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Proposal for a Council Directive
relating to the approximation of the laws,
regulations and administrative provisions of
the Member States concerning liability
for defective products

(Presented by the Commission to the Council on 9 September 1976)

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Proposal for a Directive

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The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas the approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergencies may distort competition in the common market; whereas rules on liability which vary in severity lead to differing costs for industry in the various Member States and in particular for producers in different Member States who are in competition with one another;

Whereas approximation is also necessary because the free movement of goods within the common market may be influenced by divergencies in laws; whereas decisions as to where goods are sold should be based on economic and not legal considerations;

Whereas, lastly, approximation is necessary because 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; whereas to this extent therefore a common market for consumers does not as yet exist;

Whereas an equal and adequate protection of the consumer can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage; whereas any other type of liability imposes on the injured party almost insurmountable difficulties of proof or does not cover the important causes of damage;

Whereas liability on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure

which he incurs to cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects;

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;

Whereas liability should extend only to moveables; whereas in the interest of the consumer it nevertheless should cover all types of moveables, including therefore agricultural produce and craft products; whereas it should also apply to moveables which are used in the construction of buildings or are installed in buildings;

Whereas the protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product or component part or any raw material supplied by them was defective; whereas for the same reason liability should extend to persons who market a product bearing their name, trademark or other distinguishing feature, to dealers who do not reveal the identity of producers known only to them, and to importers of products manufactured outside the European Community;

Whereas where several persons are liable, the protection of the consumer requires that the injured person should be able to sue each one for full compensation for the damage, but any right of recourse enjoyed in certain circumstances against other producers by the person paying such compensation shall be governed by the laws of the individual Member States;

Whereas to protect the person and property of the consumer, it is necessary, in determining the defectiveness of a product, to concentrate not on the fact that it is unfit for use but on the fact that it is unsafe; whereas this can only be a question of safety which objectively one is entitled to expect;

Whereas the producer is not liable where the defective product was put into circulation against his will or where it became defective only after he had put it into circulation and accordingly the defect did not originate in the production process; the presumption nevertheless is to the contrary unless he furnishes proof as to the exonerating circumstances;

Whereas in order to protect both the health and the private property of the consumer, damage to property is included as damage for which compensation is payable in addition to compensation for death and personal injury; whereas compensation for damage to property should nevertheless be limited to goods which are not used for commercial purposes;

Whereas compensation for damage caused in the business sector remains to be governed by the laws of the individual States;

Whereas the assessment of whether there exists a causal connection between the defect and the damage in any particular case is left to the law of each Member State;

Whereas since the liability of the producer is made independent of fault, it is necessary to limit the amount of liability; whereas unlimited liability means that the risk of damage cannot be calculated and can be insured against only at high cost;

Whereas since the possible extent of damage usually differs according to whether it is personal injury or damage to property, different limits should be imposed on the amount of liability; whereas in the case of personal injury the need for the damage to be calculable is met where an overall limit to liability is provided for; whereas the stipulated limit of 25 million European units of account covers most of the mass claims and provides in individual cases, which in practice are the most important, for unlimited liability; whereas in the case of the extremely rare mass claims which together exceed this sum and may therefore be classed as major disasters, there might be under certain circumstances assistance from the public;

Whereas in the much more frequent cases of damage to property, however, it is appropriate to provide for a limitation of liability in any particu-

lar case, since only through such a limitation can the liability of the producer be calculated; whereas the maximum amount is based on an estimated average of private assets in a typical case; whereas since this private property includes moveable and immoveable property, although the two are usually by the nature of things of different value, different amounts of liability should be provided for;

Whereas the limitation of compensation for damage to property, to damage to or destruction of private assets, avoids the danger that this liability becomes limitless; whereas it is therefore not necessary to provide for an overall limit in addition to the limits to liability in individual cases;

Whereas by Decision 3289/75/ECSC of 18 December 1975¹ the Commission, with the assent of the Council, defined a European unit of account which reflects the average variation in value of the currencies of the Member States of the Community;

Whereas the movement recorded in the economic and monetary situation in the Community justifies a periodical review of the ceilings fixed by the directive;

Whereas a uniform period of limitation for the bringing of action for compensation in respect of the damage caused is in the interest both of consumers and of industry; it appeared appropriate to provide for a three year period;

Whereas since products age in the course of time, higher safety standards are developed and the state of science and technology progresses, it would be unreasonable to make the producer liable for an unlimited period for the defectiveness of his products; whereas therefore the liability should be limited to a reasonable length of time; whereas this period of time cannot be restricted or interrupted under laws of the Member States, whereas this is without prejudice to claims pending at law;

¹ OJ L 327 of 19.12.1975. Also the Council Decision of 21.4.1975 on the definition and conversion of the European unit of account used for expressing the amounts of aid mentioned in Article 42 of the ACP-EEC Convention of Lomé, OJ L 104 of 24.4.1975.

