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Report (*)

drawn up on behalf of the Legal Affairs Committee

on the proposal from the Commission of the European Communities to the Council (Doc. 351/76) for a directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

Rapporteur : Mr Willy G.J. CALEWAERT

(*) This replaces the report (Doc. 246/78) referred to committee on 9 October 1978

By letter of 5 October 1976 from the Secretary-General, the President of the Council of the European Communities consulted Parliament, pursuant to Article 100 of the EEC Treaty, on the proposal from the Commission of the European Communities to the Council for a directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

On 11 October 1976 the President of the European Parliament forwarded this proposal to the Legal Affairs Committee as the committee responsible, and to the Committee on Economic and Monetary Affairs and the Committee on the Environment, Public Health and Consumer Protection for their opinions.

On 18 October 1976 the Legal Affairs Committee appointed Mr Calewaert rapporteur.

At its meeting of 25 November 1976, the Legal Affairs Committee held an initial exchange of views; at its meetings of 17 February, 26 April, 26 and 27 May and 21 November 1977, the Legal Affairs Committee considered the proposed directive on the basis of a questionnaire (PE 47.746).

At its meetings of 19 December 1977, 23 January, 20 February, 27 April, 22 and 23 May, 22 June and 5 July 1978, the Legal Affairs Committee continued its consideration of the proposed directive, on the basis of the draft report (PE 51.378).

At the last of these meetings, the Legal Affairs Committee adopted the motion for a resolution, as worded in accordance with an amendment (PE 51.707/1) by Mr Fletcher-Cooke, by 13 votes to 12, and directed its rapporteur to draft the accompanying explanatory statement (see Doc. 246/78).

At the plenary sitting of 9 October 1978, at the request of Sir Derek Walker-Smith, chairman of the Legal Affairs Committee, Mr Calewaert's report (Doc. 246/78) was referred back to committee, in order to enable the Commissioner responsible to put forward proposals likely to meet wider support both among members of the Legal Affairs Committee and in Parliament as a whole.

At its meeting of 26 January 1979, the Legal Affairs Committee decided to resume consideration of this question on the basis of the amendments (PE 56.988) submitted by its rapporteur following the receipt of suggestions from the Commissioner responsible which were forwarded to the chairman of the Legal Affairs Committee; at the same time the committee laid down 16 February 1979 as the time-limit for the submission of new amendments.

Before proceeding to examine these new amendments, the Legal Affairs Committee took decisions on the two Previous Questions, moved respectively by Mr Fletcher-Cooke and the rapporteur.

The Previous Question (PE 57.337) moved by Mr Fletcher-Cooke was rejected by 15 votes to 3 with 3 abstentions; it had been worded as follows:

> 'The amendments tabled by the rapporteur on the basis of suggestions by Commissioner Davignon are not such as to enable the committee to alter the view expressed in paragraph 1 of the motion for a resolution in Mr Calewaert's report (Doc. 246/76) as to the use of Article 100 as legal basis for this particular directive.'

The Previous Question (PE 56.988, p.2) moved by the rapporteur was adopted by 14 votes to 4 with 5 abstentions; it had been worded as follows:

> 'Article 100 of the Treaty establishing the EEC constitutes the proper legal basis for the proposal for a directive (Doc. 351/76) relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.'

At its meetings of 1 and 21 March 1979, the Legal Affairs Committee examined the amendments submitted by the rapporteur and those tabled by Members (PE 56.992).

The conclusions reached by the Legal Affairs Committee being different from those contained in the first report, it proved necessary to draw up a second report; the initial report is thus withdrawn from the agenda and therefore it was felt that it would be useful to publish again, in the present report, the opinion of the Committee on Economic and Monetary Affairs and that of the Committee on the Environment, Public Health and Consumer Protection.

On 5 April 1979 the draft report was considered by the Legal Affairs Committee and adopted by 15 votes to 0 with 1 abstention.

Present: Mr Riz, vice-chairman and acting chairman; Mr Broeksz, acting rapporteur; Mr Alber, Mr Bayerl, Mrs Ewing, Mr de Gaay Fortman, Mr Luster, Lord Murray of Gravesend, Mr Plebe, Mr Rivierez, Mr Santer, Mr Scelba, Mr Schreiber (deputizing for Mr Radoux), Mr Shaw, Mr Sieglerschmidt, and Mr Vergeer (deputizing for Mr De Keersmaeker).

C O N T E N T S

A

The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council[1],

- having been consulted by the Council pursuant to Article 100 of the EEC Treaty (Doc. 351/76),

- finding that Article 100 of the Treaty establishing the EEC constitutes the proper legal basis for the proposal for a directive,

- having regard to the report of the Legal Affairs Committee and the opinions of the Committee on Economic and Monetary Affairs and the Committee on the Environment, Public Health and Consumer Protection (Doc. 71/79);

1. Welcomes the proposed directive as a necessary precondition for the achievement of a system of competition and free movement of goods and as an essential component of a Community policy for consumer protection;

2. Requests the Commission to report to Parliament and Council, five years after the entry into force - in implementation of Article 13 - of the national provisions necessary to comply with the directive, on the advisability of transferring liability - wholly or in part, generally or in respect of certain risks only - from the producer to a guarantee fund, more particularly with a view to protecting consumers and producers against development risks;

3. Invites the Commission to adopt the following amendments, pursuant to Article 149, second paragraph, of the EEC Treaty.

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[1] OJ No. C 241, 14.10.1976, p.9

TEXT PROPOSED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES [1]	AMENDED TEXT

Proposal for a Council directive
relating to liability for defective products

Preamble unchanged

First to fifth recitals unchanged

Whereas liability cannot be excluded for those products which at the time when the producer put them into circulation could not have been regarded as defective according to the state of science and technology (development risks), since otherwise the consumer would be subjected without protection to the risk that the defectiveness of a product is discovered only during use;	deleted

Remaining recitals unchanged

Article 1	Article 1
The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.	The producer of an article, <u>even where it is incorporated in immovable property</u>, shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect .
The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the time when he put the article into circulation.	The producer shall <u>not</u> be liable <u>if he can produce evidence that the article cannot be considered defective</u> in the light of the state of scientific and technological development at the time when the article <u>was put</u> into circulation .
	<u>Article 1a</u> (new)
	<u>In the case envisaged in Article 1, the producer shall not be liable where, as soon as he has become or ought to have become cognizant of the defect, he has taken adequate and timely steps to inform the public and adopted furthermore all measures which, having regard to the circumstances of the case, might reasonably help to eliminate the injurious effects of the defect.</u>

[1] For complete text see OJ No. C 241, 14.10.1976, p. 9

TEXT PROPOSED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES	AMENDED TEXT
	The burden of proving satisfaction of the obligations referred to in the previous paragraph shall lie with the producer.
Article 2	Article 2
'Producer' means the producer of the finished article, the producer of any material or component, and any person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer.	Unchanged
	Paragraph 2 (new) The producer of an agricultural, craft or artistic product shall not be liable under this directive for damages caused by defects therein where such a product clearly does not present the attributes of industrial production
Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the person who supplied him with the article.	Unchanged, but becomes paragraph 3
Any person who imports into the European Community an article for resale or similar purpose shall be treated as the producer.	Unchanged, but becomes paragraph 4
Article 3	Article 3
Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally.	Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally, each person retaining the right to compensation from the others.

