COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.7.1999
COM(1999) 396 final

Green Paper

Liability for defective products

(presented by the Commission)

Summary

Since 1985, each producer is obliged to make good the damage to health, safety and property caused by a defective product, under the terms of Directive 85/374/EEC, the first instrument of a Community policy on producer liability. This Directive seeks to protect victims and promote improvements in product safety within the internal market through a regulatory framework which is as consistent as possible and based on a fair apportionment of the risks inherent in modern production.

The real challenge for this policy is to maximise its positive effects for consumers (and, in particular, to ensure the best possible compensation of victims), while keeping costs at the most reasonable level possible (and, in particular, not holding back industry's capacity for innovation and research). Since there is no such thing as zero risk (like the recent food crisis related to BSE and dioxin have shown), any society must adopt a system which is best suited to its development with a view to ensuring the best possible compensation of victims suffering damage from products. It is therefore essential to establish whether an instrument such as Directive 85/374/EEC is continuing to achieve its objectives in the light of the new risks which European society will have to face in the new millennium.

Approach of the Green Paper

Before contemplating any revision of the Directive, the Commission is proposing to consult all those parties concerned on the basis of this Green Paper in order to establish the impact of the Directive on victims and on the sectors of the economy concerned, and to reflect on the appropriateness and type of reform needed, with a view to ensuring greater legal certainty for the parties concerned. The announcement of this move (made during the parliamentary debate on Directive 1999/34/EC extending the rules on liability without fault to primary agricultural products) naturally aroused the interest of the economic operators, consumers and the public administrations. In a context which differs considerably from that in 1985, it is essential to establish whether the Directive is still effective and, if not, why and how to improve it. The Green Paper thus has two aims: (1) it allows to seek information which will serve to asess its application "in the field" in view of the experience of those concerned (in particular industry and consumers) and to establish definitively whether it is achieving its objectives; (2) it serves to "gauge" reactions to a possible revision as regards the most sensitive points of this legislation.

On the first point, it is more a matter of collecting information to assess how the Directive matches the objectives which it set out to achieve with regard to the various sectors involved: whether it ensures adequate protection for victims, whether it helps to discourage the marketing of dangerous products, whether it gives operators sufficient legal certainty to facilitate intra-Community trade, whether the competitiveness of European businesses is not being jeopardised by the Directive, whether the insurance sector has managed to cope with the risks tackled by the Directive, whether the authorities and consumer associations consider the Directive to be a useful instrument in their policies towards the victims of defective products, etc.

On the second point, all those concerned are invited to adopt a reasoned position as to the justification of any reform of Directive 85/374/EEC. Adoption of this Green Paper does not imply embarking on a legislative revision of its content at this stage. On the contrary, once the Commission has analysed the contributions received, it may well propose measures on this point in its second report on the Directive planned for the end of 2000. The "options for

reform" set out below are thus only guidelines for discussion - a basis for an open debate. This Green Paper does not prejudge the Commission's position on the future of the instrument. Amongst other things, the guidelines for discussion concern the following aspects:

- the details of implementing the burden of proof imposed on the victims

- implementation of the exemption in the case of "development risks" and assessment of its possible abolition

- the existence of financial limits and their justification

- the ten-year deadline and the effects of a possible modification

- assessment of the insurability of risks deriving from defective production

- improved information on the settlement of cases deriving from defective products

- the supplier's liability

- the type of goods and damage covered.

In the EU, by comparaison with the debate in the United States, Directive 85/374/EEC represents a compromise which reconciles the interests involved. The political resolve of the Member States, as embodied in the Directive, to have a balanced framework of liability governing relations between businesses and consumers, should not be underestimated. The Commission wishes to maintain this conciliatory approach. Any move to reform the Directive must *a priori* be guided by the balance resulting from its rules.

Finally, the Commission wishes the exercise to be guided by the transparency and effectiveness of the results. **In order to promote reflection and debate, it therefore wishes the replies provided to be based on facts, and not on mere positions of principle.** The Commission invites **any concerned party** to submit its written observations on the questions contained in this Green Paper within **four months of its adoption by the Commission.** Interested parties can reply to any questions they wish, even if some of the questions are aimed *a priori* at other types of operator. In addition, the Commission expects varying responses from the same sectors of the economy in the individual Member States: only such responses will enable it to assess the real impact of the Directive in the different Member States.

