

# European Communities

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## EUROPEAN PARLIAMENT

# Working Documents

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10 August 1978

DOCUMENT 246/78

### 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 W. CALEWAERT

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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 Calawaert 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).

In December 1977, the committee received a working document (PE 51.430) drafted by Mr Masullo, containing comments on the legal basis of the proposed directive; an amendment (PE 51.707/1, by Mr Fletcher-Cooke) dealt with the same subject.

At its meeting of 19 December 1977, the Legal Affairs Committee decided not to consider this amendment until the discussion on the proposed directive, and on amendments pertaining to it, had been concluded.

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 its meetings of 22 June and 5 July 1978, the Legal Affairs Committee considered, in accordance with its earlier decision, the arguments contained in the amendment (PE 51.707/1) by Mr Fletcher-Cooke and those put forward in the document (PE 51.430) by Mr Masullo; at its meeting of 5 July 1978, the Legal Affairs Committee adopted, by 16 votes to 12, the said amendment<sup>1</sup>, the aim of which was to replace the text of paragraphs 1 and 2 of the motion for a resolution embodied in the draft report<sup>2</sup>.

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<sup>1</sup> Slightly amended by its author

<sup>2</sup> See Annex IV

Paragraph 3 of the motion for a resolution contained in the draft report<sup>1</sup> was rejected by 13 votes to 12.

At the same meeting, the Legal Affairs Committee adopted the motion for a resolution, in its amended wording, by 13 votes to 12, and directed its rapporteur to draft the accompanying explanatory statement.

Present: Sir Derek Walker-Smith, chairman; Mr Calewaert, vice-chairman and rapporteur; Mr Ansquer (deputizing for Mr Rivierez), Lord Ardwick, Mr Berkhouwer (deputizing for Mr Geurtsen), Mr Broeks, Mr Croze (deputizing for Mr Pianta), Mr Fletcher-Cooke, Mr Forni, Sir Geoffrey de Freitas, Mr Inchauspé (deputizing for Mr Brosnan), Mr de Gaay Fortman, Mr Jahn (deputizing for Mr Riz), Mr Jakobsen (deputizing for Mr Shaw), Mr Krieg, Mr Lagorce, Mr Lemp (deputizing for Mr Bayerl), Mr H. W. Müller (deputizing for Mr Santer), Mr E. Muller (deputizing for Mr Bangemann), Mr Radoux, Mr Schmidt, Mr Schreiber (deputizing for Mr Zagari), Mr Schwörer, Mr Sieglerschmidt and Mr Verhaegen (deputizing for Mr Scelba).

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In drafting the explanatory statement, the rapporteur has used the arguments advanced in writing by Mr Masullo (see PE 51.430), and orally by Mr Fletcher-Cooke.

Pursuant to Rule 42(2) of the Rules of Procedure, Annex I is a statement of the views of the minority.

Annexes II and III contain the text of two notes (PE 48.128 and PE 49.216 respectively) by the Commission on the applicability of Article 100 as the legal basis for a directive on defective product liability.

At the suggestion of Sir Derek Walker-Smith, chairman of the Legal Affairs Committee, it was decided to annex the original motion for a resolution contained in the draft report by Mr Calewaert, which also incorporates (see PE 54.209) the amendments to the draft directive adopted by the Legal Affairs Committee in the course of its long work (see Annex IV).

The opinions of the Committee on Economic and Monetary Affairs (Annex V) and the Committee on the Environment, Public Health and Consumer Protection<sup>2</sup> (Annex VI) are annexed to this report.

<sup>1</sup> See Annex IV

<sup>2</sup> Pursuant to Rule 44(6) of the Rules of Procedure, a delegation from this committee was invited to take part in several meetings of the Legal Affairs Committee dealing with matters of common concern

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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<sup>1</sup>,
  - having been consulted by the Council pursuant to Article 100 of the EEC Treaty (Doc. 351/76),
  - having regard to the report by the Legal Affairs Committee and the opinions of the Committee on the Environment, Public Health and Consumer Protection and the Committee on Economic and Monetary Affairs (Doc. 246/78 ),
1. While recognizing the need for Community action in the field of approximation of legislation and administrative provisions in accordance with Article 100 of the EEC Treaty, considers that the present directive does not meet the requirements of this article;
  2. Regrets that the Commission has failed to carry out the necessary analysis prior to the elaboration of the directive, in particular in the field of competition and insurance;
  3. Considers that the introduction of a completely new legal system in this field added to the present national systems and containing considerable differences, e.g. as to maximum limitation periods and as to who is liable, will confuse matters for the consumer in a field where, if anything, simplification is needed for him not to be prevented from claiming his rights;
  4. Believes that if any distortion of competition exists in this field, the adoption of the draft directive will necessarily imply distortion of competition between the EEC industries and industries of the EFTA countries which take part in the European free trade area with the EEC States, and that for these reasons Community adhesion to a Council of Europe Convention would be preferable in this field.