TEXT PROPOSED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES	AMENDED TEXT
Article 4	Article 4
A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.	A product is defective when, being used for the purpose for which it is apparently intended, it does not provide for persons or property the safety which a person is entitled to expect, taking into account all the circumstances, including its presentation and the time at which it was put into circulation.
Article 5	Article 5
The producer shall not be liable if he proves that he did not put the article into circulation or that it was not defective when he put it into circulation.	The producer shall not be liable if he proves that, having regard to all the circumstances, either he did not put the article into circulation or it was not defective when he put it into circulation.
	Paragraph 2 (new) In accordance with the laws of the Member States, the producer may raise the defence of contributory negligence on the part of the injured person or of any other person for whom the injured person is responsible by virtue of national law.
Article 6	Article 6
For the purpose of Article 1 'damage' means: (a) death or personal injuries;	For the purpose of Article 1 'damage' means: (a) unchanged

TEXT PROPOSED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES	AMENDED TEXT
(b) damage to or destruction of any item of property other than the defective article itself where the item of property (i) is of a type ordinarily required for private use or consumption; and (ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.	(b) damage to or destruction of any item of property other than the defective article itself where the item of property (i) is of a type ordinarily required for private use or consumption; and (ii) was not acquired or used by the claimant exclusively for the purpose of his trade, business or profession.
	Paragraph 2 (new) Claims for payment of compensation for pain and suffering and for non-material damage may be awarded according to the laws of the Member States.
Article 7	Article 7
The total liability of the producer provided for in this directive for all personal injries caused by identical articles having the same defect shall be limited to 25 million European units of account (EUA).	The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect may be limited to a maximum amount which is to be determined by a qualified majority of the Council acting on a proposal from the Commission. Prior to any such determination by the Council this amount shall be fixed at 25 million European units of account (EUA).
The liability of the producer provided for by this directive in respect of damage to property shall be limited per capita - in the case of movable property to 15,000 EUA, and - in the case of immovable property to 50,000 EUA	Unchanged

TEXT PROPOSED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES	AMENDED TEXT
The European unit of account (EUA) is as defined by Commission Decision 3289/75/ECSC of 18 December 1975.	The European unit of account (EUA) is as defined by Article 10 of the Financial Regulation of 21 December 1977.
The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.	Unchanged
The Council shall, on a proposal from the Commission, examine every three years and, if necessary, revise the amounts specified in EUA in this Article, having regard to economic and monetary movement in the Community.	The Council shall, on a report from the Commission, examine every three years the amounts specified in this Article. Where necessary, the Council shall, acting by a qualified majority on a proposal from the Commission, revise or cancel the amount specified in paragraph 1 of this Article or revise the amounts specified in the second paragraph, taking into consideration economic and monetary movement in the Community.
Article 8 unchanged	
Article 9	Article 9
The liability of the producer shall be extinguished upon the expiry of ten years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.	The liability of the producer shall be extinguished if an action is not brough within ten years from the date on which the producer put into circulation the individual product which caused the damage.
Articles 10 to 15 unchanged	

B

EXPLANATORY STATEMENT

I. Basis of the proposal

1. The Community policy aims of equality of competition and consumer protection make it necessary to approximate the law on liability for defective products in the European Community. As a result of the continual development of new production methods and the ramifications of trade it is often impossible for consumers to judge whether goods are safe or to identify their manufacturer. The traditional law on liability does not satisfy present requirements because it derives from the economic circumstances and production conditions of the nineteenth century. The system of liability for intentional and negligent acts is an unsatisfactory basis for regulating the legal consequences of bodily injury and material damage caused by goods brought into circulation by the producer. More rigorous standards concerning liability are increasingly being developed in the jurisprudence of Member States, though naturally this is not homogeneous. Consumer organizations are urging national legislatures to improve the legal position of the consumer.

2. The acceptance by the producer of liability for defective products seems justified. He is able, by careful organization and supervision of production to minimize the risk of damage or injury. He has the easiest access to information and evidence as to whether goods were defective when they were put on the market. He can make allowance in his price calculation for the necessary operational contingencies and insurance premiums and thus spread the extra cost of his products evenly over all consumers.

3. Differences in national provisions on product liability necessitate the approximation of laws in order to avoid any restriction on competition arising out of the varying costs borne by companies in countries with very close reciprocal trade relations. Whilst in certain states the producer is liable even where he is responsible for the product defect which gave rise to the damage, irrespective of fault, the principle of negligence still applies in most states. Hence the injured person must prove that the producer was at fault for the defectiveness of the object which caused the damage. Generally, however, the consumer is denied the necessary access to the production process particularly where large companies are concerned. Even in cases where there is a rebuttable presumption that the product is at fault, the latter can usually supply proof of having taken every precaution and thus avoid liability. This may be summarized in the following three groups:

(a) the principle of liability arising from negligence, under which the producer is obliged to pay damages only if the injured consumer is able to prove that he was at fault for the defectiveness of the object causing the damage. This applies to Italy and until the burden of proof was reversed in 1968 also applied to the Federal Republic of Germany;

(b) reduced liability arising from negligence, under which the producer is presumed to be at fault, but evidence in exculpation is admitted: Denmark, the Netherlands, the United Kingdom, Ireland and, since 1968, the Federal Republic of Germany;

(c) the system of strict liability excepting contrary evidence to repudiate the presumed fault: France, Belgium and Luxembourg.

4. Apart from certain areas of the law in the other states, the injured person's claim for compensation can only succeed under French, Belgian or Luxembourg law if the damage is shown to have been caused by the defectiveness of the product. The consequence of this difference in the liability laws is to create different cost factors and hence distortion of competition. If a strict law on liability compels the producer to prevent defects from arising in his products, the expenditure involved affects the total production cost and the price calculation. To this must be added the cost (expenditure, contingency reserves, insurance) of any cases of liability which may nonetheless occur. Competition and the free movement of goods could also be jeopardized by trade consumers in particular, but also by subsequent processing firms, giving preference to whichever producer is subject to the strictest form of liability. Again, the choice of location for an undertaking may be influenced by this factor.

5. Under current legislation in the various Member States, the consumer enjoys varying but generally inadequate protection against bodily injury and material loss. Adequate and equal protection for all consumers is, however, a high-priority Community policy objective and the Commission refers in this connection to the Council Resolution of 14 April 1975 (OJ C 92 of 25 April 1975, items 15(a)(ii) on page 5, and 26 and 27 on page 7).

6. Since these differences in the laws governing product liability directly affect the operation of the common market, there is every justification for issuing a directive for the approximation of laws pursuant to Article 100 of the EEC Treaty. Such a directive should be based on whatever best meets the needs of the common market. At the same time the provisions contained in a directive for the

approximation of laws should not be limited to the present state of progress in the development of the law in one or more of the Member States, but should provide solutions which go beyond existing national laws and more accurately reflect modern economic conditions. Obviously the degree of approximation already achieved by Community legislation in some of the areas of law concerned must not be ignored.

7. Finally the directive should be seen in the light of numerous international and national endeavours to obtain the proper regulation of product liability, as reflected for instance in the work of UNCITRAL[1], the Council of Europe draft convention on the harmonization of the law on product liability, which also makes provision for unlimited liability irrespective of fault in the case of bodily injury, the report by the Law Commission and the Scottish Law Commission in the United Kingdom, both of which also advocate unlimited liability irrespective of fault, and the German 'Gesetz zur Neuordnung des Arzneimittelwesens' of 1976, which took effect on 1 January 1978 and which also provides for liability irrespective of fault, albeit with an overall ceiling of DM 200 million and a ceiling for each case of DM 500,000.

II. Summary of the proposal

A. Content of the proposal

8. The directive lays down the principle of the liability of the producer irrespective of fault for bodily injury and material damage caused by a defect in a movable object. An object is thus defective if its measure of safety is not such as may reasonably be expected. The issue here is not whether the producer detected or could have detected the defect in the object. He is also liable even if it could not have been regarded as defective in the light of scientific and technological development at the time when it was put into circulation (development risks). This proposal does not affect claims for compensation for damages caused by a defective object where they are based on other legal grounds. The principle of liability irrespective of fault cannot be overridden.

9. Liability applies to

(a) the producer of a defective final product, component or raw material, and

[1] United Nations Commission on Trade Law

(b) the dealer

(1) importing from non-Member countries

(2) representing himself as the producer

(3) in the case of products sold 'anonymously', where the dealer does not identify the producer or supplier.

Where two or more persons are liable in respect of the same damage, they are liable jointly and severally.

10. Damage includes death, personal injuries and the destruction of an object other than the defective object; the damaged property must be of a type intended for private use or consumption and not used for the commercial or business purposes of the injured person.

11. The burden of proof rests with the injured person to show that the object was defective at the time when the injury was caused and that the defect did cause personal injury or damage to property. The producer must repudiate the presumption that he put the object into circulation and that it was already defective at that time.

12. Total liability is limited to

- 25 million EUA for all personal injuries caused by identical articles having the same defect,
- 15,000 EUA for damage to movable property in the case of each injured person,
- 50,000 EUA for damage to immovable property in the case of each injured person.

13. The limitation period for proceedings for the recovery of damages against the producer on the grounds of product liability begins to run on the day on which the injured person became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer, and expires after three years.

The liability of a producer for all claims is extinguished after ten years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.

B. Effect of the proposal on costs - Problem of the establishment of funding schemes

14. The principle of liability irrespective of fault may require producers to increase their operational reserves and liability insurance;

the ensuing increased costs will be incorporated in the price calculation. The producer is thus not penalized thereby but is able to pass the increased cost on to the consumer.