The Green Paper is accessible on the Internet (http://europa.eu.int/comm/dg15/en/index.htm). Those consulted can send their written observations to the Commission, by mail or similar, at the following address:
European Commission
Directorate-General XV
Rue de la Loi 200
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and/or by e-mail (d3@dg15.cec.be). If they choose the latter, they are advised to send the electronic version in .html format. Observations received by e-mail **may be made public on the Internet, unless the party consulted explicitly requests otherwise.**

Follow-up to the Green Paper

Subsequent to the consultation, the Commission will assess the impact of the Directive and draw the appropriate conclusions for its possible reform. This will be the subject of a report to be presented **at the end of 2000** to the Community institutions, eventually accompanied by a duly motivated proposal for a revision.

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4. 1. INTRODUCTION

The right to compensation of a victim who has suffered damage through using or consuming a defective product, or through exposure to a defective product, is essential in a single market open to everyone. Since 1985, this right is recognised by the Directive on liability for defective products[1], under which any producer of a defective movable must make good the damage caused to the physical well-being or property of individuals. For instance, a child injured by the explosion of a soft drink bottle, an employee who loses a finger by using a defective tool, or a pedestrian knocked down by a car with defective brakes, enjoy this right, whether or not there is negligence on the part of the producer (principle of objective liability or liability without fault).

The policy of producer liability established by Directive 85/374/EEC concerns producers and victims directly. However, distributors, insurers, courts, public administrations and practitioners are involved in varying degrees in its application. The liability laid down by this Community legislation is a coherent framework which takes account of the various interests involved:

- on the one hand, those of individuals in coping with the risks to their health and physical and material well-being from a modern society marked by a high degree of technical complexity,

- on the other, those of producers in avoiding distortions of competition resulting from diverging rules on liability, and in reducing the impact of those differences on innovation, competitiveness and job creation.

This framework of liability is capable of ensuring the well-being of victims (by ensuring they are compensated and by discouraging the marketing of defective products) and of minimising the costs to industry so as to avoid excessive interference in their capacity for innovation, job creation and exporting. Through an equitable apportionment of the risks, the framework of the producer liability policy is made up of the following elements:

- liability without fault on the part of the producer in favour of the victim;

- burden of proof on the victim as regards the damage, the defect and the causal relationship between the two;

- joint and several liability of all the operators in the production chain in favour of the victim, so as to provide a financial guarantee for compensation of the damage;

- exoneration of the producer when he proves the existence of certain facts explicitly set out in the Directive;

- liability limited in time, by virtue of uniform deadlines;

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[1] Council Directive of 25 July 1985 (85/374/EEC) (OJ No L 210 of 7.8.1985, p. 29) (full text is annexed)

- illegality of clauses limiting or excluding liability towards the victim;

- a high ceiling for financial liability, but optional for the Member States;

- regular review of its content in the light of the effects on victims and producers.

Defective services are not covered by Directive 85/374/EEC. As indicated in its Consumer Policy Action Plan for 1999-2001[2], the Commission intends to examine the need to reinforce the safety of services. On the basis of this analysis, the Commission will propose initiatives that will address both service safety and the liability of service providers. An in-depth consultation with business and consumers will determine the Commission's subsequent action.

1.1. Why a Green Paper?

This Green Paper is intended to prepare the report on the application of the Directive on producer liability planned for **the end of 2000**[3]. Further to the first report in 1995 (presented in a context marked by the very small number of cases of application due to the late implementation of the Directive[4]), this Green Paper initiates the second in-depth analysis of the implementation of Directive 85/374/EEC in a context which differs from that in 1985 and 1995, particularly because of the new impetus given to the policy for the protection of the health and safety of individuals after the "mad cow" crisis.

