



EUI WORKING PAPERS IN LAW

CHRISTIAN JOERGES (ED.)

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

Volume 3

EUI Working Paper LAW No. 91/12

**Product Safety Legislation
in the Federal Republic of Germany
and in the United States**

by

Gert Brüggemeier, Josef Falke and Christian Joerges

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

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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.

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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 1:

Christian Joerges:
The juridification of product safety policy

Acknowledgements

Foreword

Introduction

Chapter I:

*Product safety, product safety policy and
product safety law*

Abbreviations

Bibliography

Volume 2:

Gert Brüggemeier Hans-W. Micklitz:
Product safety legislation in France and in the United
Kindom

Chapter II (Parts 1 and 2):

Examples of product safety legislation

Part 1:

*Product safety law in France
Hans-W. Micklitz*

Part 2:

*Consumer product safety law in Britain
Gert Brüggemeier*

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 3)

Chapter II: Examples of product safety legislation

Part 3:

Gert Brüggemeier Josef Falke

Product safety policy in the Federal Republic of Germany

3.1	Research into home and leisure accidents	1
	(Falke)	
3.2	The reference technique in general (Falke)	6
3.3	The Appliances Safety Act and its application in practice (Falke)	12
3.3.1	Lines of development	13
3.3.2	Scope	15
3.3.3	General safety obligation — § 3 (1) GSG	16
3.3.3.1	Proper use	18
3.3.3.2	Generally recognised rules of the art and the industrial safety and accident prevention provisions	20
3.3.3.3	Deviation clause	25
3.3.4	Incorporation of standards in the lists	27
3.3.5	Principles of safety standardisation	30
3.3.6	The safety mark "GS = geprüfte Sicherheit" (safety-tested)	34
3.3.7	Monitoring by the Trade Supervisory Offices; banning orders	38
3.3.8	Limits of applicability; removal from storage	47
3.4	Technical standardisation in DIN (Falke)	50
3.4.1	Development of DIN, volume of standardisation work and financing	51
3.4.2	The standards agreement	59
3.4.3	Principles of standardisation and procedures for producing standards	61

3.4.4	Incorporation of international and European standards into the German standards system	65
3.4.5	The representation of consumer interests in DIN	68
3.4.6	Conformity marks	72
3.5	Product liability (Brüggemeier)	74
3.5.1	Infringement of protective legislative provisions (§823 (2) BGB)	75
3.5.1.1	§ 3 (1) and 3 GSG	75
3.5.1.2	§ 2 of the First Ordinance under the law on technical work materials of 11 June 1979	80
3.5.2	Producer liability pursuant to § 823 (1) of the BGB (German Civil Code)	82

Part 4:

Christian Joerges

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

4.1	The original version of the CPSA and amendments to it	90
4.1.1	The CPSA 1972	91
4.1.2	Amendments	93
4.1.2.1	Mandatory standards and product bans	94
4.1.2.2	Right of petition and public information	96
4.1.3	The regulatory "philosophy" of the CPSA in 1972 and the American deregulation movement	98
4.2	The accident information system and the CPSC's policy priorities	101
4.2.1	The National Electronic Injury Surveillance System	102
4.2.2	Criticisms of the NEISS	103
4.3	Mandatory product standards and bans	106

4.3.1	Public participation	107
4.3.2	Individual standards and typical regulatory problems	109
4.3.2.1	The pool slide debacle and the CPSC's product safety philosophy	110
4.3.2.2	Lawn-mowers and the indefiniteness of cost-benefit analyses	113
4.3.3	Product bans	115
4.4	Updating of "voluntary" standards	118
4.4.1	Standardisation organisations and procedures	119
4.4.2	The CPSC attitude	120
4.4.3	Standards and product liability	124
4.5	Recalls	125
4.5.1	The CPSC legislative framework	125
4.5.2	Application of Section 15 CPSC	127
4.5.3	The function of follow-up market control	130
4.6	Evaluation of the CPSC	131

Chapter II: Examples of product safety legislation

Part 3: Product safety policy in the Federal Republic of Germany

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

3.1 Research into home and leisure accidents

While industrial accidents in particular have for years been fairly completely covered by the occupational accident insurance associations, as have road accidents and accidents in schools and nurseries¹, the Federal Republic lacks comparable statistics for the area of home and leisure. The Federal Government did not take part² in the Community pilot experiment relating to a Com-

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

munity system of information on accidents involving products outside the spheres of occupational activities and road traffic³, and was also reluctant about the demonstration project decided on in April 1986 with a view to introducing a Community system of information on accidents involving consumer products⁴. It based itself primarily on a study concerning home and leisure accidents, carried out by the Association of Liability Insurers, Accident Insurers, Automobile Insurers and Legal Costs Insurers (HUK-Verband e.V.)⁵; until then, findings on home and leisure accidents were available only for selected groups of people and types of accidents⁶.

The HUK study treats as a home or leisure accident, an occurrence in which a person doing something involved with either road traffic, an occupation or school suffers an injury requiring medical treatment or leading to impairment for at least several days. An initial survey asked 89,393 representatively sampled households⁷ whether one or several household members had suffered a home or leisure accident in the last 12 months. The figures collected are not stated, though the projection based on them is. This estimates home and leisure accidents with personal injuries requiring medical treatment or at least leading to rather long-time impairment at some 3 million for the Federal Republic; 15% of those injured will require hospital treatment. The number

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

3 Cf. Council Decision 81/623/EEC of 23 July 1981, OJ L 229, 13 August 1981, 1 et seq.

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

5 Pfundt, 1985. Cf. Mertens, BArbB1. 5/1986, 321 et seq.; *idem*, 1986, 246 et seq. On the methodology of accident analysis, see also Pfundt, 1986.

6 The findings are briefly summarised in Pfundt, 1985, 205-11. Cf. also Compes, 1986; Kern, 1986; Henter/Milarch/Hermanns, 1978; specifically on do-it-yourself accidents, Tittes, 1986.

of trivial home and leisure accidents is estimated at over 100 million per year⁸. It is further stated that in 1982 approximately 11,000 fatal accidents occurred in road traffic, some 2,500 at work or school, and some 12,000 at home or in leisure time. More than 75% of the last group of victims are over 64⁹.

In methodological evaluation of the study, the extremely high forgetfulness curve should be noted. For the period within a month of the survey, 5.3 times as many accidents are mentioned as in the period within 12 months of the survey; for accidents with in-patient treatment, there was still a forgetfulness factor of 2.1 for the same period¹⁰. This rules out comparison of the HUK study with accident survey systems that collect figures directly from accident stations immediately after the accident, and also arouses doubt as to the reliability of the detailed accounts of the circumstances of accidents. Doubts about the study's methodological grip arise also from the fact that not a single accident resulting in death was covered and that the proportion of accidents involving children was only 15%, whereas for instance in the Netherlands study it was 30%¹¹.

A second phase of survey asked for further details on the course and consequences of accidents, in telephone interviews on a total of 3,064 accidents¹². The breakdown by individual category of accident is as follows¹³:

-
- 7 Not including foreigners and people living in institutions.
 - 8 Pfundt, 1985, 9.
 - 9 Op. cit., 10-14.
 - 10 Op. cit., 4.
 - 11 Report of 1984 Data Home Accident Surveillance System, Amsterdam 1985, 18.
 - 12 By way of comparison, the Dutch accident survey system in 1984 covered some 70,000 cases.
 - 13 For details see Pfundt, 1985, 23-57.

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

Manipulation accidents are 12% with a machine and 32% with a tool. These two categories together make up 8% of all accidents surveyed; because of the relatively slight consequences of the accidents and the resulting higher forgetfulness rate, the proportion is probably to be estimated higher in reality¹⁴.

The case studies did not from the outset provide any category for covering design-related causes of accidents, but made only the following behaviour-based assignments¹⁵:

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

As a whole, the HUK study summarises to the effect that technical inadequacies in newly purchased machines, tools or appliances seem to play no part in the causation of home and leisure accidents. The Appliances Safety Act was supposed to have ensured that hardly any inadequate, dangerous to handle machines were still being sold. 99% of home and leisure accidents are seen as being the consequences of more or less serious mistaken actions¹⁶.

In his politically ambitious account and assessment of the study, Mertens comes to the conclusion that accidents with appliances and machines as yet undamaged by wear and tear that have been used properly and safely, accounted for much less than

14 Op. cit., 40-44.

15 Calculated from Pfundt 1985, 163-165, 184. On the methodological problems of allocation see loc. cit., 203-208.

0.5% of all home and leisure accidents¹⁷. This supposedly obvious conclusion, that the major part of appliance and machine accidents are due to improper or unsafe use or to damage through wear and tear, can derive support only from the "case studies"¹⁸ on the handling accidents, which are, however, full of very tendentious assessments. Mertens also presupposes that wear and tear and mistaken actions are negligible when it comes to setting technical standards. The Stiftung Warentest comes to a quite different estimate. It believes that many accidents today classed as user-caused could very quickly come to be seen as appliance caused if the necessary creativity were applied to thinking how foreseeable misuse could be avoided by suitable technical arrangements¹⁹.

We do not wish here to go any further into the fact that in 1984, 24% of appliances tested by trade inspection offices in any case proved defective²⁰ nor into the serious, widespread shortcomings in systematic market control by the North Rhine-Westphalia Central Office for safety technique that have come to light²¹. One observation of Mertens that remains convincing is that data collection on accidents must be made much more detailed if it is to be of use for technical standardisation. What he deduces from this, however, is not the need for intensive directed studies, for instance on handling accidents with appliances and tools, but instead the basic principle of "hazard analysis that has stood the test of decades" which makes it possible to prevent accidents beforehand by applying technical safety principles to re-

16 Loc. cit., 190.

17 Mertens, BArbB1. 5/1986, 34.

18 Pfundt, 1985, 96-188.

19 Loose, 1986, 366.

20 For details here see the survey in Chapter II, 3.3.5.

21 For details see the 1984 Annual Report of the Trade Supervisory Office of Land Nordrhein-Westfalen, 49-59; Fischer, 1984.

moving danger spots and sources of risk. According to Mertens, the Community should "concentrate more on intensifying supranational work on technical safety regulations and standards"²², instead of focusing its accident prevention work on appliance and machine accidents that have already occurred.

3.2 The reference technique in general

A characteristic of German product safety law, as of German safety law in general, is the "interplay between governmental legal standards and private technical standards drawn up by technical and scientific associations, in a complex multilayered system of standards"²³. The object of technical safety law is on the one hand, to protect life, health, property and the environment against damage from technical products and installations, and on the other, to provide legal guarantees in connection with economic activities bound up with certain technical risks. To this end, statutes and legal ordinances lay down binding safety objectives, vaguely defined using such formulae as "generally recognised rules of the art", "state of the art" or "state of science and technology". These indefinite legal concepts are amplified by references to technical rules or standards drawn up by public-law

22 Mertens, BArbB1. 5/1986, 34-35.

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

committees of experts or by private standardisation associations. Manufacturers or users of potentially dangerous technical products or installations are not legally bound by the technical rules or standards, but may choose other solutions if at least the same level of safety is achieved (deviation clause). This is intended to take account of the rapid development of modern technology and avoid hampering progress and producing rapid outdated.

The choice among the expressions "generally recognised rules of the art", "state of the art" and "state of science and technology" determines the lag in adapting legal requirements to technical or scientific advance²⁴. The legally indefinite expression "generally recognised rules of the art" focuses on the prevailing view among technical practitioners, on what is generally regarded as tried and tested in professional practice. This criterion always lies behind further technical advance. The formula "state of the art" shifts the legal criterion for what is permitted or commanded to the front line of technical development; the decisive point is not what is generally recognised or established in practice, but what is technically necessary, appropriate and possible, even if commercial practice is not yet in line with it. If a requirement mentions the "state of science and technology", those precautionary measures regarded as necessary according to the latest scientific findings must be used. If this cannot yet be achieved technically, permission may not be issued, since the limit to the requirement is not set by what is currently technically achievable. Detailed technical rules have been displaced from the context of governmental law-making to the allegedly more flexible level of non-governmental regulation, so as to permit quicker adaptation to technical progress but above all to allow for representative collaboration by "interested circles" in industry and the

²⁴ Fundamental to the reference trial is the so-called Kalkar decision of the German Constitutional Court of 8 August 1978, BVerfGE 49, 80 (135 f.); see Breuer, 1976, 67-68. From the burgeoning literature, see

economy, science, technical monitoring organisations and other interested and expert groups in society. P. Marburger speaks of the structural principles of flexibility and co-operation²⁵. R. Wolf calls the standardisation logic of technical regulation a "self-regulatory mechanism in the shadow of regulative policy"²⁶. Before dealing with the specific form of private technical standardisation and its controlled adoption by government in the area of safety of technical consumer goods in detail, we shall briefly summarise the German debate on the legal admissibility of reference to technical rules²⁷, since the legal admissibility of the new approach to technical harmonisation and standards raises similar questions.

There is no dispute as to the admissibility of *rigid reference*²⁸ in which a law or regulation refers to a quite specific version of a technical rule. Here the legislator can verify the content of the technical standard, and the content of the standard referred to cannot be altered without assent by the legislator. Rigid reference to technical standards is nothing other than a drafting abbreviation in the text of the statute. It does not transfer any legislative powers to non-legitimated non-governmental bodies, and it complies with the constitutional principle of certainty of law. Due to the amplitude of the reference, the content of the technical

Marburger, 1979, 145-176; Rittstieg, 1982, 21-43; Wolf, 1986, 277-295.

25 Marburger, 1979, 117-20.

26 Wolf, 1986, 153-59. The effect of unburdening the State was already stressed by Gasde, 1972.

27 See Marburger, 1979, 379-407; *idem*, Gleitende Verweisung, 1982; *idem*, Rechtliche Bedeutung, 1982, 129-135; Schwierz, 1986, 63-99; Ossenbühl, 1967; Karpen, 1970; *idem*, 1976; Arndt, 1979; Brugger, 1987, 41-44; Buckenberger, 1982; Schnapauff, 1982; Staats, 1978; Strecker, 1979; Vogel, 1979; Ernst, 27-41. Finally, see also Arbeitsschutzsystem, Bd. 1, 1980, 299-308.

28 On rigid reference, see Marburger, 1979, 387-89; Hunscha, 1982; Meyer, 1982; Strecker, 1982.

rule referred to is binding not only for the administration but the citizen as well.

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

The admissibility of *sliding or dynamic reference*, where reference is made to one or more technical standards in their most current form, was long disputed²⁹. P. Marburger names four legislative functions of sliding reference³⁰:

- To free the legislator or regulator of a regulatory task for which they usually lack the necessary technical understanding³¹ (unburdening the legislator);
- To keep the text of the statute or ordinance free of complicated and often very voluminous detailed technical provisions (unburdening the law);

29 On sliding or dynamic reference, see Marburger, 1979, 390-407; Schwierz, 1986, 57-99; Marburger, *Gleitende Verweisung*, 1982; Buckenberger, 1982; Schnapauff, 1982.

30 Marburger, *Gleitende Verweisung*, 1982, 29-30; *idem*, 379-383.

31 More clearly, it may be said that in the area of technology the State has a structural information deficit vis-à-vis the industry that does the research development work (cf. Marburger, 1979, 381-82.).

- To allow rapid adaptation of the content of the law to technical advance, by shifting the technical details of safety regulation out of the formal legislative procedure (flexibility);
- To allow involvement of expert circles in law-making (co-operation).

The involvement of "expert" circles *may* be a guarantee that technically practicable and also adequate safety solutions will be adopted if it can be made certain that the competent experts are in fact represented on the relevant standards committees. Involvement of those concerned in establishing technical standards ought to increase willingness to comply with the standards. This ought not, however, to be bought at the price of adopting objectively unsuitable regulations because of one-sided representation of interests — and "expert" circles are always also "interested" circles. The interests concerned must be represented truly comprehensively, including suppliers, consumers and representatives of the public interest³². The procedure of private technical regulation, and specifically the way it is actually done and not what it said on paper, decides whether sliding reference will lead to adoption of apposite regulations in the public interest or decisions in the particular interest of manufacturers³³.

Large constitutional objections have been raised against the admissibility of sliding reference to technical rules³⁴. It has been seen as disguised transference of law-making power to private persons, as infringement of the democracy principle, of the constitutionality principle, specifically of the precept of certainty and clarity of law, of the requirement for proper publication of laws and of the principle of separation of powers.

32 Cf. Marburger, *Gleitende Verweisung*, 1982, 30.

33 For details on the procedure for drawing up DIN standards see Chapter II, 3.4.3 *infra*.

34 See Ossenbühl, 1967; Karpen, 1970, 131 *et seq.*; *idem*, 1976, 232 *et seq.*; Arndt, 1979.

These objections are upheld against the admissibility of *sliding reference in supplementation of standards*, making reference *directly* and bindingly to technical standards in their successively current forms³⁵. With this form of reference, in which the technical regulations referred to become binding law in their current version for both citizen and administration, the legislator or regulator refrains from determining the content of the law, or leaving it to private standardisation bodies. What this comes down to is a blanket law, a law whose content can be altered at the whim of the private regulator.

*Sliding reference in specifications of norms*³⁶ occurs always in connection with an indefinite term in the legal text, which it serves to specify. The law may, for instance, prescribe compliance with the "recognised rules of the art"; as a rider or in connection with this, it may then be stated that particular technical standards count as such recognised rules of the art. What is legally binding on the manufacturer of a product or the operator of an installation is only compliance with the statutory safety standard, which thus conclusively determines the duties as to conduct. Often special procedures are being developed to control response to relevant technical rules. Thus, the Federal Ministry for Labour and Social Affairs verifies DIN standards of relevance to safety before including them in list A of the General Administrative Regulation under the Appliances Safety Act³⁷. The new approach to technical harmonisation and standards likewise creates, through administration of the list of standards, a possibility of checking the harmonised standards and the declared national

35 On this see Marburger, 1979, 390-395, *idem*, Gleitende Verweisung, 1982, 31-34.

36 On this see Marburger, 1979, 395-407; *idem*, Gleitende Verweisung, 1982, 34-37. Schwierz, 1986, 61-62 speaks about "dynamic references that prescribe a general safety criterion".

37 For details see 3.3.4 *infra*.

equivalent ones for their compliance with the underlying safety requirements³⁸.

This *additional* reference to specific technical rules is intended on the one hand, to give addressees of the norm an indication of how to comply with the legal safety requirements, and on the other, to oblige the competent authorities to accept appliances or installations that meet the technical standards listed. Firms are free to choose solutions non complying with the technical rules provided that at least the same level of safety is attained. If they keep to the listed technical standards, there is a refutable presumption that the statutory safety duty has been met. Whether a technical regulation referred to in fact meets the statutory safety standard is subject to judicial verification. The competent administrative authorities remain free to act against a product manufactured or installation operated in accordance with the standards in cases of a concrete risk. Observance of technical standards acts merely as an indicator of compliance with the statutory safety obligation.

3.3 The Appliances Safety Act and its application in practice

The German law on technical appliances (the Gerätesicherheitsgesetz — Appliances Safety Act (GSG))³⁹ is regarded as a model for both the Low Voltage Directive and the new approach to technical harmonisation and standards. The GSG, an offshoot of labour protection law, has developed into one of the most im-

³⁸ For more on this see Chapter IV, 3.3.

³⁹ Of 24 June 1968 (BGBl. I, 717), last amended on 18 February 1986 (BGBl. I, 265). In general on the GSG see Schmatz/Nöthlichs, Gerätesicherheitsgesetz. Kommentar und Textsammlung, Sonderausgabe aus dem Handbuch "Sicherheitstechnik", hrsg. von Schmatz/Nöthlichs; Jeiter, 1980; Meyer, 1979; Peine, 1986; Zimmer-

portant German laws for preventive protection of consumers against defective products, and at the same time forms a link between governmental product safety policy and safety-related technical standardisation. In presenting the GSG, one must therefore immediately include technical standardisation of relevance to safety.

3.3.1 Lines of development

The 1929 Industrial Safety Bill already included the basic idea of guaranteeing safety for workers through quality requirements on appliances; the competent authorities themselves were to determine the requirements on machines needed to protect workers' life and health. In the same year, the ILO adopted a recommendation on responsibility for protective devices on mechanically driven machines. In 1963, it extended its earlier recommendation and decided on Convention No. 119 on machine protection, with the supplementary recommendation No. 118. This was the basis for the Machine Safety Bill (*Maschinenschutzgesetz*)⁴⁰, which assumed the following guidelines:

- All technical appliances should be covered, whether for use in factory, office, home or leisure;
- Safety requirements on appliances should not be detailed in regulations, but emerge from safety rules developed by experts;

mann, *Gerätesicherheitsgesetz*; Lindemeyer; Diekershoff, 1985; Marburger, 1979, 71-78.

40 On the historical background to the development see Lukes, 1969, 220 f.; Eberstein, 1969, 1292 f.; Diekershoff, 1985, 609-611; Jeiter, 1980, 1-4; Peine, 1986, *Einführung*, Nos. 5-15. Cf. also the explanatory statement to the Draft Act on Technical Work Materials, BT-Drs. FAO/834, 5.

- In principle, manufacturers or importers should be responsible for the perfect safety of products.

This meant that three decisive steps had been taken: manufacturer responsibility was to aim at *preventive hazard elimination* through safety-minded development, design and manufacture of technical appliances. Until then, only the employer had been under an obligation, as part of a labour-law duty of care in accordance with the industrial safety and accident prevention regulations, to make only safe appliances and machines available to the employees on his premises. Even more than the businessman, the non-commercial final consumer is with advancing technical content, no longer in the position to verify the technical safety of appliances. Accordingly, the idea developed in the industrial safety context of preventive hazard protection is consistently extended to *all technical utility goods*, including those for home and leisure use⁴¹. With the rapid development of technology and the range of goods offered, the focus is placed not on administrative quality requirements but on the *generally recognised rules of the art*, to which special provisions and regulations are a guide. The supervisory authorities confine themselves to spot checks and to intervention in hazardous situations.

Effective from January 1980⁴², the law on technical work materials that had come into force in November 1968 with the brief title "Maschinenschutzgesetz" (Machine Safety Act) was amended. It was given a new brief title "Gerätesicherheitsgesetz" (Appliances Safety Act), more appropriate to its broadened scope; it assumed inspection of installations, provided legal guarantees for the safety mark "GS = geprüfte Sicherheit" (safety-

41 The title of Lukes' 1969 article is significant.

42 Gesetz zur Änderung des Gesetzes über technische Arbeitsmittel und der Gewerbeordnung, 13 August 1979 (BGBl. I, 1432).

tested) introduced by the Federal Minister of Labour, and its scope was, to some extent, extended to dealers⁴³.

3.3.2 Scope

The GSG is addressed to manufacturers and importers in so far as they market or display technical work materials by way of trade, or independently in the context of a business undertaking (§ 1 (1) GSG). Although the Länder⁴⁴, the consumer associations and the Trade Supervisory Offices⁴⁵ had advocated bringing dealers fully under the GSG, they were covered only exceptionally⁴⁶ on the grounds that retailers were not in a position to make technical safety assessments of products and that there were sufficient possibilities of fighting the danger at source. § 1 (3) GSG explicitly states that the employer's responsibility under the industrial safety and accident prevention regulations remains unaffected. In this connection, particular importance is attached to § 5 of the Accident Prevention Regulations, "General Provisions" (VBG 1), which obliges the businessman to require suppliers to furnish only those technical work materials that are in line with the Accident Prevention Regulations and the generally accepted rules of the art in safety technique and industrial medicine.

The GSG applies to all technical work materials for which there are no specific regulations. Accordingly, it does not apply to vehicles in so far as they are subject to road traffic regulations,

43 On the latter, see the Joint Declaration by Trade and Industry Federations on the application of the Appliances Safety Act of 25 April 1978, printed in Jeiter, 1980, 7-9.

44 Cf. the explanatory statement by Bayerns on the amendment to the GtA proposed in July 1977, BR-Drs. 133/77, 3-4.

45 See Wilke, 1980, 67-68.

46 For more see 3.3.7 *infra* (text at note 131-135).

nor to technical work materials which by nuclear safety provisions are subject to special requirements, or which are used exclusively by the Army, the Technisches Hilfswerk, the border guards or the police, nor where other provisions aimed at hazard prevention pursuant to § 3 GSG regulate the marketing or display of technical work materials (§ 1 (2) GSG). Accordingly, for instance, toys are governed by the Foodstuffs and Consumer Goods Act as regards any toxic properties, and by the GSG with respect to mechanical risks.