On 1 March 1979, Commissioner Davignon submitted two notes to the Legal Affairs Committee containing the views of the European Committee of Insurances on the question of the cost of strict liability insurance (see Annexes I and II); note particularly the opinion expressed by that organization: it is not so much strict liability as such but the system within which it operates which has contributed to the so-called product liability crisis in the States in recent years'; this opinion, on which the Commission's proposal is based, was accepted by the majority of the Legal Affairs Committee (see Annex III, paragraph 7).

15. Your rapporteur would also like to draw attention to the comments made by the same body on the funding schemes (see Annex II, para. 3): 'Funding schemes abandon the flexibility of individual risk assessment in favour of a reduction of all risks to the same common level which effectively reduces any incentive towards improved product safety'.

In this connection it should be noted that such funding schemes could in any case provide for rates of contribution differentiated by sector and subject to revision according to proven efforts made to prevent damage.

It should also be recalled that an amendment (PE 56.992/Ann. p.5) tabled by Mr Riz, Mr Luster and Mr Schwörer, aimed at the creation of a European Fund to guarantee development risks, was rejected by 10 votes to 10, with 4 abstentions; under these circumstances, your rapporteur thinks it will be necessary, when the time comes, to consider whether such a fund should be established on the basis of a Commission report; hence paragraph 2 of the motion for a resolution.

III. Comments on the articles of the proposal on which the Legal Affairs Committee has adopted amendments

Article 1 - Principle of liability for defective products

16. The principle of the liability of the producer irrespective of fault applies to the production of a defective object and also to its having been put into circulation. The manner in which the defect arose is unimportant. The directive thus follows the principle of risk assessment based on objectively determined causation of damage. It takes into account the various developments of legislation and jurisprudence in the Member States with a simple, comprehensive and clear regulation.

This avoids

- the continuation of liability on the basis of negligence in important product liability areas,
- a relapse into the confusing multiplicity of contractual and non-contractual claims and rules on the burden of proof, and
- a deterioration in the position of consumers in some Member States as against the present state of legal development in their countries.

17. The Commission text categorically excludes any regulations on the burden of proof which derive in any case from the civil law or the law on civil procedure of the Member States, the end effect of which is in this respect the same, and also clearly emerge from the "ratio legis" of the present directive. The need would only arise where the present allocation of the burden of proof were to be changed.

18. The Commission's explanatory memorandum (1st subparagraph of paragraph 3) stipulates that 'Liability extends only to movable property. Special rules exist in all Member States to cover defective immovable property such as buildings. Where, however, movable objects are used in the erection of buildings or installed in buildings, the producer is liable in respect of these objects to the extent provided for in this directive'.

The amendment tabled by Mr Masullo and adopted by the Legal Affairs Committee is designed to bring the explanatory memorandum into line with the text of the actual proposal for a directive by stipulating that the producer of a movable object, even if it is installed in a building, is liable under the conditions provided for in the directive.

19. In adopting by 14 votes to 12 with 1 abstention the amendment tabled by Mr Rivierez to the second paragraph of Article 1, the Legal Affairs Committee excluded liability as a result of development risks[1]; such exclusion is justified both from the point of view of equity (how is it possible to justify the manufacturer's liability for a product which at the time it was manufactured was considered perfect in the light of the state of science and technology?) and by economic considerations to which the opinion of the Committee on Economic and Monetary Affairs (in particular paragraph 9) had already drawn attention.

20. These considerations did not convince a large minority who felt that the inclusion of the manufacturer's liability in the case of development risks was essential for consumer protection and was not likely to constitute a bar on innovation, for liability arises not from the newness of a product but from damage.

[1] The sixth recital of the proposal for a directive is therefore to be considered void.

The strengthening of precautions against defects arising in the course of manufacture and marketing will not inhibit innovation but on the contrary make it safer. This has been shown wherever great importance is attached to safety, such as in the manufacture of precision instruments, in space travel and so forth. Both smaller companies and the large firms successfully pursue technical progress and compete in the production of such goods requiring the highest safety standards.

Article 1 A (new)

21. This article is the result of an amendment tabled by Mr Scelba and adopted by the Legal Affairs Committee by 6 votes to 5; its purpose is to exclude from liability a producer who takes every precaution - in particular by providing information - to ensure that the harmful repercussions of a defect are avoided. Such exclusion is not automatic; to absolve himself from liability the producer must provide proof that the requirements of this article have been satisfied.

Article 2 - Definition of persons against whom claims may be brought

22. During the discussion of the proposal for a directive[1] it was found that to make the producer liable for defects in agricultural, craft or artistic products could be too harsh an imposition if such products are not manufactured industrially. Consequently the new second paragraph proposed by the rapporteur in agreement with the Commission, - and adopted by the Legal Affairs Committee by 12 votes to 5 with 4 abstentions -, excludes the producer of products of this type from the scope of the directive. This exception is thought to be justified, even from the point of view of consumer protection because, in the event of damage, in view of the nature of the product and the fact that the producer comes into direct contact with it, the producer could normally be held liable for negligence.

23. The question of whether the product 'does not, apparently, have the characteristics of industrial production' is a matter for the court to decide.

To prevent any ambiguity, and in accordance with the principle laid down in Article 11 of the proposal for a directive, the Legal Affairs Committee adopted by 16 votes to 3, with 3 abstentions, an amendment stipulating that for damage caused by the products referred to in the new second paragraph of Article 2 it is only strict liability which is excluded. (Amendment tabled by Mr Masullo)

[1] See also on this point the opinion of the Committee on Economic and Monetary Affairs, paragraphs 8 and 11 (d).

Article 3 - Joint and several liability

24. The merits of joint and several liability on the part of the producers responsible under Articles 1 and 2 were accepted by the Legal Affairs Committee, since joint and several liability tends to help the injured party's case.

In approving by 12 votes to 9 with 1 abstention an amendment tabled by Mr Masullo, your committee, in order to remove any ambiguity about the nature of this joint liability, added a statement to this article to the effect that each party liable 'retains the right to take action against the others'.

Article 4 - Definition of defectiveness

25. The new wording proposed for the concept of 'defect' is the result of long discussions within the Legal Affairs Committee; it formed the subject of an amendment by your rapporteur which was adopted by 15 votes to 2 with 2 abstentions; in the first place, it introduces the idea that the court should take account of all the circumstances of the case; this wording also has the advantage of bringing the definition of defect in the draft directive in line with that of the draft Convention of the Council of Europe (PE 47.912/Ann., page 1 - Article 2(c)).

26. It also seems useful to add that, in taking into account all the circumstances, special attention should be paid to the time at which it (the product) was put into circulation. No one can reasonably expect the same degree of safety from an old product as from a new product. The user of an old product has to accept a higher risk. Of course the appearance on the market of an improved product does not make a product put on the market previously 'defective'. The Commission also proposes that its definition of a defective product should apply only where the product is 'being used for the purpose for which it was apparently intended'. Although this proviso is by implication covered by the provision relating to the defence of contributory negligence (see Article 5 - second new paragraph), it was nonetheless thought desirable for this means of defence open to the producer to be spelt out clearly in the clause defining when a product is defective. The word 'apparently' has been included to signify that the use to which a product is put is determined by the consumer, not the producer.

Article 5 - Exclusion of liability

27. It is undoubtedly not easy, in the event of a dispute, for the producer to show that the object which he manufactured was free of defects when it left the factory. On the other hand, placing the burden

of proof upon the injured person to show that the object was defective when put into circulation is much harder for him to fulfil. The producer can in many cases, however, provide such evidence from his records of final product checking. He is more closely involved.

28. Your committee proposes two amendments to this article:

(a) The purpose of the first, tabled by Mr Scelba and approved by 12 votes to 8 is to invite the court of law - as in Article 4 in connection with the assessment of the defective nature of a product - to take account of all the circumstances when it is considering whether the conditions governing exclusion from liability laid down in the present article have been met.

As a result of the discussions in committee it has been stipulated that it is delivery (to the distribution system in the case of a finished product, or to the following producer if it is a semi-finished product) which constitutes <u>putting into circulation</u>.

(b) As the Commission had adopted the Legal Affairs Committee's proposal that <u>contributory negligence</u> should be included in the text of the directive as a means of defence (a principle recognized by the law of all the Member States), your rapporteur tabled an amendment to this effect making express provision for the defence of contributory negligence of any persons for whom the injured person is responsible, such responsibility to be determined by national law. This amendment also brings the directive closer to the text of the Council of Europe's draft Convention (PE 47.912/Ann. - Article 4(1)).