Whereas to achieve balanced and adequate protection of consumers no derogation as regards the liability of the producer should be permitted;

Whereas under the laws of the Member States an injured party may have a claim for damages based on grounds other than those provided for in this directive; whereas since these provisions also serve to attain the objective of an adequate protection of consumers, they remain unaffected;

Whereas since liability for nuclear damage is already subject in all Member States to adequate special rules, it has been possible to exclude damage of this type from the scope of the directive,

Has adopted this Directive:

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 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.

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.

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 producer or of the person who supplied him with the article.

Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer.

Article 3

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

Article 4

A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.

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.

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 for the purpose of his trade, business or profession.

Article 7

The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect shall be limited to 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 moveable 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 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 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.

Article 8

A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this directive. The limitation period shall begin to run on the day the injured person became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

The laws of Member States regulating suspension or interruption of the period shall not be affected by this directive.

Article 9

The liability of a 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.

Article 10

Liability as provided for in this directive may not be excluded or limited.

Article 11

Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this directive shall not be affected.

Article 12

This directive does not apply to injury or damage arising from nuclear accidents.

Article 13

Member States shall bring into force the provisions necessary to comply with this directive within eighteen months and shall forthwith inform the Commission thereof.

Article 14

Member States shall communicate to the Commission the text of the main provisions of internal law which they subsequently adopt in the field covered by this directive.

Article 15

This directive is addressed to the Member States.

Explanatory memorandum

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1. Defective products can lead to extensive personal injuries to, or even the death of, anyone using or consuming the product. They may cause damage to property and that damage may be seriously detrimental to economic interests. The legal position of the injured person varies under the legal systems of the Member States. Whereas some laws provide for compensation in respect of this damage, in so far as they impose liability on the person who produced the defective product, even where fault does not exist or cannot be proved, others require the injured person to prove fault on the part of the producer. It is extremely difficult or even impossible to provide this proof. Under these laws, the injured person then has to bear the damage alone. He is unprotected in such a case.

These divergences in laws directly affect the establishment or functioning of the common market in different ways, and must therefore be removed.¹

They may distort competition on the common market. Liability rules imposed on producers of defective products which vary in strictness lead to differences in costs for the economies of the various Member States and in particular for producers in various Member States who are in competition with each other.

Where a producer is liable irrespective of fault, the damage suffered by the user of the defective article is passed on to him. The compensation paid forms part of the general production costs of the product. This increase in costs is reflected in the pricing. The damage is thus, from an economic point of view, spread over all the products which are free from defects. Before any claims are made, the producer will make allowance for possible compensation payments, and form a reserve or attempt to cover himself by effecting insurance. Where, however, the producer is liable only where he is guilty of fault to be proved by the injured person the same costs do not exist. The difficulty or indeed impossibility of supplying proof usually safeguards the producer from claims.

These differences in costs lead to differing situations with regard to competition. The existence of equal conditions of competition for all producers in the Community is a precondition for the establishment and functioning of a common market. Differences in costs leading to unequal conditions of competition must be removed by approximation of the differing liability provisions.

Differences in laws can also affect the free movement of goods within the Community.

Under the laws of the individual Member States the liability of the producer is usually governed by the law of the State in which the damage has arisen; therefore, the producer's decision as to the Member State in which to sell could be influenced by, amongst other factors, the liability laws of the Member States. Economic decisions should however be based on economic, and not legal considerations.

As a result of the differences in laws mentioned above the

person and personal property of the consumer are protected to varying degrees within the Community.

Where the injured person has to prove that the producer was at fault in respect of the defect in the product causing the damage as is the case under the traditional laws in the majority of the Member States, he is in practice in most cases without protection. As an individual, he will in most cases not succeed in discharging this burden of proof in relation to large manufacturing companies, because he has normally no access to their production processes. Even a rebuttable presumption of fault on the part of the producer, as arises under the laws of some Member States, does not lead to adequate protection of the injured person, since in most cases of damage, the defects cannot, in spite of every precaution, be detected, so that the producer can rebut the presumption of his fault by proof that he has taken every precaution and therefore avoid liability.

Where liability of the producer is based simply on the fact that the damage has been caused by a defect although no fault on his part is involved as is the case in other Member States, then the loss or damage suffered by the consumer is passed on to the producer. The consumer in these Member States is thus in a much better position than his counterpart in the other Member States. A differing degree of protection of consumers as a result of differences in the laws of individual States is however not compatible with a common market for all consumers. For these reasons, the Council, in its Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy² includes the introduction of adequate and equal protection for all consumers among those priorities which should be achieved as soon as possible.

