Setting of time limits for developing new technical standards; in this context, adoption of the offeror procedure practised by the American CPSC is recommended[14];
- Generalised formulation of safety requirements in safety regulations, even if no British Standard is available, so that manufacturers themselves can develop appropriate technical solutions;
- A shift to the method of non-binding reference to technical standards in safety regulations;
- Development of conformity marks;
- Encouragement of economic associations to develop self-regulatory codes of conduct in the area of consumer safety law, similar to the codes in the area of competition law, encouraged by the Office of Fair Trading since 1973.

2.3.2 The content of the CSA 1978

An initial partial response to the criticism and proposals in the 1976 Green Paper was the Consumer Safety Act 1978[15/16]. The characteristic of this Act, still authoritative today, is flexibility on the sanctions side. The rigid two-dimensionality of overall empowerment by statute and regulation of individual cases by the executive is abandoned. Besides the safety regulation, three other instruments are added to the executive's range of safety law measures; the prohibition order, the prohibition notice and the notice to warn. The only one important in practice is the prohibition or-

13 Loc cit., 16 et seq.

14 Cf. Chapter II, 4.3.1.

15 On the information aspect cf. 2.8 infra.

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

der, which supplements safety regulations by acting as a time-limited emergency measure.

The CSA essentially contains five points:

(1) Section 1 lays down "the law" of safety regulations. The objects of the regulations are firstly — here made explicit for the first time — the *safety* of consumer products[17], and secondly the furnishing of consumers with appropriate *information* (Section 1 (1) CSA). The way these goals are to be met through the regulations is set out in detail in Section 1 (2). A notable feature, as a further reflection of the proposals in the 1976 Green Paper, is the prominent place given to technical standards. Technical standards as a substantive reference point for safety regulations appear in four of the nine points. In the context of measures to inform and warn the consumer, marks are also explicitly mentioned.

The procedure for enacting safety regulations is, by comparison with the CPA, made formal. Competence remains with the executive (Secretary of State). However, the duty of consultation is extended. The Secretary of State is now obliged to consult organisations that represent interests affected by the regulation (Section 1 (4) CSA). One example of what this means is that in connection with the Novelties (Safety) Regulations 1980, 66 people and/or organisations were consulted. Additionally, safety regulations must now be approved by both Houses of Parliament (Section 7 (7) — "affirmative resolution procedure")[18]. Both mean considerable complication and prolonging of the procedure for issuing safety regulations.

---

17 The concept "safe" is defined in Section 9 (4) CSA: "Safe means such as to prevent or adequately to reduce any risk of death and any risk of personal injury from the goods in question or from circumstances in which the goods might be used or kept, . . .".

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

Prohibition orders (Section 3 (1) (a) CSA) are orders that prohibit the sale of a particular group of products[19]. The Secretary of State has in principle to announce the issue of a prohibition order 20 days in advance, secure opinions and check those received. This "preliminary procedure" may be dispensed with only in urgent cases ("emergency procedure"). The prerequisites for an "urgent case" are not specified in any more detail. Prohibition orders expire by law after 12 months. Additionally, they may at any time be waived by decision of either House of Parliament (Section 7 (6) CSA).

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

Notices to warn (Section 3 (1) (c) CSA) are instructions to suppliers to provide information or warnings on particular hazards of products supplied by them[20].

---

18 For details on procedure, see Weatherill/Woodroffe, 1985, 93 et seq.

19 Details of the procedure are regulated in Schedule 1, Part I, CSA.

20 The procedure is regulated in Schedule 1, Part III CSA.

(3) *Contraventions* of prohibition orders, prohibition notices or notices to warn issued by the Secretary of State are criminally (Section 2 CSA) and civilly (Section 6 CSA — offence of breach of statutory duty) actionable.

(4) For the first time, a comprehensive *information right* of the Secretary of State is also given legal embodiment. He may secure information, call for documents and ask to see them, etc. Breaches of this duty on suppliers constitute an offence.

(5) Section 5, taken together with Schedule 1, Part III, regulates in detail the powers of the implementing agencies. These are — as under the CPA — confined to the right to enter business premises, see documents, take samples of products for further investigation, and where necessary, secure assistance from authorised agencies to enter business premises by force and, in compliance with prescribed procedures, forcibly open receptacles.