29. The Legal Affairs Committee thought it would conflict with the objective of the proposal for a directive in the matter of consumer protection if provision was made for the liability of the producer to be reduced when the damage is caused jointly by a defect in the product and an act by a third party; it rejected an amendment to this effect by 15 votes to 4.

Article 6 - Definition of damage

30. The Council resolution[1] on a preliminary programme for a consumer protection and information policy includes protection against personal injury[2] and damage to the economic interests of the consumer amongst the objectives in connection with product liability; thus, by including material damage, Article 6 of the proposal for a directive is in conformity with the Council resolution; the Legal Affairs Committee expressly indicated its approval of this view by rejecting by 6 votes to 10 with 2 abstentions an amendment aimed at excluding from the definition of damage (in the sense of this directive) damage caused to an object.

Nevertheless, to make it clear that the compensation is for damage to the consumer's personal property and not to property within the professional domain, the Legal Affairs Committee proposes to introduce the concept of acquired or used exclusively for the purpose of trade, business or profession.

31. It seemed necessary to stipulate within the body of the directive itself that 'damages for pain and suffering, and compensation for non-material damage, shall be awarded in accordance with the legal provisions of the Member States' (second new paragraph); the Legal Affairs Committee confirmed its support for this amendment tabled by the rapporteur by 11 votes with 5 abstentions.

Article 7 - Limit on liability

32. The amendment tabled by your rapporteur - which met with the approval of the Legal Affairs Committee[3] and the agreement of the Commission - is designed to offer a comprise acceptable to those in favour of and those against a limit on the amount of liability; under this amendment, revision of the ceilings provided for in the first and second paragraphs of Article 7 would take place every three years, where applicable, including the abolition of that provided for in the first paragraph; the flexibility of this system is ensured by the Council having to act by a qualified majority.

33. It seems appropriate to define the European unit of account by reference to Article 10 of the Financial Regulation of 21 December 1977[4]; an amendment to this effect has been introduced by your rapporteur.

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[1] OJ No. C 92 of 25 April 1975, paragraph 15(a)(ii) on page 5, 19(ii) on page 6 and 26 and 27 on page 7

[2] Article 3(1) of the Convention of the Council of Europe (PE 47.912/Ann.) only covers compensation for death or personal injuries.

[3] This amendment was approved by 11 votes with 5 abstentions

[4] Financial Regulation of 21 December 1977. See OJ No. L 356 of 31 December 1977, p.1

Article 8 - Limitation period

34. The Legal Affairs Committee has twice examined (22 May 1978 and 21 March 1979) amendments designed to shorten the period of limitation on action for compensation, a period which the proposal for a directive specifies as three years; as the discussions revealed the justification for the Commission's proposal, these two amendments will be withdrawn by their authors.

Article 9 - Extinction of liability

35. The Commission proposed that the period should commence at the end of the calendar year in which the defective article was put into circulation.

The Legal Affairs Committee - in adopting by 11 votes to 1 with 4 abstentions an amendment tabled by Mr Fletcher-Cooke - felt that the desire to make it easy to calculate this period did not justify the latter being other than a fixed period (120 months); it is therefore proposed that the period should commence on the date on which the product was put into circulation by the producer.

The Legal Affairs Committee noted its agreement to the duration of the period (10 years) proposed by the Commission by rejecting an amendment aimed at reducing it to 5 years.

IV. CONCLUSION

36. The Legal Affairs Committee therefore recommends Parliament to give its agreement to the proposal for a directive concerning liability for defective products, subject to the Commission of the European Communities accepting the amendments annexed to the motion for a resolution.

The amendments which the Legal Affairs Committee submits for the approval of Parliament and recommends to the Commission of the European Communities should be able to gain the support of a large majority, since although those in favour of unlimited strict liability (i.e. with no ceiling to the amount and covering the whole of production) may consider the amendments over-cautious and restrictive, they nevertheless constitute the elements of a compromise acceptable to all those who dispute neither the desirability of the proposal for a directive nor the fact that - in adopting such a directive - the Council would not be acting ultra vires.

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

Draftsman: Mr P. DE KEERSMAEKER

On 19 October 1976 the Committee on Economic and Monetary Affairs appointed Mr DE KEERSMAEKER draftsman of the opinion.

At its meeting of 4 November 1977, the committee considered the draft opinion and adopted it by 5 votes to 4.

Present: Mr Starke, acting chairman; Mr De Keersmaker, draftsman; Mr Amadei (deputizing for Mr Zagari), Lord Ardwick, Mr Bangemann (deputizing for Mr Zywietz), Mr Delmotte (deputizing for Lord Bruce of Donington), Mr Noè (deputizing for Mr Ripamonti), Mr Nyborg and Mr Radoux (deputizing for Mrs Dahlerup).

1. Objectives

1. The Commission advocates harmonization in the field of responsibility for defective products in the interests firstly of the establishment and functioning of the Common Market and secondly of consumer protection.

(a) The movement of goods in the common market

2. It is a fact that the lack of harmonization of the laws and administrative provisions of the Member States, in respect of products in general or any one group of products, constitutes an obstacle to the free movement of goods on the common market. A producer in a given Member State wishing to export to another Member State must adapt his products to the legislation in force there; if the legislation is more stringent, then he will not be able to export articles produced for his own domestic market to that Member State. If, on the other hand, the legislation is less stringent, it will be technically possible to export the product, but the producer may not be in a position to compete with other products offered on this export market. This modification of products to comply with the legal provisions of the Member States to which they are being exported involves additional costs and gives domestic products a competitive edge over imported products. In order to bring about the free movement of goods, harmonization of the legal and administrative provisions is therefore necessary.

3. What is the present situation regarding the legal and administrative provisions concerning liability for defective products? This liability is not dealt with in the same way under the various national legal systems. In some Member States, the injured party, in order to obtain compensation, must prove fault on the part of the producer, while in others such proof is not required. The cost price - and consequently the selling price - of the product will reflect the extent to which producers are liable to have to pay compensation for damage caused by defective products under the national system concerned. Damages paid out are covered by costs and thus also by the selling price. Since liability in general is governed by the laws of the country where the damage is caused, all goods which are sold in any one Member State, whether produced domestically or imported, are subject to the same laws and administrative provisions concerning product liability. From this point of view, there is no distortion of competition between imported and home-produced products. Only where laws diverge too widely will the producer adapt his production and defect control efforts to the country to which he is exporting. In such cases, production line modifications will involve him in extra costs. Furthermore, an article produced in a country with more stringent regulations, while not requiring modification to meet the less stringent laws

of the country to which it is being exported, has a somewhat higher cost price as a result of the greater stringency of the control to which it has been subjected. It is, however, doubtful whether the laws in the various Member States differ so greatly that producers would make any appreciable effort on that account to avoid producing defective goods. In every Member State, liability for defective products is governed by law and all products, whether imported or domestically-produced, are treated alike.

In the light of these considerations, the Committee on Economic and Monetary Affairs finds it difficult to decide whether the harmonization proposed by the Commission to remove distortions of competition is necessary or not. The Commission is therefore requested to provide figures to show how the different national legislations give rise to distortions of competition.

(b) Consumer protection

4. In order to give an opinion on the Commission's proposal, the system of harmonization proposed should be examined and its cost assessed and weighed up against the promotion of the free movement of goods and other advantages it will bring.

In choosing this system of product liability, the Commission was guided by its concern to protect consumer interests. In short the Commission justified its choice as follows:

" Possible legal systems vary from the practically non-existent to extremely far reaching protection for the consumer. The Commission has opted for a system of the latter sort, i.e. one in which the producer is liable for defects in articles produced by him, irrespective of fault. If there is a defect the producer is required to compensate the injured party for damage caused by the defective product. The producer makes due allowance for compensation payments in calculating the price of all his products, whether or not they are defective. In this way the damages risk is spread over all consumers, as against the system in which the single consumer may suffer overwhelming damage as the result of a defect in a product (in a system where the injured party has to prove fault on the part of the producer in order to receive compensation, the consumer is left virtually without protection). It is difficult for him as an individual up against a large undertaking to provide this proof, as he has no access to the production departments of that undertaking.

The Commission therefore justified its choice of harmonization system from the point of view of consumer protection.