Technical work materials are, according to § 2 (1) GSG, ready-for-use equipment such as tools, working equipment, working machinery, powered machinery, and lifting and conveying devices which can be used for their purpose without the addition of other parts. This work equipment is by § 2 (2) GSG placed on the same footing as protective equipment, lighting, heating, cooling, ventilating or air-conditioning equipment, household appliances, sports and do-it-yourself appliances and toys⁴⁷. Appliances intended exclusively for export may be displayed on Federal territory even though they do not meet the requirements of the GSG, provided that it is clearly indicated that they are intended only for export⁴⁸.

3.3.3 *General safety obligation — § 3 (1) GSG*

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

47 This provision once again demonstrates the GSG's origin in industrial safety and its extension into the home and leisure area.

48 Decision of 24 February 1976 by the Federal Administrative Court, GewA 1976, 172.

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

Users and third parties are thus to be protected against dangers of all kind to life and health. By way of guaranteeing comprehensive hazard protection, § 2 (4) of the General Administrative Provisions on the GSG (AVV-GSG)⁴⁹ explicitly states that this concerns not only the classical technical aspects of safety such as protection against moving parts or pieces thrown off, stability or protection against touching current-carrying parts⁵⁰, but also such hazards as those resulting from noise, air pollution, heat emission or other effects of use. This means that ergonomic approaches have to be taken into account and all possible effects of working materials on their users are to be considered⁵¹.

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

49 27 October 1970, Bundesanzeiger No. 205, 3 November 1970, amended by AVV, 11 June 1979, Bundesanzeiger No. 108, 13 June 1979.

50 On this cf. DIN 31000/VDE 1000.

51 See Zimmermann, Gerätesicherheitsgesetz, 131-32.

3.3.3.1 Proper use

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

The manufacturer's or importer's indications as to application may contradict the normal use deducible from design and construction. In such cases of conflict, it is always, according to the Münster Administrative Appeals Tribunal⁵², always the normal use deducible from design and construction that applies. The appliance must take account of users' habits. The manufacturer cannot escape his responsibility through instructions for use that go against the uses predictable from the appliance's design. The objective criterion of normal use is not subordinate to subjective criteria of indications from the manufacturer, but in cases of conflict overrides them. Otherwise, the manufacturer could avoid necessary safety measures through indications of use. Since the decision cited has apparently remained isolated, it cannot be assumed that the dispute as to interpretation of proper use has ended. Laborious justifications continue to be used to play down the equal-value objective criterion of § 2 (5)(2) GSG and give priority in case of conflict to the manufacturer's instructions for use⁵³.

52 Judgment of 26 October 1978 by OVG Münster — XIII A 881/76, reprinted in Meyer, 1979, 257 et seq.

53 See Schmatz/Nöthlich, Kennz. 1125, 11: The objective criterion was allegedly chosen only to make up for the manufacturer's or importer's shortage of data or to supplement inadequate data from the manufacturer or importer; Jeiter, 1980, 42 f.: In the case of divergent instruc-

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

"Technical safety requirements should be specified in such a way that (when the product is properly used) it is unlikely that people, animals or things will be endangered. Ergonomic considerations should apply. *Foreseeable mistakes should be taken into account*⁵⁴."

This provision has wide-ranging importance, since DIN 820, in all its parts, is binding for the standardisation work of all specialised standard committees of the DIN⁵⁵. At any rate, it provides consumer representatives on standardisation committees with arguments for basing the establishment of safety standards not on the manufacturers instructions but on usual habits, including mistaken ones.

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

"Proper use within the meaning of this standard is the use for which the technical product is suitable according to the manufacturer's indications including those in publicity. In cases of doubt, it is a use that would be taken as usual from the design, construction and function of the technical product. Proper use also includes compliance with operating and maintenance conditions stated and the taking of foreseeable misuse into account⁵⁶.

DIN 3100/VDE 1000 starts from the basic idea that using technology brings hazards resulting in part from the technical

tions for normal use, the manufacturer's declarations should be given priority, since he may dispose of more recent data.

54 DIN 820, part 12, (3.9.1).

55 Cf. § 3 of the agreement between the Federal Republic of Germany and DIN of 5 June 1975.

products themselves, in part from the way people handle technical products⁵⁷. Even hazards caused by foreseeable misuse should be combated by design measures, primarily those of direct safety technology, supported by those of indirect safety technology. In practical standardisation work, the three-stage method for safety design⁵⁸, among the engineers that more or less monopolise standardisation work is likely to diminish the importance of the debate on proper, usual or foreseeably incorrect use.

3.3.3.2 Generally recognised rules of the art and the industrial safety and accident prevention provisions

§ 3 (1), the key provision of the GSG, refers in its definition of the safety criterion to the "generally accepted rules of the art" and to the industrial safety and accident prevention provisions. No lesser criterion could be conceived; the requirements clearly lag behind advancing technological development. Accordingly, when a technical rule is generally recognised, it is the experts that have to apply the rules of safety technology that are authoritative. They must primarily be convinced that the rules of the art are in line with the safety requirements to be placed on the technical work material. This technical safety solution need not be the one prevailing in practice, but must have been adequately tested in practice and have proved itself under operating conditions⁵⁹. Even where the technical standards referred to follow higher requirements, and are for instance based on the "state of the art", this does not tighten the general safety duty under § 3 (1) GSG, since it is only compliance with generally accepted rules of the art that is made binding legally.

56 DIN 31000/VDE 1000, (3.3).

57 DIN 31000/VDE 1000, (2.1).

58 For details see 3.3.5 infra.

Whether DIN standards ought to come up to the "state of the art" or merely reflect "generally accepted rules of the art" is not entirely clear in DIN's own mind. On the one hand, DIN 820, part 1, which lays down the basic principles for standardisation work, says that standards have to *take account* of the current state of science and technology and of economic circumstances⁶⁰. In referring to the state of science and technology, DIN did not wish to anticipate the severest criterion in the conceptual triad of the Federal Constitutional Court's Kalkar Decision^{61/62}. Along with the state of science and technology, economic circumstances are also to be "taken into account" at the same time. DIN 820, part 4, states that a standard must be reworked if it is no longer in line with the state of the art⁶³. The guidelines for standardisation committees give the working groups the task of ensuring that standards are in line with the findings of science and the state of technology⁶⁴. The principles for applying DIN standards state rather soothingly that while the rules for establishing DIN standards call for the consideration of the state of the art, it is nonetheless difficult to meet up with these demands due to the steady advance of technology⁶⁵. Finally, the indications to users of DIN standards indicate as an objective that DIN standards ought to be introduced as "accepted rules of the art".

59 See the official explanatory statement on § 3 (1) GSG, BT-Drs. V/834, 7. See also Schmatz/Nöthlichs, Kennz. 1135, 6-9; Diekershoff, 1985, 615; Lindemeyer, 176; Peine, 1986, § 3, Nos. 24-29.

60 DIN 820, part 1, (5.7).

61 Decision of Federal Constitutional Court of 8 August 1978, BVerfGE 49, 80 (135 f.).

62 DIN 820, part 1, dates from February 1974.

63 DIN 820, part 4, (4).

64 Guides for DIN standard committees, August 1982 version, point 10 (8) (g).

65 Principles for applying DIN standards, point II.3.

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

The industrial safety and accident prevention regulations⁶⁶ are not binding solely in so far as they reflect the generally recognised state of safety technology. They are binding not because of consensus by authoritative experts, but because of the autonomous legislative power given by Government to the agencies of legal accident insurance, or from their character as legal ordinances. Many industrial safety provisions are based on the enabling provisions of §§ 120 e, 139 a GewO (industrial code); others on the Chemicals Act, the Nuclear Act, the Explosive Act or the Federal Mining Act. Important examples of mandatory industrial safety provisions include:

- Verordnung über Acetylenanlagen und Calciumcarbidlager, 27.2.1980 (BGBI. I, 220) (Ordinance on Acetylene Plants and Calcium Carbide Stores), with a number of technical rules for Acetylene Plants and Calcium Carbide Stores, drawn up by the German Acetylene Committee;
- Verordnung über Arbeitsstätten, 20.3.1975 (BGBI. I, 729) (Workplaces Ordinance), with around 30 directives on workplaces;
- Verordnung über die Aufzugsanlagen, 27.2.1980 (BGBI. I, 205) (Ordinance on Lift Installations), with a number of technical rules for lifts drawn up by the German Committee for Lifts;
- Verordnung für Anlagen zur Lagerung, Abfüllung und Beförderung brennbarer Flüssigkeiten zu Lande, 27.2.1980 (BGBI. I, 273) (Ordinance for Installations for Storing, Bottling or Transporting Combustible Fluids by Land), with

⁶⁶ For details see the list of industrial safety provisions in the Accident Prevention Report 1985, BT-Drs. 10/6690, 5 December 1986.

- some 40 technical rules for combustible liquids, drawn up by the German Committee for combustible liquids;
- Verordnung über Dampfkesselanlagen, 27.2.1980 (BGBl. I, 173) (Steam Boilers Ordinance), with some 65 technical rules for steam boilers, drawn up by the German Steam Boilers Committee;
 - Verordnung über Druckbehälter, Druckgasbehälter und Füllanlagen, 27.2.1980 (BGBl. I, 184) (Ordinance on Pressure Vessels, Pressurised Gas Containers and Filling Plants), with some 35 technical rules for pressure vessels, drawn up by the Technical Committee on Pressure Vessels under the Central Office for accident prevention and industrial medicine of the Association of Mutual Indemnity Associations, and 90 technical rules on pressurised gases drawn up by the German Pressure Vessels Committee;
 - Verordnung über Gashochdruckleitungen, 17.12.1974 (BGBl. I, 3591) (Ordinance on High Pressure Gas Lines), with 40 technical rules on high pressure gas lines, drawn up by the Committee on High Pressure Gas Lines;
 - Verordnung über gefährliche Stoffe, 26.8.1986 (BGBl. I, 1470) (Ordinance on Hazardous Substances), with more than 50 technical rules for hazardous substances, drawn up by the former Committee for Hazardous Working Materials and by the Committee for Hazardous Materials.

By § 708 (1) RVO, the Berufgenossenschaften (Mutual Indemnity Associations) are autonomously entitled to enact accident prevention provisions binding on their members, employers and employees. These are worked out by technical committees that include experts from the indemnity associations and also representatives of the Gewerbeaufsichtsämter (Factory Inspectorate Offices), of producers and users of technical work material, of the trade unions and of employers, and are adopted by the Assembly of Representatives, which has a parity-based composition. Before they can enter into force, they require approval by the Federal Minister for Labour. Quick response to new technical develop-

ments is out of the question, since this procedure for issuing rules takes 5 or 6 years⁶⁷.

The accident prevention regulations in general contain detailed indications only on rules of conduct for employees and the wearing of protective equipment⁶⁸. Indications on safety design for machines and work equipment are by contrast formulated only very generally, in turn often referring to the "generally recognised state of the art". Accordingly, the hope of using the industrial safety and accident prevention regulations to bring safety requirements more in line with the present state of technology or science⁶⁹ is illusory. In 1982, the DIN and the Indemnity Associations finally concluded an agreement whereby the latter would in principle — apart from instruction for actions — restrict themselves to formulating general safety objectives which the DIN would then specify⁷⁰. This means that with regard to accident prevention, all technical regulatory material will, in the medium-term, rely on DIN standards.

67 Andresen, 1976, 130. Cf. the issue dates of the accident prevention regulations given in list B accompanying the AVV-GSG.

68 A survey of rules and regulations of the Mutual Indemnity Associations can be found in Baum, 1986.

69 Thus Diekershoff, 1985, 617.

70 Agreement between DIN and the Federation of Industrial Mutual Indemnity Associations, the Hauptverband der gewerblichen Berufsgenossenschaften e. V./Bundesverband der Unfallversicherungsträger der öffentlichen Hand e. V., DIN-Mitt. 62 (1983), 92-94. This also regulates in detail the involvement of legal accident insurance agencies in standardisation work. On this agreement see Buss, 1984; Jansen, 1986; Müller, 1986.

3.3.3.3 Deviation clause

The deviation clause⁷¹ of § 3 (1) (2) GSG is intended to make progress in safety technology possible and also to allow the manufacturer to depart from the generally accepted rules of the art as long as the safety technology solution he chooses is at least equivalent. This provision for departure becomes relevant where a technical rule contains not only general objects of protection, but detailed technical model rules. In such a case the technical safety objective which is to be attained in some other way has first to be derived from them⁷².

The deviation clause is of particular importance for foreign manufacturers and importers. In general, they, too, have under the GSG, to observe the "recognised rules of the art" on the territory of The Federal Republic⁷³. If the foreign rule of art is not identical with the domestic one but nevertheless provides the same level of safety, the product may not be objected to⁷⁴. If the same safety level is attained, the deviation clause thus allows foreign manufacturers to continue large production runs without losing the German market for safety reasons⁷⁵. It thus leads to the same outcome as the case law on Articles 30 et seq. EEC. For goods from Community countries, it follows from Art. 30 EEC that they are freely marketable in all Member States if they have been marketed legally in the country of origin, unless the importing country can refer to objects of protection under Art. 36 EEC or to binding requirements in the sense of the Cassis judgement⁷⁶. If the same level of safety is maintained, any appeal to

71 In general on the deviation clause in § 3 (1) (2) GSG, see Schmatz/Nöthlich, Kennz. 1135, 18-21; Jeiter, 1980, 49-51; Lindemeyer, 190-194; Peine, 1986, § 3, Nos. 85-90.

72 See Schmatz/Nöthlich, Kennz. 1135, 19-20; Jeiter, 1980, 50; Peine, 1986, § 3, No. 90.

73 See Schmatz/Nöthlich, Kennz. 1135, 15-16; Lindemeyer, 175.

74 See Schmatz/Nöthlich, Kennz. 1135, 20; Lindemeyer, 191.

Art. 36 EEC in order to protect against dangers to life or health is ruled out. The bilateral agreements on mutual recognition of German and French standards⁷⁷ make it easier to use the GSG deviation clause, since list C in the general administrative regulations for the GSG gives the French standards that are, until proof of the contrary, to be taken as equivalent in safety level to the German standards. At the same time, the bilateral agreement is an indication that neither using the GSG deviation clause nor following ECJ Case Law on Articles 30 et seq. EEC are enough to avoid obstacles to trade between Member States.

The deviation clause applies in favour of manufacturers and importers even in respect of accident prevention regulations. Here distortions of competition may arise because an employer as user of work materials does not have a similar entitlement to deviate where the same safety is guaranteed⁷⁸. As far as capital goods are concerned, a remedy could be found here if the various mutual indemnity associations declared a willingness to allow for corresponding departures in the accident prevention regulations⁷⁹. The problem will lose practical importance as the acci-

75 See Peine, 1986, § 3, No. 79.

76 See Chapter IV, 1.

77 See Chapter II, 1.10 and 3.3.4, end.

78 See Lindemeyer, 192.

79 The Federation of Industrial Mutual Indemnity Associations has so far opposed this; cf. Lindemeyer 192. Whether this position is compatible with Arts. 30 et seq. EEC remains questionable even after the ECJ judgment of 28 January 1986 in Case 188/84, ECR [1986] 419-woodworking machines (see also the discussion in Chapter IV, 1.2.3 *infra*). This judgment explicitly confirms Member States' rights to decide on the equivalence of different safety conceptions, though not by simply giving blanket preference to the totality of their own accident prevention regulations.

dent prevention regulations come to specify only general objects of protection but not the technical details for meeting them⁸⁰.

It is controversial whether a manufacturer or importer who appeals to the deviation clause has to show that the same safety has been achieved in another way⁸¹, or whether the authority wishing to intervene must establish that the other technical safety solution is not equivalent⁸². Products are certainly freely marketable in principle without prior permission, even where the manufacturer takes advantage of the deviation clause. However, where the authorities intervene in the presence of a specific hazard, there is more to say for the idea of obliging a manufacturer or importer who departs from the regulation position to provide facts or proof of equal safety.

The obligation to comply with generally accepted state of the art and the industrial safety and accident prevention regulations does not apply to manufacturers or importers where the technical work materials have, according to written statements by the proposed user, been manufactured to order (§3 (2) GSG)⁸³.

3.3.4 Incorporation of standards in the lists

In Annexes A, B and C to the General Administrative Regulations on the GSG, the Federal Minister for Labour and Social Affairs indicates rules of the art, compliance with which leads to

- 80 On this trend, cf. the DIN agreement with the Mutual Indemnity Associations, DIN-Mitt. 62 (1983), 92-94 and Schmatz/Nöthlichs, Kennz. 1135, 17.
- 81 Thus Schmatz/Nöthlichs, Kennz. 1135, 20-21. See also Peine, 1986, § 3, Nos. 87-88.
- 82 Thus Lindemeyer, 192-194 and Jeiter, 1980, 51. See also § 2 (1) (2) AVV-GSG.

a presumption that work material is in line with the legally required level of safety. Through continual supplementation and corrective adjustment (at present, twice yearly), the latest results of standardisation work and technical practice in the area of accident prevention are taken into account. In October 1987 the individual lists included a total of 1,708 safety rules⁸⁴, which break down as follows:

List A (domestic technical standards)

DIN standards or VDE definitions	1.277
DVGW standards	3
VDI rules	25

List B (accident prevention regulations, etc.)

Accident prevention regulations (UVV)	85
Implementing instructions on the UVV	64
Directives, safety rules and leaflets from the mutual indemnity associations	115
Ordinances, administrative regulations, technical rules and directives for installations monitored under § 24 GewO	21

List C (foreign technical standards)

Standards of the French Standardisation Organisation AFNOR	118
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This breakdown brings out the overwhelming importance of DIN standards or VDE definitions, which account for some 3/4 of the safety rules indicated. Table 1 gives an overview of the numerical development of regulations under the GSG. Since 1970, the number of safety rules included in the lists has more

83 For more on this see Peine, 1986, § 3, Nos. 91-100.

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

than quintupled. The lists are subject to continuing review. For instance, the September 1986 update deleted 112 technical rules and included 169 new ones.

In November 1984 list C was opened. On the basis of the bilateral agreement between France and the Federal Republic⁸⁵, it contains standards from the French Standardisation Organisation AFNOR, notified by the Ministry for Foreign Trade and Industrial Development, on which the competent authorities in the Länder, the Committee on technical work materials, and interested circles have been heard.

Table 1: Development of regulation work under the Appliances Safety Act and number of recognised test centres(1)

Year	Number of listed standards		Number of recognised test centres
	A and B	C	
1970	287	—	-
1971	529	—	2
1973	623	—	21
1975	679	—	49
1977	823	—	62
1979	925	—	69
1981	983	—	69
1983	1210	—	76
1984	1210	118	76
1986	1565	118	78

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

If a manufacturer or importer refers to a standard in list C, the Trade Supervisory Office only then — unless safety is evidently guaranteed in another way, pursuant to the deviation clause in § 3 (1) (2) GSG — asks for this standard to be submitted

85 For details on this see Chapter II, 1.10 infra.

in German. If the work materials prove to comply with the French standard, equal safety counts as guaranteed⁸⁶.

The Federal Minister of Labour is, as a rule, involved in the issuing of implementing regulations on the accident prevention regulations and in bringing out technical safety rules and leaflets of the accident insurance agencies; indeed, accident prevention regulations require his approval. In general, accordingly, no additional technical testing is necessary for inclusion of these regulations in list B⁸⁷.

3.3.5 Principles of safety standardisation

In establishing the technical norms for inclusion in list A, the Appliances Safety Division of the Federal Institute for Industrial Safety⁸⁸ and the DIN Committee on Safety Technology work closely together.

The Commission on Safety Technology was set up in 1965 in connection with the preliminary work on the Act on Technical Work Materials, on the initiative of and with financial support from the Federal Minister of Labour⁸⁹. Its tasks are, above all, to encourage safety standardisation work in the specialised DIN standardisation committees, co-ordinate safety standardisation in DIN, select suitable DIN standards for inclusion in the lists and

86 Cf. the BMA Circular of 3 October 1984 to competent Länder authorities, BArbBl. 11/1984, 52.

87 Cf. Schmatz/Nöthlich, Kennz. 1304, 67.

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

89 Until then, the German Standards Committee, the predecessor of DIN, had neglected safety standardisation. Cf. the letter from the President of the German Standards Committee to the chairmen and executive

propose them to the Federal Minister of Labour, and, acting on suggestions from the Federal Institute for Industrial Safety and the Trade Supervisory Offices, test whether standards with safety provisions are still in line with the current state of the art⁹⁰. It coordinates involvement of safety experts from the Factory Inspectorate and the Federal Institute for Industrial Safety in the specialised standardisation committees, and in 1975 submitted a proposal, never discussed in detail, far less applied, to set up an accident information system also covering the home and leisure sectors⁹¹. It includes representatives of Federal Ministries and of the Länder labour authorities, of the Federal Institute for Industrial Safety, of the legal accident insurance agencies, of the trade unions, of employer associations, of the Federal Association of German Industry, of standards workers and of science.

The Federal Institute for Industrial Safety delivers opinions on draft standards with safety relevance as part of the regular procedure for establishing standards, and tests the standards proposed by the Safety Technology Committee for inclusion in List A. In a kind of written soundings-taking procedure, it then gives expert circles interested a chance to comment on proposed changes or additions, though without going as far as a new round of discussion on the standards⁹². In order to secure the broadest possible consensus of all expert circles and to cover all reservations and all findings, umbrella associations in industry, trade and handicrafts, and the unions, standardisation workers, the DIN Safety Technology Committee, the Länder labour authorities and

secretaries of the specialised standards committees of 18 February 1966.

90 For details on the tasks of the Safety Technology Commission see Lehmann, 1972; Unfallverhütungsbericht 1973, 161.

91 Cf. Lehmann, 1975.

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

the members of the Committee on technical work materials are asked to participate⁹³.

At this stage, immediately before publication of the lists, the number of objections still being raised is very small. This is due, above all, to the fact that test criteria are laid down in detail for all standardisation work in DIN 31000/VDE 1000, "general guidelines for safety design of technical products"⁹⁴ and DIN 820, part 12 "standardisation work, standards with technical safety provisions, design"⁹⁵.

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

More important than these formal structural criteria are the substantive requirements that DIN 31000/VDE 1000 lays down for the safety design of technical products. The eventual standard of March 1979 had been preceded as long ago as December 1971 by a preliminary standard based on preliminary work under the auspices of the Federal Ministry of Labour⁹⁶. It was to act as the basis for the specification of safety standards or VDE definitions⁹⁷ and allow initial assessment of technical products as re-

93 Cf. Mertens, 1974, 331.

94 On this see Zimmermann, 1977; *idem*, 1981.

95 On this see Zimmermann, 1979.

96 On the preliminary work see Ludwig, 1970; Sälzer, 1972.

gard safety, in so far as valid, specific and complete standards for this are not or not yet available⁹⁸. Its provisions are to be specified in standards for individual types of technical product or in VDE definitions for individual types of electrical equipment, and supplemented by indications as to relevant tests⁹⁹.

The safety design of technical work materials is seen in the first place as a design task for engineers. In safety design the preferred solution should meet the safety objective in technically rational fashion as well as being economically the best, and *in case of doubt*, safety requirements take priority over economic considerations¹⁰⁰. The following three-stage method applies: technical products should be so designed that no hazards are present (direct safety technology). If this is not or not fully possible, special safety devices that come into play automatically should be used (indirect safety technology). Only in third place come indications of the conditions under which hazardous use is possible (safety through instructions). The technique of safety through instructions is to be used in combination with direct and indirect safety technology even where hazards with products can be prevented only by particular actions on the part of the user¹⁰¹. This restriction can amount to excluding foreseeable misuse from design safety technology and allocating it to the technique of safety through instructions.

To supplement and extend the general guidelines of DIN 31000/VDE 1000, technical safety provisions for particular areas that overlap specialities or safety objectives should be sum-

97 DIN 31000/VDE 1000 (2.3).

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

99 DIN 31000/VDE 1000, (2.5).

100 DIN 31000/VDE 1000, (4.1).

marised in basic standards (infrastructure)¹⁰². Finally, in order to allow the DIN standards to have full product-specific effect, groups of products or individual products should be covered in standards for special fields or standards for components¹⁰³.

3.3.6 The safety mark "GS = geprüfte Sicherheit" (safety-tested)

The GSG does not have an obligation to test technical work materials, but offers manufacturers and importers the possibility of securing confirmation from a recognised test centre, after a design test, that their appliances meet the provisions of § 3 (1) GSG or of a legal ordinance adopted pursuant to § 4 or § 8a. If the result is positive they secure the right to use the safety mark "GS = geprüfte Sicherheit", uniform for all types of appliance and accompanied by an identification of the test centre (§ 3 (4) GSG)¹⁰⁴. It was introduced by the Federal Minister for Labour in 1977, after the Association for a Safety Mark had spent seven years failing to agree on one. It is intended to provide the consumer with a simple and easy means for choosing safer products. The GS mark serves the marketing interests of manufacturers and is also a way of lessening the burden on supervisory authorities, who should refrain from testing appliances bearing the mark¹⁰⁵, unless there are grounds to suspect its illegal use.