<sup>1</sup> Of No. C 241, 14.10.1976, p.9

EXPLANATORY STATEMENTI. INTRODUCTION

1. Many observers have rightly pointed out that the main purpose of the system instituted by the Treaties establishing the European Communities is to regulate economic activities in the European Community with a view to the furtherance of industrial, agricultural and commercial progress; the recent tendency, therefore, on the part of the Community institutions to regard the individual as the end, not the means, of Community activity must be seen as an extremely positive development.

2. One manifestation of this trend is the interest being taken in the protection of the consumer<sup>1</sup>. It was this line of thinking that prompted the Commission of the Communities to submit in September 1976 a proposal (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; this proposal is based upon Article 100 of the Treaty establishing the European Economic Community.

II. THE PROBLEM OF THE LEGAL BASIS<sup>2,3</sup>

3. Before Article 100 can be applied, it is essential that the provisions of the Member States, which it is proposed to harmonize, should 'directly affect the establishment or functioning of the common market'; conversely, the Treaties stipulate that the harmonization of these rules should eliminate the harmful effects caused by disparities between the provisions in question.

4. The Commission of the European Communities relies mainly on the following three arguments to justify its choice of Article 100 as the legal basis for the proposal :

<sup>1</sup> A term which, as the Legal Affairs Committee has pointed out in adopting the opinion (Doc. 114/77, page 40) drafted by Mr Riz on the report from the Commission of the Communities on the Montpellier Symposium on judicial and quasi-judicial means of consumer protection, has come to be used, though improperly, to describe purchasers and users of non-perishable goods as well as users of services

<sup>2</sup> This chapter constitutes the explanatory statement for points 1 and 2 of the motion for a resolution

<sup>3</sup> It will be noted that the conclusions reached by one of the committees requested for an opinion (the Committee on the Environment, Public Health and Consumer Protection) as to the applicability of Article 100 of the Treaty as the legal basis for the proposal (see Annex VI, paragraph 1.4) differ from the views of the Legal Affairs Committee, as set out in this chapter

- (a) 'divergencies between the various national legislations may distort competition in the common market' (first recital);
- (b) 'the free movement of goods within the common market may be influenced by divergencies in laws' (second recital);
- (c) 'the consumer is protected against damage caused to his health and property by a defective product either in differing degrees or in most cases not at all, according to the conditions which govern the liability of the producer under the individual laws of Member States' (third recital).

5. The Legal Affairs Committee notes that two preliminary problems of interpretation now arise.

The first concerns the (actual or potential) influence of national provisions on the functioning of the common market. For a literal interpretation of Article 100 ('... approximation of such provisions ... as directly affect ...') could lead to the conclusion that it is necessary for the influence to be either an existing fact, or present at the time of creation of the Community 'law' whose purpose was to eliminate such effects as were harmful to the functioning of the common market. However, the first ('divergencies ... may distort competition ...') and the second ('the free movement of goods ... may be influenced by divergencies in laws ...') recitals<sup>1</sup> of the proposed directive refer only to a potential influence.

6. The second problem, indissociable from the first, concerns interpretation of the word 'directly' in Article 100.

For the Article to apply, it is essential for there to be an immediate causal link between (the divergencies between) national legislations and the (mal)functioning of the common market, or is it not sufficient for such an influence to be 'appreciable', taking a broad interpretation of the word 'directly'?

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7. It has not proved necessary for the Legal Affairs Committee to settle these questions definitively, for other reasons have emerged in the course of the discussions, creating some doubt as to whether Article 100 of the EEC Treaty is applicable to the proposed directive.

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<sup>1</sup> See above, paragraph 4

8. To explain these reasons systematically, the three first recitals of the explanatory statement of the Commission proposal must be considered in turn (quoted respectively under paragraph 4 (a), (b) and (c) above).

9. The first recital asserts that divergencies between the national legislations may distort competition in the common market. This is a statement which should have been backed up by statistically established facts.