II. The implications of the proposal for a directive

5. The effects of the proposal system on costs, to be met ultimately by the consumer in the form of increased prices, on viability, on equal competitive opportunities for firms, on their potential for innovation and thus, ultimately, on the vitality and growth of our economy, and so on, should, however, be investigated. As regards the objective of the free movement of goods and equal competitive opportunities, we must look into the question of how complete - or how partial - this harmonization is, and how much latitude is given to the Member States to lay down the implementing provisions.

(a) Costs arising from the system of product/liability

6. The damages paid out by the producer in respect of defective products constitutes for him a cost component to be taken into account when cost prices and retail prices are calculated. In this way, potential liability for damages is spread over all products and consequently is borne by all consumers. Calculation of this component may be based either on the formation of a reserve which can be drawn upon when compensation has to be paid, or on an insurance policy. But how great is the extra cost involved here? The Commission has not carried out any economic research into costs arising from the proposed system of consumer protection. Without this information on the real costs of the system it is difficult, not to say impossible, to form a judgement on the proposal for a directive. To be sure, it is impossible to determine the costs exactly since a large number of factors will remain uncertain in such an analysis. This is not, however, a valid excuse for failing to look into the costs of the proposed system, especially as reference can be made to experiences with a similar system in the USA. It is obvious that the situation in the USA is not identical with that obtaining in Europe. Certain negative experiences in the USA with a system similar to that proposed here do, however, raise misgivings and an analysis of the situation in the USA could prove very useful - and even essential - for the European proposal in order to avoid from the outset the drawbacks of the American system. It is perhaps of interest to quote some figures to illustrate trends in the USA. Since this system of liability for defective products was introduced, the number of claims for compensation has risen from 50,000 a year at the beginning of the 60's to around 500,000 in 1970, and one million today, an increase of 2,000 per cent. The amount of compensation claimed has risen from $500 million at the beginning of the'60's to $12,500 million in 1970, and $50,000 million today[1]. In most cases the claim is finally rejected,

[1] American Machinist, June 1976

but the whole system involves enormous legal costs, with the result that only a small part of the money laid out ever reaches the injured parties. At the meeting of the Legal Affairs Committee on 17 February 1977[1], Mr FICKER, official of the Commission, explained that the situation in Europe was not comparable with that in the USA, since the damages awarded there are exceptionally high; he gave a number of examples to demonstrate this point. Such enormously high sums ought not to be so easy to obtain if legal costs are known to be higher than the compensation awarded. Professor O'Connel pointed out in an article in 'The National Underwriter' of 23 April 1976 that of each dollar paid in the insurance premiums only 37.5 cents reached the injured party, the rest going in costs. The enormous costs involved in the system mean that there are constant substantial increases in insurance premiums for product liability, which leads in turn to substantial increases in costs and, consequently, prices.

From these experiences in the USA, only one lesson can be drawn: before introducing a similar system, one needs to have a clearer picture of the costs involved. Without a thorough preliminary cost analysis, no decisions can be made on the introduction of such a system. The Commission's proposal makes no mention of the costs of the proposed system. The danger is that, exactly as in the USA, the costs will after a time become astronomic and that ways of reducing them will then need to be found.

(b) <u>The consequences for certain branches of industry - and the definition of contributory negligence</u>

7. For certain branches of industry in particular the risk and costs involved are enormously high and scarcely tolerable; this applies to safety appliances and certain capital goods. A thorough study of repercussions on the various branches of industry is therefore necessary in order to avoid certain of them becoming uncompetitive or to avoid consumers who are obliged to use certain products from having to pay an enormously high price as a result of the costs involved in insuring against the risk of liability. The very nature of certain products, indeed, calls for extreme caution to be exercised when using them. If the producer is to be liable for accidents occurring with such products regardless of the consumer's contributory negligence, this will represent a considerable risk for the producer, involving enormous costs. The extent to which negligence and fault on the part of the user would limit or even annul product liability is, however, not detailed in the proposal for a directive. According to the Commission, such a provision is superfluous since this principle is already enshrined in the laws of all the Member States. The Legal Affairs Committee should give a judgement on this matter. From the economic point of view, however, it should be noted that these national provisions probably vary. Even if they are identical, it is

[1] PE 47.936

doubtful whether they are interpreted in exactly the same way in each of the Member States. In order to achieve the equal competitive opportunities in the Community which the Commission is aiming at with this proposal for a directive, harmonization of these national provisions is, however, necessary. Mr FICKER's[1] argument that the definition of a standard concept of contributory negligence would be the same as drawing up specifications for Euro beer, Euro bread, etc., (which have been criticized by Parliament) does not hold water. Two quite different concepts are being juxtaposed here. Even in the case of optional harmonization, the legal concepts used in the directive should be interpreted in the same way in the different Member States in order to eliminate barriers to trade. Otherwise there will be no harmonization.

(c) Products of craft industries and small and medium-sized undertakings

8. The principle of product liability for defective products irrespective of fault is based on spreading the liability in respect of defective products over the other non-defective products of the same series. It is therefore a principle that is based on mass production and does not seem appropriate for goods which are not mass-produced but produced by craft industries; one wonders whether this proposal does not involve an intolerable burden for such industries. The principle underlying the proposal for a directive might also be the source of problems for small and medium-sized undertakings, which can only spread the risk over a limited production series and thus have a heavier burden to bear than the firms which produce much larger numbers of identical goods. In addition, the large firms can for the same reason also invest much more easily in all possible kinds of control machinery to stop defective goods reaching the market.

(d) Development risks

9. In Article 1 (2), the producer is also held liable for damages caused by a defect that no-one could have been able to discover since the product was considered free of defects according to the state of science and technology at the time the producer marketed it. If, on the basis of later developments in science or technology, the conclusion is reached that a product which was regarded as safe is in reality dangerous, then the producer is liable. To extend producer product liability to development risks constitutes a barrier to innovation. In those branches of industry where research and development play an important part, in particular, this constitutes a very heavy liability and would undeniably put a brake on innovation and push up costs to cover the development risk. In this context, it should not be forgotten that, in view of present structural unemployment,

[1] PE 47.936

innovation is of vital importance for the European economy and that, in the light of the international distribution of labour, Europe must concentrate mainly on technologically advanced products. To put a brake on innovation in Europe will weaken its competitive position vis-à-vis third countries. The inclusion of development risks in product liability makes it impossible to calculate the risks of importing new products, with the result that the additional costs incurred in insuring this unpredictable risk will be very high. A searching enquiry into the costs of producer liability for development faults and its influence on innovation is therefore necessary and it would perhaps be useful to look elsewhere for a satisfactory solution to this problem. The producer must be obliged to do everything within his power to withdraw goods already in circulation or to inform the public as soon as a product is shown by new scientific or technological findings to be defective. The Commission must examine how this can best be done from the legal point of view and put forward proposals to ensure that it is carried out at Community level. In addition, one may well wonder how far it is necessary to lay down rules for this problem of development risks. According to Mr FICKER[1], not one of the delegations in the working party (United Kingdom, Ireland, Netherlands, Belgium, Germany and Italy) was able to quote from its experience a single case of this type.

(e) Equal competitive opportunities

10. In conclusion, the proposal should be assessed in the light of the objective quoted by the Commission in the proposal itself of creating equal competitive opportunities in the Community. National provisions as regards liability for fault, as regards contract and as regards liability linked to the ownership of a given product are to remain in force alongside the proposed Community system of product liability. As a result the costs arising from liability for defective products will vary from one Member State to another. An example may perhaps clarify this point: the ceiling for damages laid down in the proposed directive may be exceeded in certain Member States where national provisions in respect of contractual liability or liability on the grounds of fault place no such ceiling on compensation, whereas such a ceiling does exist in other Member States. The costs arising from product liability, and consequently the conditions of competition, thus vary from one Member State to another.

Furthermore, this proposal for a directive leaves to individual Member States the formulation of implementing rules for certain aspects of the proposal - eg. the division of responsibility for the compensation to be paid in the case of several liability and the reduction or exclusion of liability in the case of contributory negligence by the injured party (see paragraph 7).

[1] PE 47.936

If Member States are allowed to lay down such implementing provisions, this will undoubtedly lead to divergence in the application and consequent cost to producers of the principle of product liability. The proposal is, therefore, not fully in line with the intended objective of bringing about equal competitive opportunities in the Community.