In the first report, the Commission had concluded that the lessons to be learnt from the implementation of the Directive were still limited. In 1995, the Member States had only a very limited case law in the field. In the light of the information available in 1995, the Commission had considered it unnecessary to submit any proposals for amendments. However, certain aspects of the Directive relating to consumer protection and the functioning of the internal market called for ongoing attention. This was the case, for instance, with the exclusion of unprocessed agricultural products. Subsequent to the "mad cow" crisis, and in accordance with Directive 99/34/EC, the Member States must now apply the rules of Directive 85/374/EEC to unprocessed primary agricultural products[5].

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2 Communication from the Commission - "Consumer policy action plan 1999-2001" (COM(98)696 of 1.12.98).

3 The Commission has to report regularly to the Community institutions on the state of application of the Directive (see Article 21 - every five years on the general application of the Directive; Article 15(3) and 16(2) - ten years after notification of the Directive on development risks and the financial limit; and Article 18(2) - every five years on the revision of the amounts laid down in the Directive).

4 The Commission presented its first report on the application of the Directive on 13.12.95 (COM(95)617), based on an impact study carried out in 1994.

5 Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ No L 141 of 4.06.99.)

The Commission first of all proposes (*point 2 of the Green Paper*) to obtain the fullest possible information on the impact of the Directive on the proper functioning of the single market, the protection of health and safety, the competitiveness of industry and its capacity for innovation, and the financial sector (insurance). The objective is to establish (1) **what are the effects brought about by the application of the Directive, whether it has brought more benefits than costs, in particular as regards the protection of victims and the costs borne by business,** and (2) **how and to what extent the Directive is behind these effects.** Subsequently, it proposes to establish,on the basis of a number of guidelines for discussion (*point 3 of the Green Paper*), (3) **which aspects of the Directive should be reformed in order to increase its social benefits while keeping costs at a reasonable level.**

On the basis of the information and observations received, the Commission will then present its conclusions to Parliament and the Council in the application report to be adopted in 2000. This report will identify the shortcomings in the implementation of the current Directive and the fields which need to be improved. If the Commission considers that Directive 85/374/EEC has to be amended, a legislative proposal will be presented to that end. This Green Paper does not prejudge the Commission's position on the future of the instrument.

The choice of a Green Paper to prepare the report in 2000 is justified because of the scale and variety of the interests at stake. It was the Commission's intention that the assessment process should be governed by transparency, and that producers, consumers, insurers, practitioners and any other sector concerned should be able to make known their experience and views on implementation and the subsequent development of producer liability. **In this spirit of transparency, the replies will not be confidential and can be made public unless the participant in the consultation process explicitly requests otherwise.**

Apart from access to information on the application of the Directive[6], the Green Paper invites operators to take part in the consultation on the future of the legislation under examination, with a view to gaining a better idea of the costs of any revision. The Green Paper thus fulfils the Commission's undertaking to consult the representatives of consumers, producers, distributors, insurers, public administrations and any other circles involved, before substantially revising the provisions of Directive 85/374/EEC. This commitment to transparency was entered into vis-à-vis Parliament and the operators involved when adopting Directive 99/34/EC extending the 1985 Directive to primary agricultural products[7].

The consultation exercise launched with the Green Paper is also opened to operators, consumers and administrations coming from the countries which are candidates to accede to the EU.

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6 When reference is made to "application of the Directive", this of course refers to application of the national measures implementing the Directive (e.g. the national transposing laws).

7 The Commission (see SEC(1998)2232 of 6.1.99) did not share the EP's favourable opinion, at first reading, of the revision of the Directive at the same time as its extension to the agricultural sector.

1.2 How to reply to it

The credibility and quality of the results of the consultation depend on the degree of involvement of the participants in this consultation. One of the difficulties in assessing the impact of the Directive remains the lack of reliable data because of the absence of an analysis methodology to measure its effects. To partly remedy this shortcoming, it is proposed that operators take account of the following parameters in order to contribute as effectively as possible to the exercise:

* The index of complaints (number and content of judgments, proceedings settled out of court, number of claims made, etc.)

The aim is to establish how the Directive is used in disputes of all types (legal proceedings, claims submitted for arbitration, claims lodged with insurers, etc.) Operators are invited to provide all types of information on this field.