It was for this reason that, at its meetings of 17 February, 26 April and 26 May 1977, the Legal Affairs Committee asked the relevant Commission department to produce figures to demonstrate the existence of the distortions of competition which would have justified issuing a directive based on Article 100<sup>1</sup>. The response to these requests did not come up to the expectations of a number of members of the Legal Affairs Committee. The first communication from the Commission<sup>2</sup> gave no precise figures whatever relating to the present situation, while in the second<sup>3</sup> the only figures provided referred to one sector only in a single Member State, where the Commission was able to show that the introduction in the German Federal Republic of the principle of liability irrespective of fault in the case of damage or loss caused by pharmaceutical products had not led to insupportable economic burdens for industries in this sector (the total burden on the German pharmaceutical industry was calculated to be 0.55% of total turnover<sup>4</sup>).

The response to this was that, in the first place, a single sector in a single Member State could not be regarded as being representative of all production sectors (industrial, craft and agricultural) of all the Member States.

In the second place, it was pointed out that, if we are to go by the Commission's statement that a system of liability irrespective of fault would cost industry only 0.55% more of its annual turnover than a system of liability for fault alone, this shows that the lack of uniformity between Member States' legislations in the matter of liability for defective products does not distort competition to such an extent as to affect the functioning of the common market.

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<sup>1</sup> The Committee on Economic and Monetary Affairs had expressed similar concern: '... The Commission is therefore requested to provide figures to show how the different national legislations give rise to distortions of competition' (opinion of the Committee on Economic and Monetary Affairs, Annex V, paragraph 3, below)

<sup>2</sup> See Annex II

<sup>3</sup> See Annex III

<sup>4</sup> It will be noted in passing that this percentage refers to the pharmaceutical industry as a whole; it does not indicate the difference between the percentage of liability incurred by major industries on the one hand and that incurred by small and medium-sized industries on the other

Finally, it was noted that the Commission was asked for statistics of quite a different kind, namely statistics from which it might be possible to show actual distortions of competition as between undertakings selling their products in different Member States, distortions caused by the varying degree of severity of the laws in the different

Without statistics of this kind it is absolutely impossible to prove that the different legislations of the Member States in the matter of defective products have any direct effect on the functioning of the common market.

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10. Another reason advanced by the Commission to justify the use of Article 100 as the legal basis for the proposal for a directive may be found in the second recital: 'the free movement of goods within the common market may be influenced by divergencies in laws' (see para. 4(b)). Here it was noted that the danger of adverse effects referred to was not explained in the explanatory memorandum accompanying the proposal for a directive. It is hard to understand this explanatory memorandum, especially when one considers that Title I of the EEC Treaty (Articles 9-37), which deals with this very matter of the free movement of goods, contains provisions governing the elimination of customs duties between the Member States, the setting up of the common customs tariff and the elimination of quantitative restrictions between the Member States and all measures having equivalent effect. It is impossible to see, therefore, how the different legislative provisions of the Member States on liability for damages caused by defective products could have the slightest influence on the free movement of goods within the common market.

11. The Commission probably intends the phrase 'free movement of goods' to be taken in a non-technical sense; for the second recital of the proposal for a directive continues as follows:

'... decisions as to where goods are sold should be based on economic and not legal considerations'.

Apart from such obvious points as that economic and legal considerations are generally difficult to distinguish and that, in any State governed by the rule of law, economic choices will always be influenced anyway by legal provisions, it is impossible to accept the Commission's interpretation of the expression 'free movement of goods', which, as we have seen, has a highly technical meaning and scope in the system set up by the Treaty.

12. With regard to the third recital<sup>1</sup>, it was pointed out that the different standards for consumer protection (which, from the ethical and legal point of view, should be the main objective of all legal provisions on this matter) did not seem likely to directly affect the functioning of the common market, particularly in view of the fact that the Treaties contain no express provisions on consumer protection<sup>2</sup>.

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13. Another criticism formulated by the Legal Affairs Committee concerns the legal basis of the proposed directive.

It was noted that the aim of the proposal is not to harmonize the national legislations, in the sense of seeking out their common elements and taking them as the basis for Community legislation. On the contrary, the aim of the proposed directive is to institute a system of liability which would be more onerous than that at present in force in any of the Member States.

The Legal Affairs Committee therefore concluded that the aim of the proposed directive was not one of harmonizing the national legislations within the meaning laid down in the Treaty.

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14. For all these reasons, the Legal Affairs Committee feels that Article 100 of the Treaty does not constitute a valid legal basis for the proposed directive. If it were to be adopted by the Council, some members of the committee feel that it might well be annulled by the Court of Justice of the European Communities, in particular in application of Article 173 of the EEC Treaty.