2.3.3 Assessment

The thinking of the CSA 1978 is characterised by the division of labour between safety regulations and prohibition orders. Prohibition orders are a response to new types of product hazard. During their 12-month-duration, experience accumulated can be used to decide whether there is justification for extending the provisional measure into a safety regulation. Of the eight prohibition orders issued under the CSA between 1978 and 1983, six have been converted into safety regulations. Prohibition notices and notices to warn played no significant role in practice.

Statements on the effectiveness of the CSA in guaranteeing the safety of consumer goods can only be tentative. Compared with the eighteen safety regulations made under the CPA be-

tween 1961 and 1978, fourteen were made under the CSA between 1978 and 1985[21]. As regards formal punishments for contravention of safety regulations and prohibition orders, the government's first five-year report (pursuant to Section 8 (2) CSA) to Parliament on practice with the CSA (and CPA), of 1983, gives the following figures[22]:

Contraventions of safety regulations

---

21 Regulations made under the Consumer Safety Act 1978, Section 1

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

22 According to Weatherill/Woodroffe, 1985, 122.

Period	Number of persons convicted	Number of breaches of the law
Nov. 78 - 31.3.79	54	59
1.4.79 - 31.3.80	98	142
1.4.80 - 31.3.81	109	158
1.4.81 - 31.3.82	185	439
1.4.82 - 31.3.83	256	665

Much greater importance, however, attaches to "soft implementation", to co-operation between the on-the-spot implementing agencies, the trading standard officers, and the manufacturers and traders concerned.

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

2.4 Present prospects for development

2.4.1 Legal reform projects

Six years after enactment of the CSA, the 1984 Government White Paper "The Safety of Goods"[23] took a new look at British consumer good safety law. Moving on from the fundamental

23 Cmnd. 9302, London HMSO, July 1984.

Green Paper of 1976, it singles out the following two main weaknesses of the CSA.

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

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

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

a court may order the destruction or confiscation of incriminated goods. Recall procedure is still not provided for.

The decisive step towards making British consumer good safety law effective is however seen as a change in the underlying conception: replacement of individual case regulation through safety regulations and prohibition orders by generalisation of the safety law approach. The introduction of a *general safety duty*, already present in the Health and Safety at Work Act (Section 6 HSWA) and favoured in the 1976 Green Paper, is once again advocated. This duty would require all manufacturers and traders (importers, wholesalers, retailers, etc.) to bring only safe goods to market in Britain. It would allow the implementing agencies, without having to pass through safety regulations or prohibition orders, to proceed directly against any trader because of any consumer product, provided it be *unsafe*. While the CSA 1978 was still endeavouring to give an exhaustive definition of the concept of safety (Section 9 (4))[24], the 1984 White Paper completely abandons any such legal semantics of safety. The safety of consumer goods is defined by referring to "sound and modern standards of safety". The 1984 White Paper has thus brought into consumer product safety law what was originally achieved in 1974 by the HSWA, but later only hinted at by the CSA 1978: the step to delegalisation, or to "legislation by reference to standards" (J. Fraser). "Sound standards" are in the first place British Standards[25], but also European and international standards that have been recognised as such. Observance of relevant standards

24 Cf. note 17.

25 In November 1982 a memorandum of understanding between Government and BSI was signed, recognising the BSI as the national standardisation body and aimed at speeding up production of technical standards. It is reprinted in the White Paper "Standards, Quality and International Competitiveness", 1982, Annex A.

would indicate "due diligence", and rule out criminal responsibility[26].

The 1984 White Paper's approach — possibly influenced by similar considerations at the European level — very strongly links interests in the international competitivity of the British economy[27] and in safety and consumer protection policies. Once this link is set up, experience shows that the latter have the worse of it. The consequences of this kind of "reference to standards" approach for consumer product safety policy are obvious, even though they have not yet been drawn and do not seem at all realisable: development of genuine (consumer product) safety standards and/or effective consumer involvement in the standardisation process.

The 1985 White Paper "Lifting the Burden"[28] again expresses the Government's intentions in legal policy: to move towards a general safety duty and wind down single-case regulation. This consumer protection policy approach is now even more closely tied in with an overall deregulation programme intended to eliminate needless regulatory burdens and costs for the British economy.