* The availability of safe products on the market

It will be useful to know whether and how the Directive is one of the factors conditionning the market entry, maintenance and withdrawal of a product (for instance, has the producer decided to withdraw or not to market a product because of the risk of his liability being invoked?). At Community level, the accidents caused by a product and/or involving a product can be identified and quantified thanks to the former Community system, EHLASS - *European Home and Leisure Accident Surveillance System*. However, the former system could not identify the defective nature of the product in question. The new Community system for compiling information on injuries set up under the programme of Community action on injury prevention[8] is looking into this approach in order to meet this need. However, it might be possible to find this information at national level[9].

* The trend in costs, production and selling prices

The aim is to establish the real costs inherent in the system of liability, and the extent to which they are in fact passed on in the prices of products.

* Differentiation between markets

The aim is to establish whether and to what extent the differences between the liability schemes in force in the different export markets (inside and outside the EU) are taken into account by economic operators (e.g. change in the production process, supplementary insurance to cover new risks in the export market, etc.)

* Innovation/research

The aim is to learn about operators' experience in order to know how the Directive has influenced industry's capacity to innovate (e.g. has the Directive discouraged the development of a particular sector?).

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8 OJ No L 46 of 20.02.99

9 According to the Spanish *Instituto Nacional de Consumo (informe Sistema EHLASS 1997*, www.consumo-inc.es/Estudios), the Spanish victims surveyed stated that the cause of the accident was chance (45.2%), lack of attention (21.4%), their own negligence (15.4%), the action of a third party (7.0%), a design or production defect (2.8%), lack of information from the manufacturer (0.2%) and failure to follow the instruction manual (0.4%).

Using these parameters (or other equivalent ones), operators are invited to make known their experience and to reply to the questions in this Green Paper.. In the field of producer liability, where the positions of principle are well-known, the Commission wishes to obtain factual practical information (if possible quantified) rather than mere declarations, so that it can justify its conclusions, particularly if they are to culminate in a substantial revision of the Directive.

2. WHAT ARE THE EFFECTS OF DIRECTIVE 85/374/EEC?

Evaluating the impact of the Directive means not just listing the cases brought before national courts or taken to arbitration, or even those on which the Court of Justice has pronounced[10]. The aim is more to assess how the Directive meets the objectives it set out to achieve with regard to the various sectors involved: whether it ensures adequate protection for the victims, whether it helps to discourage the marketing of dangerous products, whether it gives operators sufficient legal certainty to foster intra-Community trade, whether the competitiveness of European businesses is jeopardised by the Directive, whether the insurance sector has managed to cope with the risks covered by the Directive, whether the authorities and consumer associations regard the Directive as a useful instrument in their policies towards the victims of defective products, etc. To this end, the operators concerned and administrations are asked to answer the following questions.

2.1 The impact on the internal market

Applicable throughout the European Economic Area, and taken as a model by non-member countries (in particular those which have applied for membership of the European Union) (see annexes), the Directive on producer liability is a major element of the legal environment in which intra- and extra-Community trade is conducted. The Commission would like to know how those concerned view its impact in the light of their experience since 1985.

2.1.1 Community trade

In Directive 85/374/EEC, the current internal market, with its strong growth in intra-Community trade,[11] has a consistent and avowedly balanced framework of producer liability in Europe. It is intended to ensure adequate protection for victims, to promote trade in goods and to largely harmonise the conditions of competition in the internal market. The existence of harmonised legal conditions is intended to make trade easier, since the producer is in the same legal position no matter where his products are distributed.

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10 The ECJ has issued two rulings on the Directive in actions against France (C-293/91, judgment of 13.1.93, ECR 1993, p. I-1) and the United Kingdom (C-300/95, judgment of 30.5.97, ECR 1997, p. I-2649).

11 Since 1985, trade in products between Member States has increased significantly. In 1997, intra-Community trade in industrial goods was estimated at 31.5% of GDP (European Commission, *Report on the functioning of Community product and capital markets*, COM(1999)10 of 20.1.99).