101 Notes on DIN 31000/VDE 1000.

102 List A of the AVV-GSG at present contains 26 standards with general safety conditions.

103 See the notes to DIN 31000/VDE 1000 and Zimmermann, 1979, 45-46.

104 On the GS mark see Albertz, 1985; Schwarze, 1983; Zimmermann, 1984; *idem*, Gerätesicherheitsgesetz, 142a-144; *idem*, 1987; Jeiter, 1980, 54-58; Peine, 1986, § 3, Nos. 112-144; Kalwa, 1987.

105 § 6 (1) AVV-GSG. In 1983, 8% of the defective technical work materials reported on in the "standard defect notifications" from the Trade

The Federal Minister for Labour and Social Affairs, after consulting the Committee on Technical Work Materials and with agreement from the Upper House of the German Parliament, determines by legal ordinance the testing centres competent for the design test. These must be suitable in staff and equipment for the task, economically independent and able to offer guarantees of reliable testing. The list of test centres also lays down the fields for which a test centre is recognised. At present there are 78 recognised centres¹⁰⁶, among them 10 technical control boards, the Bavarian Provincial Institution for Trade, the Association of German Electrical Engineers, the German Vehicle Testing Association and three mail-order firms¹⁰⁷, each with an intensive range of competences, plus 27 specialised committees of the Indemnity Associations, three DIN standards committees, the Federal Institute for Materials Testing and 32 other test centres with very specific areas of competence¹⁰⁸. In the context of the bilateral agreement between France and the Federal Republic, the Laboratoire Nationale D'Essais was also recognised as a test centre in December 1985. Recognition is preceded by verification of the Federal Institute for Industrial Safety, relating *inter alia* to staffing and equipment and including a demonstration from some of the areas of coverage applied for¹⁰⁹.

In order to arrive at uniformity of testing practice, test centres must undertake to participate in the information clearing

Supervisory Offices bore a test mark from a recognised test centre; cf. the 1984 annual report of the Federal Institute for Industrial Safety, 1984, 21.

106 For the development over time, see Table 1 *supra*.

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

108 See the list of test centres in the AVV-GSG, in the version of the October 1986 communication (BArbBl. 10/1986, 50 *et seq.*).

houses for test centres in their field attached to the Committee for technical work materials, and comply with agreements arrived at there. Apart from individual test contracts, the test centres have the following tasks. Should they find that technical work material for which they have given authorisation to use the safety mark has been supplied defectively, they have to cause the manufacturer or importer to provide a remedy. If the faults are not removed, or unsafe appliances continue to be marketed, the Trade Supervisory Offices are to be informed. They have to note accidents arising in using appliances tested by them and see to the removal of faulty goods still found. They have to transfer their experience from testing work into standardisation and regulatory work¹¹⁰. If an applicant for a test refers to a French standard contained in list C, the test centre has to apply the French standard where the technical work material is not in line with the relevant German standards and equal safety is not obviously guaranteed¹¹¹.

The GS mark has been widely used for many technical consumer goods. The total number of types of appliance or machine with valid GS marks amounted by 31 December 1985 to 85,000¹¹². Applicants for the GS mark have the chance to ask for the criteria related to their appliance so as to be able to take the safety requirements in force more reliably into account, even at the design stage of technical work materials. Since in the case of many technical consumer products there is competition between various test centres, one cannot ignore the danger that differing test criteria might be applied and that manufacturers and im-

109 For details, and on the test reports, see Zimmermann, *Gerätesicherheitsgesetz*, 142b-142d.

110 See the criteria, guidelines and instructions for test centres under § 3 (4) GSG, BArbBl, 11/1984, 50-51.

111 See the BMA Circular of 3 October 1984 to test centres, BArbBl, 11/1984, 52.

porters might choose test centres likely to give them more favourable test results than others. The only remedy is extension of the information network among test centres, and the checks on test centres by the Federal Institute for Industrial Safety, active since 1984.

In safety checks carried out by the Stiftung Warentest, appliances bearing the GS mark continually display serious safety shortcomings¹¹³. The reasons adduced are that particular identifiable test centres interpret the regulations in force less strictly than would be necessary, that products are altered after securing the mark, and that the safety regulations applied are inadequate.

112 Unfallverhütungsbericht 1985, BT-Drs. 10/6690, 5 December 1986, 33.

113 Loose, 1986, 364-65; see also "Normen sorgen für dicke Luft. Warentester legen zu Recht manchmal schärfere Maßstäbe an", Frankfurter Rundschau, 1 April 1987, 5. The Federal High Court recently explicitly decided that the Stiftung Warentest could apply more stringent criteria in safety testing than those in the technical standards: BGH, NJW 1987, 2222 et seq. Cf. Vieweg, 1987 and Budde, 1987. In the standard-setting procedure, no consensus had been secured as to the necessary safety arrangements for electric compost choppers. The Stiftung Warentest, other consumer representatives and the Federal Institute for Industrial Safety had tried in vain to get their ideas on adequate safety included, but had to succumb to the supplier side in the opposition procedure. The Federal Minister for Labour has since recommended test centres that have already issued approval for the GS mark on compost choppers meeting the DIN standard to withdraw that approval. The Stiftung Warentest, which overlaps in personnel with the standardisation associations, particularly with DIN, — it is represented on the five-member DIN Consumer Council and on some 100 standards committees and other DIN and VDE working bodies, and the Director of DIN is Chairman of the Administrative Board of Stiftung Warentest — only rarely goes beyond the requirements of technical standards in its testing practices. There are scarcely any testing programmes not based on technical standards, at any rate, as far as safety testing goes. If an appliance does not meet the safety requirements, it is automatically graded "defective". The manufacturers' side understandably supports stronger ties to technical standards for the Stiftung Warentest. According to the "guidelines for industrial experts in the Stiftung Warentest" drawn up by the Federal Association of German Industry, the Stiftung Warentest should not grade a feature of a product poorer than "satisfactory" if it meets the requirements corresponding to the state of the art.

3.3.7 *Monitoring by the Trade Supervisory Offices; banning orders*

The competent supervisory bodies for monitoring the Appliances Safety Act are the 71 National Trade Supervisory Offices. These offices have a very wide range of tasks, with responsibilities for protection against nuisances, social industrial safety and, in the area of technical industrial safety, for workplaces, monitored installations, dangerous work substances, explosive materials, radiation protection, organisation of industrial safety in factories and, of course, for technical work materials¹¹⁴.

An extensive empirical study in 1979 showed that they devoted only a fraction of their working time, some 2.2%, to application of the Appliances Safety Act¹¹⁵. The trade supervisory offices are not obliged to make systematic checks on all technical work materials or all manufacturers or importers. Since 180,000 types of technical work materials come newly on to the market each year¹¹⁶, this would be far beyond their resources. From considerations of effectiveness, the principle applied is that of directed monitoring activities. They have to check technical work materials where a competent authority for industrial safety or legal accident insurance agency, officer of policy or other authorities, user of technical work materials or centre dealing with hazards protection under the GSG (Stiftung Warentest, works councils, test centres) has submitted a report on a defective technical

114 An illustrative picture of their wide range of tasks is presented by the annual reports of the Trade Supervisory Offices of the Länder.

115 Arbeitsschutzsystem, Bd. 2, 1980, 515.

116 Cf. Haberland, 1984, 366.

work material or on an accident in using a technical work material¹¹⁷.

Because of time overloads on trade supervisory officers and on the Federal Institute for Industrial Safety, a unique possibility has been neglected. This would be the introduction of an accident information system which would, though not being representative, specifically examine cases where defective technical appliances had caused accidents or led to serious hazards. It is hard to understand why no resources have yet been found for systematic evaluations of defect reports passed on to the Länder, in which manufacturers or importers of products whose safety has been impugned have their headquarters¹¹⁸.

Since the primary objective of the GSG consists in preventive hazard protection, trade supervisory offices might temporarily become active at fairs and exhibitions of more than local importance¹¹⁹ in order to test work materials on offer there, with an economical use of staff¹²⁰. In 1984, 54% of all inspection in connection with the GSG took place at fairs and exhibitions. An advantage is that at fairs, where the latest technical work materials are displayed in large numbers and many types, a whole product range can be covered in each case, without having to trace manufacturing plants and importers scattered over the whole national territory, and also that testing can often be done before mass production begins. A disadvantage is that general testing is possible only through visual inspection, so that only defects that strike the eye can be covered, but no more detailed tests can be done, which

117 § 5 (2) GSG and § 1 AVV-GSG.

118 Not counting the figures for Baden-Württemberg, in 1984 alone there were 1,734 of them with several defects each.

119 Often in so-called Fairs Committees, along with technical supervisory officials of the accident insurance agencies.

would often require the dismantling or even destruction of the technical work appliance¹²¹.

Ad hoc market checks on particular types of technical work materials suggested by accident reports or safety tests as being particularly accident-prone are done by the Central Office for Safety Technology, Radiation Protection and Nuclear Technology of Land North Rhine-Westphalia. In view of the shocking accident situation in the private sphere, it concentrates mainly on types of appliances intended for use in the home, do-it-yourself, play and sport¹²². The findings secured are, if not yet incorporated in technical safety standards, then used in standardisation work¹²³.

Should the trade supervisory offices discover defects implying danger to life or health of users or third parties given proper use, the severest sanction open to it, where other measures prove inadequate, is the banning order¹²⁴, preventing the technical work material from being marketed or displayed (§ 5 (1) (2) GSG). Whether an office has recourse to a banning order is in its own discretion, in accordance with its duty. Only in two particularly serious cases does § 5 (2) GSG lay down a duty to test, namely where a competent authority for industrial safety or a legal accident insurance agency has notified it that a technical work material has a defect in quality that endangers the life or health of

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

121 Cf. Wilke, 1980, 52-54.

122 Cf. the progress report by Fischer, 1984, and the annual reports of the Trade Inspectorate of Land North Rhine-Westphalia 1982, 45-71; 1983, 47-55; 1984, 48-59.

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

users or third parties given proper use, or where during use of the technical work material an accident has occurred and there is good reason to believe that the accident can be attributed to a defect in the quality of the technical work material. If the law's objective, preventive accident protection, is not to be frustrated then the authority must act, if only to avoid public liability claims, since any other decision would mean acquiescing in a severe accident¹²⁵.

The order to be issued to the manufacturer or importer, and only under very restrictive conditions to an exhibitor or trader¹²⁶, must be accompanied by reasons, and the defects must be specified in detail. To ensure that banning orders are issued only in justified cases, the Trade Supervisory Office must before deciding, unless the danger of delay or the defect in the nature of the work materials is obvious, consult one of the agencies of legal accident insurance whose members use technical work materials of the same type (§ 6 (1) GSG). Should an accident have occurred because of the defect ascertained and other accidents are to be feared, immediate execution of the banning order should be directed (§ 7 (3) AVV-GSG). A copy of the banning order is to be sent to the Committee on Technical Work Materials (§ 6 (2) GSG).

Even though they are explicitly mentioned in the GSG as the sole means of sanction, banning orders constitute the last resort, to be used only in severe cases, where no remedy can be secured by more moderate measures. Less invasive measures are, for instance, cautions about defects ascertained and advice about eliminating them or an order to remove defects ascertained within

124 On banning orders see Peine, 1986, § 5 Nos. 25-119; Falke, 1987.

125 For details on this see Peine, 1986, § 5, Nos. 31-42.

126 On banning orders against a trader or exhibitor see the statements at notes 131-135 *infra*.

a certain time and thereafter to sell only defect-free appliances¹²⁷. They can be considered only where the manufacturer or importer is prepared to remedy the defects ascertained. Willingness to do so is greater before starting actual marketing. Cases have been reported where importers have, after ascertainment of severe safety defects, seen their negotiating position with the manufacturer as strengthened by a banning order. Since banning orders are based on Federal law they apply in principle in the whole of Federal territory, even if issued by Länder authorities¹²⁸.

The *synopsis* below gives the picture of trade supervisory offices' test work under the GSG in 1984, not including systematic market spot checks carried out. It was already stressed that more than half the inspections take place at fairs and exhibitions. 57% of the 46,600 technical work materials tested are used primarily in industry, agriculture and administration, and some 29% are foreign manufactures. Of appliances tested, a total of 24% proved defective, 20% of the domestic products and 34% of foreign ones. The systematic market checks, not covered here mostly give considerably higher rates of defect¹²⁹. Unsafe appliances usually have an average of two defects. 42% of defects can be remedied by re-equipping, 40% by design measures, and 15.6% result from faulty instructions for use. However, 2.3% of defects are so serious as to require complete redesign.

127 See Schmatz/Nöthlich, Kennz. 1155, 6-8; Jeiter, 1980, 73-74; Peine, 1986, § 5, Nos. 16-24.

128 BVerfGE 11, 1 (6).

129 Thus, BMX children's bicycles had a defect rate of 89%, and a particular kind of heating stove 90% (cf. Fischer, 1984); in 1976-8 65% of technical medical appliances (cf. Wilke, 1980, 63) and 54% of fork-lift trucks (see Annual Report of the Industrial Inspectorate of Land North Rhine-Westphalia 1984, 57 et seq.) were unsafe.

Synopsis: Tests by Trade Supervisory Offices under
the Appliances Safety Act in 1984(1)

	Number	%
Number of inspections		
- total	13,799	=100.0
- at fairs, exhibitions	7,465	=54.1
Technical work materials tested		
- total	46,566	=100.0
- mainly used in		
- industry, agriculture, administration	26,521	=57.0
- home, leisure, school, kindergarten	20,045	=43.0
- manufactured		
- in Germany	33,185	=71.3
- abroad	13,381	=28.7
Technical work materials with safety defects		
- total	11,195	=100.0
- domestic products	6,609	=59.0
- foreign products	4,586	=41.0
Number of types of defect		
- total	20,009	=100.0
- eliminable by re-equipping	8,407	=42.0
- eliminable by design measures	8,005	=40.0
- unusable — redesign necessary	466	=2.3
- defects in instructions for use	3,131	=15.6
Letters sent out following inspection	1,433	
Banning orders	49	
Court procedures	4	

- (1) Compiled from the annual reports of the trade supervisory offices in individual Länder for 1984.

Banning orders were issued in only 49 cases. This small number is only in part because most defects could be more or less easily removed by re-equipping, design measures or changes to instructions for use. It is also due, apart from strict application of the proportionality principle, to the self-image of the trade super-

visory offices, who see themselves more as advisers than as supervisory authorities¹³⁰.

Table 2 shows the numerical trend in test inspections by trade supervisory offices and in banning orders from 1969 to 1984. The number of inspections grew steadily until 1974, reaching a plateau of around 14,000 thereafter. The number of banning orders grew from 1969 to 1975 to a unique peak figure of 377 then fell between 1976 and 1981, apart from the high value for 1979, to a figure between 150 and 190, and in 1984, at 49, was only just above the initial year, 1972. This means a critical point is being reached if trade supervisory offices still wish, in their search for less drastic solutions, to be able to use threats of banning orders credibly.

Banning orders against traders are possible only on tighter conditions¹³¹. Exhibitors at fairs can be banned from displaying work materials with safety defects only if the manufacturer or importer cannot be traced (§ 5 (1) (2) GSG). Otherwise, banning orders to traders presuppose under § 5 (3) GSG that the manufacturer or importer has previously been banned from marketing the technical product, that the trader knows this banning provision, for which it is sufficient for the authority so to inform him, and that the trader has the possibility of returning the defective lot of technical work material¹³² but refuses to avail himself of this right of return. In view of this "protective barrier" of restric-

130 47% of Trade Supervisory officials see themselves more as advisers, 16% more as supervisors; cf. Arbeitsschutzsystem, Bd. 2, 1980, 587-590.

131 Cf. Schmatz/Nöthlich, Kennz. 1155, 15-27; Jeiter, 1980, 74-79; Peine, 1986, § 5, Nos. 108-119.

132 This condition reflects the legislator's expectations that the Joint Declaration of Industry and Trade Federations of 15 April 1978 (reprinted in Jeiter, 1980, 7-9) will give the trader a contractual right of return where a banning order has been issued against the manufacturer or importer. Cf. the letter from the German Congress of Industry and Trade of 23

tive conditions on action, it is hardly surprising that the power to issue bans to the trade, so urgently called for by the trade supervisory offices¹³³, plays no part¹³⁴ in practice. It is scarcely possible for trade supervisory offices to forbid marketing of defective products that are already in the trade¹³⁵.

Table 2: Numerical trend in test inspections by the trade supervisory offices and in banning orders(1)

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

(1) Compiled from Meyer, 1979, 38; Dickershoff, 1985, 623 f.; annual reports of trade supervisory offices of individual Länder for 1982 to 1984.

Banning orders are published in the monthly newsletter on the GSG distributed by the Federal Institute for Industrial Safety; only 500 copies are distributed for internal use by trade supervisory offices¹³⁶. Since 1981 the Federal Institute for Industrial Safety has been publishing non-appealable banning orders or

August 1979 to Chambers of Industry and Trade (printed in Jeiter, 1980, 76-78).

133 Cf. Wilke, 1980, 67-68.

134 Of 353 bans issued between 1982 and 1984, not a single one concerned traders, and in 1981 only 44 out of 240.

135 Cf. Haberland, 1984, 369.

those for immediate execution. This is intended to warn owners of defective appliances and, where technical work materials are still in trade, to bring dangers to the attention of traders and potential purchasers. By September 1986, 53 banning orders had been published¹³⁷. One may however doubt whether publication in the Federal Labour Gazette some time after enactment of the banning order can bring about the widely effective information distribution that is necessary. A broadly conceived concerted information campaign by trade supervisory offices, the Federal Institute for Industrial Safety, the Indemnity Associations and the retail trade has so far been waged only in the case of compressed-gas springs in revolving chairs which are liable to break¹³⁸, with successful effects since some 40% of the hazardous revolving chairs were re-equipped. Since 1984 non-appealable banning orders and those for immediate execution have been communicated under the European Commission's system for information exchange on product hazards¹³⁹.

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

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

138 Cf. the Annual Report for 1983 of the Federal Institution for Industrial Safety, 19 f.; and the Annual Report for 1983 of the Trade Inspectorate of Land North Rhine-Westphalia, 52-55.

139 On the legal remedies open to purchasers of products whose manufacturers have been banned from continuing to distribute them, see Falke, 1987, 7-9.

3.3.8 Limits of applicability; removal from storage

Despite its general approach, in no way specific to particular products, the GSG did not prove flexible enough to serve as the sole act for converting Community directives in the area of safety of technical work materials. This is evident particularly from the conversion of the Low Voltage Directive¹⁴⁰ into German law. Because of the far-ranging correspondence between the content and concept of the GSG and the Low Voltage Directive, the Federal Government took the view that no special legislative procedure would be required to convert the directive into national law. Only once did the Commission disagree and threaten to go before the ECJ. At this point the Federal Government met the Commission's wish through the first ordinance under the Act on Technical Work Materials¹⁴¹ and the amendment to the general administrative regulations to the GSG¹⁴², thereby converting the Low Voltage Directive "formally in every respect". The extent to which the first ordinance amended or extended the GSG is evident from the criticism, raised by the Commission¹⁴³:

- It was not clear how far the existing state of safety technology in the Community within the meaning of the directive was identical with the general accepted rules of the art within the meaning of the GSG;
- The GSG applied only to protecting people, not to the safety of domestic animals and the preservation of material values, as the directive laid down;

140 For details on the Low Voltage Directive, see Chapter IV, 2.

141 11 June 1979 (BGBl. I, 629).

142 § 3 (3) and § 6 (4) of the AVV-GSG were amended.

143 Cf. Zimmermann, *Gerätesicherheitsgesetz*, 147-48. The table presenting the differences between the GSG and the First Ordinance to the GSG (*loc. cit.*, 157-161) brings out the untenability of the Federal Government's original position.

- The safety objectives listed in Annex I to the Directive in order to specify the general clause were not contained in the GSG;
- The general clause in the GSG referred to industrial safety and accident prevention provisions which possibly contained other requirements than the Directive's.

Despite the correspondences and similarities between the GSG pattern and the new approach to technical harmonisation and standards, the GSG will not be enough to convert directives that follow the new approach, if only because of the difference in objects of protection, the modes of demonstrating conformity and above all the stating of relatively detailed basic safety requirements instead of referring to the generally accepted state of the art. Reference to the generally accepted state of the art cannot come into consideration for the Community Directive if only because the Commission, following Article 100 a (3) in the Single European Act, must in its proposals for legal harmonisation measures under Article 100 a in the areas of health, safety, environment protection and consumer protection take a very high level of protection as a basis¹⁴⁴. Adoption of individual directives under the new approach ought thus lead to supplementation of the GSG by a whole fringe of ordinances for specific groups of products. The alternative would be to adopt a parallel act to the GSG, converting all the details of the new approach into national law. But even then it would presumably be necessary to convert each of the product/specific basic safety requirements, relatively detailed by comparison with the German tradition of product safety law¹⁴⁵, separates into German law in each case — after all it is ultimately vague that determine the level of protection¹⁴⁶.

144 On this cf. Chapter IV, 4.1.

145 It is clear that the basic safety requirements are not merely described conceptually in a comprehensive general clause, but laid down in detail specifically for a product. But even after presentation of the first draft directives, it remains questionable how detailed the basic safety requirements are. Among controversial points are e.g. three sentences in

The second ordinance under the GSG¹⁴⁷ converts Directive 79/663/EEC¹⁴⁸, which forbids the marketing and use of decorative items containing dangerous liquids. Like the first ordinance under the GSG, it is based on § 4 (1) GSG, which empowers the Federal Minister for Labour and Social Affairs in fulfillment of obligations under bilateral agreements or binding Community decisions to determine by legal ordinance that technical work materials may be marketed only where particular requirements are met or when, following a design test, they have been generally accepted, or when they have passed a conformity test. Other Community directives likewise applying to technical work materials within the scope of the GSG have not led to further ordinances under the GSG because they concern monitored installations and were converted into German law as ordinances pursuant to § 24 of the German industrial code. These ordinances for monitored installations¹⁴⁹ are industrial safety regulations within the meaning of § 3 (1) GSG¹⁵⁰.

Annex II, section B.III in the Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (OJ C 136, 4 June 1985, 1 et seq.), first introduced in this form in the final version. They run: "the essential safety requirements which must be met in the case of products which can be put on the market shall be worded precisely enough in order to create, on transposition into national law, legally binding obligations which can be enforced. They should be so formulated as to enable the certification bodies straight away to certify products as being in conformity, having regard to those requirements in the absence of standards. The degree of detail of the wording will depend on the subject matter." These sentences both express the reservations of many Member States regarding far-reaching delegation of safety regulation to standardisation bodies, and can be regarded as a retreat from the new approach even before its realisation. Cf. the answer to written question No. 119/86, OJ C 19, 26 January 1987, 4-5.

146 Cf. also the verbatim inclusion of the essential safety requirements of the Low Voltage Directive in § 2 of the First Ordinance under the GSG.

147 Of 26 November 1980 (BGBl. I, 2195).

148 Directive 79/663/EEC of 24 July 1979, OJ L 197, 3 August 1979, 37.

149 These are ordinances on steam boiler installations, pressure vessels, pressurised gas containers and filling plants, lift installations, electrical installations in premises where there is an explosion hazard, acetylene

Following a series of sensational accidents and the disclosure of widespread severe safety defects¹⁵¹, § 8 a GSG created the conditions for adopting special requirements for licensing and operating medical technical appliances. This was done through the Medical Appliances Ordinance¹⁵², which introduced special obligations on instructions and marks, a licensed design system for important types of appliances, the inclusion of all suppliers under the regulations and above all obligations on operators to carry out functional tests before commencing operation, employ only qualified staff, notify defects or malfunctions arising, regularly carry out safety checks and keep data sheets on the appliances. The comparison with technical medical appliances, now outside the scope of the GSG, and with the Medical Appliances Ordinance brings out the GSG's liberal underlying concept particularly clearly. Like the new approach, it rules out safety rules for the *operation* of hazardous installations or appliances.

3.4 Technical standardisation in DIN

Details of technical safety standardisation work and of reference to technical standards have already been discussed in connection with the GSG. Accordingly, the following account can concentrate on the development and extent of standardisation work in the Deutsche Institut für Normung e.V. (DIN) (3.4.1), the so-called standards agreement between the Federal Government

and calcium carbide installations and installations for storing, filling and transporting combustible liquids on land.