III. Conclusions

11. (a) The existence of distortions of competition resulting from cost differences arising from different legal and administrative provisions concerning liability for defective products needs to be statistically demonstrated. Only then can this objective be used as an argument for the implementation of the proposed harmonization;

(b) Only on the basis of a detailed cost analysis can an opinion be given on the proposed system. However, no mention is made of costs in the proposal;

(c) The proposed system may generate enormous additional costs for certain products, such as safety appliances, thereby pushing up the price of these products, this increase will ultimately have to be paid by the consumer;

(d) The proposed system of liability is oriented towards mass production, since the liability for defective products is spread over all the non-defective products of the same series. Individual or limited production makes the principle of liability irrespective of fault a heavy burden for firms which produce their goods by craft methods and for small and medium-sized undertakings;

(e) Making the producer liable for development risks pushes the cost of the system up even further. It also has a very adverse effect on innovation activity and, as a result, on the competitive position of European industry;

(f) The equal competitive opportunities which are the objective of this proposal cannot be achieved since, alongside this Community proposal for product liability, national provisions specifying the compensation to be paid would remain in force with the result that damages will still vary from one Member State to another;

(g) In conclusion, unequal competitive opportunities will persist since the Member States would conserve the power to lay down national provisions covering certain aspects of this proposal for a directive.

OPINION OF THE COMMITTEE ON THE ENVIRONMENT, PUBLIC HEALTH AND CONSUMER PROTECTION

Draftsman: Mr SPICER

On 19 October 1976 the Committee on the Environment, Public Health and Consumer Protection appointed Mr Spicer draftsman.

A hearing was held on 14 February 1977 to which interested parties were invited.

The draft opinion was considered at the meetings of 24 November 1976 and 17 March 1977.

At its meeting of 30 March 1977 the committee unanimously adopted the draft opinion less one abstention.

Present: Mr Ajello, chairman, Mr Jahn, Lord Bethell, vice-chairmen; Mr Spicer, draftsman; Mrs Cassanmagnago Cerreti, Mr Didier, Mr Edwards, Mr Evans, Mr Plebe, Lord St. Oswald, Mr Spillecke and Mr Veronesi.

1. Justification for the directive

The aim of the directive is to give equal and adequate protection to consumers throughout the Member States by applying a uniform system of liability for defective products which cause physical or material damage.

1.1. This aim is justified by the fact that, as things stand, citizens of the European Community will not find that they enjoy the same degree of protection in the case of defective products in all member states.

1.2. The directive is particularly important given the fact that technological change and developments in marketing techniques mean that consumers are constantly faced by the introduction of new articles whose producers, reliability and components may be quite unknown to them. The securing of redress in the case of a defective product which causes damage has therefore become more difficult even as higher standards of living have been attained.

1.3. The decisions of the courts in most Member States have recently taken account of the need for effective consumer protection. However, it is unlikely that progressive decisions alone will solve the problem. The courts should be able to base their judgements on clear legal provisions.

1.4. There is also the problem that differences in the legal systems of the Member States with regard to product liability can distort competition. Thus the Commission has chosen Article 100 of the EEC Treaty as the legal basis for its proposals for a directive. As things stand, where the liability is more severe, producers must adjust their prices accordingly in order either to include the compensation of possible damage in the total manufacturing costs of products, or to take out an insurance and pay the corresponding premiums. Free movement of goods within the Common Market is impeded by differences between the laws

governing liability in the various Member States. Purchasers might prefer to concentrate their buying in those countries where they are best protected against damage and financial loss. Manufacturers of end-products concentrate their purchases of semi-finished goods in those countries where producers are exposed to the greatest liability. Although, perhaps, such manoeuvres may be in the consumer's interest, they do not accord with the spirit of a Common Market and need to be eliminated so that products from the various Member States in a particular field compete on the basis of economic criteria only.

1.5. The directive was envisaged in the preliminary programme of the European Economic Community of 14 April 1975 for a consumer protection and information policy. In drawing it up, the Commission has taken account of the studies and other work already carried out by Member States, consumer organisations and international bodies, in particular the Council of Europe and the OECD. In this specific case the Council of Europe has approved, on 20 September 1976, a draft European convention on product liability in regard to personal injury and death. This is open for signature from 27 January 1977. Although the Commission and Council of Europe representatives have collaborated, the two documents are not similar in every respect.

2. The present situation in the Member States

Although the tendency of legal developments in the Member States has been to increase the protection afforded to the victims of defective products, consumers in several Member States still face considerable difficulty in proving liability and securing damage. The directive attempts to remedy this situation mainly by filling in existing gaps in national laws, although in some Member States alterations and improvements in existing laws will be required.

2.1. In France, Belgium and Luxembourg, product liability has become strict, because the fault of the producer is presumed, and he cannot provide a defence by saying that, through lack of knowledge or unforeseen circumstances, he was not liable.

In five Member States, - Germany, the Netherlands, Denmark, the United Kingdom and Ireland - product liability is based on "fault". This is a loose concept, requiring a relationship between the producer and the defect in which the producer has to supply proof that since he could not have foreseen the defect and did not know about it, he is without fault.

In the United Kingdom and Ireland, the situation is complicated by the fact that although liability is based on fault, "negligence" by a producer is a right of action in itself, and a victim has to bring an action against a producer for negligence.

2.2. Reviews or reforms of the law on product liability are currently being undertaken in a number of Member States. In the United Kingdom and in Ireland, Law Commissions are examining the law with a view to preparing reforms. In Denmark a Ministry of Justice working group has been set up in order to study the problem. In the Netherlands a new draft law provides for the reversal of the burden of proof to the advantage of the victim of a defective product; final consideration of this has been postponed until the outcome of European activity is known. In Germany, the reform of product liability has been discussed since 1968 and the law regarding pharmaceutical products has introduced the system embodied in the draft directive. But in Italy no new legislation to protect the consumer is at the moment contemplated, so that the directive could set new standards here as well as pointing the way for reformers in the other Member States.

3. Opinions heard by the Committee

The Committee has held a 'hearing' with representatives of Consumer Organisations, of U.N.I.C.E., and the rapporteur of the Economic and Social Committee.

3.1. Consumer associations in all the Member States are actively pressing for reforms which will introduce the concept of "strict liability" where it does not already exist. The Bureau Européen des Union des Consommateurs (BEUC), while welcoming the directive, is also aware that the Commission has not been able to adopt all the recommendations made on the second draft of the directive by the Consumers Consultative Committee, on which BEUC is represented.

3.2. U.N.I.C.E. (Union des Industries de la Communauté Européenne), which is the European employers' organisation, does not believe that there is sufficient justification for the proposed directive.

In particular UNICE argues that the directive will not do away with the complexity of national laws, but superimpose another liability sphere on top of existing legislation. European Motor Manufacturers have particularly objected to the 10 year time limit in Article 9

and would prefer a limit of 3-5 years.

3.3. UNICE maintains that the directive might lead to the introduction in the EEC of the very high insurance costs at present found in the USA, where a system of strict liability is in operation. However, your rapporteur agrees with the representatives of the Consumer Associations that conditions in the USA differ in important respects, most notably the existence of the "contingency fee" system and the lack of any system of contributory negligence. There is no reason to fear that the directive would bring about a sharp increase in European insurance costs.

3.4. Your rapporteur has been anxious to hear the reservations expressed about the directive by non-consumer interests in addition to the comments put forward by consumer interests, in order that he might be able to present a global view of reactions to it. Ultimately, however, the impact upon industry of such a directive is best assessed by the Economic and Monetary Affairs Committee, whose opinion will be available to Parliament.

4. Recommendations of the Public Health Committee

4.1. Defective Products

The directive applies only to defective products which cause death, personal injury or damage to property other than the defective product itself. The question is whether the directive should also apply to liability for the defective product itself - that is, to provide safeguards for a consumer who buys a product which simply does not work, but does not cause injury or damage. At present, responsibility for compensating for the defectiveness of the product itself is the responsibility of the seller. The logical extension of the present draft directive would be that responsibility for faults in branded goods should be mainly imposed on the manufacturer.

In the view of your rapporteur, to attempt to insert such an amendment into the present directive (presumably in Article 6) would be to "overload" it, and raise issues which are not intended to be dealt with by it. Liability for the defect in a product (as distinct from a fault which causes injury or damage) comes under the laws of sale in the Member States and not under the provisions of laws regarding product liability: any attempt to widen the present directive would therefore lead to legal complications which would probably impede its progress

Nevertheless your rapporteur agrees that there is a need to reform the law to give consumers adequate protection and redress in the case of products which are simply defective.