Directive 85/374/EEC aims to harmonise to a large extent national law on producer liability. It does not contain any provision directly concerning conflicts of law. Despite the wide degree of harmonisation achieved by it, there are still divergences at national level. When a defective product causes damage in the Member State or it has been marketed within the internal market, the victim can be compensated under the uniform liability rules contained in the Directive. As regards the non-harmonised aspects, it is important that the victim and the producer establish which law is applicable. An intergovernmental convention was signed in 1973 to law down the law applicable to product liability. However, most of the Member States are not parties to this agreement, which has been ratified only by Spain, Finland, France, Luxembourg and the Netherlands. In the absence of any other applicable instrument, conflicts of law relating to product liability are governed by the legislation of each Member State.

It must nevertheless be acknowledged that the legal certainty of the victim and the producer is far from being assured in this field, since the Directive is both incomplete and complementary to any other national producer liability scheme. In 1985, the disparity in legislation was perceived by the Community legislator as being such as to affect the level of intra-Community trade, so that it warranted an approximation of the legal conditions governing liability - an approximation which was partly achieved by Directive 85/374/EEC

> On the one hand, the Directive does allow the Member States - in the case of certain points clearly defined in the Directive - to legislate differently in each Member State (see the options set out in Articles 15 and 16 of the Directive).
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> On the other hand, the general national law on liability based on fault, which naturally also applies to producers, is not harmonised and thus continues to apply. The situation in Spain illustrates this coexistence of the legal frameworks for producer liability which may well hamper the legal certainty of the parties in practice: on 4 October 1996, in a case involving the explosion of a bottle, the Spanish supreme court delimited the field of application of the transposing law of 1994 vis-à-vis the general consumer protection law of 1984, by ruling that the former establishes a special and closed system of liability, while the latter establishes a general system of quasi-objective liability with a reversal of the burden of proof. Although it did not apply it in the case in question (since the product was put into circulation before 1994), the Court ruled that the principle of liability under the law of 1994 extends to the distributor (which is the case only in the specific circumstances set out in Article 3(3) of the Directive) and entitles the victim to lodge the claim against one of the persons responsible, but not against all the persons jointly and severally (which runs counter to the principle of joint and several liability set out in Article 5 of the Directive)[12].

The Directive is only an initial step towards establishing a genuine producer liability policy at Community level. One of the reasons for reviewing it every five years[13] is in fact to proceed towards greater harmonisation with a view to establishing a regulatory framework which is as comprehensive, coherent, balanced and effective as possible for protecting victims and ensuring legal certainty for producers. However, it would appear that the objective of greater harmonisation can only be achieved *a priori* by upholding the objective of total harmonisation in the present Directive (since no clause allows the Member States to adopt stricter rules under the Directive).

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12 TS Sala Civil, 4.10.96, No 778/1996 (RJ 1996-7034).

13 See the 18th recital of Directive 85/374/EEC on this point.

1. According to your experience, does the Directive properly function in practice?

☞ Given the importance for consumers and economic operators to rely on a stable legal framework of product liability, do you think it would be justified to modify the Directive?

☞Has the disparity in legislation on producer liability - even potentially - discouraged the marketing in one Member State of products from another Member State?

☞ Where ordinary law has been applied rather than the Directive, what do you consider to be the reasons for this?

☞ Do you think the Directive should be revised to become the common and sole system of liability for defective products (deletion of Article 13 of the Directive)?.

☞Do you think that each Member State should be able to adopt stricter liability rules (introduction of a "minimum" clause in the Directive)?

2.1.2 The global context

In accordance with the principle of equality of treatment for products imported from non-member countries and put into free circulation in the Community, the legislation at stake applies *in toto* to imports. Products exported, on the other hand, are subject to the legislation of the country of distribution in which they may cause damage. The Directive thus helps to define the legal and economic environment for European operators in the global context, where the producer liability policies of many countries are equivalent to that set out in Directive 85/374/EEC, since it served as a model for Japan, Australia and Switzerland, in particular[14]. However, this equivalence is not total, and the conditions governing liability sometimes depend to a large extent on the legal framework of which they form part. On this point, the situation in the United States calls for a separate commentary.