150 On the above cf. Zimmermann, Gerätesicherheitsgesetz, 162-164.

151 Between 1976 and 1978, 65% of medical electrical appliances tested showed numbers of severe safety defects, in part hazardous to life; cf. Wilke, 1980, 63-64. In 1985 safety checks by the Bavarian Technical Control Board even showed a defect rate of 85%; cf. FR for 27 August 85, 18.

152 Ordinance on the safety of technical medical appliances (Medical Appliances Ordinance) of 14 January 1985 (BGBl. I, 93). On this cf. Nöthlich, 1985; Zimmermann, Gerätesicherheitsgesetz, 164-166c; *idem*, 1985; Hahn, 1986; Held, 1985; Theobald, 1986; Hartl, 1986.

and DIN (3.4.2), the procedure for producing standards (3.4.3), the adoption of international and European standards in German standardisation work (3.4.4), the organisation of consumer participation (3.4.5) and conformity marks (3.4.6).

3.4.1 Development of DIN, volume of standardisation work and financing

Although there are in the Federal Republic over 200 organisations¹⁵³ concerned with the production and dissemination of technical rules, the DIN is highly pre-eminent. Through its constant practice, DIN has established its position as the authoritative national standardisation organisation through a multiplicity of cooperative relationships, embodied in agreements, with Federal and Länder authorities, associations and technical and scientific bodies, so as to integrate technical regulations produced outside DIN into the unitary, almost completely comprehensive, DIN set of standards. The most important agreement of this nature — apart from the standards agreement with the Federal Government — is DIN's agreement with the Verband Deutscher Elektrotechniker (Association of German Electrical Engineers — VDE) of 13 October 1970¹⁵⁴, which led to the foundation of a joint body, the Deutsche Elektrotechnische Kommission (German Electrical Engineering Commission — DKE) and to the incorporation of the extensive body of the VDE regulations into the DIN standard system¹⁵⁵. The most important agreement of this type in recent years is that existing with the Mutual Indemnity Associations¹⁵⁶.

153 Marburger, 1979, 195-96.

154 Printed in DIN-Normenheft 10, Grundlagen der Normungsarbeit des DIN, 4. Aufl., Berlin/Köln 1982, 219 et seq.

155 For other agreements see Reihlen, Auswirkungen des Normenvertrages, 1977; Kypke, 1982, 156-158.

156 See indications in note 70.

There the latter confine themselves to setting general safety objectives and safety criteria and refer for specification to DIN standards. Thereby firm links between the regulatory work of the legal accident insurance agencies (gesetzliche Unfallversicherungsträger), the accident prevention regulations, and DIN standards will be secured. This dominance of DIN over the other regulatory bodies expressed in these examples of integration alone justifies concentrating this account on DIN.

DIN, or more exactly its predecessor, owes its foundation in 1917 to joint efforts by Government bodies, industry and the Association of German Engineers (VDI) to concentrate technical harmonisation work in order to increase armaments production¹⁵⁷. The "Standards Committee for General Engineering" originally under the VDI, extended its area of operation very quickly, leading also to a change of name to "Standards Committee of German Industry". In 1926 the Association took the name "German Standards Committee", since standardisation had in the interim come to extend from industrial production to many other areas. In 1975 a new constitution and the name "DIN Deutsches Institut für Normung e.V." were introduced, the object being specified as being, "through joint work by interested circles and for the benefit of the public", to produce, publish and promote the application of "German Standards or other working results that aid rationalisation, quality guarantees, safety and communication in the fields of economy, technology, science, administration and among the public", and to "represent German standardisation at home and abroad"¹⁵⁸.

157 For more on the history of DIN see Kypke, 1982, 153-155.

158 § 1 (2) and (3) of the DIN statutes of 20 April 1975, printed in DIN-Normenheft 10 (loc. cit., note 154), 9 et seq.

By 1986, DIN had some 5,400 firms as members and was employing 746 full-time workers¹⁵⁹. Standardisation work was done through 113 standards committees divided into 3,656 working groups, by 41,000 honorary collaborators in almost 5,000 sessions of standards committees. DIN standards numbered 19,937 in 1986¹⁶⁰, 1,363 of them new that year. Almost two thirds of newly emerging DIN standards have to do with adapting existing standards to advancing knowledge or development¹⁶¹. By way of comparison, in international standardisation by ISO and IEC, two-thirds of new standards refer to areas not yet covered¹⁶².

Some 30% of 6,039 DIN standards are available in English, DIN standards are interpreted for the public at 39 centres in Germany and 108 abroad. In October 1979, with the help of the Federal Government, the German Information Centre for Technical Rules (DITR) was set up within DIN¹⁶³. The DITR database will collect all German technical rules, including rules other than DIN standards, accident prevention regulations and the technical legal and administrative provisions of the Länder, of the Federal Republic and of the European Community. Since 1987, the catalogue has for the first time also contained references to corre-

159 These and the following figures are taken from the DIN report for 1986-7.

160 This means that the number of standards went down by comparison with previous years; this is to be explained mainly through the withdrawal of 1,300 standards for pictorial trademarks in 1986.

161 In 1983-6 5,890 new DIN standards came out, while 2,240 standards were withdrawn without replacement; both movements ended with a decline in total numbers of 33. This means that in that period 3,683, i.e. 62.5% of newly issued standards, served to adapt existing standards to technical progress. Source: personal calculations from indications in DIN annual reports.

162 In 1979-86 5,179 ISO or IEC standards were newly issued, with total number of standards rising over the same period by 3,624; figures on standards withdrawn without replacement are not available. Source: personal calculations from indications in DIN annual reports.

sponding international standards. DITR makes its stored information available in user-oriented fashion and can considerably facilitate and accelerate the administration and updating of voluminous standards, databases and manuals.

Table 3 shows the number of international, European and DIN standards in the year 1978 and 1986. Here, what is of interest is not so much the absolute figures for the individual types of standard, but the percentage increase in each case between 1978 and 1986. In view of the great differences in tradition and range, the individual sets of standards are hardly comparable, and German standards have taken over many international and European ones. What emerges very clearly is that international and European standards have in terms of numerical growth increased very much faster than DIN standards.

Table 3: Numbers of international, European and German standards in 1978 and 1986

Numbers of	1978	1986	Increase
ISO/IEC standards	5.099	8.726	71 %
European standards (1)	443	829	81 %
DIN standards	18.006	19.937	11 %

- (1) Including CENELEC harmonisation documents and Euro-standards for iron and steel.

Table 4 gives a picture of the number of standards and proposed standards in DIN in 1986 for the 20 areas with most standards plus a few other selected areas. The relationship between projected standards in hand and the number of existing standards is an indicator of the rate of growth in each specialised area. There is a clearly below-average rate in aviation, tools and clamps, shipbuilding, textiles and textile machines, fire-fighting equipment, sport and leisure appliances, personal protective

163 Basic information on the DITR is contained in the DIN Annual Report for 1982-3, 19-23.

equipment and safety marking and household goods. Development is particularly lively in the areas of information processing systems, mechanical engineering, plastics and ergonomics¹⁶⁴. The singular importance of electrical engineering in technical standardisation emerges clearly: it accounts for nearly one-third of all standards.

The areas of importance to non-commercial final consumers such as foodstuffs and farm products, sport and leisure appliances, heating and ventilation, household goods and bicycles lag quantitatively behind such exclusively or largely industrially dominated product areas as aviation, mechanical engineering, tools and clamps, naval products, mining and shipbuilding. The areas of ergonomics and air purification, which explicitly have industrial safety or environment protection as their objects, are quantitatively of very little importance even if they do show considerable growth in recent years.

The individual standards committees seem to correspond not so much to a systematic breakdown of standardisation as to branches of industry, in which the manufacturer's can be particularly effectively pursued; C.O. Bauer, a DIN Executive Member for years, has spoken of an "identity between industrial associations and specialised standards committees"¹⁶⁵. DIN rejects long-term centralised planning of standardisation work and keeps to the traditional working principle of responding to input from interested business circles and using the organisations or structures existing there. All the same, it is admitted that in some areas it is not enough to see technical standards as carbon copies of the state of the art, that is, of the state reached at a particular point in time by technical equipment, products, methods and procedures,

164 Because of the low number of standards, the areas of bicycles and air purification are left unmentioned.

165 Bauer, undated, 47.

which has in the opinion of experts proved itself in practice. In the area of information technology and nuclear safety, for instance, standards had to be worked out hand in hand with development before the state of the art had emerged. The Advisory Committees to the Standards Committees are, in view of the absence of central planning, asked to take decentralised planning all the more seriously, and draw up outline programmes for their specialised areas¹⁶⁶.

Table 4: Number of DIN standards and projected standards in 1986 for the 20 areas with most standards and some other selected areas (source: DIN Activities Report for 1986-7, p. 24-26)

Rank	Area	Standards	Projected/ %
Order*			Standards
1	Electrical Engineering	6.473	1.842 0.28
2	Aviation	2.457	538 0.22
3	Materials Testing and Fuels Standards	1.837	861 0.47
4	Tools and Clamps	904	183 0.20
5	Mechanical Engineering	838	679 0.81
6	Naval Products	768	215 0.28
7	Precision and Optical Engineering	757	277 0.37
8	Building Construction	651	241 0.37
9	Hydraulic Engineering	507	179 0.35
10	Images and Film	464	39 0.08
11	Vehicles	459	160 0.35
12	Plastics	457	285 0.62
13	Mining	416	114 0.27
14	Shipbuilding	404	87 0.22
15	Railway	363	126 0.35
16	Mechanical Connectors	351	91 0.26
17	Textiles and Textile Machinery	351	55 0.16
18	Fire-fighting Equipment	276	57 0.21
19	Packaging	273	75 0.27
20	Foodstuffs and Farm Produce	230	94 0.41
24	Information Processing Systems	214	325 1.52
34	Heating and Air Conditioning	159	73 0.46
36	Sport and Leisure Equipment	151	32 0.21
41	Nuclear Technology	131	71 0.54
56	Personal Protective Equipment and Safety Marking	64	10 0.16

166 Cf. DIN Annual Report for 1986-7, 5.

63 Household Goods	52	9	0.17	
71 Ergonomics	34	21	0.62	
93 Bicycles	11	11	1.00	
102	Air Purification	7	52	7.
43				
--- TOTAL		19,937	8,6530.43	

* According to the number of standards in each specialised area. The composition of the DIN Executive Board reflects the prevailing influences on standardisation work. The 50 members can be allocated to the following fields of interest¹⁶⁷:

Industry	22
Federal Government	5
Technical Supervision, Materials Testing	4
Public Utilities	3
Standardisation Organisations	3
Länder	2
Trade	2
Service Industries	2
Health	2
Handicrafts	1
VDI	1
Science	1
Mutual Indemnity Associations	1
Consumers	1

Table 5 gives a picture of the development of DIN's finances¹⁶⁸. DIN finances itself very largely from sales proceeds for standards sold by its own publishing house (64.6% in 1986), and otherwise in equal proportions from contributions from member firms and other financial support from business circles and public sources. The latter doubled between 1975 and 1978. Government pays the costs in full for the Safety Technology Committee and the Consumer Council, the work of which is in large part for the public interest. If the volume of the official DIN budget is set against the number of newly produced standards, one arrives at a hypothetical figure for the average cost of each new norm. This figure would, however, represent only 10% of the actual total expenditure accounted for by the honorary workers in the form of travel expenses, fees, preparation of meetings

167 As at 1 March 1987; source: DIN Annual Report for 1986-7, 22-23.

168 See also DIN Report for 1982-3 and Kypke, 1982, 176.

and development work as such¹⁶⁹. The DIN budget is also unbundled through the existence of the so-called external standards committees, financed almost exclusively from the trade associations that support them¹⁷⁰. 50% of DIN's financial outgoings go to national standardisation, 30% to worldwide standardisation through ISO/IEC, 15% to European standardisation through CEN/CENELEC and 5% to bilateral co-operation with other countries¹⁷¹.

Table 5: Development of DIN income by source of finance between 1972 and 1986, and hypothetical costs per standard

	1972	1975	1978	1981	1984	1986
Budget volume in million DM	25.0	37.5	48.4	62.5	68.4	75.4
of which (%):						
- Proceeds from publications and miscellaneous income	70.0	73.0	61.4	62.0	63.2	64.6
- Contributions and sectorial support from industry	22.0	18.0	20.2	18.2	8.5	18.1
- Public subsidies	8.0	9.0	18.4	19.8	18.3	17.3
Number of newly produced DIN standards			1,592	1,539	1,649	1,418,363
Hypothetical costs per new standard (DM)			23,556	31,449	37,902	48,237,55,329

Source: DIN activities reports and personal calculations.

¹⁶⁹ Cf. Reihlen, *Kosten der Normung*, 1977 and the indications in the DIN Report for 1986-7, 3 and 9.

¹⁷⁰ For more details on this and other forms of the problematic — since it creates dependencies — support for DIN by private industry see Brinkmann, 1976, 88-89.

¹⁷¹ Cf. DIN-Geschäftsbericht 1986-7, 3.

3.4.2 *The standards agreement*

Because of the overwhelming economic effects of technical standardisation, its increasing importance to the public and the resulting need for legitimation, thinking began in the late 1960's about setting the relationship between Government and DIN on a legally established foundation. A DIN-commissioned report proposing a contractual agreement between DIN and the Federal Government was, particularly because of its great flexibility, finally accepted¹⁷².

In the agreement, concluded on 5 June 1975¹⁷³, the Federal Government recognises DIN as the "competent standards organisation for Federal territory and West Berlin and as the national standards organisation in non-governmental international standards organisations" (§1(1))¹⁷⁴. DIN undertook to take the public interest into account in its standardisation work. This includes in particular the areas of safety technology, health protection, environmental protection, consumer protection, and areas where there is a special interest for the economy as a whole (e.g. energy conservation) or where there is special particular interest for government or for public tendering and procurement (EDP, information and documentation, building construction)¹⁷⁵. It ensures that standards can be adduced in legislation, in public administration and in law as descriptions of technical requirements (§ 1(2)). This is meant to ensure that DIN standards can be referred to as the recognised state of the art. The DIN has further undertaken to

172 Cf. Ernst, 1973.

173 The agreement is printed with notes in DIN-Mitt. 54 (1975), 359-364. Cf. the statement issued by DIN under the heading "Partnerschaft", DIN-Mitt. 54 (1975), 365 et seq. See also on the standards agreement Böttger, 1979; Pokorny, 1977; *idem*, 1976; Reihlen, Die Auswirkungen des Normenvertrages, 1977.

174 In 1986 DIN supplied secretarial services for 162 out of 1,009 technical committees of ISO/IEC and 42 out of 99 technical committees of CEN/CENELEC. Source: DIN Annual Report 1986-7, 27-33.

give the Federal Government a place on its directing bodies, to involve other national bodies as well in standardisation work, to give Government applications for standards preferential treatment and to advise and inform it in matters relating to standardisation. The Federal Government in return supports DIN financially from the national budget, observes strict subsidiarity in national standardisation (§4(2)), informs DIN on matters of standardisation at national and supranational levels and involves it in developments in such matters, uses DIN standards in the national administration, and publishes a list of DIN standards, draft standards and projected standards in the Federal Gazette. Finally, DIN declares its willingness "to contribute to international understanding in the area of standardisation" and to do every thing in its power to ensure that "obligations entered into by the Federal Government through bilateral agreements on liberalisation of trade and removal of technical barriers are not interfered with by DIN standards (§ 6 (1) — "antiprotectionism clause"). Finally, DIN explicitly undertakes to comply with DIN 820, which sets out the principles for standardisation work, and with the directives for the specialised standards committees (§ 3); the assumption of responsibility for public tasks is thus made dependent on compliance with precisely specified fundamental internal rules of procedure. In supplementation of the standards agreement, DIN was entrusted in 1984 with the carrying out of tasks arising from conversion of the Community Directive on an information procedure, in the area of standards and technical regulations¹⁷⁶.

The standards agreement does not transfer any sovereign powers and from the legal point of view regulates the therefore unwritten relationships between DIN and the Federal Government. It confirms the principle of reference to DIN standards in

175 See notes on § 1 of the standards agreement, DIN-Mitt. 54 (1975), 361.

176 On this see the correspondence between the Federal Minister for Economic Affairs and DIN, printed in DIN-Mitt. 63 (1984), 254.

legislation and administration and contributes to the creation of a comprehensive and coherent system of standards¹⁷⁷.

3.4.3 Principles of standardisation and procedures for producing standards

The legitimisation of DIN standardisation work through the standards agreement with the Federal Government presupposed a standardisation procedure that would be transparent, public in principle and formally provide for participation of all those concerned. The decisive factor for legitimating standardisation work would thus be neither substantive evaluation of the findings nor actual involvement of interested circles, but only the procedure specified in DIN 820¹⁷⁸. The conditions for this were created through the reformulation of DIN 820, Part 1 and Part 4 of February 1974, through the October 1974 directives for standards committees and the October 1975 reformulation of the DIN rules of procedure.

DIN 820, Part 1, lays down the principles for standardisation work. Standardisation is seen as "planned harmonisation carried out jointly by interested circles" for the general good, which ought not to lead to special economic advantages for individuals¹⁷⁹. The technical work should be done by honorary workers, namely experts from interested circles. Examples listed are users, public authorities, mutual indemnity associations, vocational and technical colleges, institutes and universities, traders, handicraft, industrial manufacturers, testing institutions, technical insurers, independent experts, the technical supervision system, con-

177 In DIN terminology this means that the extension of "Nebennormenwerken" (sets of subsidiary standards) is prevented.

178 Cf. Schatz, 1984, 195.

sumers, scientists. In the composition of the working groups, where standardisation work is actually done, the principle to be observed is that interested circles should be represented in suitable proportions¹⁸⁰. On the selection of workers, the directives for the working committees go on to specify that account has to be taken of the special features of the field of work and the objective of bringing the latest findings of science and the state of the given art into standardisation work¹⁸¹. Such a wide declarative openness to all considerable interested groups prevents, however, a real openness in debating existing conflicts of interests. It is further provided that results of regional or international standardisation work be taken over where possible without change¹⁸². Finally, standards should both, promote the development and humanisation of technology and *take into account* the current state of science and technology and economic circumstances — requirements that in some cases are entirely contradictory¹⁸³.

DIN 820, part 4, lays down the course of standardisation work in detail and also specifies the openness principle laid down in DIN 820, Part 1. The procedure leading up to publication of a standard should, if no special delays arise, take some three years.

In principle any one is free to apply to DIN or a competent committee for standardisation. *De facto*, most applications come from business or from the committees themselves. If the application for standardisation is accepted, the public is informed of the standardisation project. In non-public sessions, the committee works out a preliminary standard. Following technical standardi-

179 DIN 820, part 1 (2).

180 DIN 820, part 1 (3.4).

181 Guidelines for standards committees, point 10 (5).

182 DIN 820, part 1, (5.2).

sation checks by DIN's internal standards verification centre, the draft standard is made available to the public for opinions during a period of at least 4 months and at most 2 years. Objections or proposals for supplementation or amendment can be put forward by anyone. Opinions received are discussed by the competent working committee, and those who have submitted them should be invited. Should an objection be rejected, a mediation and if necessary arbitration procedure within DIN is available. Before final publication, the standard is once again subjected to final technical standardisation checks overall to guarantee that standardisation work is uniform and non-contradictory. It is explicitly stated that all standards must be checked at least every 5 years; if a standard is no longer in line with the state of the art, it must be reworked if it is to be maintained¹⁸⁴.

Formal voting rules for deciding on standards do not exist. Instead, the *consensus principle* applies:

"The content of a standard should be arrived at by mutual agreement in the endeavour to reach a common view — where possible avoiding formal voting"¹⁸⁵.

The dedication to the consensus principle is an expression of the self-image of regulatory work as a technical and scientific optimisation procedure rather than an economic-*cum*-sociological-*cum*-technical balancing problem. Above all, however, it takes account of the fact that DIN has no enforcement powers, but is dependent on voluntary compliance by the business areas concerned. As explained in DIN 820, part 1:

183 DIN 820, part 1, (5.7).

184 DIN 820, part 4 (4).

185 DIN 820, part 4 (6).

"DIN standards in the German Standardisation System are open to use by anyone. They should be introduced as «recognised rules of the art»"¹⁸⁶.

This means that DIN standards cannot, even where further-reaching objectives are stated verbally, go significantly beyond the standards observed in practice, at any rate as far as those are represented by standardisation bodies. The principles for applying DIN standards state that "while the rules for establishing DIN standards call for the state of the art to be taken into account, this demand is extremely hard to achieve in practice, simply because of the steady advance of technology", and that "the outcome of teamwork cannot be expected to meet the highest aspirations"¹⁸⁷.

Marburger gives the following five minimal constitutional requirements for standardisation procedures¹⁸⁸:

- Relevant expertise must be comprehensively represented on the standardisation committees;
- All interests involved should have balanced representation in the procedure for arriving at standards;
- The public must have an opportunity to influence the content of the standard produced;
- Technical standards must be subject to regular revision;
- The procedure must be laid down in binding fashion.

The greatest difficulties in meeting these legal requirements, which are appropriate for European standardisation procedure too, lie mainly in securing the balanced involvement of all inter-

186 DIN 820, part 1 (6.1).

187 Section III, 3. and 4.

188 Marburger, 1979, 138-146.

ests concerned. Gusy¹⁸⁹ notes one-sided representation of interests in various respects:

- Private interests may take precedence over public interests which are not concretely enough defined and often not personally represented on the committees;
- Standardisation against clear market leaders is not possible — the factor of honorary standardisation work one-sidedly favours industrial suppliers;
- Consumers are under-represented and able to articulate their interests only with great difficulties;
- There is an overlapping of interests between industry and standardisation that is hard to break down — the expertise of the applicants from industry cannot be outweighed.

It does not seem possible to overcome, but at most to limit, these aspects of one-sidedness as long as the principle is maintained of seeing production of standards as a self-governing task for industry, and making compliance with technical standards a free matter.

3.4.4 Incorporation of international and European standards into the German standards system

A large proportion of DIN standards is based on European and international harmonisation work. 25% of all DIN standards are directly connected with international and European standards. 50% of all international and European standards (70% in electrical engineering) are converted into DIN standards, half of them without any technical differences¹⁹⁰. Frequently the adoption of an international standard is not possible because the German state of the art is higher than the international consensus on technical

189 Gusy, 1986; see also Brinkmann, 1976, 94-96 and Backherms, 1978, 53-56.

requirements would require¹⁹¹. And international standards adopted by the German standards system are still subject to the usual obligation for verification after 5 years. This may mean that because of progress in technical requirements, an international standard taken over as a DIN standard is tightened up in the national framework, if international decision is delayed.

A number of resolutions by the DIN Executive Board are of relevance to international and regional standardisation work. They state:

"Where an EN Standard (European Standard) exists to which DIN has assented, this standard should be adopted unchanged by the German standards system as a DIN Standard, with a note to that effect. Where an International Standard exists, this should either be taken over unchanged by the German standards system as a DIN Standard with a note to that effect, or else as a DIN Standard produced on its basis after suitable reworking, as with the former ISO recommendations and IEC publications. Unchanged adoption of standards is to be preferred."

"These conditions for the possibility of adopting European Standards (EN Standards) or International Standards by the German standards system unchanged as a DIN standard are met only if these have previously been subjected to the same opposition proceedings and test procedures as DIN Standards"¹⁹².

In the international bodies ISO and IEC a national member organisation is not obliged to take a standard over into its national standards system, even if it has assented to the international standard¹⁹³. By contrast, with the regional bodies CEN and

190 Cf. DIN-Jahresbericht 1982/83, 24.

191 Op. cit., 25.

192 DIN-Präsidiumsbeschuß 5/1972.

CENELEC there is a binding obligation on a standards organisation, even if outvoted, to take standards over *unchanged* into the national standards system¹⁹⁴. In the area of the Low-Voltage Directive, this briefly led to considerable difficulties¹⁹⁵. This experience and the principle of majority decision with binding effect even on outvoted standards organisations make considerable difficulties likely when reaching agreements as to European standards, especially when national deviations are, contrary to the practice in the field of the Low Voltage Directive¹⁹⁶, no longer permitted.

There is also a DIN Executive resolution on the relationship between regional and international standardisation stating:

"International standardisation should, as a rule, be given precedence. Where, however, CEN/CENELEC have, in connection with the European Community harmonisation programmes, agreed with Member State governments, and decided to work on a standardisation project to which DIN has assented, it must be given precedence by the relevant DIN standards committees. The state of worldwide standardisation has also to be taken into account in the European standardisation project. International standardisation work in ISO and

193 The rules on take-over are stated in the basic norm DIN 820, part 15 — standardisation work, DIN/ISO standards, DIN-IEC standards, structure. According to these provisions, in the German "package" a national preamble and a national appendix are possible, but they must not contain any changes to the international standards. See also Krieg, 1977.