### III. THE PROPOSED DIRECTIVE AND ITS AIMS (NOTABLY PROTECTION OF THE CONSUMER)<sup>3</sup>

15. The Legal Affairs Committee in any case felt that the proposed directive was inadequate to attain its aims, which the committee shares, for if it were adopted the result would not be to eliminate divergencies already existing in the different Member States in respect of producer liability and consumer protection.

<sup>1</sup> See paragraph 4(c) above

<sup>2</sup> A deficiency unlikely to be remedied by the declaration of intent formulated by the Council of Ministers (Preliminary programme of the European Economic Community for a consumer protection and information policy, OJ No. C 92, 25.4.1975)

<sup>3</sup> This chapter constitutes the explanatory statement for paragraph 3 of the motion for a resolution

16. The Commission's proposal in fact envisages the introduction of a system which would not replace the national legislations in this area, but would be superimposed upon them; this fact is implicit inter alia in the nature of the legal instrument selected (a directive), which is only binding on the Member States 'as to the result', leaving to the national authorities 'the choice of form and method'<sup>1</sup> with which the result is to be attained.

17. For this reason, the matter would be governed by two different systems of legal standards, which would create confusion for the consumer at national level and moreover would not eradicate the existing divergencies in the extent of consumer protection in the different Member States.

#### IV. THE PROPOSED DIRECTIVE AND EUROPEAN INDUSTRY<sup>2,3</sup>

18. Moreover, in the view of the Legal Affairs Committee, the establishment of a system of producer liability for defective products, such as is described in the proposed directive, would involve industry in the Member States in heavy costs (of various kinds).

As the Commission states in its explanatory memorandum accompanying the proposed directive<sup>3</sup>, these costs would be added to the cost of the articles produced<sup>4</sup>, which would thus lose their competitiveness - in relation to similar products originating in other countries - on non-Community markets<sup>5</sup>.

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<sup>1</sup> See Article 189 of the EEC Treaty

<sup>2</sup> This chapter constitutes the explanatory statement for paragraph 4 of the motion for a resolution

<sup>3</sup> The arguments contained in this chapter are developed in particular in the opinion of the Committee on Economic and Monetary Affairs (see Annex V, paragraphs 6-11)

<sup>4</sup> See Doc. 351/76, p.4 (in Article 1a) of the explanatory memorandum: '... only the principle of liability irrespective of fault can lead to a universally acceptable solution, whereby the cost of the damage is divided among a large number of consumers ...'

<sup>5</sup> Which shows that the proposed system is confined to dividing (among all consumers) the damage caused by defective products (to some of them)

MINORITY OPINION

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- A. With regard to paragraphs 1 and 2 of the motion for a resolution, a minority<sup>1</sup> of the Legal Affairs Committee felt that Article 100 did constitute a valid legal basis for the proposed directive, and that the Commission had performed all the necessary analytical work for the proposed directive to be drawn up, in particular in respect of competition and insurance. These views were based mainly on the arguments contained in the two Notes from the Commission which are reproduced in Annexes II and III.
- B. The minority<sup>1</sup> of the committee made plain its disagreement with paragraph 3 of the motion for a resolution, taking the view that the adoption of the proposed directive would have a beneficial effect for the consumer.
- C. The minority<sup>1</sup> of the Legal Affairs Committee stated its opposition to paragraph 4 of the motion for a resolution, taking the view that the adoption of the proposed directive would not place industries in Community countries at an appreciable disadvantage.

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<sup>1</sup> See page 4, second indent

Note by the Commission on evidence  
on the applicability of Article 100 as the basis for the approximation of  
laws concerning liability for defective products

Article 100 provides for the 'approximation of such provisions laid down by law, regulation or administrative action in the Member States, as directly affect the establishment or functioning of the common market'.

One way in which the common market can be affected by such provisions - many others could be enumerated - is in the distortion of competition by the differing regulations which control the economic activity of competing enterprises or impose on them unequal burdens. The most obvious example of this is fiscal law. The 'institution of a system ensuring that competition in the common market is not distorted' is one of the activities of the Community (Article 3 f) by means of which it is intended to fulfil its aims as set out in Article 2.