---

26 For details see 2.7 infra.

27 Cf. esp. the White Paper, "Standards, Quality and International Competitiveness", London HMSO 1982.

28 Cmnd. 9571, London HMSO, July 1985, based on an interministerial study on administrative and legislative obstacles for small firms in Britain: "Burdens on Business", London HMSO, March 1985.

2.4.2 Consumer Protection Act 1987

In November 1986 the British Government published the draft of a Consumer Protection Bill[29], which was passed by Parliament in summer 1987. The Consumer Protection Act 1987 (CPA) contains three substantive sections:

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

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

---

29 Reprinted in PHI 1987, 18-26. The Consumer Protection Act 1978 is published by HMSO, London 1987.

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

As far as penalties go, a distinction has to be drawn: breach of the general safety duty is merely an offence punishable by fine or imprisonment. There is *no* civil sanction. This is kept for the new product liability law[30], as a conversion of the Community

Product Liability Directive. Contraventions of specific governmental regulatory measures, in particular safety regulations, retain their traditional twofold character as crimes and as the torts of breach of statutory duty.

2.5 Accident information systems

The consumer protection policy debate in Britain takes on a special quality because the relevant legal policy work was set on an empirically based scientific foundation. During the mid-1970's, the UK began developing the most comprehensive accident information system of the times alongside NEISS in the US, namely the Home Accident Surveillance System (HASS). In 1977, following an initial stage in 1976, a system for collecting data on accidents at home and in the garden was developed in England and Wales. Twenty hospitals with 24-hour accident and emergency services were incorporated into the system as informational sources. In an alternating pattern, ten hospitals at a time supply data on non-fatal accidents requiring medical treatment in hospital. Fatal accidents are surveyed and assessed by the Office of Population Censuses and Surveys (OPCS). According to the last available HASS report, from 1986 and based on 1985 figures[31], every year in Great Britain, i.e. England, Scotland and Wales[32], 5005 people die in home accidents and 3.1 million people are seriously injured as to require medical treatment. Home accidents constitute 40% of all fatal accidents in Great Britain (as against 42% road accident deaths), and at 34%, are by far the largest proportion of accident victims treated in hospitals. The number of fatal home accidents in the narrower HASS survey

31 Home Accidents, 1986.

32 Figures for Scotland are supplied to HASS by the Scottish General Register Office.

area, England and Wales, has been very stable at around 4800 since 1980.

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

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

2.6 Technical standardisation

2.6.1 The British Standards Institution

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

Today the BSI is headed by a board responsible for general standardisation policy. Below the board are six Councils overseeing specific areas: building, chemistry and health, engineering, electricity, technology and computing. There is also a Quality Assurance Council, responsible for product certification, tests and inspection. In 1984, the latter was transformed into the National Accreditation Council for certification bodies. Its tasks are to monitor and authorise for product certification and quality assessment, certification bodies other than the BSI. Practical standardisation work is done by some 300 technical committees[33]. These committees are comprised of some 28,000 experts, primarily from interested business circles who work on a voluntary basis. The BSI has more than 1074 permanent employees.

Besides the technical committees, the Consumer Standards Advisory Committee is of importance from the viewpoint of product safety. Some 70-80 representatives of consumer associations take part in this endeavour. The Consumer Committee de-

33 The data refer to the BSI's Annual Report for 1985-6.

veloped out of the Women's Advisory Committee introduced in 1951. Its task is to ensure involvement of consumer interests in the standardisation process. The Consumer Committee is at present represented on 230 technical committees. Since consensus or unanimity by Committee members is a precondition for adoption of a technical standard by the BSI, opposition by a consumer representative can block a standard.

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

2.6.2 Methods of "reference to standards"

British Standards, like DIN standards, are mere recommendations. They have no legal standing[34]. This has all changed since the British Government adopted the "reference-to-standards" policy in worker and consumer protection law in the late 1970's. This policy is in turn determined by the great political value attaching to British Standards for the international competitivity of the British economy in the last decade, especially following UK entry into the EEC in 1973. Among political expressions of this situation are the (already cited) 1976 Green Paper "Consumer Safety", the General Agreement on Technical Barriers to Trade, to which Britain acceded in early 1980, the 1982 Memorandum of Understanding between Government and BSI, and particularly

34 Every British Standard contains the following clause: "Compliance with a British Standard does not of itself confer immunity from legal obligation".

the 1982 White Paper "Standards, Quality and International Competitiveness".