194 These common rules for CEN and CENELEC have applied only since 1986, after the 1985 CEN General Assembly adopted the principle of binding majority resolutions for CEN too. See Mohr, CEN-Generalversammlung 1985, DIN-Mitt. 65 (1986), 47-48. The rules on take-over are laid down in basic standard DIN 820, part 13 — standardisation work, DIN-EN standards, structure.

195 Cf. Orth, 1981.

196 Cf. Chapter IV, 2.3.1 *infra*.

IEC is not, however, to impede progress with work in CEN/CENELEC¹⁹⁷.

3.4.5 The representation of consumer interests in DIN

The regulation of consumer representation in standardisation work played a considerable part in the negotiations on the agreement between the Federal Government and DIN. The DIN Executive Resolution of 8 October 1974 decided, in agreement with the Federal Minister for Economic Affairs, to set up under DIN a publicly financed body to improve the representation of consumer interests in standardisation, namely the Consumer Council (Verbraucherrat)¹⁹⁸. Two factors made this achievement possible: (1) The Consumer Council's work is paid for almost exclusively by government so that no additional contributions are required from the business world; (2) even more importantly, an organisational form has been found in the Consumer Council that allows the inclusion of consumer viewpoints in the normal course of standardisation work¹⁹⁹. This means that interest representation comes about primarily in decentralised fashion in the individual standards committees.

The political and formal ties of the Consumer Council display three features. The honorary body of the Consumer Council acts as the link to the consumer protection scene. Government financing means relative autonomy vis-à-vis the manufacturing side. The formal status of the Consumer Council as a standing committee of the DIN Executive and the disciplinary attachment of its full-time workers to DIN, guarantee professional ties to DIN and its working committees²⁰⁰. This form of consumer rep-

197 DIN-Präsidiumsbeschluss 5/1979.

198 Cf. Brinkmann, 1976, 101-02. See also Köhne, 1987.

199 Cf. Kypke, 1982, 192-93.

resentation has appositely been called a "partnership-type in-house solution"²⁰¹.

Details on the Consumer Council's work are regulated in the rules of procedure of the DIN Executive²⁰². The Consumer Council has the task of advising and supporting DIN steering and working committees in matters of interest to the non-commercial final consumer, and of incorporating consumer interests into international, regional and national standardisation. Consumer interest representation must take place exclusively within the procedure framework laid down by DIN 820 for standardisation work. In carrying out these tasks, the Consumer Council should

- keep standardisation projects and work programmes in the standards committees under observation;
- present applications for standardisation projects of relevance to consumers on the standards committees;
- ensure personal representation of consumers on the standards committees;
- keep standardisation work under observation, even in standards committees on which consumer representatives do not regularly sit;
- present opinions on preliminary and draft standards and where necessary, formulate objections to draft standards;
- ensure the incorporation of DIN standards into the work of consumer institutions, and feedback of experience acquired there into standardisation work;
- ensure the instruction and training of consumer representatives working on DIN working committees²⁰³.

200 Op. cit., 194-95.

201 Schatz, 1984, 199.

202 Rules of procedure of the DIN Executive of October 1975, point 4.2.2.

203 Op. cit., point 4.2.2.4.

The five members of the Consumer Council²⁰⁴ are appointed by the President of DIN in consultation with the Consumers' Working Group (AGV, Arbeitsgemeinschaft der Verbraucher), and the Federal Minister for Economic Affairs. This appointment procedure re-emphasises the fact that this interest representation of consumers has been decreed rather than fought for.

The most important working body is the Executive Office, whose seven collaborators are presently DIN employees. To facilitate co-ordination and train consumer representatives, the Executive Office has produced an exhaustive "guide to standardisation for consumer representatives"²⁰⁵. At present there are some 2,400 standards and draft standards of relevance to consumers²⁰⁶. To avoid hopeless fragmentation of forces, a priority programme has been developed, which provides for some 100 pieces of standardisation work to be handled at any one time²⁰⁷. This means that each Executive Office staff member not doing secretarial work, primarily engineers, is involved in 20 or so work projects. These projects include sometimes international standardisation, but concern primarily advising the honorary representatives in standardisation. The priority programme responds to current standardisation projects in DIN and does not set up any alternative standardisation programme from the consumer side. Apart

204 The Consumer Council is presently represented by: a professor of domestic technology and one representative each of the Stiftung Warentest, the Federal Office for Materials Testing, the Consumer Association and the Berlin Consumer Centre.

205 Stiftung Verbraucherinstitut/DIN-Verbraucherrat (ed.), Leitfaden für Verbrauchervertreter bei der Normung, Berlin 1981. An extract concerning structural problems of honorary consumer work in standards committees is contained in: Bosserhoff, 1984, 7 et seq. The point is considered in detail in Chapter V, 6.1.3.

206 DIN (ed.), Normen und Norm-Entwürfe für den Verbraucher, Verzeichnis 1985, Berlin 1985.

from pragmatically taking into account staffing and financial capacities, the criteria are the following standardisation objectives:

- Safety or health;
- Environment protection, energy conservation, other general economic interests;
- Interchangeability, compatibility, allocation possibilities;
- Assessability of fitness for use.

In general, standardisation projects are followed from their inception. In addition, the Consumer Council reserves the right to "break in" in the course of preparation of standards in order to assert consumer interests. Still more importantly, a fixed group of selected people, augmented in each case by experts in particular areas, receives all draft norms of consumer relevance produced for a final opinion, so as to assert consumer interests in the course of the normal opposition procedure²⁰⁸.

In addition to members of consumer associations, those who act as consumer honorary representatives on individual standardisation projects, include advisers to energy supply utilities, representatives of the Stiftung Warentest, test centre workers, trade supervisory offices, the Federal Institute for Materials Testing, the Federal Institute for Industrial Safety, representatives of motoring and hobby clubs and scientific workers in university institutes²⁰⁹. In a large number of cases, this means that consumer representation is handled by workers of other institutions that do not have consumer protection as their primary objective. It is obvious that consumers will always be dependent on others involved who will take their views into account and represent them;

207 On the priority programme see Bosserhoff, 1980, 671; Kypke, 1982, 199-202. On a priority programme for consumer involvement in European standardisation see Bosserhoff, 1987, Prioritätenprogramm.

208 On these principles cf. Bosserhoff, 1980, 671-72.

209 Cf. Bosserhoff, 1978, 116 f.; Kypke, 1982, 203-206.

it is hardly possible to assert consumer interests as a specific interest in the course of technical standardisation²¹⁰.

3.4.6 Conformity marks

To promote standards in the areas of testing, monitoring, quality assurance and certification of products, services and procedures, DIN has, by an executive resolution of 24 September 1971, set up the Deutsche Gesellschaft für Warenkennzeichnung GmbH (German Society for Product Marking -DGWK). By §3 of its articles of association²¹¹ it is deemed competent for setting up, administering and monitoring marking systems on the basis of DIN standards, international standards and suitably recognised other provisions of the nature of standards. The DGWK is, by DIN executive resolution 2/1973, additionally competent for the nomination of testing and monitoring agencies, insofar as they are brought in for neutral, independent determination of conformity with standards and assessments of products on the basis of standards. As part of its tasks, DGWK handles co-operation in international and regional certification. Technical treatment of certification tasks²¹² is incumbent on the standards committees in collaboration with the DGWK.

The activities of the DGWK (a 100% subsidiary of DIN) are reflected in the form of the DIN testing and monitoring mark. This is conferred on products that have been tested for conformity with the relevant DIN standard and the manufacture of which is monitored in requisite fashion. This testing is carried out

210 Cf. also Schatz, 1984, 213-14.

211 DGWK articles of association of 30 November 1971, printed in extracts in DIN-Normenheft 10 (loc. cit., note 154), 199.

by independent test centres such as technical control boards and other testing laboratories domestically and abroad or by national materials testing institutes, or trade associations, For recognition by the DGWK, testing and monitoring centres have to carry out their task independently and in the strictest neutrality, and without observance of any economic dependency on the basis of possible ownership or contractual relationships²¹³. If a test centre confirms that a product meets all the requirements specified in DIN standards, the DGWK confers the DIN testing and monitoring mark, for a limited period and for a fee²¹⁴. Depending on the content of the standard observed, the DIN test mark acts as a commodity mark and/or safety mark, or else confirms a product's fitness for use.

Marking with the DIN test mark "DIN-geprüft" (DIN-tested), which is based on an independent test of conformity and attests compliance with all DIN standards of relevance for a product, must be clearly distinguished from the marking of a product with a DIN number or the association's mark *DIN*, which anyone may use²¹⁵. In order for a DIN number to be used as a mark, it is sufficient for the product to meet only the requirements of the DIN standards indicated, in the manufacturer's view. If the mark *DIN* is used, the rules for this mark should be ob-

212 For details on this see DIN Executive Resolution of 2 January 1985, reported by Volkmann, 1985, 172. In general on certification see Volkmann, 1982; *idem*, 1984; *idem*, 1986.

213 §4(1) of the guidelines for recognition and nomination of testing and monitoring centres of 28 November 1974, reprinted in DIN-Normenheft 10 (loc. cit., note 154), 196-198.

214 Cf. in detail the guidelines for conferment of the DIN testing and monitoring mark of 1 January 1975, reprinted in DIN-Normenheft 10 (loc. cit., note 154), 192-194; see also the rules for the DIN testing and monitoring mark, reprinted in DIN-Normenheft 10 (loc. cit., note 154), 191.

215 DIN 820, part 1 (6.5).

served. These state that DIN standards directly affecting the relative product must be complied with.

3.5 Product liability

The extent to which product liability law provides incentives to manufacturers to make safer technical consumer products is a question that depends on a variety of uncertain legal and extralegal preconditions. It cannot therefore be answered *ipso iure* either affirmatively or negatively, whether for the law of the FRG or any other Community Member State²¹⁶. In any case, the incomparability in principle of the "reality" in product liability law between the U.S.A. and Western Europe has to be stressed²¹⁷. This lies not so much in distinctions in substantive law, i.e. the liability for product hazards recognised in most American States ("strict product liability in tort") versus negligence liability in Europe, as in specific institutional conditions confined to the U.S. These are notably the punitive damages awarded by lay juries, the contingency-fee system, i.e., the fact that the losing party does not as a rule have to bear the winner's legal costs, the need to supplement often inadequate social insurance by compensation payments, the extensive pretrial discovery procedure, etc. In Community Member States employers' liability insurance is a major limiting factor on the social preventive approach, namely giving companies an incentive to manufacture safer products through the establishment of liability of individual manufacturers. On the whole, however, Community Member States will not be able to do without product liability suits, if only because of the possible negative publicity for relevant rulings of Supreme Courts, leading to particular effects on the conduct of manufac-

216 Cf. Chapter II, 3.1.2 *supra*.

turers of industrial products. Accordingly, a brief outline of West German product liability law would be appropriate here.

From the viewpoint of liability law there are two main grounds for claims as far as manufacturer responsibility for damage-causing technical consumer products goes: infringement of product safety standards like § 3 GSG or § 2 of the First Implementing Order to the GSG, which act as protective legislative provisions within the meaning of § 823 (2) of the German Civil Code, and general tortious liability of manufacturers pursuant to § 823 (1) of the German Civil Code. Seller-centred contractual liability need not be considered here, since the overwhelming number of product liability cases do not, as far as consumers are concerned, involve any direct contractual relationship between the manufacturer and those suffering damage.

3.5.1 Infringement of protective legislative provisions (§823 (2) BGB)

3.5.1.1 § 3 (1) and 3 GSG

As already stressed²¹⁸, German product safety law has since adoption of the GtA 1968 (since 1980 the "GSG") had a general safety duty, in § 3 (1) GSG. Although oriented primarily towards industrial safety, the safety duty of § 3 (1) GSG, because of the generalisation of the concept of technical work material by the list in § 2 (2) GSG, *de facto* covers a major part of consumer goods marketed in FRG. § 3 (1) GSG is accepted as applying as a protective legislative provision within the meaning of § 823 (2) BGB. It contains a specific rule of conduct, enacted not only in the (public) general interest, but aimed in particular at protecting

217 For informative comments on this see Schmidt-Salzer, Kommentar, 1986, Nos. 192-209.

purchasers and users of products. Culpable infringements of protective legislative provisions entail compulsory compensation, pursuant to § 823 (2) BGB.

Although from a technical regulatory point of view, § 3 (1) GSG was taken as a model for industrial safety and product safety provisions in other Community Member States, in particular Britain, its scope nevertheless lags markedly behind that of, say, the English offence of breach of statutory duty²¹⁹. This is because of two central features of the legal description of a protective legal provision in § 823 (2) BGB, taken together with § 3 (1) GSG: the concept of "generally accepted rules of the art" in § 3 (1) GSG and the culpability requirement of § 823 (2) BGB.

The indefinite legal concept of *generally accepted rules of the art* has fairly clear outlines in German technical safety law. In the context of the German Constitutional Court's so-called three-stage theory²²⁰, the recognised rules of the art set the lowest safety level. Though the distinction between the upper two safety levels, as state of the art and state of science and technology, is not uncontroversial either²²¹, the boundary between recognised rules of the art and state of the art is probably not disputed even among technical experts. As already stressed²²², for the detailed specification of the indefinite legal concept of generally accepted rules of the art the consensus of technical practitioners in the area concerned is taken as a basis. In other words, the decisive point is the canon of technical rules proven in practice. This practice need not conform to scientifically discussed and experimentally tested

218 Cf. 3.3.3 supra.

219 Cf. Chapter II, 2.7.1 supra.

220 BVerfGE 49, 80 at 135-36.

221 Cf. Nicklisch, 1983, 261, Winckler, Zum Begriff, 1983, 2125; Budde/Reihlen, 1984, 248.

222 Cf. 3.3.3.2 supra

new technical solutions. This means also that the judge has no leeway in individual cases in shaping the safety requirements. As regards the objective situation, all that has to be ascertained is whether the technical procedure chosen by the manufacturer was in conformity with the recognised practice at the time when the product was marketed or displayed. A further restriction of the scope of § 3 (1) GSG is the double stress on *proper use*. Users are protected against product hazards only given proper use, and only in so far as "the proper use allows". § 2 (5) GSG defines proper use to be (1) the use for which the technical work material is suited according to indications by the manufacturer or importer, particularly indications given by way of publicity, or (2) the usual use following from the design and construction of the technical work material. This restriction of the scope of protection to proper use has to be interpreted in such a way that the recognised rules of the art do not involve safety rules or technical safety standards in the narrower sense, since as regards safety standards, the basic standards DIN 820, Part 12, (3.9.1) and DIN 31000/VDE 1000 (3.3) go further by also taking foreseeable misuse into account.

The relatively low level of safety aimed at in the legal concept of generally recognised rules of the art takes much of the virulence away from the issue of sliding reference in specifying standards²²³. In principle it may not be assumed that technical

standards and the safety level of generally accepted rules of the art are identical, though in practice there is a "factual presumption" to that effect. Even with official notification of a technical standard as a recognised rule of art, for instance, by its incorporation in list A under the general administrative regulations pursuant to § 11 GSG of 11 June 1979, it is possible to show that the given technical standard does not constitute a generally accepted rule of art within the meaning of § 3 (1) GSG. The sole decisive criterion in the last analysis remains probation in practice and acceptance by practical experts²²⁴.

A further precondition for manufacturer's or importer's liability under § 823 (2) BGB together with § 3 (1) GSG is that they have *culpably* marketed a product that is technically inadequately safe. The literature on liability law as regards infringement of protective legal provisions within the meaning of § 823 (2) BGB is not unanimous as to what the culpability has to relate to, whether to actual injury and/or to breach of duty²²⁵. Here, however, this question may be set aside. According to § 823 (2) taken together with § 3 (1) GSG, manufacturers and importers are negligent if they could have avoided marketing products not complying with generally accepted rules of the art and therefore inadequately safe. In view of the low level of safety specified by the legal concept of generally accepted rules of the art, the question of culpability tends to lose significance, at any rate in cases of manufacturer liability. If proof is brought that the design of a product did not correspond to the generally accepted rules of the art, this justifies an assumption, no doubt hard to refute, of the manufacturer's culpability. On the other hand, importers as a rule have no culpability where the non-compliance of an imported product with generally accepted rules of the art can be detected

224 Among these rulings are BVerwg, BB 1984, 563 — children's sickbeds; BGH, NJW 1980, 1219 — folding bicycles; see also BGH, VersR 1984, 270 — chisels.

only by extensive testing or if the product has been subjected to a design test pursuant to § 3 (4) GSG and given the safety mark (GS = geprüfte Sicherheit)²²⁶.

It should be stressed that the legal description of liability in § 823 (2) BGB taken together with § 3 (1) GSG, by contrast with, say, the offence of breach of statutory duty in English product safety law, does not cover traders as among those liable. However, as was stated, the amendment to the GSG 1979, in so far as banning orders from trade supervisory offices are concerned, also includes traders among those to whom the norms of the GSG are addressed, in §§ (1)(2), under the above-specified conditions²²⁷. Accordingly, the legislator has not made a corresponding extension of the general safety duty of § 3 (1) GSG.

In line with the traditional nature of public law on safety controls, compensation is confined to injuries to the personal legal goods of life, limb and health.

§ 3 (3) GSG regulates the duty on manufacturers/importers to supply particular *instructions for use* when marketing products, to ward off of hazards to life, limb and health of users and third parties. Here, then, is one of the few cases of statutory regulation of the original duty of instruction. Here the general principles of tortious liability in connection with provision of information apply without restriction²²⁸. As a rule, according to the

225 Cf. Brügemeier, 1986, Nos. 824-25.

226 Among these rulings are BGH, NJW 1980, 1219 — folding bicycles. Instructive is LG Koblenz, 4 December 1981, printed in Kullmann/Pfister, Bd. I, point 7870/4.

227 Cf. 3.3.7 (text accompanying note 131-135) supra.

228 A recent basic ruling is BGH, BB 1986, 2368 — aerosols; cf. also OLG Koblenz, VersR 1981, 740 — grills. Informative is AG Gelsenkirchen, 14 June 1973, with dissenting note, Schmidt/Salzer, printed in Schmidt-Salzer, Entscheidungssammlung Produkthaftung, Bd. III, 1982, 527.

jurisprudence of the Federal High Court, generally known dangers or those within the ambit of ordinary experience need not be warned against.

3.5.1.2 § 2 of the First Ordinance under the law on technical work materials of 11 June 1979

The First Ordinance under § 4 (1) GSG serves to convert the Low Voltage Directive²²⁹ into national law. From the liability-law viewpoint, § 2 more or less constitutes a forerunner of the new approach to harmonisation and standards. According to § 2 (1) of the Ordinance, manufacturers and importers may market or exhibit in the FRG only such electrical equipment as has been manufactured in accordance with the state of safety technology evident in the European Community and does not, given regular installation, maintenance and proper use, endanger the safety of people or domestic animals or the preservation of material values. § 2 (2) reproduces the basic safety requirements given in Annex 1 to the Low Voltage Directive *verbatim* § 2 (1) of the First Ordinance is, like § 3 (1) GSG, a protective legal provision within the meaning of § 823 (2) of the German Civil Code. There are however two ways in which § 2 (1) of the First Ordinance goes beyond § 3 (1) GSG: by including material property in the area of protection, and by focusing on the state of safety technology as the decisive safety level. The latter point is of critical importance. What counts is no longer generally accepted rules of the art, which may well be already outdated by technical development, but the *state of safety technology in the European Community*. That this is not merely a terminological difference but a substantive one is the unanimous view in the German literature²³⁰. Firstly, it refers to the level of safety addressed by the legal con-

229 OJ L 77, 26 March 1973, 29. Cf. Chapter IV, 2 *infra*.

cept of state of the art, in principle higher than that in the concept of generally accepted rules of the art; and secondly, the state of Community safety technology is interpreted as the state of safety technology in the country where the highest level has been reached²³¹.

This once again brings out the significant difference between public safety law and civil liability law. The Low Voltage Directive, like the First Ordinance under the GtA 1968, makes compliance with safety requirements a precondition for the marketability of technical equipment. But there is a (refutable) presumption that these conditions have been complied with by the manufacturer/importer where he has met particular electrical engineering standards, namely (1) harmonised electrical engineering CENELEC standards, (2) international CEE/IEC standards or (3) national electrical engineering standards. *In liability law*, the injured party may demonstrate that the notified electrical engineering standard was no longer up to the current state of safety technology at the time the electrical equipment was marketed. From the *administrative law* viewpoint, the Low Voltage Directive, just like the new approach, provides for objections against the underlying electrical engineering standard by a Member State using the safeguard clause procedure.

Proof of negligence becomes problematic in these cases. A shift in the burden of proof can at any rate not be justified if a particular notified electrical engineering standard has been complied with by the manufacturer or importer²³². This finding corresponds with the allocation of the burden of proof in the related

230 Among many cf. Kullmann, in: Kullmann/Pfister, Bd. I, point 2455/6.

231 Cf. Zimmermann, Gerätesicherheitsgesetz, 149; Schmatz/Nöthlich, Kennz. 1610, 9; Kullmann, in: Kullmann/Pfister, Bd. I, point 2455/6.

232 As far as can be seen, there are not yet any relevant decisions on § 2 (1) of the First Ordinance under the GtA.

cases of infringement of the product monitoring duty in general product liability pursuant to § 823 (1) of the German Civil Code.

3.5.2 Producer liability pursuant to § 823 (1) of the BGB (German Civil Code)

Tortious liability under § 823 (1) BGB is in German civil law the comprehensive basis for producer liability for damage caused by "defective" goods, whether used commercially or privately. Only the outlines can be sketched out here²³³.

Very soon after the BGB came into force, the case law of the Reich Supreme Court chose the path of dogmatically underpinning manufacturer liability in law of tort. Tortious product liability developed from the general obligation on property owners under 823 (1) BGB to ensure that nobody is avoidably endangered by objects or on land controlled by them. The Reichsgericht established a general duty of manufacturers of commodities to not market products which could, given proper use, injure anyone as to the legally protected goods of life, limb, health and property²³⁴. This line of case law has been continued and consolidated by the Federal Court. Today, tortious liability under § 823 (1) BGB is characterised by two features:

- A system of differentiated, directly enterprise-related transactional obligations on manufacturers (design, manufacture, construction, product monitoring and organisational duties), which can only in restricted fashion be delegated so as to exempt from liability;

233 On this see Kullmann in: Kullmann/Pfister, Bd. I, point 1520; Mertens, 1986, § 823, No. 279 ff., Brüggemeier, 1986, Nos. 521 et seq.

234 Among basic rulings are RGZ 87,1 — Brunnensalz; RGZ 163, 21; RG, DR 1940, 1293 — Kraftdroschke.

- A system of appropriate rules on the burden of proof.

The two duties on manufacturers traditionally to the fore are those of proper design and manufacture of the product. Objects manufactured, in particular technical consumer products, must be safe in operation, so that in foreseeable use no one is avoidably injured. Safety is to be guaranteed by suitable information on and planning of the product (direct safety technique within the meaning of DIN 31000/VDE 1000) and additional protective measures (indirect safety technique within the meaning of DIN 31000/VDE 1000). The safety level that applies to design and manufacture is the given state of the art within the meaning of the Federal Constitutional Court's three-stage theory²³⁵.

It should, however, be emphasised that by contrast with § 3 (1) GSG and § 2 (1) of the First Ordinance under the GSG, the aspect of "judging safety" plays a much more central part with § 823 (1). In defining the extent of the transactional duty on manufacturers, beside what is technically feasible, the *normative element* of "legitimate social expectations of safety" enters in. The Court determines the specific extent of precaution against hazard according to what is *possible* according to the state of the art at a given point in time, what is *economically reasonable* for the manufacturer and what is *essential* in the interest of protecting the integrity of the person. Judicial determination of the requisite level of safety thus consists in each individual case of a difficult compromise between degree of hazard, likelihood of damage and cost of prevention²³⁶.

235 BGH, VersR 1952, 357 — Rungenverschluss; BGH, VersR 1960, 1095 — Kühlanlage.

236 Informative material on this in BGH, NJW 1984, 801 — Eishockey-Puck; BGH, NJW 1985, 620 — Schlepplift; BGHZ 92, 143 — Kupolofen.

Should it not be possible, even with proper design and manufacture, to rule out damage given foreseeable use, the manufacturer is obliged to attach, or have attached on the appliance, instructions on the nature of proper use (instructive safety technique within the meaning of DIN 31000/VDE 1000). § 3 (3) GSG constitutes a special statutory regulation of the original duty of instruction on manufacturers and importers.