The Committee therefore calls on the Commission to draw up a directive covering liability for products which are defective but which do not cause physical or material damage.

4.2. The inclusion of immovable property

Article 1 of the directive makes it clear that the strict liability system will apply to damage caused by "an article" - a term which is not further defined. The Explanatory Statement shows that liability extends only to movable property, and states that "special rules exist in all Member States to cover immovable property such as buildings", (p.5).

The draft Council of European Convention is limited to movables in the same way.

However the Consumer Consultative Committee, which is a body advising the Commission, made a strong plea that immovables should be included in the directive. The CCC drew attention particularly to the case of mass-construction houses, which would not fall within the terms of the present directive. One of the aims of the directive is to give consumers effective protection against defective products emanating from large manufacturing companies. It therefore seems logical to extend this protection by introducing a system of strict liability for immovables.

This is clearly a complex question, and might best be solved by including within the scope of the directive liability for damage caused by immovables when this is due to a defect in a movable component.

The Committee therefore asks the Commission to consider amending the directive in this way.

4.3. Defective Services

Another area to which the scope of the directive might be extended is defective services. Again, this was a question raised during the Committee's discussions. Services are not included in the draft

Council of Europe Convention, but the Consumer Consultative Committee asked for them to be included in the directive.

Although superficially attractive, the inclusion of defective services might raise considerable legal problems and again endanger the direct - ive's progress - which all consumer organisations are anxious to see. The whole basis of the present directive is to provide protection for the consumer in a society where mass-production is increasingly the rule. But defective services generally operate on a completely different basis: in many cases, for example that of legal advice, the producer is involved directly with the consumer and not dif- ficult to identify. Further, under the laws in the Member States, a service which is defective generally comes under the law of neg- ligence.

There is a possibility of including those services in the directive which, if defective, are able to cause physical injury and only such injury. Legal advice, for example, would hardly fulfill these conditions.

However, the evidence so far suggests that the directive has a stormy career ahead of it. Since the Public Health Committee does not wish to impede its progress in any way, it feels that to ask for the inclusion of defective services would again 'overload' the directive.

<u>The Committee therefore asks the Commission to give a firm undertaking that it will introduce a directive to cover defective services</u>.

4.4. <u>Pain and suffering</u>

The Commission draft directive restricts liability to death, personal injury and material damage. The Consumer Consultative Committee saw no justification for excluding compensation for pain, suffering and other non-pecuniary loss. The justification for such an omission is presumably that separate provisions exist in national law. But since the directive introduces a new basis of strict product liability, it seems a good opportunity, in the interest of consumers, to widen the types of losses which are recoverable.

<u>The Committee would like to recommend that the directive should include the right of injured parties to fair compensation for any suffering and inconvenience</u>.

4.5. Contributory negligence

The Commission's draft does not deal with the problem of contributory negligence. The draft Council of Europe Convention states (Article 4):

"If the injured person or the person entitled to claim compensation has by his own fault contributed to the damage the compensation may be reduced or disallowed having regard to all the circumstances. The same shall apply if a person for whom the injured person or the person entitled to claim compensation is responsible under national law has contributed to the damage by his fault".

This seems a reasonable safeguard. The question is whether it is necessary to include it in the directive. Judges in all Member States now have the power to evaluate the contributory negligence of the defendent or his agent. Indeed the tendency in the Scandinavian countries outside the Community has been to restrict a producer's defence to gross negligence on the part of the consumer victim: it is possible that Danish law may also take this direction.

It is difficult to see how comprehensive the draft directive is intended to be. Since a number of its provisions are already in force in some Member States, it seems reasonable for it to cover all possible aspects of the problem of consumer liability, and not to appear one-sided by omitting a safeguard which will be important to producers. The directive should however avoid treating slight inadvertency of the victim as contributory negligence; and in cases of personal injury probably only gross negligence or intentional conduct should be taken into account.

The Committee considers that in the interests of clarity the directive should make provision for a reduction of damages where the occurrence of the injuries or damage is partly due to the activities of the injured party or his agent.

4.6. The amount and apportionment of damages

Article 7 of the draft directive sets an upper limit of liability of 25 m.u.a. for all personal injuries caused by identical articles having the same defect, and of 50,000 u.a. for damage to immovable property, and 15,000 u.a. for damage to movable property.

It is not clear what the term "identical" means here. It could apply for example to all articles of a particular series, or to all articles with the same trademark. It is also unclear how damages are to be divided between people who have suffered as a result of a defect in a similar product.

The draft Council of Europe Convention does not state any upper limits, although it does (in Annex 1) give Member States the right to limit the amount of compensation above certain minimum levels.

The fear has been expressed that an upper limit in the directive may force producers to take out insurance with a correspondingly high limit, although a correct evaluation of the risk might have led to a lower upper limit in the insurance policy. This could mean that the price of a product will increase to an extent not justified by the strict liability imposed by the directive on the producer.

Consumer representatives, on the other hand, have pointed out that although the upper limit is high enough for individual damages and damages caused to small groups of persons, the limit would not cover major catastrophes - e.g. air-liner disasters - adequately. They also point out that the removal of an upper limit would not necessarily entail high insurance costs, if each insurance company assesses risks accurately.

The Commission argues that, in effect, a limit of 25 m.u.a. for liability for personal injury is equivalent to an unlimited liability in the single case, per capita. It regards Article 7 as a reasonable compromise.

The rapporteur has great sympathy with the consumer representatives' objections to the upper limit but feels that it may be unrealistic for Parliament to press for its removal. At the same time he is anxious that provision should be made for those few cases where damages will need to exceed the upper limit. He recommends that the Commission should examine the possibility of making provision for the establishment of state or industry contingency funds, sufficient to cater for disasters where damages may be in excess of the upper limit.

The Committee therefore recommends that the exact apportionment of damages be made more explicit and the word 'identical' in Article 7 be defined. It also recommends that member states be required to

make provision, via state or industry funds, for damages in excess of the upper limits stated in the directive.

5. Summary of conclusions

The Public Health Committee :

- approves of the directive, and hopes for its rapid implementation

- calls on the Commission to draw up a directive on defective products which do not cause physical or material damage.

- calls on the Commission to give consideration to the incorporation in the directive of liability for damage caused by immovables when this is due to a defect in a movable component.

- calls on the Commission to draw up a directive on defective services.

- calls on the Commission to include in the directive the right of injured parties to fair compensation for any suffering and inconvenience.

- considers that the directive should deal with the question of contributory negligence.

- recommends that the exact apportionment of damages between injured parties should be clearly stated in Article 7, and that the words 'identical articles' should be clearly defined.

- recommends that member states be required to make provision, via state or industry funds, for damages in excess of the upper limits stated in the directive.

ANNEX I

NOTE BY THE GENERAL SECRETARIAT OF THE
EUROPEAN COMMITTEE OF INSURANCES, PARIS

COSTING IN STRICT LIABILITY - COMMUNITY PROPOSALS

1. As the representative organisation of European insurers, the CEA has followed closely the development of thinking within the European Community on product liability. In effect, the CEA is mandated to speak on behalf of its member associations representing the insurance industry in the nine states of the Community. As such, the position adopted by the CEA represents the consensus view of the insurance industry in the Community.

2. Individual insurers may wish to go further - or not so far - on certain issues but this remains essentially an individual position. What is important is the collective position of European insurers represented within CEA.

3. Such a view may, at times, appear over-cautious. We believe, however, the representatives of an industry with an annual turnover in the region of sixty eight thousand million EUA (premiums gross of reinsurance excluding foreign earnings) are entitled - indeed, are obliged - to exercise caution in certain critical cases involving the future of the Community insurance industry.

4. European insurers believe it is important to stress, at the outset, their common view that, in the event of the introduction of national legislation based on the provisions of the present draft directive (text adopted by the Commission, July 1976), the Community insurance industry, as presently constituted, will in most cases be in a position to provide the necessary coverage and capacity at a price which can be carried by the manufacturer without significant increase in his general production costs.

5. Insurance underwriters do not anticipate, if the directive follows the present draft, the overall increase in insurance costs to be other than insignificant, especially when compared to other major costs of production including wages and salaries, advertising and promotion costs, raw materials, etc. What insurers do anticipate is some increase in cost, and this for a number of reasons.