Article 1

Principle of liability for defective products

2. Article 1 lays down the principle of liability irrespective of fault. The fact that this liability is not based on fault is made clear in the final clause of paragraph 1. The liability is that of the producer. 'Producer' is defined in Article 2.

Only a liability of this type leads to an adequate protection of the consumer, since he is freed from the burden of proving fault on the part of the producer and also need not fear that he will have to bear his damage alone because the producer can prove that there was no fault.

Liability irrespective of fault does not burden the producer to an unjustified extent. Normally he can divide the costs of damage passed on to him as a result of liability being made independent of fault among all users or consumers of products free of defects from the same range, or of his production as

¹ Article 100 of the EEC Treaty.

² OJ C 92 of 25.4.1975, item 15(a)(ii), p. 5; items 26 and 27, p. 7.

a whole, by including the expense incurred (payment of damages or payment of insurance premiums) in his general production costs and in his pricing of the goods. Thus all consumers bear the costs of the damage to a reasonable extent.

Any other type of liability would in the overwhelming majority of cases leave the injured person to bear the damage. By this means, he receives only a completely inadequate protection against the risks arising from defective products. Paragraph 2 of Article 1, makes it clear that the producer is also liable in respect of damage even when nobody could have recognized the injurious defect, because the product, according to the state of science and technology at the time when the producer put it into circulation, could be considered as free from defects. Later scientific and technical knowledge sometimes makes it possible only at a later date to realize that a product considered to be harmless is in reality dangerous (development risks). If these extremely rare cases of damage were to be excluded from the producer's liability, the consumer would have to bear the risk of unknown defects. Here also only the principle of liability irrespective of fault can lead to a universally acceptable solution, whereby the costs of the damage is divided among a large number of consumers by the producer. For this reason development risks had to be included.

This decision, however, makes it necessary to limit the period of liability, because liability for an unlimited period would place an unreasonable burden on the producer in view of the constant development of science and technology. Paragraph 2 of Article 1 must be therefore considered in conjunction with Article 9, which provides for the extinction of liability after ten years. If after this period of ten years, it is discovered that an apparently harmless product used widely for all these years has given rise to damage, then this is comparable to an unavoidable accident, the risk of which has to be borne by everyone as part of the general hazards of life and for which no one else need be answerable.

3. Liability extends only to moveable property. Special rules exist in all Member States to cover defective immovable property such as buildings. Where, however, moveable 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.

No distinction should be made between industrial and craft products. Although there is perhaps a smaller incidence of defects and therefore less risk of damage with the latter, since they are subjected to continuous supervision by the craftsman during the production process, adequate consumer protection requires here also that the producer be made liable.

Article 1 also includes agricultural products, irrespective of whether they have undergone processing or are consumed in their natural state. The consumer has to be protected also against the dangers arising from these products.

4. The producer is liable to anyone who suffers damage from the defective product. Whether or not the injured person was the owner of the object is unimportant. It is even irrelevant whether the injured party was using the product when the damage arose or merely happened to be standing near the user. The wording of the Article covers these persons.

5. The injured person has to affirm and to prove the facts giving rise to liability specified in Article 1.

6. Liability based on Article 1 is that of the producer of the defective product. Dealers have not been included among those persons against whom claims may be brought, in so far as they do not come under the exceptions specified in Article 2. Liability on the part of dealers in defective products, of the type provided for in the directive, would indeed make it easier for the injured consumer to claim his rights. This would however be achieved at a high cost, since every dealer would have to insure himself against claims even in respect of products which are almost completely free of risk. This would lead to a sharp increase in the price of the products, without the protection of the consumer being increased otherwise than by facilitating proceedings. Moreover, the liability of the dealer would be in any event only an intermediate liability, since he in turn would claim against his suppliers and back to the producer. Finally, there is no reason to make the dealer liable since in the overwhelming majority of cases he passes on the purchased product in unchanged form, and therefore has no opportunity to affect the quality of the goods. Only the producer is capable of this. The directive proceeds from the presumption (Article 5) that the defect must have arisen in the producer's production process. Merely to protect the good name of his product the producer will do everything to prevent defects by carefully organizing his production. None of these considerations apply to the dealer. It was therefore considered advisable to concentrate liability for defective products on the producer.