Ignoring for the moment the possibility of using British Standards for contractual description of performance, something done above all by the State when placing orders, there are four particular important ways for giving technical standards legal relevance[35]:

— *Incorporation.* A formerly widespread method is to incorporate a British Standard, in modified form or sometimes *verbatim*, into a safety regulation. An example of this is the Oil Heaters Regulations of 1961/1966. By contrast with reference proper, here it is the regulation itself — even though partly incorporating a British Standard — that independently, and exhaustively, regulates the technical requirements.

— *Strict reference.* With this reference method, so far the major one in Britain, the provision (as a rule a safety regulation) refers for safety standard, test procedure, etc. directly to a British Standard, indicating the BS number and date. Compliance with this technical standard is then a legal obligation. In German terminology, this is a case of rigid/static legal reference. Any change to the technical standard necessitates adaptation of the safety regulation. Examples of this are the Heating Appliances (Fireguards) Regulations (1973) and the Nightdresses (Safety) Regulations 1967.

— *Undated reference.* In this case the safety regulation refers to one or more specific standards by simply mentioning the BS number, but compliance with the norm is not made binding. The manufacturer/importer then has alternative possibilities of meeting the safety requirements. This reference is made on a "deemed to satisfy" basis.

— *General reference.* The legal provisions may however also describe the safety requirements in general, or abstractly contain a general safety obligation[36]. The manufac-

35 Cf. also BS O: A Standard for Standards, Part 1, 1981, Clause 9.

36 E.g. Section 6 (1) (a) HSWA 1974, which, borrowing from § 3 (1) GSG, postulates a general duty "to ensure, so far as is reasonably prac-

turer/importer/trader is free to choose the way he wishes to meet the requirements. One acceptable way will be to comply with the relevant British Standard, or equivalent technical standards, if they exist. More recently, the Ministry has gone over to providing so-called *administrative guidance*. Here there is a clear statement of which technical norms satisfy the safety requirement concerned. This reference is made on the so-called "approved" basis. Practical examples are the Electrical Equipment (Safety) Regulations 1975, the Building Regulations and the area covered by the HSWA. By contrast with administrative provisions under § 11 of the German GSG, administrative guidance has no formal legal standing.

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

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

The two methods of non-binding legal reference to technical standards ("undated and general reference") seem to be becoming steadily more common in Britain. In particular, the 1982 Government White Paper "Standards, Quality and International Competitiveness" is decidedly in favour of this regulatory approach ("statute plus BSI"). The parallels with the "new approach" to

---

ticable, that the article is so designed and constructed as to be safe and without risks to health when properly used".

harmonisation of technical standards at Community level are unmistakable. The introduction of a general safety duty in consumer product safety law, announced in the 1984 and 1985 White Papers and brought about through the Consumer Protection Act 1987, is merely a consistent development of this legal area, with respect to both industrial and consumer protection policy.

2.6.3 Product certification

Certification is an area that has been intensively discussed and dealt with in Britain, partly from a trade policy standpoint. In 1982, certification procedure was available for between 200 and 300 types of products. In the most part, BSI kitemarks are issued. Product certification is handled by the BSI through the Certification and Assessment Department. In addition to this department, there are other recognised certification institutions in particular areas. Two examples are the British Electrotechnical Approvals Board (BEAB) for electrical products and the British Board of Agreement (BBA) in the area of building and construction. In Britain, three marks of conformity or quality are commonly used:

— *BS number.* Mere use of the BS number is the least effective measure. It is merely a statement by the user or manufacturer, not subject to any further control, that the product has been manufactured in accordance with the relevant British Standard.

— *Kitemark.* This conformity mark has existed since 1903. Authorisation to use the kitemark is given by the BSI following checking at the manufacturing plant to ensure that the requirements are met. At the end of 1986 there were 1,365 kitemarks. The BSI Inspectorate carries out continual checks to ensure that the provisions are still being complied with.