6. The system of strict liability proposed by the draft directive is intended to facilitate the payment of claims for injury or damage caused by defective products. As such, insurers anticipate an increase in the number of claims made and paid. What remains unknown (and will remain

unknown until legislation is introduced) is the actual extent to which strict liability will affect the frequency and level of product claims and the cost of pursuing and defending actions before the Courts. This means that insurers do not have the means of quantifying any increase under strict liability at the moment.

7. Some manufacturers have expressed the view that - following the introduction of legislation based on the present draft directive - a gap might develop between the amount of insurance the individual manufacturer is able or willing to purchase and the amount of his potential liability under law. Such a view is based on the supposed crisis of affordability and availability in the United States. Insurers reject this view. If such a crisis exists it is not due to strict liability as such. Despite superficial similarities between current products law in the United States and the present Community proposals, there are important practices which are peculiar to the American system and which will not be introduced into the Community by the draft directive. In short, it is not so much strict liability as such but the system within which it operates which has contributed towards the so-called product liability crisis in the States in recent years.

8. Insurance must be seen, in essence, as a mechanism for spreading the losses of the few over the contributions of the many. Fundamental to this system is the individual assessment of risk which seeks to distinguish between the manufacturer with a good claims record and the manufacturer with a poor record - a distinction essential to the preservation of high standards.

9. The individual assessment of each risk is the key to the problem of seeking to quantify the likely increase in insurance costs following the introduction of strict liability. No two risks are the same. The individual insurance price - the premium - is calculated, at least in part, on the basis of the relationship between class experience (the particular trade) and individual experience (the particular insurance user).

10. Insurance underwriting is usually based on past experience. This serves to quantify the volume of premium required to cover future claims projections. Such projections are usually made, subject to government controls, on an individual basis by each insurer based on his existing portfolio and his new business estimates.

11. Community insurers, however, have no experience of the type of strict liability as provided for under the draft directive. United States comparisons are, we believe, invalid for the reasons indicated earlier. Meanwhile, it is too soon to draw any firm conclusions from the one, limited area where a form of strict liability is applied to pharmaceutical products

in the Federal Republic of Germany. Nevertheless, the professional ability of insurers to assess risks is unrivalled and judgement rating tempered by competition should provide a stable insurance basis until the necessary experience has been built up.

12. CEA has always accepted thatinsurers will have to prepare price guidelines as the draft directive moves closer to becoming a reality. At this time, however, this reality still appears some distance away. Meanwhile, hypothetical projections which are not grounded on relatively firm evidence have little value. So far, the CEA has not felt it helpful to prepare such projections.

13. Some consensus is emerging on the subject. A growing number of individual underwriters have been putting forward unofficial estimates which tend to suggest an increase of up to 100%, which, it is suggested, calculated on an average rate currently below one per mille on turnover, would have an insignificant effect on the cost of individual products. There will be exceptions, of course. Some products will be hardly affected (although the more hazardous products already pay substantially higher premiums at present - even here, on present information, it is anticipated that the development risk will generally be insurable).

14. What is important is to keep in mind the need to provide the most favourable terms to the careful producer. The insurance mechanism ensures this possibility. This is not the case with funds, a solution rejected by German legislators when preparing their recent legislation on pharmaceutical products. Funds, moreover, reduce all manufacturers to the same common level and remove individual incentives to product safety improvements.

15. The CEA - allowing for the need for caution mentioned earlier in this note - is not inclined to support the pessimism expressed in some quarters, if only because insurers know that it is in their interests to keep insurance costs to a minimum. This is brought about by competition between insurers in a free insurance market.

If no underwriter can afford to be too optimistic because price-cutting will result in heavy losses, no underwriter can afford to be too pessimistic or he will find himself prices out of the market.

16. Thus, the possible increases in insurance costs are more likely to be in the region suggested by the underwriters mentioned in paragraph 15 than the tenfold or more increases put forward - without the lease convincing evidence - by those who wish to destroy the insurance mechanism and reduce all manufacturers - good or bad - to the same common level to the detriment of the consumer and consumer safety.

ANNEX II

COSTING IN STRICT PRODUCT LIABILITY

ADDITIONAL NOTE BY THE GENERAL SECRETARIAT OF THE EUROPEAN COMMITTEE OF INSURANCES, PARIS

1. In paragraph 13 of Doc. 10.531 (2/79) CEA suggested that the present Community proposals (July 1976) have led a growing number of individual underwriters to forecast an increase of up to 100% on current rates following the introduction of national legislation implementing the present proposals. Some indication of the practical effects of such an increase - even allowing for the hypothetical nature of any such indication - may help to put the matter into clearer perspective.

2. The insurance mechanism alone is capable of retaining the flexibility of individual risk assessment which permits adaptation to individual circumstances and the maintenance of a reasonable balance between individual risks.

3. Funding schemes abandon the flexibility of individual risk assessment in favour of a reduction of all risks to the same common level which effectively reduces any incentive towards improved product safety with adverse effects on both the manufacturer's sense of moral responsibility and his will to reduce insurance costs (since, even if insurance costs are, and are likely to remain, minimal, any insurance economies will improve the competitive position of the individual manufacturer).

4. Individual risk assessment normally requires the fullest information on occupation, production and sales facilities, product control and loss prevention, sales, exports, etc. Any attempt to quantify rates on a Community basis is complicated by such factors as differences in scope of cover from one country to another, the absence of any detailed comparative studies on rating procedures in Member States, the rating of individual risks on a case-by-case basis by individual insurers, etc.

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5. These preliminary remarks are essential to the development of the ideas expressed in paragraph 1 of this additional note.

6. Subject to the above considerations the figures given below give some indication of the premium ranges applicable to limits of indemnity (insurance limits as opposed to legal limits - limits of liability) of, say, between 5 and 7.5 million EUA on products intended for use or consumption in western Europe. The level of premium is, of course, governed by the nature of the

individual product which, compared with other products in any given product sector, may present a much higher or a much lower degree of risk, especially concerning bodily injury.

7. If an average rate was to be applied to the whole range of products, including the most dangerous, in a given sector, this rate would be lower than the actual rate which would be applied to an insured who only produced the most dangerous products in the same range.

8. The geographical destination of the product concerned, even in western Europe, can also give rise to important variations due to differences in law and court decisions. Equally important is the use to which the product is to be put. Again, the rate is strongly influenced by the insured's management and housekeeping and his attitude towards loss prevention.

9. The following rates are expressed per mille on turnover:

- Domestic appliances	0.60 - 3.00
- Electromedical and X-ray appliances	1.00 - 6.00
- Beverages (beer, mineral water, wines, spirits)	0.15 - 0.70
- Burners, fuel oil	0.50 - 2.50
- Bricks, stones, tiles	0.10 - 0.50
- Bicycles	0.15 - 0.90
- Plastics, plastic articles, colours, industrial fats and oils	0.40 - 2.00
- Fertilizers	0.30 - 2.00
- Pharmaceuticals	0.50 - 6.00
- Clocks, watches	0.10 - 1.00
- Textiles for clothes	0.05 - 0.60
- Textiles for industrial use	0.25 - 0.90
- Concrete	0.20 - 2.50
- Construction plant	0.50 - 3.00
- Woodworking	0.15 - 1.50
- Explosives	1.00 -10.00
- Fodder	0.40 - 3.00
- Foodstuffs	0.15 - 3.00
- Footwear, leather goods	0.10 - 0.60
- Furniture	0.10 - 0.60
- Glassware	0.10 - 0.80
- Insecticides	1.00 - 6.00
- Lifts	0.50 - 2.50
- Machines, various	0.50 - 3.00
- Office machines	0.15 - 0.50
- Metal construction	0.60 - 3.00

- Metal products	0.15 - 3.00
- Packaging materials (except canning)	0.10 - 1.20
- Pleasure boats	0.30 - 1.00
- Sports goods	0.10 - 1.00
- Toys	0.30 - 0.75
- Transformers, turbines, generators	0.50 - 3.00
- Motor cars (excluding recall)	1.50 - 3.00
- Firearms	0.30 - 1.00
- Rubber goods (except tyres)	0.20 - 1.00

10. These figures represent no more than a tenuous indication of guide rates for a selected range of products. Quotations (price indications) would normally only be given on receipt of detailed underwriting information. Individual circumstances could well alter dramatically the present indications in the light of a more detailed individual assessment of risk.

11. Insurers believe liability without fault of the producer will encourage greater emphasis on loss prevention. This in itself will serve to encourage the careful producer who invests in loss prevention techniques.