Article 2

Definition of persons against whom claims may be brought

7. Article 2 defines the meaning of the term 'producer'. It covers all persons who were involved on their own responsibility in the process of producing the article. It is obvious that where there are several producers of component parts of an article, only those whose contribution was defective and therefore made the end product defective are liable. It was considered inopportune to concentrate liability on the producer of the final product as used by the consumer. It would have been easy to evade such exclusive liability. Moreover, it is more just to include in the liability irrespective of fault, the component producer in whose production stage the defect arose. The protection of the consumer is increased if all those involved in the production process are liable. This is particu-

larly true where the producer of the final product is only a small undertaking while the supplier of the component is a large undertaking. Since the risks arising from component parts are easier to calculate if the insurer knows the component producer, but become incalculable if only the producer of the final product is liable (a fact which is reflected in higher premiums), such a multiplication of liabilities also does not lead to a superfluous and expensive multiple insuring of the same risk.

8. 'Producer' includes any person who, even if he did not himself manufacture the defective article, represents himself as its producer by putting his distinguishing feature on the article. This provision is intended to cover primarily those undertakings, such as mail order firms, which have products, especially articles for mass consumption made by unspecified undertakings in accordance with precise instructions and sell them under their own name. This close economic link between the actual producer and the bulk buyer who represents himself to the public as the sole producer must result in liability on the part of the dealer in this case. There would be inadequate protection of the injured consumer if the dealer could refer him to the producer who is unknown and in many cases may hardly be worth suing.

9. The same applies where a product is sold anonymously in the sense that the producer cannot be identified from the particulars accompanying the product. In this case there is a substitute liability of each supplier in order to compel him to reveal the actual circumstances, in particular the identity of the producer. Such a rule protects the consumer against anonymous products and provides an incentive for the marking of products.

10. 'Producer' finally includes any person who imports into the European Community products from non-member countries. This liability also aids consumer protection, since proceedings in any non-member country usually present the injured person with insurmountable difficulties. Such a liability, which however in contrast to the case in the second paragraph does not lapse where the producer is known and can be sued, should also be required of the importer. He can protect himself against this liability by means of contractual terms at the time when he agrees to buy the goods from his supplier.

11. Within the European Community it is neither necessary nor desirable to provide for liability of other links in the chain of distribution. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968,¹ which has been in force between the six original Member States since 1 February 1973 and will apply in the three new Member States in the near future, gives adequate opportunity to claim against the producer even in a Member State other than that in which the injured person is resident. Under this Convention, the injured person can indeed sue the producer in the court in whose jurisdiction the

tortious act occurred,² which is often the place where the injured person is resident. A judgment in his favour can then be enforced in the Member State in which the producer is established.³

Article 3

Joint and several liability

12. The joint and several liability, provided for in Article 3, of all producers liable under Articles 1 and 2 gives the injured person the opportunity of claiming against that person in the production chain who because of his economic position is most able to pay compensation for the damage. He is also freed from the need to initiate proceedings against all producers to obtain from each the proportion of damages which corresponds to his share in causing the damage.

Claims for contribution by the person who paid the damages in full against those persons who are jointly and severally liable with him are governed by the laws of the individual Member State. There was no reason to include these provisions in the scope of the directive. The same is true in respect of whether and to what extent a person who under the principles of the directive is solely liable to the injured person can for his part have recourse to his suppliers.

Article 4

Definition of defectiveness

13. Since the directive is intended to protect the consumer's person and personal property not used for business purposes, the definition of defectiveness is based on the safety of the product. It is therefore irrelevant whether a product is defective in the sense that it cannot be used for its intended purpose. Such a concept of defectiveness belongs to the law of sale. A liability which applies in respect of all persons suffering damage from the defective article and the aim of which is to protect the rights of the consumer can be based only on lack of safety. It follows that it is not possible to make a distinction between persons and property and to apply in the case of damage to property a different concept of defectiveness from that applied in the case of personal injury. There is a perfectly legitimate interest on the part of the user or consumer of a product that it should not cause damage to his personal property, i.e. that it should also be safe in relation to these objects. It would be too narrow to restrict the concept of safety to the integrity of the person.

The measure of safety an article must provide in order not to be considered defective must be judged according to objective

¹ OJ L 299 of 31.12.1972.

² Article 5(3).

³ Article 31 *et seq.*

criteria on the basis of the circumstances in each individual case. Such a decision can be made only by the court. It is impossible to determine in advance for all conceivable products the measure of safety that the whole range of consumers is entitled to expect. The producer is liable in respect of the risk of damage arising from the particular subjective tendency of a person to suffer injury, such as allergies to medicinal products which are objectively harmless, only where he has failed to point out such generally known risks in presenting his product, in particular in the instructions for use. This decision however also depends on the special circumstances of the individual case, which have to be assessed by the court.