Since there is no basis in law of tort for liability as to *development hazards*, case law in Germany has developed a product monitoring duty. Manufacturers are obliged even *after* supplying a product to take measures to ensure that they are in time and comprehensively informed of any possible product hazard²³⁷. Should any risk become apparent, they are obliged to take corrective action). "The content and extent of a warning, and the time to give it, are determined largely by which legal good is in danger and depend on the extent of the hazard"²³⁸. Among the variety of possible legally mandated responses are: public warning on the conditions that cause danger to arise, which may be sufficient or recall of the whole product series to remove the source of hazard, which may be necessary²³⁹.

The place of the *duty of organisation* in tortious manufacturer liability under § 823 (1) BGB is not entirely clear. It acts in part as a subsidiary duty where the other transactional duties on manufacturers do not apply; in part it acts as a methodological device to provide a basis for direct liability of a businessman or business under § 823 (1) BGB for misconduct by employees (vicarious liability).

237 BGH, BB 1986, 2368 — Spraydose.

238 BGHZ 80, 186, 191 — Derosal/Apfelschorf I.

239 Recently and fundamentally, BGH, NJW 1987, 1009 — Motorrad.

Rules on the *burden of proof* are of decisive importance for the effectiveness of tortious manufacturer liability as an instrument for both individual compensation for damages and social prevention of damage. According to the two fundamental decisions of the Federal Court (Hühnerpest, 1968²⁴⁰ and Derosal/Apfelschorf I, 1981²⁴¹), the following evidentiary situation is to be taken as a basis. The injured party bringing the action has to show that interests protected under law of tort have been injured by the product, in the form it left the manufacturer's sphere of control. If a design, manufacturing or (original) instruction defect is alleged, it is for the manufacturer to show that no such misconduct took place within his sphere of control. He can show this specifically where design and manufacturing defects are alleged by proving that he has taken the state of the relevant art into account when marketing the product. According to a disputed but probably prevalent view, compliance with relevant technical standards cannot in this context be taken as a basis for *prima facie* proof. This follows from the differing objectives of technical standardisation and of liability law²⁴². In the case of technical standards, the manufacturer's side that largely determines standardisation in staffing and financial terms is pursuing its own interests in rationalisation, quality and perhaps also safety. In liability proceedings, the point is to determine the level of safety required in the interest of guaranteeing the object of statutory protection. Accordingly, the state of the art and technical standards are in principle not the same in coverage. Departure from a standard (whether in a positive or a negative direction) is irrelevant in liability law, as is conformity with standards. In a manufacturer's liability case the manufacturer has therefore to bring positive proof of having taken the state of safety technology

240 BGHZ 51, 91 — Hühnerpest.

241 BGHZ 80, 186 — Derosal/Apfelschorf I.

242 Cf. the decisions in note 234; in the literature, among many see Marburger, 1983, 597; Bauer, in: Brendl, Gruppe 7, 41 et seq.

of relevance for liability-law purposes into account. Anything else applies only in the cases, extremely rare in German law, of so-called strict reference. This case is regulated by Art. 7 (d) of the Community Product Liability Directive²⁴³.

As regards *monitoring* duties, the general principal applies that the objective burden of proof is on injured parties, to show that manufacturers are in breach of duty. This evidentiary situation might as far as consumer goods are concerned, be decisively improved through official access to data from the joint Community information system on home and leisure accidents.

In the present context of liability for consumer goods, it should be mentioned that *traders* too are subject to transactional duties under § 823 (1) BGB. They are of course not liable in the same way as manufacturers, but they are under *trader-specific duties as to conduct under law of tort*. These are notably:

- The duty to ensure that no new causes of damage arise in the trade sphere. An unobjectionable device ought not, while in the trader's control, to be turned into a hazardous product;
- Investigation and information duties (the duty to disclose dangers). A potentially hazardous product should be discovered as soon as possible, i.e. before it gets into the hand of the consumer. However, a duty on traders to investigate factory-new products is assumed only where there are special reasons.

Special provisions apply to importers. While the Community Product Liability Directive in principle treats those who import commodities into the Community in the same way as manufacturers, in the case of tortious liability under § 823 (1) BGB a distinction must be drawn. An importer bringing a product from a Community Member State into the FRG is to be treated like a normal trader. An importer importing a product from a non-

²⁴³ Cf. Chapter III, 3.5 *supra*.

Member State into the FRG is liable in the same way as a trader, to the extent that manufacturer liability in the third country is guaranteed, especially as far as execution goes. This depends critically on bilateral agreements on recognition and execution of judgments between the States concerned²⁴⁴. If manufacturer liability is not guaranteed, the importer is (on a disputed view) liable in the same way as a manufacturer.

244 On the so-called Brussels Convention on Jurisdiction and the enforcement of judgments in civil and commercial matters, to which 9 out of 12 Community Member States have since acceded, see Kropholler, 1987.

Part 4:

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

Adoption of the 1972 Consumer Product Safety Act (CPSA) by the 92nd Congress was a success for the consumer movement and its legislative impact in the US. The CPSA and its implementation through the Consumer Product Safety Commission (CPSC) of 1973 are, however, important even outside the United States. The new legislation and its regulatory machinery has served as a model or at least a stimulus in all countries where product safety law has been further developed¹. Moreover, the many amendments to the CPSA and the difficulties in applying it have been taken as an illustration of the inadvisability of increased government influence on product safety².

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

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

2 For the most fully worked-out criticism, see Viscusi, 1984.

But irregularities and constant amendments seem to be a typical feature of product safety policy and product safety law, and description and interpretation have to go along with them. These considerations are taken account of in the description below by presenting the CPSA not only in its current version, but in its original one as well (4.1), and by always referring to the constantly fluctuating conditions in which the CPSA had to operate (4.2-4.5).

4.1 The original version of the CPSA and amendments to it

The CPSA's adoption in 1972 was the conclusion to years of preliminary work. The most important preparatory step was the setting up of the National Commission on Product Safety³, proposed in 1967 by Senator Warren Magnuson, initiator of many consumer policy legislative acts. The fact that Senator Magnuson was not aiming directly at enactment of a general product safety act but leaving the development of suitable proposals to an independent commission did much to help make his initiative successful⁴. The Commission, appointed by President Johnson in 1968, was able to carry out its preliminary work and hearings unmolested by the usual antagonistic pressures. In 1970 the Commission presented its voluminous final report⁵. The report not only submitted the findings of broad-based surveys — on product hazards, accident information systems, voluntary product standards, consumer education, the state of product safety law, the relationship between Federal law and State law, product

3 Act of Nov. 20, 1967, Joint Resolution 33, Pub. L. No. 90-146, 81 Stat. 466 (1976).

4 See the brief and informative description of this strategy in Pertschuk, 1982, 41 et seq.; detailed descriptions in e.g. the note on the Consumer Product Safety Commission, 1975, 1079 et seq.; Schwartz, 1982.

safety policy in other countries — but also contained proposals for general product safety legislation, the core of which was to be the setting up of a new independent agency⁶.

4.1.1 *The CPSA 1972*⁷

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

- This firstly applies to the CPSC itself. There have long been independent commissions in the area of so-called economic regulation (the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Trade Commission⁸), but transfer of protection of consumer safety interests to an independent agency was an innovation⁹. The autonomy of the CPSC was shielded against both private

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- 5 National Commission on Product Safety. Final Report Presented to the President and Congress, Washington, D.C. 1970.
 - 6 Only one of the six commissioners, H.L. Ray, dissociated himself from the Commission's proposals (*loc.cit.*, 120 et seq.). He saw them as lacking more precise identification and consideration of incentives that could encourage industry itself to raise safety levels, and further recommended co-operation with private standardisation organisations. These suggestions have since been implemented. On the first point, see also the self-critical remarks by Commissioner M. Pertschuk, 1982, 141 et seq., and on the amendment to the provisions on mandatory standard setting, 4.1.2.1 *infra*.
 - 7 Pub. L. No. 92-573, 86 Stat. 1207 (1972).
 - 8 See the descriptions in Müller/Vogelsang, 1979, and Weber, 1986, 174 et seq.
 - 9 See Scalia/Goodman, 1973. Creation of the CPSC completed the network of newly created agencies in the area of social regulation: the National Highway Traffic Safety Administration had been founded in 1966, the Occupational Safety and Health Administration in 1970 and the Environmental Protection Agency in 1970.

and governmental interests. The five Commission Members are each appointed for seven years; budget appropriations need not be approved by the Office of Management and Budget (OMB), but simply by Congress directly¹⁰.

- It is also true of the broad range of tasks of the CPSC. The CPSA covers all consumer goods, except where other agencies are involved in monitoring safety hazards as part of their competence¹¹. Additionally, the CPSC was handed the administration of specific existing acts¹². The Commission thus has a kind of general catch-all competence that always applies wherever there are no more specific regulations that take priority. But even where such priority regulations affect particularly important goods (particularly automobiles and pharmaceuticals), the scope remains significant. The jurisdiction of the CPSC is reckoned to apply to 15,000 consumer products¹³; the often cited estimate by the National Commission on Product Safety that some 36 million consumer product accidents occur yearly¹⁴ relates to these products not covered by special regulations.
- A further innovation was the attempt at making safety regulation "scientific". Section 5 CPSA provides for systematic collection and analysis of accident data, and gives the Commission tasks and powers in the area of research¹⁵.
- Another breakthrough is the introduction of a wide variety of regulatory machinery, ranging from information policy measures through standard setting and provisions for bans, up to an elaborate recall system¹⁶. This gamut of measures has greatly encouraged the international debate on product safety policy¹⁷ and may be regarded as exhaustive: there is

10 See §§ 4, 32 CPSA.

11 See §§ 3 (a) and 31 (a) CPSA.

12 Federal Hazardous Substances Act 1960, Flammable Fabrics Act 1953, Poison Prevention Packaging Act 1970, Refrigerator Safety Act 1956 and Cigarette Safety Act 1984.

13 Figures from Dr. G.C. Nichols, CPSC (International Affairs Division).

14 Op. cit. (note 5), 1.

15 See also Section 27 (a) CPSA.

16 Specifically, see Sections 7 (standards), 8 (product bans), 12 (seizures), 14 (certification), 15 (recalls).

17 See only the OECD Report "Safety of Consumer Products", 1980.

probably no safety policy measure conceivable which has not already been tried out within the framework of the CPSA.

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

4.1.2 Amendments

The original consensus expressed in the National Commission on Product Safety's 1970 Report had made enactment of the CPSA possible. This consensus, however, did not last. The controversies over the legal justification for a government product safety policy and its appropriate means, largely dormant during the preparatory phase of the Act, came to the fore at a later date and have never yet been settled.

CPSC adverseries succeeded in bringing about severe budget cuts in the 1980's. The first budget for 1974, still solely based on recommendations from the Food and Drug Administration, amounted to some 30 million dollars¹⁸. When the Commission then asked for its own appropriations for 1975 and 1976, it managed to secure increases to some 37 and 42 million dollars respectively from Congress¹⁹. Until 1981 the budget kept to this

18 Not considering inflation, this would be equivalent to a 1985 figure of some 70 million dollars.

19 Figures in Cornell/Noll/Weingast, 1976, 478.

figure in nominal terms, and was then cut in 1982 to 33 million dollars²⁰. It is still at this level today²¹. Staffing is one aspect that reflects this development. The Commission began in 1973 with 579 workers, reached a peak of 914 in 1977²², and then gradually shrank back to its original number. It should be kept in mind that the dollar has lost some 50% of its value by comparison with 1974²³ and that therefore a return in nominal terms to the 1974 budget means halving it *de facto*²⁴. What suffered most from all these cuts were the technical and scientific divisions of CPSC and its "field offices", whose tasks lay particularly in the area of follow-up market control. Their numbers were cut from 13 to 5²⁵.

4.1.2.1 Mandatory standards and product bans

The most important amendments to the CPSA concerned regulations on the issue of product standards. Authoritative prescription of mandatory safety standards was, according to the National Commission on Product Safety's recommendations and the concepts behind the Act's procedures, to be the most important instrument of the new product safety policy²⁶. Standards could according to Section 7 (a) (1) and (2) CPSA 1972 refer to

- 20 See table in Viscusi, 1984, 40.
- 21 35 million dollars in 1984; 36 million dollars in 1985, approx. 35 million dollars in 1986 and 1987 (figures from CPSC Authorization Act 1985, 99th Congress, 1st Session, Report, 99-60 Calendar No. 138, 7 and from Statler, 1984, 93).
- 22 See Viscusi, 1984, 40.
- 23 See the figures accompanying the Consumer Product Safety Amendment Act of 1983, 98th Congress, 1st Session, Report 98-114, 9 et seq.
- 24 See the CPSC's figures in the Hearings before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce. House of Representatives, 98th Congress, 1st Session on H.R. 2367, 6/7 April 1983, Serial No. 98-29, Washington, D.C. 1983, 413.
- 25 See Consumer Product Safety Amendment Act of 1983, op. cit. (note 23), 9 et seq.

performance, composition, contents, design and construction, finish or packaging. However, apart from informational requirements, the Commission was to confine itself to performance standards wherever possible. A procedure was introduced that would give consumer associations a say in developing standards: the so-called offeror procedure. This made standard setting open to tender, and the Commission had the possibility of financially supporting its development by the selected offeror (Section 7 (d) (2))²⁷.

These provisions have undergone far-reaching changes. In 1978, the CPSC was given the possibility of refraining from the offeror procedure²⁸; in 1981 the procedure was then completely abolished²⁹. At the same time Congress fundamentally changed its originally critical attitude towards mandatory standards: the Commission was henceforth to aim exclusively at performance standards and duties of information, but no longer to prescribe the "design" of a product (Section 7 (a)). Still more important: "the Commission shall rely upon voluntary consumer product safety standards . . . whenever such voluntary standard would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards" (cf. also Section 9 (b) (2) (B)).

Additionally, the Commission was mandated to draw up a "final regulatory analysis", setting out in detail the costs and benefits of the regulation it had in mind and the alternatives it had considered (cf. Section 9 (c) (1) and (4), (f) (2) (A) and (B)). Also

26 See references in Klayman, 1982, 99 et seq.

27 See the detailed description in the note, The Consumer Product Safety Commission, 1975, 1121 et seq.; on the petition procedure, see also 4.3.1 *infra*.

28 Act of November 10, 1978, Pub. L. No. 95-631, Section 3 (a), 92 Stat. 3742, 3743.

in 1981, the CPSC's quasi-legislatory independence was considerably cut back. By the newly introduced Section 36, Congress can now veto a product safety rule desired by the Commission³⁰.

The amendments to Section 9 CPSA did not affect only the issuing of mandatory standards. They also concerned regulations on the banning of products. Such bans could be promulgated under Section 8 CPSA 1972, where products presented a disproportionate risk of injury, and this hazard could not be eliminated by a standard. Since Section 8 (2) requires a product ban to be promulgated "in accordance with Section 9", the possibility of "voluntary" standards must now be looked into before a ban is ordered, and above all, an exact cost-benefit analysis produced³¹.

4.1.2.2 Right of petition and public information

Among the regulatory innovations of the CPSA 1972 was the power for interested persons and organisations to call on the Commission to develop or change a product regulation, and even in some cases to compel it through the courts to take action (Section 10 CPSA 1972). This possibility of influence was abolished in 1981. All that now apply are the general (more restrictive) provisions of the Administrative Procedure Act³². The practical significance of this revocation seems, however, to be slight

29 Pub. L. No. 97-35, § 1203, 95 Stat. 703, 704-13 (1981); details in Klayman, 1982, 100 et seq.

30 On the constitutional prerequisites for using the veto right, see the indications in Claybrook, 1984, 69.

31 For more details see 4.3.2 infra.

32 5 U.S.C. § 553 (e) (1976).

in the light of a silent transformation through the 70's in function of the right of petition³³.

Considerable effects were however produced by corrections to the CPSC's information policy, first through the courts and then confirmed in legislation. The relevant provision of Section 6 CPSA distinguishes between information concerning business secrets (Section 6 (a)) and other information on product hazards (Section 6 (b)). The first category of information was already according to Section 6 (a) CPSA 1972, to be treated confidentially. Other information was, however, pursuant to Section 6 (b) CPSA 1972, to be passed on. In so far as this made particular manufacturers identifiable, they had to be given a chance to state their position, and the Commission was bound to control the accuracy of information as far as possible, and verify the fairness of any publication. A liberal information policy is in any case in line with the general objectives of the CPSA (Section 5 (a) (1)), as with those of the Freedom of Information Act 1972³⁴, which in principle obliges the American authorities to comply with a request for information where not explicitly prevented by specific laws.

The CPSC thus had to face the difficulty of reconciling these rights to information with the restrictions contained in Section 6 (b) CPSA. It used the expedient of differentiating between a "passive" and an "active" way of passing on information. Whereas in the former case the Commission would merely refer to data it had received, in the latter it would verify this data prior to official promulgation. This practice led to some controversy³⁵, and was then definitively overthrown by a Supreme Court deci-

33 See Schwartz, 1982, 45 et seq., 55 et seq. and 4.3.1 infra.

34 5 U.S.C. § 552 (1976 and Supp. II 1978).

35 Cf. on the one hand *Pierce Stevens Chemical Corp. v. CPSC*, 585 F.2d 1382 (2d Cir. 1978), and on the other hand *GTE Sylvania, Inc. v. CPSC*, 598 F.2d 790 (3d Cir.), cert. granted, 100 S.Ct. 479 (1979); and

sion³⁶. In 1981, Section 6 CPSA was entirely recast. Since then, a manufacturer can, pursuant to Section 6 (a) (3), designate any information concerning him as confidential, and have recourse to the courts against its being made public, should the Commission find this designation unjustified (Section 6 (a) (6)). Even where business secrets are not involved, the Commission is to inform manufacturers before passing on any information, secure their opinion and verify the accuracy of all indications (Section 6 (b) (1)); here, too, the manufacturer can, in case of dispute, call for a decision by the courts (Section 6 (b) (4)). The Commission's possibilities of action through information policy have been severely restricted through these new requirements³⁷. A 1983 initiative³⁸ by Senator H.A. Waxman to reverse these changes was unsuccessful³⁹.

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

The legislative and statutory history of the CPSA has to be seen in the context of the rise of the consumer protection movement in the US during the 1960's, and the subsequent "revolt against regulation"⁴⁰, which became official under the Reagan administration. This debate is so complex and at the same time so bound up with American traditions and conditions that it would

exhaustively the Comment on The Consumer Product Safety Act, 1980, 1180 et seq.

36 CPSC v. GTE Sylvania Inc., 447 U.S. 102 (1980).

37 See submissions by S.D. Dornfield from the Society of Professional Journalists, jurist A.F. Popper and Commissioner St.M. Statler to the 1983 Congressional hearings (op. cit., note 24), 80 et seq., 90 et seq., 368 et seq.

38 Reprinted op. cit., 3 et seq.

39 Calendar No. 138, 99th Congress, 1st Session, Report 99-60 of 16 May 1985.

be neither possible nor advisable to present it even in outline. However, in order to understand and assess the CPSA and its present significance, some indications as to the concrete repercussions of those developments on the CPSC's conceptual approach are necessary. These were partly encouraged by the general political "climate", partly mediated through the influence of individual politicians and partly brought about through the legislative interventions described. Yet a description merely explaining the Commission's conceptual approaches is admittedly risking crass simplification. By American standards, the CPSC is a very small agency, but it is not a monolithic block. Changes to its policies do not take place abruptly and uniformly, but in laborious, conflictual processes. With these reservations, three stages in the CPSC's history may be distinguished:

- The initial phase, 1973-8: "[Chairman] Simpson and his staff have attempted to design their organisation from the beginning so that its goal is clear and its method of standard setting minimises arbitrariness. This is what political scientists have always asked heads of new agencies to do. Now one has. It will be interesting to see what difference it makes". These sentences end one of the first reports on the CPSC⁴¹. Its generously optimistic verdict was founded above all on the endeavour to make product safety policy "scientific", and therefore, in particular, upon the efforts of the newly established Commission to arrive, on the basis of its data surveys, at rational debate and determination of priorities⁴². These initial hopes were later disappointed⁴³. The Commission did not succeed in developing and effectively applying a convincing programme. It took four years before three product regulations could be adopted (on swimming

40 Pertschuk, 1982.

41 Kelman, 1974, 102.

42 For more details see 4.2 *infra*.

43 Symptomatic critical assessments can be found by the mid 70's in Cornell/Noll/Weingast, 1976 and Hoffman, 1976; see also Feldman, 1980, 58 *et seq.*, 60 *et seq.*

pool slides, matchbooks and plate glass)⁴⁴. Information policy instruments and recall possibilities were not fully used. Not only industry but consumer associations as well gave vent to severe criticisms⁴⁵. During the 1977 Congressional Hearings, J.E. Moss, himself a major proponent of enactment of the CPSA, confirmed the general misgivings very clearly⁴⁶.

- The Commission's public image improved following the 1978 appointment of Susan King as its new chairman⁴⁷. The Commission then trimmed down its overambitious standardisation programme, opened up an important new field of activity with its "chronic hazards program"⁴⁸ and made a prudent use of its regulatory instruments — mainly by making the recall provisions of Section 15 (b) CPSA effective⁴⁹.
- Primarily due to its successes during the consolidation phase following 1978, the CPSC managed to survive the deregulation wave following President Reagan's assumption of office. Moves by the OMB under D. Stockman to take away the Commission's independence and integrate it into the Department of Trade were unsuccessful. However, the Commission had to accept the cuts to its budget described above as well as the legislative amendments between 1981 and 1983 and interventions in personnel policy⁵⁰. All these corrections were, and still are, marked by a clearer orientation of the Commission towards criteria of economic efficiency and self-control of its activities through cost-benefit analyses. A memorandum drawn up by P.H. Rubin, Associate

44 For more details see 4.3 *infra*.

45 See Bollier/Claybrook, 1986, 171 *et seq.*; for further evidence see the hearings cited in note 46.

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

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

48 For the programme and the opinion-forming process within the Commission see Merrill, 1981, 1264 *et seq.*, 1297 *et seq.*

49 For details see 4.5 *infra*.

50 See Bollier/Claybrook, 1986, 173.

Executive Director of the Division for Economic Analysis⁵¹, documents this trend. The memorandum points to budget restrictions on the Commission, and recommends cost-benefit analysis as a way of using scarce resources more effectively⁵². But its ambitions go further: all regulatory machinery should be verified on cost-benefit-analysis criteria, and the assessment of safety hazards implicit in individual consumer decisions should be recognised as the ultimately binding rationality criterion of safety policy⁵³.

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

Any product safety policy, whatever regulatory philosophy it may follow, is bound to set priorities. This need becomes all the more urgent, the more comprehensive is its scope and the greater the room for manoeuvre of the safety policy agency. The collection of data on accidents and accident risks is an obvious preparatory step towards a rational priority policy⁵⁴.

The CPSC has various simple and more ambitious information sources available. It collects newspaper clippings; it accepts consumer complaints through a free telephone service ("hotline")⁵⁵; Section 15 (b) CPSC obliges manufacturers and traders to notify the Commission of product hazards⁵⁶; also

51 P.H. Rubin, Cost-Benefit Analysis, 26 February 1986 (internal memorandum of the CPSC).

52 *Op. cit.*, 6.

53 *Op. cit.*, 8 et seq., 3 et seq.

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

55 See 16 CFR 1003.

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

noteworthy in this connection is information from the Commission's "Field Services"; and a co-operation agreement was concluded with the Association of American Trial Lawyers, which systematically gathers information on product liability actions⁵⁷.

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

4.2.1 The National Electronic Injury Surveillance System

A system for collecting accident data (the "Hospital Emergency Room Injury Reporting System") had already been developed in 1969 by National Commission on Product Safety Executive Director William V. White, and was extended in 1970 by the Food and Drug Administration. The Commission was able to draw on this preliminary work when it began immediately building up its own accident information system⁵⁸.

The characteristic feature of this system is its orientation towards current accident data. These data are gathered from selected hospital emergency services; originally numbering 119, they were reduced to 74 in 1979 and to 64 after 1984. Especially trained personnel in these stations allocate accidents associated with the use of products to 19 general categories and some 900

57 For the beginning of the co-operation, see Statler, 1980, 80 et seq.; Johnson, 1982, 63 et seq.

58 On this see Kelman, 1974, 92 et seq.; Hoffman, 1976, 397 et seq. and the Commission document "The National Electronic Injury Surveillance System: A Description of Its Role in the U.S. Consumer Product Safety Commission", April 1986.

more specific sub-categories, grade their severity (on a scale of originally 8, now 7 grades), the nature of the injury (by allocating it to one of 250 categories of injury), and the age and sex of those involved. These figures are transferred on a daily basis to the CPSC's computers. In a Consumer Product Hazard Index, the frequency and severity of hazards associated with a product are determined, and additionally evaluated on an Age-Adjusted Frequency-Severity Index.