Among the provisions affecting competing enterprises in differing ways are those on liability. These include regulations to determine whether a manufacturer must accept liability for any consequences arising from defective products which he has produced. If he is liable for such consequences, as is the case in France, Belgium and Luxembourg, and to some extent in the United Kingdom, he must make provision for the event of a claim. He can do this either by creating reserve capital (self-insurance) or by entering into an insurance contract with an insurance company (outside insurance). The creation of reserve capital deprives him of production investment; if he enters into an insurance contract he is obliged to pay the premiums. In either case the additional expenditure increases his production costs, to which must be added the other cost components (materials, remuneration, tax, advertising). Production costs must be covered by prices; thus an increase in production costs caused by expenditure as outlined above, to cover the risk of a claim, works through to higher prices.

Where the producer is not liable, as e.g. in Italy, these additional cost components do not arise. He is therefore in a position to manufacture and market his products more cheaply.

As a result of the differing legal basis, the producer who is not liable is in a better position to compete than the one who must accept liability. Competitive positions whose inequality is founded on differing legal standards are at variance with the aim of a Community system of undistorted competition. They must be eliminated through approximation of the legal standards on which they are based.

Note by the Commission  
on evidence on the applicability of Article 100 as the legal basis for  
a directive on defective product liability

Mr. Ficker

"Following your invitation, I should like to make some further remarks in addition to the paper (PE 48.128) which I prepared for your committee and a copy of which you all have received. As I pointed out in this document, in the second paragraph, and I would like to start with this, one way in which the common market can be affected by such provisions is through the distortion of competition. There are many others. I would like to make it clear that it is the opinion of the Commission that distortion of competition is only one of the problems within the common market; there are others. We stated clearly in the 'considérants' of our proposal and again in the Explanatory Memorandum that in three respects we consider that Article 100 is applicable: first, distortion of competition; second, the free movement of goods; and third, the consumer protection aspect.

I have been asked to say some words about distortion of competition; that means only the first aspect. From the very beginning of our work we were in close contact with the representatives of European industry on a European level, UNICE and the Permanent Conferences of the Chambers of Commerce, and we, as lawyers, have to rely primarily on their judgement and on their considerations. When we contacted UNICE early in 1975 we received a statement saying that UNICE "supports the attempt of the Commission aimed at harmonising the laws of the Member States relating to product liability". And it states expressly, I quote: "Furthermore, the differences between the laws of the Member States can even lead to distortion of competition." Second, we received a letter from the Permanent Conferences of Chambers of Commerce and Industry addressed to Mr. Jenkins (the same letter was addressed to the President of the Council, Mr. Owen) and I shall read the introduction in the English version, which states: "The Permanent Conference considers that the harmonisation of the laws of the Member States of the European Communities concerning product liability is necessary for several reasons: first, the differences existing between the national laws lead, because of the disparity in the financial burden, to distortion of competition". We have to rely on these statements because the precise aim of our permanent contacts with industry is to know their opinion on all the matters we are considering and primarily on the question of the legal basis.

There are other important statements which I think are of the greatest interest to this committee. There was an oral question by six members of the Christian-Democratic Union's parliamentary group concerning the draft directive. The question was as follows: "Does the Federal government consider the proposed ruling in the draft directive to be in accordance with Article 100 and 101 of the Treaty establishing the European Economic Community, if yes, for what reason?" The answer given was: "In the opinion of the Federal government these conditions are fulfilled in the case of the legal provisions relating to product liability. The extent of their liability for defects in products is of great importance for the competitive position of an enterprise. Basic differences in the laws relating to product liability in the individual Member States lead to advantages and disadvantages in competition and influence the choice of the place of business of an enterprise."

And now turning to the final point, I would very much like to give you exact figures which would provide the best evidence. These figures, however, are in the hands of industry and you are well aware of the fact that industry is not very keen to have this directive. So to give you exact figures is a very hard task, but I have tried to do my best and I am in fact able to present you with exact figures. After hard research we have found a very good concrete example in one branch of industry of the change-over from the "fault" liability principle to the strict liability principle. This is in the new German Act on pharmaceutical products, introduced last year and which will enter into force on 1 January 1978. Here, in Chapter 16, you will find a provision stating that the producer of a defective pharmaceutical product should be strictly liable, but this liability is limited to 200,000,000 D.M. as a global limitation and 500,000 D.M. per capita. Now, what is going to be the cost of the insurance? The German pharmaceutical industry has to be prepared for this by 1st January next year. There are two "layers". The first "layer" is from 0 - 10,000,000 D.M. and here the premiums asked for are 0.1% of the turnover. And the second "layer" from 10,000,000 - 200,000,000 D.M. is 0.45% so that the total charge of industry is 0.55% of the turnover. The turnover of the German pharmaceutical industry last year was approximately ten billion D.M., 0.55% of this sum is 55,000,000 D.M. as premium. I think we all agree that we have in France, Belgium and Luxembourg, and, as far as pharmaceutical products are concerned, also in Germany next year, a strict liability system. In Italy, on the contrary, we have nothing like a strict liability system. If a branch of industry has to pay 55,000,000 D.M. insurance premiums a year, this cannot be regarded as "quantité négligeable" even if the turnover is great.