An article does not however become defective merely because it wears out through use. A person who uses a worn product usually runs a higher risk than someone who uses a brand new product. The former is not entitled to expect the same degree of safety as the latter. It is clear from Article 5 that the article must be defective at the time the producer puts it into circulation. This is presumed, but the presumption is rebuttable. Where articles have been used over a long period of time, the court will pay particular attention to this circumstance.

The same applies where safety regulations are tightened up after a product has been put into circulation, at which time it met the existing requirements. In such a case there is in principle no obligation on the part of the producer to withdraw all products. Anyone using products which do not meet more recent safety requirements does so at his own risk. Here also, however, the court's assessment of the facts will be decisive in individual cases.

The definition of the term defect should be considered in conjunction with Article 9, which provides for the extinction of the producer's liability after the expiry of a period of ten years from the time when the product was put into circulation.

Article 5

Exclusion of liability

14. One of the conditions for the liability of the producer is that the defect in the article should arise in the producer's production process. Another condition is that the producer should put the product into circulation of his own free will. Liability is therefore excluded where the defect arose only after that time or the article was put into circulation against the will of the producer, e.g. through theft.

The existence of these two facts establishing liability is however presumed. The producer can prove the contrary.

As with any evidence, it can only be a question of establishing a high degree of probability, sufficient to convince the court, in accordance with general experience, that the fact to be proved does exist. Since this probability results above all from the interrelationship between the type of defect, the na-

ture of the defective article and the time which has elapsed since the article was put into circulation, regard must be had to these factors, especially as the relevant objective criteria.

It is evident that this burden of proof rule is also intended to decide who has to bear the consequences where proof cannot be provided. Otherwise the rules of procedural law of the Member States are unaffected.

15. It was not considered necessary to define the term 'put into circulation'¹ since this is self-explanatory in the ordinary meaning of the words. Normally, an article has been put into circulation when it has been started off on the chain of distribution.

16. It is not laid down in the directive that contributory negligence on the part of the injured person leads to a reduction in or exclusion of liability. Such a provision would be superfluous since this principle applies under the laws of all Member States.

The same applies to exclusion of liability by reason of unavoidable accident, such as an act of God which under the laws of all Member States may be pleaded by the producer as a defence to an action by the injured person.

Article 6

Definition of damage

17. Article 6 defines the damage for which the producer is liable.

The reference to the death of the user or consumer of the defective article is intended to cover both rights to compensation arising for the benefit of the injured person in the period between the event giving rise to injury and his death, and rights to compensation arising for the benefit of persons who had rights against the deceased. These will be primarily rights to maintenance of the spouse or close relatives.

The term 'personal injuries' comprises the cost of treatment and of all expenditure incurred in restoring the injured person to health and any impairment of earning capacity as a result of the personal injury.

The directive does not include payment of compensation for pain and suffering or for damage not regarded as damage to property (non-material damage). It is therefore possible to award such damages to the extent that national laws recognize such claims, based on other legal grounds.

18. Limiting the scope of the damage for which compensation must be paid to the economic consequence of death and to personal injury is not possible, since it would not meet the need for an adequate consumer protection system. The ex-

¹ Articles 1(2), 5 and 9.

press object of the preliminary programme for a consumer protection and information policy referred to above¹ is to protect the economic interests of consumers as well as their health. The scope of the directive therefore also extends to damage to property in so far as this is necessary to protect the interests of consumers, but does not extend to damage to economic interests in the commercial sphere. It is obvious that it is precisely in this field that defects in products can lead to large-scale damage. The Commission, for the approximation of this area of law, reserves the right to prepare proposals in view of its importance for the common market.

19. The definition of the scope of the directive given in Article 6 is based on these considerations. In deciding whether compensation is to be paid in respect of damage to property, account must be taken of whether the property damaged by the defective product meets the criteria laid down in Article 6(b). An objective and a subjective criterion have been used to define the scope of the directive. The damaged property must firstly be of a type normally acquired only for private use or consumption. The term 'private' is used to indicate the activities of the injured person outside his work or profession. Secondly, a further requirement must be laid down in the form of the subjective purpose of the purchaser at the moment of purchase or, alternatively, the subjective use at the moment when the damage occurred, likewise aimed at private use and not commercial use or consumption.

The combined application of both criteria effectively separates those of the consumer's assets which it is intended to protect as private, non-business property from those used for business purposes.

These commercial activities are described by the words 'trade, business or profession'. The addition of 'profession' has the effect of including the 'liberal professions', to which the same considerations relating to economic competition apply.