Today the NEISS still supplies data on some 200,000 accidents per year. However, it allows only retrospective conclusions as to the involvement of products in causing accidents and/or the co-responsibility of product users. Accordingly, the NEISS data have always been treated as only a starting point for in-depth studies. Only these follow-up studies can and should determine typical accident patterns and, when appropriate, the dangers arising from a particular product⁵⁹.

4.2.2 Criticisms of the NEISS

The suitability of the NEISS as a source of data for determining priorities for action was always a controversial issue. Objections concern partly technical factors which can be corrected, such as the reliability of the data collection and the differ-

59 For more details see Kelman, 1974, 94 et seq. According to the Commission's 1982 Annual Report (5), in the 1981 financial year 235,000 accidents were surveyed through the NEISS system. In at least 2,000 cases follow-up studies were done. The 1983 and 1984 Annual Reports did not give any figures; it emerges, however, from the CPSC documents cited supra (note 58), that these figures continue to apply. Nevertheless, it should be borne in mind that as the statements by Commissioner E. Sloan to the 1981 Senate Hearings confirm, the budget cuts decided at that time had considerable effect here, too (see Hearing before the Subcommittee for Consumer Protection of the Committee on Commerce, Science and Transportation, 1 Dec. 1981, No. 97-87, Washington, D.C. 1982, 9 et seq.). On implementation of in-depth in-

entiation of product categories. Other decisions, such as the concentration on accident emergency services⁶⁰, are difficult to alter. It seems even more difficult to respond to objections concerning the suitability of the data themselves; e.g., collection of accident figures is alleged to be demonstrative of the hazardousness of a product only if it can be related to the intensity of its use⁶¹; the scaling of the intensity of injury according to a hazard index is said to be arbitrary⁶²; the precision of accident evaluation is said to vary according to the type of product involved, particularly because of geographical differences in product use, to such an extent that no conclusions as to priorities for action can be based on the NEISS data⁶³.

Some of these objections are unacceptable to the CPSC, for partly conceptual, partly pragmatic reasons; others have clearly influenced the development and evaluation of the data system. Here it must be remembered that the NEISS was oriented towards the original conception of the CPSA, and that later legislative amendments, budget restrictions and reorientations of the Commission's safety policy inevitably affected the structure of the accident information system. Thus, the decision in favour of an accident coverage system and against the time-consuming evaluation of general investigations of accidents was a result of the endeavour to secure data on product-related hazards as rapidly as

vestigations, there are detailed product-specific guidelines (CPSC Order 901024, 13 January 1983).

- 60 See Hoffman, 1976.
- 61 Cf. already Cornell/Noll/Weingast, 1976, 484 and now Viscusi, 1984, 49 et seq.
- 62 See Cornell/Noll/Weingast, 1976, 483 and the statement by medical practitioner J. Greensher at the Re-Authorization Hearing before Congress in 1981 (Hearings before the Subcommittee on Health and the Environment, House of Representatives, 97th Congress, 1st Session, H.R. 2271 and 2201, 5 and 13 March 1981, No. 97-4, Washington, D.C. 1981, 21 et seq.).
- 63 Heiden/Pittaway/O'Conner, 1982; cf. Waksberg's reply, 1983, and the rejoinder by Heiden/Pittaway, 1983.

possible; the concentration on hospital casualty departments took account (among other things) of the recognition that, for instance, doctors in private practice could hardly be induced to draw up accident reports⁶⁴. Original ideas about the Commission's possibilities of opposing recognised hazards by producing mandatory standards was certainly too optimistic. But the reasons for changes in its orientation were manifold. On the one hand, the Commission felt that priorities — notably the "chronic hazards program"⁶⁵ — had at times to be determined by a conscious policy. Furthermore, the Commission, responding to both its own experience and to external restrictions, moved towards co-operation with private standardisation organisations in working out standards and shifted part of its activities into the area of follow-up market control. NEISS, in turn, was forced to adapt to all of these changes. On the other hand, while budget restrictions did not exclude refinements to assessment methods, they did *de facto* rule out adoption of proposed cost-intensive improvements⁶⁶. Thus, in 1985 the CPSC tried out survey methods aimed at integrating data on accident causes, in particular on product defects or mistakes by product users, into the NEISS⁶⁷. This study was aimed primarily at saving costs on the in-depth investigations. Likewise, the call for the Commission's safety policy to be oriented towards economic rationality criteria was taken into account only in connection with the evaluation of accident data⁶⁸.

64 See Verhalen, 1985. Brief descriptions which also show the NEISS's further development are contained in each of the CPSC's annual reports (in Part II).

65 See note 48.

66 See Verhalen, 1985, 67 et seq.; J. Greensher, loc. cit. (note 62).

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

68 The 1983 Annual Report (II, 6) for the first time contained detailed estimates of accident costs.

4.3 Mandatory standards and bans

The original expectation that hazards arising from consumer products might primarily be combated by adopting mandatory product standards is particularly striking to a German observer. In Germany, the legislative restraint on issuing general clauses in safety law and the shifting of regulation and monitoring tasks to privately organised institutions had already taken place in the 19th century⁶⁹. The ramification of institutions of "private-governing" is so firmly established and their professional competence so undisputed that consumer policy initiatives aim only at reorganisation of the co-operative relationships between government agencies and non-governmental self-regulatory bodies and at some pluralisation of standard-setting procedures⁷⁰. From a German viewpoint, the CPSA appears as an extraordinarily ambitious project: the private sector's technological and scientific capability lead was to be compensated for by the setting-up of an independent agency, while at the same time the standard-setting process was to be opened up pluralistically and all those involved were to be offered comprehensive legal protection.

The regulations embodying the original conception of standard setting concern firstly, the involvement of the public in determining action priorities through petitions under Section 10 CPSA 1972 and tendering for standardisation contracts by the offeror process under Section 7 (d)-(e) CPSA 1972, and secondly, the verification and development of regulations within the Commission pursuant to Section 9 CPSA 1972.

69 See Wolf, 1986, 71 et seq., 99 et seq., 114 et seq.

70 See Brinkmann, 1976.

4.3.1 Public participation

Section 10 (a) CPSA 1972 gave all interested parties, i.e. individual consumers and consumer organisations, and firms, the right to call upon the Commission to enact, amend or withdraw a product safety regulation. By Section 10 (d), such petitions have to be responded to within 120 days. Section 10 (e) further provided for enforcement actions in the event of rejection of petitions — though this right was to become available only three years after the CPSA's entry into force (Section 10 (e)). The draftsmen of the bill hoped that these provisions would both cope with the phenomenon of organisational "inertia" and promote the Commission's readiness to pay attention to publicly expressed safety interests.

In the first three years, the number of petitions as well as the Commission's readiness to take all motions seriously into account — e.g. regulations on earrings, umbrellas and platform shoes — was considerable. The petition process proved to be extremely resource-intensive, yet petitioners were usually disappointed⁷¹. Under the impact of the petitions and of the declared objective of Section 10 CPSA, the Commission was in four cases prepared to opt for the setting of standards, although the products concerned would not, according to the NEISS data, have deserved this attention⁷². This led to the Commission's first spectacular failure⁷³.

Under the second chairman, S.J. Byington, the petition procedure was tightened up in 1977. By that time the difficulties of

71 For details see Hoffman, 1976, 412; Schwartz, 1982, 47 et seq. and the statements by Commissioner R.D. Pittle to the 1977 Congressional Hearings (loc. cit., note 46), 248 et seq., 358 et seq.

72 See supra 4.2.1.

73 See infra 4.3.2.1.

working out mandatory product standards had become apparent. The petition process had therefore lost its attractiveness, especially to the consumer side. Only business remained active; it used the procedure to secure amendments to and exceptions from regulations in force⁷⁴. The legislative reaction in 1981 was inevitable: Section 10 CPSA was deleted. Since it was now the general provisions of the Administrative Procedure Act that applied, abolition of the special right of petition meant only formal ratification of a change that had already come about⁷⁵.

The same fate was in store for the offeror process pursuant to Section 7 CPSA 1972. According to the ideas of the National Commission on Product Safety, incorporated in the Senate bill, the danger that the Commission might be captured by business interests in working out regulations was to be averted by granting groups (not economically interested themselves) the opportunity to develop a product standard. Section 7 (b) (4) CPSA 1972 complied with these ideas by obliging the Commission to make its intention to adopt a product standard public and call upon "any person" to present suitable proposals. Section 7 (d) (2) further provided for the possibility of supporting such work financially.

In four cases, the offeror process led to product regulations (swimming-pool slides, matchbooks, plate glass materials, motor lawn-mowers). In only one of these cases, namely lawn-mowers, was a consumer organisation (the Consumer's Union) active; in two other cases (televisions, Christmas-tree lights) in which non-industrial organisations (the Underwriters Laboratories and the National Consumers' League respectively) were involved, the procedures ended with improved voluntary standards, so that in

74 See Schwartz, 1982, 54.

75 Cf. 4.1.2.2 *supra* and the observations in Merrill, 1981, 1360, 1363 et seq. on the role of petitions in the area of carcinogenic substances.

the Commission's view, adoption of a binding rule became superfluous⁷⁶.

The offeror process proved extraordinarily time-consuming, costly and frustrating for all concerned. Commissioner R.D. Pittle openly admitted all these shortcomings in the 1977 Congressional hearings⁷⁷. Nonetheless, he did see ways of making the procedure effective: through more precise guidelines from the Commission, improved co-operation with the offeror in working out standards, and adequate financial support for the work of non-commercial organisations. According to the testimony of D.A. Swankin, who headed standardisation work on Christmas-tree lights for the National Consumers' League, Pittle's ideas were in this case largely realised, with great practical success⁷⁸. However, no further testing of these improvements was carried out. The provisions on the offeror process were withdrawn in 1981⁷⁹.

4.3.2 Individual standards and typical regulatory problems

In the years 1973-1984, the CPSC issued only 22 binding product regulations. These included 7 based on the CPSA, 3 concerning regulations on informational requirements and some 7 product bans⁸⁰. These figures appear rather modest. Whether they in fact reveal the Commission's inefficiency and/or the inadequacy of the Act itself could be decided only from a comparison

76 See Schwartz, 1982, 61 et seq.

77 Loc. cit. (note 46), 270 et seq., 281 et seq., 285 et seq.

78 Loc. cit., 259 et seq.

79 See 4.1.2.1 supra, at note 29. Standards and bans in force can be found from CFR 16, 1000.

with the cost and time incurred by private standardisation organisations, and a qualitative comparison of results. Account would further have to be taken of the fact that since standards are part of the public (though not purely governmental) system, additional potential for conflict arises, which may then be taken up again in judicial review of administratively approved standards. A generalised evaluation of CPSA provisions is made still more difficult by the fact that every standard was a response to specific regulatory problems, and that patterns of conflict also varied. There would be no point in repeating the history of every individual standardisation process, since any attempt to derive general evaluations from this would inevitably fail. That notwithstanding, the description below should illustrate some problems in setting mandatory standards, on the basis of two well-known cases⁸¹.

4.3.2.1 The pool slide debacle and the CPSC's product safety philosophy

The legal conditions on which a product rule may be laid down and the criteria it has to meet follow from Section 9 (b) and (c) CPSA. In their original version, these provisions referred to "unreasonable risk of injury" and "reasonable necessity" for a standard (Section 9 (c) (2) and (7) CPSA 1972); before issuing a product rule, the Commission was additionally to consider its likely effect on the utility, cost and availability of the products

80 Figures in Viscusi, 1984, 58 et seq. G.C. Nichols (note 13 supra) mentions 36 procedures for mandatory standards and over 100 for voluntary ones.

81 Comprehensive analyses taking the CPSC's work as a touchstone to test divergent regulatory theories are not available. A general survey, primarily from a legal viewpoint, is offered by Lamatina, 1981; see also Schwartz, 1982, 57 et seq., 73 et seq. A brief assessment oriented to criteria of cost-benefit analysis can be found in Viscusi, 1984, 71 et seq., 88 et seq. For an illuminating political science analysis, see Feldman, 1980, 58 et seq., 73 et seq. The most comprehensive approach,

concerned (Section 9 (f) (1) (C) CPSA). On the basis of these vague expressions, the Commission first of all sought legitimation for its decisions essentially in hazard analyses, rejecting a legal obligation to quantify risks and costs⁸². In *Aqua Slide 'N Dive Corp. v. CPSC*⁸³, the leeway claimed by the Commission was significantly reduced. The *Aqua Slide* decision concerned the first product standard put through by the Commission, following a particularly painful experience. The initiatives for regulating swimming-pool slides had been begun by the National Swimming Pool Institute (NSPI, an industry group concerned) and the plaintiff itself (by far the biggest producer) using the petition procedure⁸⁴. Although according to NEISS survey data, the slides were far from being among the riskiest groups of products, the Commission decided to embark on a regulatory procedure, in view of the severity of accidents that did occasionally occur. It was at the same time revealing what its product safety philosophy was: accidents were attributable to clumsy or incautious but foreseeable types of use. In the offeror process, the NSPI was mandated to work out a standard. Only after three years was it finally promulgated⁸⁵. In relation to slide design, the Commission, doubting its own competence, refrained from mandatory provisions and merely made recommendations. All that was bindingly required was a ladder chain and warning notice: "careless slides can cause paralysis", "careless slides can cause injury". The *Aqua Slide 'N Dive Corp.* opposed these requirements, fearing mar-

though confined to the Commission's "chronic hazards program" is in Merrill, 1981.

82 See e.g. Merrill, 1981, 1279 et seq., with references.

83 569 F.2d 831 (5th Cir. 1978).

84 The grounds for the petition are illuminating: *Aqua Slide* wanted to avoid a product ban or a compulsory recall under the Federal Hazardous Substances Act (see 569 F.2d 835).

85 42 F.R. 2751 (19 January 1976).

keting disadvantages due especially to the indication of the nature of possible, though improbable, injuries⁸⁶.

The key legal question in judicial review of the standard was the interpretation of the provisions just cited of Section 9 CPSA 1972. The Court accepted that the Commission had to assume an "unreasonable risk" even in the case of extremely unlikely but severe injuries; but it reproached it for not having shown "reasonable necessity" for the regulation adopted. The Commission had not, it said, ascertained the economic effects of its regulation⁸⁷, nor tested the effectiveness of chain and warning⁸⁸. Judge Wisdom's concurring opinion treated the relationship between economic cost and benefit much more decidedly: he agreed with the Commission that the warning signs helped to reduce risks; but these benefits were out of proportion relative to the costs they would incur.⁸⁹ In other respects, the effects on competition had proved considerable, contributing to a monopoly position which was, ironically, now held by the plaintiff itself⁹⁰.

The differences in style between the majority opinion and Judge Wisdom's arguments show how problematic it is to infer from the Aqua Slide decision that the implementation of the CPSA should be guided by economic rationality criteria. In prac-

86 569 F.2d 842.

87 569 F.2d 840.

88 On the effect of warning notices, observations were carried out for two days (*loc. cit.*, 841); the ladder chain was tested by a Commission consultant on his neighbour's children; "This is not the stuff of which substantial evidence is made" (*op. cit.*, 843).

89 569 F.2d 845.

90 Schwartz, 1982, 51, note 130. The Commission's attempt to withdraw the regulation in 1981 was opposed by Aqua Slide and not pursued because of the cost of withdrawal proceedings.

tice, though, the decision did have this effect⁹¹, contributing to the 1982 amendment to Section 9 CPSC⁹².

4.3.2.2 Lawn-mowers and the indefiniteness of cost-benefit analyses

The regulation of "walk-behind power mowers" was also taken up on petition from an industry group (Outdoor Power Equipment Institute, OPEI) in 1973. In this case, the initiative was aimed at securing official blessing for an already worked out voluntary standard⁹³. The Commission, however, took the chance to then bring in a consumer organisation that had distinguished itself by its activities in this area (the Consumers' Union, CU). CU finished its work in July, 1975. The outcome was controversial: the OPEI criticised all the major technical proposals, as well as the cost-benefit analysis added by the CU.

This essentially explains the duration and intensity of verification of the proposals by the CPSC: the standardisation work was practically repeated yet again, with renewed official involvement, and not completed until 15 February 1979⁹⁴. In the "findings" justifying the regulations⁹⁵, the effects of the Aqua Slide judgment are clearly recognisable. They contain a review of estimated numbers and costs of accidents with lawn-mowers, an analysis of the effects of the regulation on product costs and an account of the likely effects on accident figures and product costs

91 See also *D.D. Bean & Sons Co. v. CPSC*, 574 F.2d 643 (1st Cir. 1978) on the partial review of the matchbook standards, and for the history and economic analysis of this regulation Kafoglis, 1979. Additionally, see Industrial Union Department, *AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

92 4.1.2.1 *supra*.

93 On this see Schwartz's case study, 1982, 77 *et seq.*

94 44 F.R. 10024 (15 February 1979), 16 CFR 1205.

of the most important safety requirements. This regulation has stood up to judicial review, with one marginal exception⁹⁶. What is remarkable here is that the Commission's "safety philosophy", in showing its readiness for "paternalistic" protection of the consumer against his own foreseeable mistakes, was explicitly confirmed, while at the same time cost-benefit analyses acquired more importance.

The risks bound up with lawn-mowers are widely known. Accordingly, use leading to injury can be treated as misuse, and the existing safety level taken as a "proper" outcome of consumer demand⁹⁷. However, the Court of Appeals, when it was called in, did not accept this argumentation: "Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risks . . . There is no evidence . . . that (consumers') presumed willingness to defeat protective measures is reasonable"⁹⁸. This safety philosophy effects the bases for cost-benefit analysis. If consumer behaviour were declared to be the criterion for justifying regulatory intervention, then economic analysis as such would be superfluous; the willingness to take risks may then appear "unreasonably" high, only with regard to accident insurance and health protection provisions⁹⁹. But leaving these difficulties aside, and comparing merely the (estimated) increase in product cost with the (estimated) effects of the standard on accident figures and the (estimated) savings (though here delaying the purchase of a new mower and the concomitant use of old, hazardous machines would be particularly hard to estimate¹⁰⁰); the fact remains that broad room for discretion in decision arises.

95 16 CFR 1205. 8.

96 *Southland Mower Co. et al. v. CPSC*, 690 F.2 d 499 (5th Cir. 1980).

97 Cf. esp. *Viscusi*, 1984, 94.

98 619 F.2d 513.

99 See 4.1.3. *supra*.

The CPSC thus saw itself confronted with divergent cost-benefit analyses from the CU and the OPEI. It did a study of its own, which was revised once more following criticisms by the Standard Research Institute, called in by the OPEI¹⁰¹. The Court of Appeals declared itself satisfied with these efforts¹⁰². Since according to CPSC estimates, the cost-benefit analysis came out in favour of adopting the regulation, its legal significance ultimately remained undetermined; and the question remained unanswered as to whether measures were no longer "reasonably necessary" when their effects on product costs exceeded savings on treating accident victims. Admittedly, the CPSC success before the courts was wiped out on one important point through a legislative amendment to the regulation by Congress¹⁰³.

4.3.3 *Product bans*

According to Section 8 CPSA 1972, products giving rise to an "unreasonable risk of injury" could be "banned" unless some product standard promised appropriate protection. The banning procedure came under the provisions of Section 9 CPSA 1972 applying to standard setting, but not those of Sections 7, 10 CPSA 1972 on petitioning and the offeror process. The possibility of putting through regulations on its own account does much to explain the Commission's inclination, once the standard-setting procedure had proved unexpectedly complex and conflictual, to opt for the banning procedure. In fact, in at least two cases where

100 See Lenard, 1979, 69, 71, 73.

101 690 F.2d 523 et seq.

102 619 F.2d 524 et seq.; for a criticism, see Viscusi, 1984, 94 et seq.; Johnson, 1982, 28 et seq., explicitly praises the CPSC's analyses and recommends it to private standardisation organisations for imitation.

103 See 16 CFR 1205.5, note 1.

issuing or tightening up a standard might have been conceivable, the Commission decided on product bans¹⁰⁴.

The most important field of application of Section 8 CPSA, however, became the hazards analysed under the "chronic hazards" program, from health-threatening, especially carcinogenic, chemicals, a case where recourse to Section 8 CPSA 1972 immediately lends itself¹⁰⁵. The expectation that product bans might become an important regulatory instrument has however since been disappointed, an outcome foreshadowed by both the formaldehyde controversy and the 1981 legislative amendments.

The formaldehyde controversy began in 1976 with initial reports on health complaints from people living in houses treated with urea formaldehyde (UF) foam insulation for energy conservation. A true consumer movement developed against UF dangers, further stimulated by medical studies on the possible carcinogenicity of the product¹⁰⁶. The CPSC initiated wide-ranging additional scientific studies, and initially suggested a regulation

104 Cf. Merrill, 1981, 1277, note 74 and Schwartz, 1982, 68 and the example of the "ban on unstable refuse bins", 42 F.R. 30300, 13 June 1977, amended by 46 F.R. 55925, 13 November 1981, 16 CFR 1301; the refuse bins had according to the Commission's findings led to 21 deaths (20 of them children); the product ban specified the nature of the bins concerned in detail (*loc. cit.*, 1301.1.(b) and (e)); cf. also the ban on particular types of children's bicycles under 16 CFR 1500. 18 (a) (12), which in turn refers to the requirements for bicycles (43 F.R. 60034, 22 December 1978, 16 CFR 1512); for an illuminating and critical discussion of bicycle regulations cf. Cornell/Noll/Weingast, 1976, 493 et seq.; the standard was essentially confirmed by the decision in *Forester v. CPSC*, 559 F.2d 774 (D.C. Cir. 1977).

105 On the structure of the program, see Merrill, 1981, 1296 et seq., 1310 et seq. Among the most prominent "victims" of the Commission was the chemical TRIS, which had since 1971, following a standard set by the Commerce Department, been used to treat sleepwear to reduce fire dangers. In this case the Commission presented its action as an interpretation of Section 2 (q) (1) (A) Federal Hazardous Substances Act (on the dramatic background, see Merrill, 1981, 1323 et seq.). For the losses resulting from the Commission's action, firms involved received, through the 1982 "Tris Act", compensation amounting to 56 million dollars (references in Bollier/Claybrook, 1986, 180).

to oblige manufacturers to provide information on general (not carcinogenic) hazards¹⁰⁷. It was not until 1981 that the Commission threatened to ban urea formaldehyde¹⁰⁸. The proposal for a regulation, which takes up 23 closely printed pages, first describes the state of the medical studies and goes on to discuss the economic consequences of a ban. The avoidance of 23 cancer deaths yearly and other major health risks was said to be in line with the requirements emerging from the Aqua Slide and Southland Mower decisions, and to be in "reasonable proportion" with the economic drawbacks of a ban¹⁰⁹. On 2 April 1982 the definitive ban was issued¹¹⁰. It was praised for its scientific justifications, once again spelled out, while the Commission's economic analysis was found to be heavily flawed¹¹¹.

The Court of Appeals, called in by a number of manufacturers concerned¹¹², did not go into calculations of the economic benefit of preventing cancer deaths against the cost of banning urea formaldehyde. The Court was able to avoid taking a position on this regulatory aspect because it already regarded "unreasonable risk of injury" as not proven. Measurements of UF burdens had not been effected by random sampling, and where this had been the case, they were often due to installation errors and therefore controllable by a standard. The experimental scientific basis for the assumption of carcinogenic effects was on the whole too narrow, and could not justify the Commission's risk

106 See Bollier/Claybrook, 1986, 180 et seq.

107 45 F.R. 39434 (1980); on this see again Merrill, 1981, 1354 et seq. and Ashford/Ryan/Caldart, 1983.

108 46 F.R. 11188 (5 February 1981).

109 46 F.R. 11200 et seq.

110 47 F.R. 14366 (2 April 1982).

111 On the first aspect see Ashford/Ryan/Caldart, 1981, 360 et seq.; Fox, 1985, 84 et seq., and for an economic analysis Merrill, 1981, 1358 et seq.

estimates. The Commission's 1983 Annual Report¹¹³ has a brief note on the outcome of the trial, which is very illuminating for its present position: "the Commission voted 3-2 to seek an appeal in the Supreme Court, but the US Solicitor General decided not to ask the Supreme Court to take the case". But it is not only the outcome of the formaldehyde controversy and the resulting requirements to demonstrate product risks that lessened the attractiveness of product bans become unattractive. Legal amendments in connection with the 1981 re-authorisation worked in the same direction: product bans could henceforth be issued only under the conditions introduced in Section 9 CPSA for the setting of mandatory standards.