In the United States, producer liability is framed by three elements: (1) the legal system encourages the parties to go to court (the level of damages awarded by juries, arrangements making it easier to search for proof, the "no win, no fee" principle under which victims who lose their case do not pay their lawyers any fees); (2) there is no uniform federal legislation[15]; (3) it is State legislators and judges who have set out the major principles governing liability ("warranty", "negligence", "strict liability"), -

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14 For a comparative examination of legislation in the field, see OECD, *Product liability rules in OECD countries*, 1995. In Japan, the new law on product liability, in force since 1 July 1995, has been applied in a large number of cases (see www.law.kyushu-u.ac.jp/~luke/pllawcases.html).

15 Since the 1970s, the American federal legislator has been trying to establish a uniform and balanced legal framework for its large market. In May 1996, President Clinton blocked a federal bill passed by Congress. Subsequently, two bills were introduced in the Senate in 1997 (Bill S. 5 and Bill S.648), and one bill in 1998 (*Product Liability Reform Bill of 1998, US Senate, S.2236, 105th Congress*). The latter failed because of lack of agreement in the Senate.

principles which were approximated in practice under the "Restatement"[16] (a kind of standard law drawn up by the American Law Institute).

> In 1992, litigation involving producer liability was as follows in the 75 largest counties in the US: 12 763 cases of producer liability were decided; 358 cases went to a jury; 142 cases were won by the plaintiff. Of that total, the average award was 727 000 dollars, and compensation exceeded one million dollars in only 15.4% of the cases. The jury awarded punitive damages in only three of the 142 cases won by the plaintiff. The total for such damages, for the three cases, was 40 000 dollars[17].

> According to the *National Center for State Courts*, of the 19.7 million civil cases dealt with each year by state judges, 40 000 cases involve producer liability. Only 10% of victims take legal action to obtain compensation. Between 1965 and 1994, punitive damages were awarded in 379 cases (or 13 per year). In the United States, insurance costs for American businesses seem to be decreasing. Premiums fell between 1987 ($4 billion) and 1993 ($2.6 billion). The premium per $100 cover is 26 cents[18].

There is a great similarity between liability conditions in Europe and the United States, although there are some notable individual differences (the American rules concern the liability of the professional vendor, while the Directive applies only to the (real or apparent) producer, the importer and the distributor in the case of an unidentified producer; the period of liability in the EU is ten years, while the American legislation lays down a period of 18 years[19]). However, the lack of federal legislation laying down *inter alia* a ceiling for punitive damages is regarded by the Transatlantique Business Community as hampering trade between the EU and the United States. That is why the Community and business circles have always supported American efforts at reform.[20] Seen in this light, the European producer is better off, as the European Directive establishes a uniform and coherent framework of liability, without the most criticised elements of the American system (the role of the jurys, punitive damages, etc.).

> The truth is that, although the European and American legislations are very close in terms of principles, this is not the case with their practical application. Practical application of the European legislation does not appear to have the same results and consequences for those concerned as in the United States. The litigation involving the liability of the tobacco industry in Europe and the United States is a good example of this point. In Sweden, on the basis of liability without fault, Mrs Gustafsson had claimed compensation from the Swedish tobacco company *Swedish Match* for the damage caused to her health because of failure to provide information on the risks associated with tobacco, and in particular a warning of the risk of cancer. The case was rejected by a court in Stockholm in 1997. Upon appeal, the supreme court referred the case back

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16 The principle of "liability without fault", for instance, recognised in 1963, was adopted by most states and consolidated in the Institute's "*section 402A of the Second Restatement of Torts*". This Restatement was revised in the light of 30 years' experience (ALI, *Restatement of the Law, Third, Torts: Product Liability*, xxxi, 382 pp., 1998).

17 US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, Civil Justice Survey of State Courts, 1992: *Civil Jury Cases and Verdicts in Large Counties* (July 1995).

18 The Public citizen, *The Facts about Products Liability, www.citizen.org.*

19 See Section 107, Bill S. 2236. The federal period of 18 years already applies to the aerospace sector by virtue of the *General Aviation Revitalization Act* of 17 August 1994 (49 U.S.C. § 40101).

20 Transatlantic Business Dialogue, *Statement of Conclusions, 1998 CEO Conference*, Charlotte, 5-7 November 1998 and *TABD Mid Year Report*, Washington, D.C., 10 May 1999.