— *Safety mark.* Since there are (as yet) no specific safety standards to date, and a British Standard is not necessarily ori-

ented towards coverage of all possible relevant safety requirements, a safety mark was introduced in 1974. Firms may use it on products that have met special safety requirements when tested by the BSI. In practice, however, the safety mark has evidently not yet caught up with the kitemarks. Compared with the 1,365 kitemarks at the end of 1986, there were only 37 safety marks.

A fairly important procedure in Britain is that of *quality assessment*. This centres not around an individual product, but rather on whether a manufacturing or service firm in general meets the requirements of BS 5750[37], the BSI's basic quality standard. Firms that meet the requirements — at present there are 1,402 of them — are registered by the BSI. This registration also seems to be of interest to the firms concerned from a marketing viewpoint.

2.7 Liability

Traditionally in British safety law, the main non-administrative response to contraventions of safety regulations is criminal sanction[38]. The CSA lays down penalties of up to three months imprisonment and fines of up to 1000 pounds (Section 2 (4)). However, the conditions under which the accused may put forward the defence of due diligence are in each case regulated in detail[39]. While the HSWA 1974 explicitly excludes civil sanctions, they are explicitly permitted by the CPA 1961 and the CSA 1978. The Consumer Protection Act 1987 once again provides

37 BS 5750 has since been adopted internationally as ISO 9000.

38 With the general political trend towards deregulation in Britain, too, the interministerial study "Burdens on Business" (op. cit., note 28), 62, has recently for the first time unreservedly recommended restriction to civil law and to insurance solutions. But even outside the narrower area of consumer product safety law, increasing decriminalisation of economic regulation is being called for. Cf. Tench, 1981; Breaking the Rules, 1980.

only criminal sanctions for breaches of the general safety requirement (Section 10 (1) CPA). As to liability, in consumer product safety law in England and Wales there were three possible grounds of claim, of which however we shall describe only the first two in more detail, given their more direct relevance: breach of statutory duty, negligence ("product liability in tort") and contract. Henceforth the new product liability law embodies a third one (modified strict liability).

2.7.1 Breach of statutory duty

The offence of breach of statutory duty is the most interesting one from a liability point of view, even if to date, it has no practical importance[40] with regards to consumer product safety law. This institution is controversial in the English legal literature on liability. Dias/Markesinis, for instance, say that it lies "between" liability on grounds of negligence and strict liability[41]. Firstly, Section 6 (1) CSA clearly states that breaches of obligations under safety regulations, prohibition orders or prohibition notices constitute a civil offence of breach of statutory duty. It seems also to be undisputed that this is strict liability, since the criminal law defence of due diligence is ruled out. Liability is based on merely marketing an unsafe or damage-causing consumer product. However clear this differentiation may seem, the demarcation becomes unclear when one comes to consider the cases of primary interest here, where the manufacturer/trader has complied with a technical standard referred to (in particular a

39 Section 2 (6) CSA; Section 12 Consumer Safety (Amendment) Bill.

40 According to information from the legal expert of the Department of Trade and Industry's Consumer Safety Unit, no action for compensation on the basis of breach of statutory duties can be traced. See also the DTI's document of November 1985, "Implementation of EC Directive on Product Liability", para. 42.

British Standard). No problems arise with the case where a safety regulation bindingly prescribes compliance with a particular standard (Section 1 (2) (b) CSA). Here, compliance with a technical standard that ultimately proves technically inadequate (for instance, because it is out of date) excludes breach of statutory duty as a ground of liability. More interesting, since it will no doubt be of greater importance in the future, is *non-mandatory* reference to technical standards, for instance, pursuant to Section 1 (2) (c) CSA.

For civil liability on grounds of breach of statutory duty, it must here suffice for the plaintiff to show that there has been a breach of the relevant safety regulation, in other words, an unsafe product has been brought to market. Since action for breach of statutory duty does not require negligence, the defence that a relevant British Standard has been complied with is not admissible. The main defence open in breach of statutory duty cases is to show that the person suffering the damage is (largely) co-responsible. Compensation for damage is limited to personal injuries. Exclusion of liability or limitation of liability is null and void[42].