4.4 Updating of "voluntary" standards

The explicitly critical attitude towards "voluntary" standards that characterised the NCPS Report ("chronically inadequate, both in scope and permissible levels of risk")¹¹⁴ and was to have determined the regulatory approach in the CPSA 1972, had already changed by the mid-70's; it was finally reversed with the legislative amendments of 1981¹¹⁵. To understand this development and the CPSC's present support for voluntary standard setting, a few indications as to the structures of private standard setting in the US might be of assistance.

112 *Gulf South Insulation et al. v. CPSC*, 701 F.2d 1137 (5th Cir. 1983).

113 II, 103; see also, for a criticism of the judicial critique, Ashford/Ryan/Caldart, 1981, 363 et seq. and Fox, 1985, 88 et seq.

114 *Op. cit.*, (note 5), 62; see Hamilton, 1978, 1371 et seq.

115 See 4.1.2.1. *supra*.

4.4.1 *Standardisation organisations and procedures*¹¹⁶

There are no less than 580 groups in the US concerned with developing standards, but the number of organisations of national importance is very small. For some influential agencies, standardisation activities are part of a general representation of professional or economic interests. This is true of the engineering societies ("American Society of Civil Engineers"; "American Society of Mechanical Engineers"; "Institute of Electrical Electronics Engineers"; "Society of Automotive Engineers"); they are "non-profit" organisations with individual memberships, though their standardisation activities are supported and influenced by contributions from industry. By contrast, the trade associations represent manufacturers in individual industries. Both the engineering societies and the trade associations not only develop standards themselves but additionally participate in the activities of the most important standardisation organisations: the American Society for Testing and Materials (ASTM) and the National Fire Protection Association (NFPA). In view of its particular reputation, special mention should be made of Underwriters Laboratories (UL), an institution promoted by American insurers, dealing with, among other things, electrical hazards, fire protection and the development of test procedures. The activities of all these organisations are coordinated — which often means stimulated — by the American National Standards Institute (ANSI), which also represents the US in international contexts.

The standardisation organisations reacted to public criticism of the quality of voluntary standards in the 1970's by reviewing their procedural arrangements. Thus, standards brought before the ANSI must go through a procedure before being recognised as an "American National Standard". The ANSI must ascertain whether all those primarily involved have had a chance to express

116 On the following, cf. Hamilton, 1978, 1336 et seq.; Hemenway, 1975,

views and raise objections on whether the standard is "unfair" or ignores "the public interest"; additionally, all standardisation proposals are published and, where of direct relevance to consumers, passed on to a "Standards Screening and Revision Committee of the Consumer Council"¹¹⁷. The ANSI's procedural rules are more specific, and stricter, when it comes to organisation of standardisation procedures. For safety standards, inclusion of workers, authorities, insurers, consumers, and other groups is supposed to guarantee a balanced representation of interests, ("A consensus does not necessarily mean unanimous acceptance. Votes are weighted rather than counted"¹¹⁸), and guarantee that standards will actually be applied. All large standardisation organisations have similar procedural guarantees. This is the case in particular for the ASTM, which develops detailed "due process" requirements, and has, like the NFPA and the UL, set up "consumer sounding boards"¹¹⁹.

4.4.2 *The CPSC attitude*

Running parallel to these reorganisation efforts of private standardisation associations, attitudes changed towards "self-regulatory" measures in general¹²⁰, as did the CPSC's position on voluntary standards in particular. In 1975, the CPSC was already developing forms of co-operation with private standardisation organisations¹²¹ and regulating "employee membership and partici-

81 et seq.; Johnson, 1982, 6 et seq.

117 Hamilton, 1978, 1365 et seq.

118 For more on the consensus principle see Hamilton, 1978, 1361 et seq., and the critical remarks in Hemenway, 1975, 89 and in Opala, 1969, 45.

119 See Hamilton, 1978, 1349 et seq., 1384.

120 See Katz, 1976; Reich, 1984, 123 et seq.

pation in voluntary standards organisations"¹²². In the statement concerning the 1978 Regulation on "Commission involvement in voluntary standard activities", the Commission explicitly dissociated itself from the National Commission on Product Safety's critical observations on voluntary standards¹²³; at the 1981 Congressional hearings this attitude was confirmed by then Commission Chairman Stuart Statler, who pointed out that in 83 cases, the Commission had already collaborated on developing or revising voluntary standards¹²⁴. The Underwriters Laboratory additionally stressed that the passing on of accident figures by the Commission had already often led to private standardisation activities¹²⁵.

The 1978 Regulation just mentioned distinguishes between two forms of official involvement. "Monitoring" of the development of voluntary product standards involves observing the process and influencing it through directed questions, and providing accident figures and the results of in-depth studies. In the case of "participation", a Commission worker takes part in sessions of the private Standardisation Committee, and technical assistance is sometimes provided. The first form of involvement requires approval from only the Commission Executive Director; the second requires approval from the Commissioners themselves¹²⁶. The object of both forms, and the type of support that the Commission can provide¹²⁷, is fully in line with the CSPA's general

121 See e.g. the references in Hamilton, 1978, 1404 and the testimony by Commission Chairman S.J. Byington in the 1977 Congressional Hearings, loc. cit. (note 46), 363 et seq., 373 et seq.

122 40 F.R. 26025, 20 June 1975 (for the form in force at present, see 46 F.R. 29930, 4 June 1981, 16 CFR 1031).

123 43 F.R. 19216 (4 May 1978), 16 CFR 1032.1.

124 Op. cit. (note 62), 321 et seq., 338 et seq.

125 Op. cit., 816 et seq., 823.

126 16 CFR 1032.2 (b) and 1032.3 (a) and (b).

safety policy objectives. Support is accordingly also bound up with particular conditions on the standardisation procedure: it should be open to all interested parties and guarantee genuine involvement of consumers and/or small businesses; it must provide for revisions of standards; actual compliance is important; certification provisions should be worked out and standards themselves confined to "performance" regulations¹²⁸. The Commission always keeps its option to issue a mandatory product regulation open, whether to make a voluntary standard generally mandatory or because a voluntary standard is inadequate from a safety policy viewpoint¹²⁹.

The 1981 legislative amendments did not formally cancel this policy statement, but they did reduce its practical significance, for many reasons. By the new version of Section 9 (b) CPSA, the Commission must always give preference to voluntary standards where they eliminate or "adequately reduce" the hazards concerned and "substantial" compliance is to be expected. This already guarantees that the Commission will await efforts toward voluntary solutions and cannot without further action ignore their outcome. Additionally, the new version of Section 9 (c) and (f) CPSA links announcement, and above all enactment, of binding rules with additional requirements. The Commission has not only to show that a product hazard will not be adequately reduced or that observance of a standard would be inadequate; it has further to provide a detailed "regulatory analysis" that must contain cost-benefit analyses of its regulatory proposal and of all alternatives contemplated. The Commission initially responded in 1984 to this change in conditions for co-operation with standardisation organisations, through a proposal to supplement the 1978 regulations on involvement in developing voluntary standards; it

127 See 16 CFR 1032.4.

128 See 16 CFR 1032.5.

suggested a new procedure that would require special recognition of voluntary standards already being applied¹³⁰. The declared aim of this proposal was to encourage application of safety standards and improve consumer orientation towards safety aspects of consumer products. But response to the proposal was discordant, and mainly negative. Industry feared distortions of competition and restrictions on innovation; standardisation organisations recalled the Commission's limited resources for implementing recognition procedures; the Consumer Federation of America protested against the Commission being converted into a sales promotion agency. The Commission decided to withdraw its proposal¹³¹. But this did not end efforts to further develop standardisation policy. A memorandum of 22 April 1985¹³² incorporating suggestions from Commission departments and from public hearings describes and discusses a series of options ranging from voting rights in setting voluntary standards via systematic announcements of regulatory procedures pursuant to Section 9 CPSA, up to the conclusion of co-operation agreements with standardisation organisations. The Commission decided to consider only three of these possibilities: to intensify its involvement in standardisation work on products particularly important in its view; to make direct contact with individual manufacturers before producing or amending standards; to refer to standards in its public information¹³³. The practical importance of all these activities is hard for the outsider to estimate. However, thanks to its accident information system and its own technical competence, the Commission should continue to have considerable possibilities of influencing

129 See 16 CFR 1032.6; cf. 1032.1 (c).

130 49 F.R. 25005, 19 June 1984.

131 50 F.R. 19699, 10 May 1985; the hearings and discussions that led to this decision are documented in the "Briefing Package on Proposed Amendment to Commission Policy Involvement in Voluntary Standards Activities", 14 December, 1984.

132 Alternatives for Support of Voluntary Standards.

the production and promotion of standards of relevance to safety¹³⁴.

4.4.3 Standards and product liability

The intensification of "voluntary" standardisation in the US cannot be explained solely on the basis of the CPSC's original powers and its current encouragement of voluntary standards, but is to be attributed essentially to the influence of American liability law. American case law punishes neglect of a mandatory standard, but also non-compliance with a safety level laid down in a voluntary standard, as in principle "negligence *per se*"¹³⁵. This sanction manifestly explains industry's willingness to follow voluntary standards¹³⁶; it likewise explains the interest in having standards recognised by ANSI and making the standardisation procedure itself "fair"¹³⁷.

On the other hand, compliance with a standard in no way rules out product liability. Section 25 CPSA explicitly confirms this principle for mandatory standards: "Compliance with consumer product safety rules . . . shall not relieve any person from liability at common law . . ." However clear this position, court practice nevertheless responds in different ways when manufacturers appeal to their compliance with voluntary or with manda-

133 Commission Guidance on Voluntary Standards Activities, Memorandum, 28 April 1986.

134 According to a memorandum from D.L. Noble of 14 May 1986, 15 participation projects and 31 monitoring projects were pursued in that year. The memorandum specifies in each individual case the nature of the hazards involved, and documents advantages and drawbacks to each individual project.

135 See Weinstein/Twerski/Piehler/Donaher, 1978, 56.

136 See Eads/Reuter, 1983, 40.

137 See 4.4.1 *supra* and Hoffman/Hoffman, 1980/81, 293, 295.

tory standards in product liability actions. Standards may, for instance, be adduced to establish the "state of the art" in product safety, or to support or confute expert testimony¹³⁸. All these forms of observance of standards, however, depart from the principle that the courts autonomously determine the level of product safety intact; this principle is not questioned either by efforts at legislative channelling of product liability law¹³⁹.

4.5 Recalls

The recall provisions in the CPSA initially stood in the shadow of preventive standard setting, but soon developed into an important instrument for the CPSC, taking on additional importance after the 1981 restrictions. In the context of European product safety policy, the American example deserves particular attention not only because the new approach to technical harmonisation and standards delegates preventive product safety policy very largely to private standardisation organisations, but also because the need for European framework legislation on follow-up market control seems irrefutable¹⁴⁰.

4.5.1 *The CPSA legislative framework*

Two provisions in the CPSA deal with response to hazards arising from already marketed products. By Section 12, the Commission may order seizure and/or public warnings, recalls, repairs, exchange or replacement of "imminently hazardous con-

138 See Hoffman/Hoffman, 1980/1981, 288 et seq., and specifically on automobile standards Holley, 1982, 813 et seq.

139 See Dworkin, 1983, 612 et seq.

140 See Chapter I, 3.3, and for more details Chapter V, 4.

sumer products". However, the significance of this provision remained marginal¹⁴¹. The Commission has developed its follow-up market policy entirely on the basis of Section 15. This preference is not surprising: the criteria for intervention in Section 15 are broadly formulated, the potential for sanctions is rich in alternatives and can be treated flexibly.

Section 15 (a) CPSA provides sanctions against all "substantial product hazards" arising either from failure to comply with a binding rule or from product defect. Every manufacturer, distributor and retailer must by Section 15 (b) immediately inform the Commission if they obtain information that reasonably supports the conclusion that such hazard is present. On the basis of such reports and/or other sources of information (NEISS accident figures, consumer complaints, in-depth studies etc.), a hearing is held to which all interested circles, including consumers, are invited (see Section 15 (c) and (d)).

Should the Commission determine after such consultation that a "substantial product hazard" is proven, two measures are possible:

- "Notification" under Section 15 (c), whereby a manufacturer, distributor or retailer may be ordered to inform the general public, notify all manufacturers, distributors or retailers, or mail notice to every person who has purchased or received the product;
- The further-reaching possibilities of Section 15 (d), where it seems necessary in the public interest to repair a product, make it fit applicable standards, exchange it or replace it. Additionally, a "corrective action plan", showing how the order is to be implemented, may be required.

141 See Schwartz/Adler, 1984, 429.

4.5.2 Application of Section 15 CPSA

The administration of this legal framework has been interpreted and refined by the Commission in its rules on "substantial product hazard reports"¹⁴² and in a number of internal (though publicly accessible) documents. Some elements of this policy have already been emphasised: (1) the general clause of Section 15 (a) (2) on defects that lead to "substantial product hazards" has been clarified by the Commission using exhaustive circumlocutions ("a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function"), differentiations (design, manufacture, instructions), examples ("a knife does not contain a defect insofar as the sharpness of its blade is concerned") and assessment criteria ("... the Commission and staff will consider: the utility of the product involved; the nature of the risk of injury which the product presents; the population exposed to the product and its risk of injury; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of product liability; and other factors . . .")¹⁴³.

(2) The obligation laid down in Section 15 (b) on manufacturers, distributors and retailers to report product hazards is regarded by the Commission as an indispensable precondition for its recall policy. It exhaustively commented on this obligation in 1978, defending it against criticism from firms involved¹⁴⁴. The objections are quite understandable. Fears exist with regard to the negative effects of such reports on product liability suits, and also with regard to deterioration of image and hence of competitive position. The rule dating from 1978 sought to allay these doubts by explicitly treating the report itself as not constituting admis-

142 43 F.R. 34998 (7 August 1978), 16 CFR 1115.

143 16 CFR 1115.4; and exhaustively Madden, 1981, 202 et seq.

sion of a product defect¹⁴⁵. In 1981 the legislator came to meet the interests of firms involved by making the new version of Section 6 (b) (5) CPSA provide that in principle information secured under Section 15 (b) be no longer published¹⁴⁶. This legislative amendment, and probably also the Commission's budget difficulties¹⁴⁷, led in 1980-2 to a notable decline in the number of reports received. But the Commission's position was not lastingly affected. In 1984 it once more gave detailed justifications for the importance of the reporting duty¹⁴⁸, and managed to reverse the trend of the years 1980-2 again¹⁴⁹.

This strictness cannot be explained by the information function of the reports alone. Procedures under Section 15 CPSA were inevitably always largely based on other informational sources¹⁵⁰. Assuredly, closer observance of the reporting duty would facilitate the identification of hazards. But the importance of the reporting duty also seems to lie in its compensating for the indefiniteness of the general clause in Section 15 (a) (2). The

144 43 F.R. 34988-34998, 7 August 1978 (on the subsequently adopted rule, cf. in detail Madden, 1981, 211 et seq.).

145 16 CFR 1115. 12 (a).

146 See 4.1.2.2 supra.

147 See Schwartz/Adler, 1984, 434.

148 49 F.R. 13820, 6 April 1984; see also Statler, 1984.

149 Exact figures can be found in the memorandum from the divisions for "corrective action" and "administrative litigation" of 13 May 1985 and 11 May 1986; for previous years see Schwartz/Adler, 1984, 433, note 221; Statler, 1984, 93. However, the courts have cut down on sanctions for breach of the reporting duty. In *Advance Machine Co. v. CPSC*, 666 F.2d 1166 (8th Cir. 1981) and in *Athlone Industries, Inc. v. CPSC*, 707 F.2d 1485 (D.C. Cir. 1983) it was found that the Commission had to impose the fines provided for in Section 20 CPSA through the courts (on the importance of this decision see Zollers, 1985). In *Drake v. Honeywell, Inc.* 797 F.2d 603 (8th Cir. 1986) it was decided that breach of the reporting duty did not justify any right of private action.

150 See Schwartz/Adler, 1984, 433 and for the Commission's information sources CPSC Order 9010.34, 4 June 1984, 8 et seq.

Commission's interpretive leeway seems to strengthen its position vis-à-vis firms involved when negotiating a recall plan.

(3) As with all product safety policy instruments, priority setting is essential in follow-up market control. An instructive 1981 document¹⁵¹ differentiates three types of injury and likelihood; it relates the severity of injury to the likelihood of occurrence, and thereby sets up three types of urgency to which cases arising can be allocated. These classifications show that the Commission sees follow-up market control as implementation of the statute, and orients use of its resources towards the objective of preventing hazards; consistent orientation of its policy towards cost-benefit-analysis criteria¹⁵² would lead to another scale of priorities.

(4) The great flexibility that Section 15 (c) and (d) allow the Commission in its response to product hazards is exploited both in notification and in recalls and the drawing up of a "corrective action plan". The intensity of response, its specific shape and its monitoring correspond to the type of product and the urgency of the hazard¹⁵³. A noteworthy point is the high rate of mutual agreement in the resolution of recalls¹⁵⁴. This can be explained by industry's interest in avoiding adverse publicity and product liability actions, and the Commission's interest in rapidly eliminating product hazards ("safety delayed is safety denied"). Will-

151 Hazard Priority and Corrective Action Guidelines, 19 January 1981; see also the detailed description of the decision-making procedures in the Task Force "Report on Recall Effectiveness", 25 August 1980, table D and Madden, 1981, 234 et seq.

152 See 4.1.3 supra.

153 For details see Madden, 1981, 238 et seq. and Schwartz/Adler, 1984, 437 et seq. (on recalls), 411 et seq. (on notices), as well as, specifically on recalls, the detailed CPSC Order 9010.34 (supra note 150).

154 See Madden, 227 et seq.; Schwartz/Adler, 1984, 434. According to figures from former Commission Chairman S. King cited at the 1981

ingness to compromise manifestly did not suffer from the 1981 legislative amendments.

4.5.3 *The function of follow-up market control*

The history of implementation of follow-up market control under Section 15 (b) CPSA is one of success. The figures are indeed impressive. Former Commission Chairman S. King reports that between 1973 and 1980 some 2,500 recall actions were carried out, concerning some 100 million products¹⁵⁵. At the 1983 Congressional hearings, Chairman N.H. Steorts was able to point to 3,174 actions on 293 million products¹⁵⁶. Commissioner Stuart M. Statler in 1980 called the provisions of Section 15 CPSA one of the Commission's most effective instruments, that could be used even to solve general product safety problems¹⁵⁷ — e.g. for an industry-wide recall because of a universally occurring design defect¹⁵⁸. But there are limits to this kind of remodelling of Section 15 CPSA. The primary safety objective of recalls, namely to eliminate hazards arising from already marketed products, can never be fully achieved. The CPSC's implementation studies show this very clearly. Though the success or failure of a recall action cannot simply be read off from the percentage of returned products¹⁵⁹, it is nevertheless indisputable that the effectiveness of such actions calls for hard strategic decisions. The type of con-

Congressional Hearings, loc. cit. (note 62), 22, over 90% of procedures under Section 15 CPSA were settled by mutual agreement.

155 S. King, loc. cit.

156 Op. cit. (note 24), 302, 310, cf. 320 et seq.; see also Statler, 1984, 92.

157 Statler, 1980, 79.

158 Schwartz/Adler, 1984, 439, note 260.

159 As stated again in the Recall Effectiveness Study, Loren Lange, Office of Strategic Planning, May 1978; the 1980 Report (note 151 supra) additionally points to a number of other relevant factors: the significance of the proportion returned depends on how many products are still be-

sumer information must depend on whether manufacturers or retailers have customer lists available; where necessary, suitable public media must be used. The intensity of information must take account of the hazards of the product concerned, but also of the attitudes, inhibitions and efforts of the final consumer. For all the doubts about the feasibility of recalls arising from these problems, it should nevertheless be borne in mind that recall actions can be used both to raise standards and to improve safety controls within firms. These feedback effects are also to be taken into account in assessing the "success" of recall arrangements.

4.6 Evaluation of the CPSC

Assessments of the CPSC's performance are as controversial as product safety policy itself. The analyses presented by consumer organisations arrive at positive results. According to calculations by A.K. Lower/A. Averyt/D. Greenberg¹⁶⁰, the falling trend in home and leisure accidents has been speeded up (twofold) by the Commission's activities; in the years from 1978 to 1983 alone, the CPSC is said to have prevented 1.25 million serious injuries and deaths, and saved some 3.5 billion dollars in consumer costs. W.K. Viscusi¹⁶¹ arrives at a contradictory finding: the falling accident figures merely continued (even though more strongly), a trend that has not been significantly influenced by the CPSC. It is hardly surprising that there are also studies with findings fluctuating between the two results cited¹⁶².

ing used at all, how many have been privately repaired following a warning and how many have been simply thrown away.

160 Lower/Averyt/Greenberg, 1983.

161 Viscusi, 1984, 271 et seq. and *idem* 1985.

162 Zick/Mayer/Snow, 1986.

Problems with evaluations like these arise because they have to identify and quantify factors, which explain the trend in accident figures and how they are influenced by the CPSC's activities. All the studies mentioned use simplifying, if not speculative, assumptions for this. More illuminating, though controversial as well, are analyses of individual measures and of their aggregated impact. The Commission itself undertakes analyses, which estimate effects after a measure has been fully implemented. Thus, for instance, the rule on children's cots is supposed to have prevented 50 deaths per year, the ban on TRIS in children's night-clothes to have averted 500 possible cancer cases, and the lawn-mower regulation to have reduced annual injuries by 60,000¹⁶³. For the CPSC's co-operation with standardisation organisations and for recall actions¹⁶⁴, there are similarly impressive figures¹⁶⁵. Critics of the Commission have questioned these success claims in individual studies. The careful analysis of the Mattress Flammability Standard 1973¹⁶⁶ by P. Linneman¹⁶⁷ finds that a reliable pronouncement on the standard's effects is impossible. He points out, however, that the Commission's regulation standard had simply adopted a voluntary standard, which had already been adhered to by industry to 80%. Moreover, the Commission seems to have been prevented from adopting a stricter solution to the problem (namely promulgation of a standard on self-extinguishing cigarettes)¹⁶⁸. W.K. Viscusi has checked all mandatory

163 CPSC figures to the 1981 Congressional Hearings, *loc. cit.* (note 62), 431; also 419, 426.

164 For 1981 *cf. loc. cit.* (note 163), 427; *cf.* also the 1983 Congressional Hearings, *loc. cit.* (note 24), 318 *et seq.*

165 The individual estimates may be added together. Thus, for 1981, the Commission arrives at a reduction, in relation to mandatory and voluntary standards, by 300 deaths and 125,000 injuries (*loc. cit.*, note 62, 412); for 1983, 450 deaths and 248,000 injuries are claimed (*loc. cit.*, note 24, 309).

166 38 F.R. 15095 (8 June 1973).

167 Linneman, 1980, 469.

standards, in detail and overall, for their effects. His analysis of the 1973 Poison Preventive Packaging Regulation¹⁶⁹ concentrates on figures for child poisoning by aspirin. He disputes the success claimed by the Commission for compulsory child-proof containers; the poisoning rate, he says, fell generally, and the relatively better figures for the product covered by the regulation should be measured against possible counterproductive side effects of the regulation in other areas (such as "lulling" effects in non-regulated areas¹⁷⁰). The phenomena mentioned by Viscusi certainly exist; however, it seems speculative to use them as evidence in an argument like his. The Commission's positive findings are, at any rate, supported by studies of the American Academy of Pediatrics¹⁷¹. In the case of the standard for children's cots¹⁷², even Viscusi concedes an improvement in accident figures by 10%¹⁷³; a demonstration that this improvement can be attributed to some general trend can hardly be provided.

These conflicting analyses cannot and will not be definitively assessed here. The controversies, at any rate, show how ambitiously research on effects must be designed if it is not only to determine involvement of the regulated products in accidents, but also clarify other possible influencing factors taking side effects of regulation into account. The CPSC can at any rate claim that its many critics have so far failed to undertake analyses which would conclusively question the benefits of standard-setting. And there can hardly be any doubt that the Commission's

168 Bollier/Claybrook, 1986, 173; the standard has since been supplemented, see 16 CFR 1632 (1985).

169 38 F.R. 21247 (7 August 1973), 16 CFR 1700.

170 Viscusi, 1984, 77 et seq.; see also *idem* 1985, 539 et seq.

171 See figures by Greensher/Mofenson to 1981 Congressional Hearings, loc. cit. (note 62), 81.

172 38 F.R. 129 (21 November 1973), 16 CFR 1508.

173 Viscusi, 1985, 552.

recall activities serve an extremely useful function - although they merit further evaluation and improvement.



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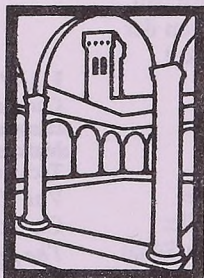
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