20. Claims for compensation in respect of damage to or the destruction of the defective product itself are excluded. Product damage is damage which is inflicted upon the user or purchaser of a defective article in the form of personal injury or damage to property. The producer of the article is liable in respect of this type of damage. Liability in respect of the quality of a newly-purchased article, its fitness for particular purposes, including its freedom from defects in the sense that it will not be damaged or destroyed in its entirety as a result of defects in part of it, is normally governed in the laws of all the Member States by the law relating to the sale of goods. This field is not affected by the directive. If for reasons connected with the protection of consumers the need arises to improve the legal position of the purchaser of a defective article *vis-à-vis* its seller or to improve his rights of action against the producer, this can be achieved under the legal systems of the Member States in which the need shows itself. In so far as it is necessary for the functioning of the common market, it could be achieved by approximating the law relating to standard form contracts.

21. The amount of damages to be awarded in individual cases on the basis of this distinction is even under the legal systems in the Member States not determined by legislation. Under all these systems, it is the courts which decide on the amount of damages. This matter is therefore also not governed by the directive, but is left for the courts in the Member States to decide.

'Direct' damage such as expenditure incurred in repairing or replacing the damaged or destroyed article must obviously be compensated for. Compensation in respect of further damage is dependent upon the chain of causation between the defect and the damage. This question of remoteness of damage is a matter for the courts in each Member State to decide. Research into the comparative law on the subject has shown that in practice, however, the amount of damages awarded in individual cases will not differ substantially.

Article 7

Limit on liability

22. If the liability of the producer is no longer made to depend upon fault on his part and is thus deprived of the limiting factor of personal contribution for the damage, as a condition of his liability, another limiting factor must be provided for. Liability irrespective of fault without any kind of limitation would place an incalculable burden of risk on the producer. This would involve the danger that producers would be afraid to take business risks in developing new products. This would in turn impair or jeopardize economic and technical progress, which is not in the general interest, particularly of consumers.

It would follow from the impossibility of calculation that the risk of causing damage could be insured against only at a high cost. Every insurance contract provides for a limit on the amount for which cover is given. This amount is determined according to the risk to be insured and the readiness of the insurer to make a particular sum available in the event of damage being caused and of the insured party to pay the necessary premiums. Where liability is not limited by law, the sum insured can be very high. In fact, it will be very high because the producer has an interest in covering every conceivable risk including even those which are beyond the realms of probability. The premiums payable are reflected substantially by increases in the price of the products, which must be borne by the public and thus by the consumer. It therefore seems in the interests of achieving an equitable balance between the need to protect consumers and the burden imposed upon industry to put a legal limit on liability.

Liability is limited in amount² and in time.³

¹ OJ C 92 of 25.4.1975.

² Article 7.

³ Article 9.

The limitation on the amount sets an upper limit on claims against the producer based on his liability irrespective of fault. Since he will not be liable according to the strict criteria of this directive for sums in excess of that limit, there is no need for insurance cover beyond that limit.

23. The possible extent of the infringement of the rights involved, the moral imperative of compensation and the purpose of such a limitation, all require that, in fixing the upper limit on liability, a distinction should be made between personal injury and damage to property.

24. Since personal injury involves the infringement of a legal right of the highest importance, which it is imperative to protect, only an overall limit can be laid down, covering the entire range of damages suffered by all injured persons. An appropriate limit would appear to be 25 million European units of account.

A further limitation limiting liability in the individual case, has not been imposed. The need for the risk of damage to be calculable is met by the overall limitation. It is the setting of an overall limit alone which in individual cases of damage, and these are far more frequent than cases of mass damage, causes the liability to be unlimited, since injury to a single person cannot reach the limit proposed in the directive. This means that the interests of the consumer, who usually suffers damage or injury in isolation, are fully taken into account.

On the other hand, an upper limit such as that represented by the sum proposed could to the greatest extent cover mass damages. Mass damages are included under the words 'injuries caused by identical articles having the same defect'. This is to cover the relatively infrequent cases in which the same defect occurs in various products of the same kind, therefore damaging a number of consumers. In cases of personal injuries, several hundred persons could be compensated within the framework of the proposed limit, provided their claims are of an average amount. Cases where the damage is more extensive than this should be classed as major disasters. In these extremely rare exceptions, the assistance of the public may under certain circumstances be forthcoming, as was the case with the thalidomide cases. It would not be advisable to adopt these exceptional cases as a standard for liability in the usual individual case and to use them to determine the upper limit of liability. A limit to liability would lose all meaning if its amount were based on very rare major disasters.