I hope that with these figures I have answered your questions. Let me again emphasize - distortion of competition is only one of the points. There are others: free circulation of goods, and the consumer protection aspect"

ORIGINAL DRAFT OF THE MOTION FOR A RESOLUTION

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The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council<sup>1</sup>,
  - having been consulted by the Council pursuant to Article 100 of the EEC Treaty (Doc. 351/76),
  - having regard to the report by the Legal Affairs Committee and the opinions of the Committee on the Environment, Public Health and Consumer Protection and the Committee on Economic and Monetary Affairs (Doc.            ),
1. Welcomes the proposed directive as one of the necessary preconditions for the achievement of fair competition, free movement of goods and consumer protection within the Community;
  2. Requests the Commission to submit to Parliament by 31 March 1979 a proposal for a directive concerning liability for damages arising out of defective services;
  3. Requests the Commission to adopt the following amendments in its proposal pursuant to Article 149, second paragraph, of the EEC Treaty.

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<sup>1</sup>OJ No. C 241, 14.10.1976, p. 9

- Preamble and recitals : unchanged
- Articles 1, 2 and 3 : unchanged<sup>1</sup>
- Article 4 : Having regard to all the circumstances, including presentation, a product is defective when it does not provide for persons or property the safety which a person is entitled to expect.<sup>2</sup>

- 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 liability of the producer shall be reduced or cancelled if the injured person contributed to the damage by his own negligence.<sup>3</sup>

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<sup>1</sup> Meetings of 19 and 20 December 1977 and 23 and 24 January 1978

<sup>2</sup> Meetings of 20 February and 22 June 1978

<sup>3</sup> Meeting of 27 April 1978

- Article 6 :

For the purpose of Article 1 'damage' means

- (a) death or personal injuries;
- (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 acquired 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.

Damages for pain and suffering, and compensation for non-material damage, shall be awarded in accordance with the legal provisions of the Member States.<sup>1</sup>

- Article 7 :

Acting by a qualified majority on a proposal from the Commission, the Council may fix a ceiling for the total liability of the producer provided for in this Directive for all personal injuries caused by identical articles having the same defect. In the first instance this ceiling shall be fixed at 25 million European units of account (EUA).

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<sup>1</sup> Meeting of 27 April 1978

The liability of the producer provided for by this Directive in respect of damage to property shall be limited

- in the case of movable property to 15,000 EUA and
- in the case of immovable property to 50,000 EUA.

The European unit of account (EUA) is as defined by Commission Decision No. 3289/75 /ECSC of 18 December 1975.

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.

The Council shall, on the basis of a report from the Commission, examine every three years the amounts specified in this Article. If necessary, the Council, acting by a qualified majority on a proposal from the Commission, shall revise or abolish the ceiling specified in the first paragraph or revise the ceilings specified in the second paragraph, having regard to economic and monetary movement in the Community.<sup>1</sup>

- Article 8 : unchanged<sup>2</sup>
- Article 9 : The liability of a producer shall be extinguished upon the expiry of ten years from the date on which the defective product was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.<sup>2</sup>
- Articles 10 to 15 : unchanged<sup>3</sup>

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<sup>1</sup> Meeting of 22 June 1978

<sup>2</sup> Meeting of 22 and 23 May 1978

<sup>3</sup> Meeting of 22 and 23 May 1978 for Articles 10, 11, 13, 14 and 15;  
meeting of 22 and 23 June 1978 for Article 12

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.

6. 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<sup>1</sup>. In most cases the claim is finally rejected,

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<sup>1</sup> 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<sup>1</sup>, 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'Connell 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. The consequences for certain branches of industry - and the definition of contributory negligence

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

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<sup>1</sup> 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<sup>1</sup> 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,

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<sup>1</sup> 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<sup>1</sup>, 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).

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<sup>1</sup> 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 Unions 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 directive'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 difficult to identify. Further, under the laws in the Member States, a service which is defective generally comes under the law of negligence.

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.

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

#### 4.4. Pain and suffering

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.

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

#### 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 defendant 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.