Whether the courts will maintain this line of interpretation in the sense of "strict liability" in England and Wales is at present completely uncertain. Firstly, no relevant decisions have been taken as yet. Secondly, with the Consumer Protection Act 1987, British legislation has in part taken a different course. Breach of the general safety requirement now introduced has been specified solely as the elements of an offence. The liability aspect has been left for British product liability law, which has to implement the Community Product Liability Directive. By contrast with the National Consumer Council's expectations expressed in 1984[43], the

41 Dias/Markesinis, 1984, 156. Cf. also in general Stanton, 1986.

42 Section 3 (1A) CSA, introduced by the Unfair Trade Act 1977.

offence of breach of statutory duty does *not* extend to the "general safety duty". Breach of statutory duty remains confined to the safety regulations and comparable governmental regulatory acts. Most recently, there has been a noticeable general trend by courts in England and Wales to look at the political objectives lying behind individual-case statutory regulations in order to specify the content and extent of the statutory duty and the circumstances that define its violation[44]. Since it has, however, become clear since the 1980's that in the view of both Government and Parliament, "sound and modern standards of safety" ought to define the scope of the duty, it cannot be ruled out that if standards "approved" by the BSI[45] are observed, liability for breach of statutory duty will not arise.

2.7.2 Negligence

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

Offence-based manufacturer liability on grounds of negligence[46] developed relatively late in English common law. Whereas in the US and Germany the foundations had been laid

43 The Safety of Goods (loc. cit., note 23), 7-10.

44 Dias/Markesinis, 1984, 158.

45 Cf. 2.6.2 supra.

by similar decisions at the highest judicial level at around the same time, 1915-16[47], this did not come about in England until 1932. The landmark decision *In Re* M'Alister (or Donoghue) v. Stevenson[48] for the first time assumed positive duties of care between persons outside contractual relationships, which could be breached merely by being negligent ("not using reasonable care"). Subsequently, negligence liability by manufacturers of defective products was consolidated. The general duty of care was differentiated into manufacturing duties ("production defects"), design duties ("design defects") and duties of instruction ("marketing defects"). Procedurally as well, it may now be taken as a basis in England and Wales — comparable in this respect with the FRG — that it is in principle sufficient for the injured party to show that interests protected under the law of tort have been injured during proper use of the product in question. By the *res ipsa loquitur* rule, the manufacturer's negligence is (refutably) presumed.

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

---

46 Cf. esp. Hepple/Matthews, 1985, 258 et seq.

47 RGZ 87, 1 — Brunnensalz (1915); Mac Pherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

48 A. C. 562 (1932).

At least since Walton v. British Leyland UK Ltd. (1978), a duty to monitor a product and respond accordingly seems to have been recognised. This is the counterpart in law of tort to the regulatory "notice to warn". In Walton v. British Leyland, the car manufacturer was condemned to make compensation for damages, on grounds of breach of a duty of recall. English law has also developed duties of care and transaction under law of tort for the marketing stages. The doctrine of "strict liability", adopted by most US States since 1963[49], has not yet been accepted by English law of tort any more than by German producer liability law.

2.7.3 The present legal policy situation (1987)

The forthcoming implementation of the Community Product Liability Directive in British law and the British Government's undertaking in 1987 to introduce a general safety duty into consumer protection law, broke the ground for innovative developments. These included: (1) Introduction of a general safety duty into the Consumer Safety Act; raising criminal penalties; removal of the offence of breach of statutory duty from the CSA, with revised provision for it in a special act on product liability; (2) Introduction of a general safety duty into the CSA, with retention of possibly raised criminal and civil sanctions; implementation of the Community Directive in a separate product liability act.

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

49 Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 377 P. 2d 897.

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

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

2.8 Information

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

2.8.1 Information of regulatory bodies

As regards information to governmental agencies on damage-causing products, the 1976 Green Paper referred to the following sources[50]:

— Government departments;
— Complaints about product defects from Members of Parliament and the public;
— Local authorities;
— Consumer associations and the Royal Society for the Prevention of Accidents;

50 Cmnd. 6398, 1976, 2.

— The national and international press and specialised journals;
— The BSI;
— The Office of Population Censuses and Surveys (OPCS).