25. Since widespread damage caused by the defectiveness of a product, leading to mass damages, scarcely arises in the case of damage to property, but in the more frequent individual cases, in spite of restriction to personal assets not used for professional purposes, damage may arise which is difficult to calculate in advance, a converse ruling has been provided for these damages, namely limitation in individual cases without aggregation of all cases of damage in an overall limit. Where widespread damage resulting from a product defect scarcely arises, there is no danger that the risk of damage in respect of all claims cannot be calculated.

To determine the ceiling of liability for damage, however, it is necessary to distinguish between the moveable and immoveable property of the injured person, since the two types of property by nature differ greatly in value. A single limit for both types of property would be too high for moveable property and too low for immoveable property. In determining the amount it was essential to find an average value for personal assets not used for professional purposes. A figure of 15 000 EUA for moveable property and 50 000 EUA for immoveable property seems appropriate. In the latter case, account should be taken of the fact that in all Member States of the European Community, in the majority of cases, immoveable property is insured by the owner against destruction or damage, so that in general adequate protection is available, whereas this is not the case to this extent with moveable property.

These two limits operate independently, not cumulatively.

26. The new European unit of account used to determine the maximum limits of liability is an average variation in value of all currencies of the Member States. By using this unit of account it is possible to solve the monetary problems which arise as a result of the fact that the exchange rates of the various currencies involved change daily.

This latter fact, in combination with the circumstances that the calculation of the equivalent in national currency is necessary only at the point of time when the amount of damages is fixed, either by agreement or by judicial decision, indicated that it was appropriate to adopt that point of time as the time when the European unit of account should be converted into the relevant national currency. A fixing generally of a specific date for conversion of the European unit of account into national currencies would involve the danger that the relative values of the currencies would change again between the date so specified and the day on which the damages were awarded.

In an age where purchasing power of all currencies is steadily being eroded it is necessary to adjust from time to time the specified maximum limits of liability in order to maintain their value at the level laid down in the directive. A period of three years appeared to be appropriate. Therefore, a clause has been provided for paragraph 5 of Article 7 which takes these matters into consideration.

Articles 8 and 9

Limitation period and extinction of liability

27. The right of the injured person to compensation, being subject to limitation, arises upon the occurrence of the damage. It is, however, proposed that the limitation period should commence only when the injured person has, or ought to have, according to the circumstances, all the information necessary to bring proceedings. This is specified in the first paragraph of Article 8.

It is in the interest both of consumers and of industry to provide for a uniform period of limitation. Accordingly, it was necessary to regulate this matter in the directive. A period of three years appeared appropriate in view of the fact that the directive gives the victim the right to bring action against the producer directly and, as the producer will in many cases be resident in another Member State, the victim may well require that length of time. Where legal relationships cross frontiers, the parties should have adequate time to reach a fair compromise between their interests, thus avoiding the need for court proceedings.

28. Products wear out in the course of time. It therefore becomes more and more difficult to establish whether the defect causing the damage already existed at the time the article left the producer's production sphere or arose later through wear. New, more advanced products replace outdated ones. New safety standards lay down stricter requirements. Progress in science and technology makes it possible to acquire better knowledge as to whether products with many inherent risks are dangerous or harmless. For these reasons a limitation of the period of liability is necessary.¹ It would be unreasonable to burden the producer beyond a certain period with an ever-increasing risk of damage. This is particularly true because the presumption that the product was originally defective operates against him.

A limit to the period of liability is necessary above all to provide a well-balanced solution to the problem of 'development risks'. The producer can be liable in respect of defects which are discovered within a certain period of time as a result of progress in science and technology. An unlimited period of liability, however, would mean that the producer would have to bear an inordinately high risk particularly in this field.

Ten years appeared appropriate as an average period.

The rule that the period commences in each case at the beginning of a calendar year is intended to make the limitation period easier to calculate.

The period is a cut-off period. Its effects are absolute. It cannot therefore be interrupted or suspended by provisions in the laws of the Member States relating to cut-off periods of this type.

Where proceedings for the recovery of damages are pending, the plaintiff cannot lose any rights he may have by the expiry of this period. The sole ground, therefore, for suspending the period is the bringing of an action by the injured person within this period.

Article 10

Prohibition of exclusion or restriction of liability

29. The object of the directive to achieve an adequate protection of consumers would not be achieved if the liability

provided for by this directive were subject to freedom of contract. It is therefore proposed that this liability is obligatory. It cannot be restricted or excluded by an agreement between the producer and the consumer. The provision has however been worded in such a way that it does not cover only a contractual exclusion of liability in the strict sense. The text also excludes any assertion by the producer that the consumer, by using the product, has voluntarily assumed the risks which might arise from the defectiveness of the product.

Article 11

Relationship to claims based on other grounds

30. In addition to the right to damages based in the laws of Member States on this directive, and which may rank as a claim in tort, rights to damages may possibly, under the laws of individual Member States, be based on other grounds. These may be of a contractual nature, either arising from a special agreement between the producer and the injured person (guarantee of freedom from defects and agreement to accept responsibility for all the consequences of the defectiveness), or under the legal systems of some Member States, being considered, according to interpretation of existing laws, as obligations arising under the law of sale of all sellers of a defective article, including the producer. In addition there may be claims in tort based on the fault of the producer, in so far as it exists. Such rules may be left untouched by the directive because they also serve the objective of an adequate protection of consumers.

Since, however, the right based on this directive gives the injured person a better legal position under the laws of all the Member States, it will in due course replace *de facto* other rights which may perhaps exist.

Article 12

Exclusion of damage arising from nuclear accidents

31. As regards damage arising through or in connection with the use of atomic energy, there are in force in all Member States similar special rules governing these risks based on liability criteria which are as strict as those of this directive. It has therefore been possible to exclude damage of this type from the scope of this directive.

¹ Article 9.

Selective bibliography

I. Documents

Memorandum on the approximation of the laws of Member States relating to product liability (doc. XI/332/74, August 1974).

II. Comparative law

La responsabilité civile du fabricant dans les pays du Marché commun. Colloque organisé par la Faculté pour ses relations de jumelage avec le département du droit de l'université de Tübingen. (Rapports par Ghestin (France), Brouwer (Commission des Communautés européennes), Sauveplanne (Pays-Bas), Esser (Allemagne), Albrechtskirchinger (Allemagne), Jolowicz (Angleterre), Limpens (Belgique), Thuesen et Lando (Danemark), Malinvaud (France), Cottino (Italie), Bigot (France)). Aix-en-Provence: Faculté de droit et de science politique d'Aix-Marseille 1974.

Die Haftung des Warenherstellers. Verhandlungen der Fachgruppe für Zivilrechtsvergleichung anlässlich der Tagung für Rechtsvergleichung in Kiel vom 8. bis 11. September 1965, mit Abhandlungen von Prof. Dr. Werner Lorenz, München, und Prof. A. Vinding Kruse, Kopenhagen. Berlin, Frankfurt 1966.

Product liability in Europe. Collection of reports prepared for the Conference in Amsterdam on 25 and 26 September 1975, under the auspices of the Association européenne d'études juridiques et fiscales, London 1975.

III. Publications relating to the laws of the Member States

Denmark

Dahl, Produktansvar, København 1972.

Hansen, Sælgerens ansvar for skade forvoldt af ting med farlige egenskaber, København 1965.

Hansen, Produktansvarsforsikring, København 1967.

Germany

von Caemmerer, Products Liability, in: *Jus Privatum Gentium*, Festschrift für Max Rheinstein, Tübingen 1969, Vol. 2, p. 659 *et seq.*

Diederichsen, Die Haftung des Warenherstellers, München, Berlin 1967.

Soll die Haftung des Produzenten gegenüber dem Verbraucher durch Gesetz, kann sie durch richterliche Fortbildung geordnet werden? In welchem Sinne? Gutachten Simitis und Sitzungsbericht M zum 47. Deutschen Juristentag, München 1968.

France

La responsabilité des fabricants et distributeurs. Colloque organisé les 30 et 31 janvier 1975 par l'UER de droit des affaires de l'Université de Paris I, Paris 1975.

Malinvaud, La responsabilité civile du vendeur à raison des vices de la chose, *Juris classeur périodique* 1968, I. p. 2153.

Mazeaud, La responsabilité civile du vendeur-fabricant, *Revue trimestrielle de droit civil* 1955, p. 611 *et seq.*

Tunc, Les problèmes contemporains de la responsabilité délictuelle. Introduction, *Revue internationale de droit comparé* 1967, p. 757 *et seq.*

Ficker, Die Schadensersatzpflicht des Verkäufers und seiner Vormänner bei Sachmängeln in der französischen Rechtsprechung, Berlin 1962.

Italy

Alpa, Responsabilità dell'impresa e tutela del consumatore, Milano 1975.

Alpa e Bessone, La responsabilità del produttore, Milano 1976.

Carnevali, Responsabilità del produttore, Milano 1974.

Netherlands

Schut, Produktaansprakelijkheid, Zwolle 1974.

United Kingdom

Liability for defective products, The Law Commission and the Scottish Law Commission (Working paper No 64 and Memorandum No 20), London 1975.

Borrie and Diamond, The Consumer, Society and the Law, 2nd edition, London 1968.