Most important by far is the HASS/HADD accident information system which has been extremely effective in reporting on non-fatal accidents in England and Wales. HASS and HADD are described above (2.5).

2.8.2 Information to purchasers of products

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

As in other countries reported on, *comparative tests of goods* have long been customary in Britain, too. A prominent role in this connection is played by the Consumer Association Ltd. This is a private-law non-profit-making organisation founded in 1957, financed exclusively from membership dues. Membership at present comprises some 700,000 persons. The Consumer Association carries out comparative tests on all types of consumer goods and relevant services. Test results are published in the magazine "Which?", directly available only to members. Since, however, test results are reported on television and in the press and the magazine is available in public libraries, the Consumer Association and "Which?"[51] have an overall importance for con-

sumer education equalling that of the German Stiftung Warentest and its magazine "test".

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

One peculiar feature of the British situation is the importance attached to consumer protection, here primarily in connection with safety in the home, through *consumer education*, in the schools. The Royal Society for the Prevention of Accidents (ROSPA), publicly funded, has set itself the task of bringing safety questions into school syllabuses. The government's Press and Information Office supplies schools with film material for this purpose and television stations broadcast corresponding "safety messages" in pauses between programmes.

EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge – depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

From Name . . . . . .

Address . . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . .

❒ Please send me a complete list of EUI Working Papers
❒ Please send me a complete list of EUI book publications
❒ Please send me the EUI brochure Academic Year 1990/91

Please send me the following EUI Working Paper(s):

No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .

Date . . . . . .

Signature . . . . . .

EUI Working Papers as from 1990

As from January 1990, the EUI Working Papers Series is divided into six sub-series, each series is numbered individually (i.e. EUI Working Paper HEC No. 90/1; ECO No. 90/1; LAW No. 90/1; SPS No. 90/1; EPU No. 90/1; ECS No. 90/1).

February 1991

Working Papers in Law

LAW No. 90/1
David NELKEN
The Truth about Law's Truth

LAW No. 90/2
Antonio CASSESE/Andrew CLAPHAM/Joseph H.H. WEILER
1992 – What are our Rights? Agenda for a Human Rights Action Plan

LAW No. 90/3
Sophie PAPAEFTHYMIOU
On a "Constructivist Epistemology of Law"

LAW No. 90/4
Joachim WÜRMELING
Legislativer Trilog im Institutionellen Dreieck der Europäischen Gemeinschaft. Das Verfahren der Zusammenarbeit nach Artikel 149 Absatz 2 EWGV.

LAW No. 90/5
Renaud DEHOUSSE
Représentation territoriale et représentation institutionnelle: réflexions sur la réforme du Sénat belge à la lumière des expériences étrangères

LAW No. 90/6
J. KORTE (ed.)/
A. E. KELLERMANN/
W. M. LEVELT-OVERMARS/
F. H. M. POSSEN
Primus Inter Pares: The European Court and National Courts.
The Follow-up by National Courts of Preliminary Rulings ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands

LAW No. 90/7
Reiner GRUNDMANN
Luhmann Conservative, Luhmann Progressive

LAW No. 90/8
Bruno DE WITTE
The Integrated Mediterranean Programmes in the Context of Community Regional Policy

LAW No. 90/9
Anne-Laurence FAROUX
Le Ministère de la Culture en France: Création et organisation

* * *

LAW No. 91/10
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 1
Christian JOERGES
The Juridification of Product Safety Policy

LAW No. 91/11
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 2
Gert BRÜGGEMEIER/
Hans-W. MICKLITZ
Product Safety Legislation in France and in the United Kingdom

LAW No. 91/12
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 3
Gert BRÜGGEMEIER/
Josef FALKE/Christian JOERGES
Product Safety Legislation in the Federal Republic of Germany and in the United States

LAW No. 91/13
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 4
Josef FALKE/Christian JOERGES
"Traditional" Harmonisation Policy, European Consumer Protection Programmes and the New Approach

LAW No. 91/14
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 5
Christian JOERGES/
Hans-W. MICKLITZ
Internal Market and Product Safety Policy

LAW No. 91/15
Christian JOERGES
Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik