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REPORT OF THE GROUP OF INDEPENDENT EXPERTS ON LEGISLATIVE AND ADMINISTRATIVE SIMPLIFICATION

VOLUME II
WORKING DOCUMENTS

The working documents contained in this second volume have been produced as contributions to the Group's work by some of its members and by independent rapporteurs and experts appointed by the Group. The views expressed in those documents are those of their authors and not necessarily those of the Group of independent experts on legislative and administrative simplification nor those of the Commission.

Table des matières
Table of contents
Inhalt

THE CULTURE OF REGULATION IN THE EU: HISTORICAL DEVELOPMENT, CURRENT SITUATION AND NEED FOR ACTION

Contribution of Mr Alvaro ESPINA to the general chapter (chapter 1) of the final report

THE CULTURE OF REGULATION IN THE EU: HISTORICAL DEVELOPMENT, CURRENT SITUATION AND NEED FOR ACTION

Since the European Communities were founded there has been a remarkable development in regulation and in the ways in which the Community intervenes in the economy. This development has been apparent in the broadening of the fields in which action is taken and also in the forms and intensity of regulation. The broadening has been the result of the gradual expansion of Community objectives, culminating in the statement of aims and the list of objectives in Articles 2, 3 and 3A of the Treaty on European Union, and in their becoming part of the current body of Community law. At the same time, the forms of Community action have expanded: while in an initial stage most action was taken through the enactment of binding rules, the relative share of "hard", or prescriptive, measures has now diminished, making room for other, "softer" and incentive-oriented forms of intervention and for cooperation and guidance.

It is not normally possible to say straight away whether one particular form of intervention is more suitable than the other without looking at the objectives pursued. Where the objectives of the Treaty are more specific, action through regulations is usually inevitable, except in those cases where there is more or less natural convergence of the measures taken by the Member States. One thing, however, is certain: as the fields of intervention have expanded, there has been a tendency to reserve "hard" measures for essential objectives in the areas in which the Union has exclusive or privileged powers and in which a larger number of operators is affected; where other, less important objectives are involved, or where a limited number of addressees is affected, the tendency has been to use "softer" forms of regulation or action. But even this cannot be regarded as a general pattern because achieving Treaty objectives has sometimes made it necessary to tighten intervention at certain stages and relax it in other circumstances, thus leaving responsibility for achieving the objectives to the Member States.

In relative terms, there has been a gradual decline in the share of "strict" measures and an increase in "soft" methods, as is clear from Figures 1, 2 and 3, which roughly correspond to the three historical stages marked by the Treaty of Rome, the Single European Act and the Treaty on European Union. Figures 1 and 2 were drawn up using a double-entry table; one side classifies action according to the degree of convergence between national laws and the extent to which Community power is exclusive, and the other classifies action according to the number of operators affected by the rules.

Although the classification is not exact and the share of each block has not been measured precisely, Community measures during the first stage may be summarized in four boxes, with two positions (high and low) along each of the two axes. It will be seen that three of the four boxes contain mandatory rules. During the second stage, the Single European Act introduced a wider range of objectives and forms of action, so that Figure 2 has four rows and four columns.

A comparison of the two Figures clearly shows the shift between the two stages: substantial expansion of intervention accompanied by a reduction in the intensity of new measures, so that if 75% of the rules were mandatory in Figure 1, only 50% (eight of the sixteen boxes) were mandatory in Figure 2, their relative share down by one third.

Article 3b of the Treaty on European Union institutionalizes this approach by introducing subsidiarity as one of the guiding principles for the exercise of the non-exclusive powers that the Treaty confers on the Union (mixed or shared powers). Although subsidiarity is not a principle that regulates powers, which are laid down by the Treaty (as the Edinburgh European Council made clear), it must be applied with due regard for the principles of sufficiency and effectiveness. In addition, the Treaty explicitly states that Community action must not go beyond what is necessary to achieve the objectives of the Treaty, which requires that a systematic look be taken at the intensity of the action needed to achieve them (principle of proportionality).

Figure 1: Community action prior to the Single European Act

Degree of convergence of national laws and/or Community powers			
	High	Common policies and other mandatory rules	Regulations and directives
	Low	Action programmes	Mutual recognition
		Low	High

Number of operators affected

Figure 2: Community action between the Single European Act and the EU Treaty

Degree of convergence and/or Community powers					
	Exclusive	Common policies	Conclusions, resolutions, decisions of Council and Commission	Directives	Regulations
	Privileged	Structural Funds	Harmoni-zation by objectives and cooperation	New mandatory approach	Framework directives
	Shared Medium	Self-regulation	New voluntary approach	Mutual recognition	Conclusions, resolutions, decisions of Council and Commission
	Shared Low	Responsible care and dissemination of best practice	Guidance Funds	Action programmes and framework programmes	Recommen-dations by Council and Commission
		Low	Medium	High	*Erga omnes*

Number of operators affected

To reflect these changes, Figure 3 has been designed as a three-dimensional space with three levels of intensity on each of the axes. The vertical (y) axis classifies measures by reference to the extent of Community powers, depending on whether they are exclusive or shared powers and on the relative priority within the shared powers. The horizontal (x) axis classifies measures according to whether they affect all operators, the Member States or specific groups. The depth (z) axis, which bears the most direct relationship to the principle of proportionality or matching of means to ends, classifies measures in accordance with their degree of regulatory intensity - high, medium or low. Under this classification, fully binding Union rules account for 11 of the 27 positions, or 41.5% of the total, once again showing a fall of almost one quarter compared with their relative share during the previous stage.

This development is, to a certain extent, a natural process because the appearance of the global market, the cumulative impact of the existence of the EC and the completion of the internal market require the Member States and most operators to harmonize de motu proprio the respective measures if they want to take full advantage of their effects. It is fair to say that the phenomenon of convergence is spreading "by sympathy" and that the setting of explicit convergence objectives in a number of fields requires independent convergence policies in other fields that are not directly covered.

One of the factors that exerts greatest pressure in this direction is the operation of the capital market, which severely penalizes divergent action, sometimes excessively so. This phenomenon is not limited to Europe; it is a feature of the global market, but occurs with much greater reason among the "Fifteen" given the complete lack of restrictions and the simplifications of procedures for the free movement of capital within the internal market. In addition, in a period such as this, with high unemployment rates, in which no country willingly accepts becoming less attractive for new initiatives, the interplay of the four freedoms of movement and establishment must inevitably have an influence on the action of all European governments. This set of circumstances provides objective momentum towards convergence in order to achieve economic and monetary union, which is referred to in Article 2 of the Treaty. In the absence of a degree of interpenetration of the European economy such as that already reached, harmonization would have required more prescriptive measures but, under present conditions, in many cases it comes about almost spontaneously.

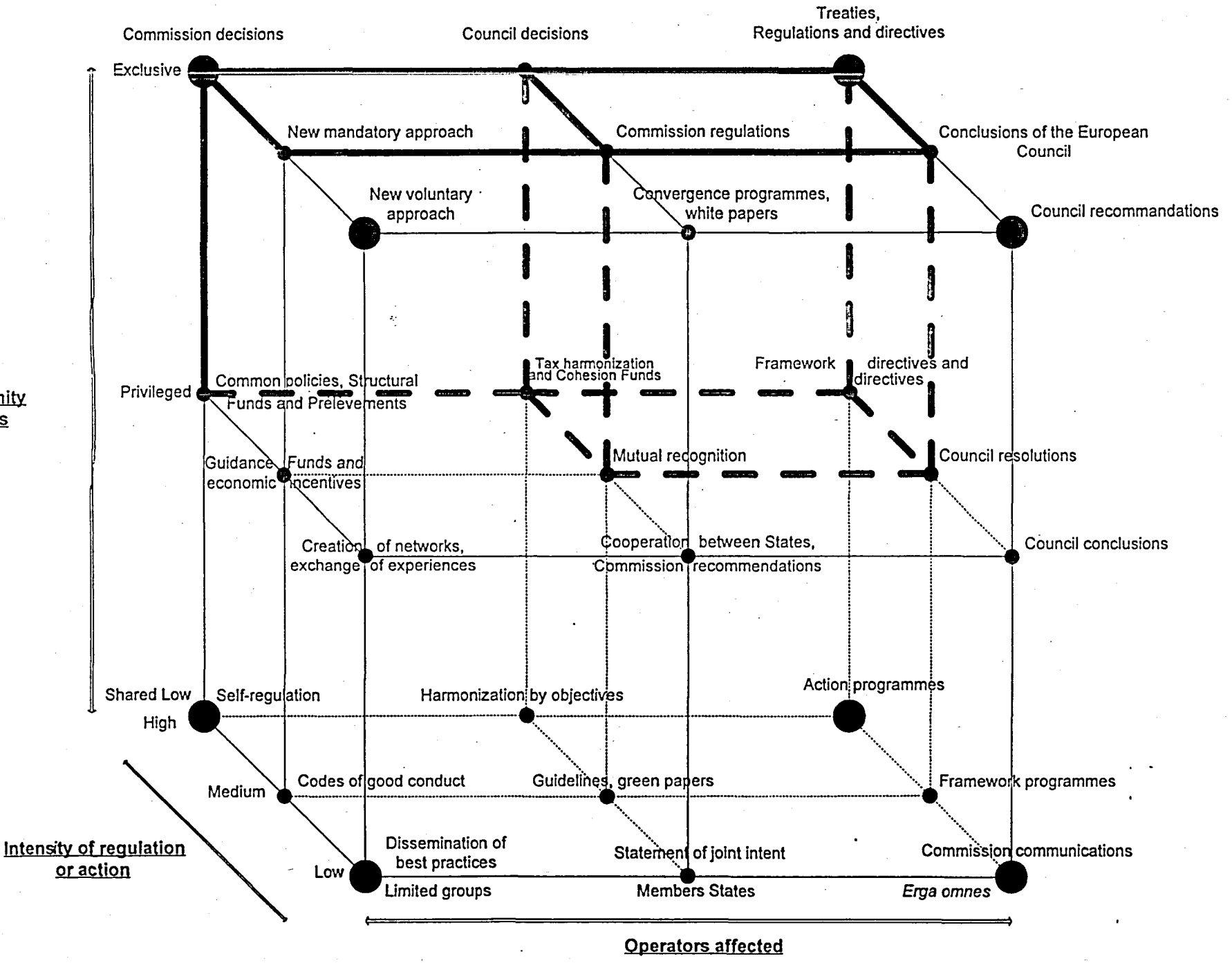

Figure 3: Community action after the EU Treaty

5

It is clear that the most efficient way of making progress on achieving the Treaty objectives consists precisely in reaching a situation where Community law and regulations and market practice encourage the Member States and private operators to act in such a way that, by achieving their own objectives, at the same time they achieve the Treaty objectives. In the final analysis, this is the key to ensuring that economic regulation attains maximum efficiency. And such efficiency is the best way of minimizing action by the Union and reducing it to those objectives which cannot be achieved by the Member States (principle of sufficiency) or which, being objectives that can be achieved by the Member States, can be better achieved through joint action (principle of effectiveness), as laid down by Article 3 of the Treaty. Thus, it is fair to say that the exercise of the Union's exclusive powers concerning regulation of the four basic freedoms of movement (persons, goods, services and capital) and their use to enact legislation to achieve the internal market, have performed this function efficiently by establishing ground rules that provide more and more incentive for the Member States to pursue their own objectives, contributing at the same time to the achievement of Union objectives.

However, this does not mean that all the objectives will be achieved automatically. On many occasions the individual interests of countries are different, in which case "go-it-alone" policies would prevent Union objectives being attained. Economic literature, game theory and real life provide many examples of situations where, within a general context in which cooperation and harmonization of action produce the greatest benefit for all players, "free-rider" behaviour may be beneficial for some of them. It is in these cases that "hard" Community action is more advisable. That is precisely why the Treaty reserves for the Union the full capacity to provide itself with the means necessary to attain its objectives and carry through its policies (Article F.3), together with exclusive powers in respect of all those issues directly and indirectly related to competition (dumping, state aid, etc.). The Treaty also removes from the field of free competition a number of areas for which regulation sets minimum standards at Community level, such as health and safety at work, protection of consumers and of the environment. This is without prejudice to the fact that, on grounds of efficiency and since the Single European Act, recourse has been had to the principle of subsidiarity when exercising this power in the case of environmental problems that are not transnational.

In general, it may be said that Europe has historically shown a greater propensity to "hard" regulation than other parts of the world. In present circumstances this may have adverse effects on competitiveness and employment, for a number of reasons. First, because of the higher cost involved for firms in complying with excessive regulation, which puts them at a competitive disadvantage in relation to other firms. The principle of regulatory restraint is in itself a factor of competitiveness, independently of the objectives pursued.

In the present economic climate this is exacerbated by two factors which affect firms' competitive behaviour: greater uncertainty and volatility of markets and firms' need for flexible production techniques and methods of organization if they want to adapt rapidly to changes of that nature. Accordingly, anything that restricts a firm's ability to adapt, if it is not strictly necessary to achieving the objectives pursued, will ultimately prove costlier in relative terms than would have been the case at earlier stages, when the economy was much more stable and markets did not require organizational change on such a scale and at such a pace.

The new economic environment has far-reaching implications for subsidiarity, not only in terms of whether public measures aimed at achieving the objectives of the Treaty should be introduced at the level of the EU or of the Member States, but also in terms of whether self-regulation should be regarded as a valid alternative to external regulation in matters less readily seen as falling within the Community's field of competence. The higher the level at which regulation is undertaken, the more general and standardized it tends to be and the smaller its capacity to address the actual circumstances and behaviours being regulated. And the higher the level of the regulatory body, the greater the difficulties usually experienced in amending any legislation unless, like the rules governing the single market, which are based on the "new approach", the legislation has established permanent procedures for introducing change. Thus, where objectives can be achieved through self-regulation (e.g. collective bargaining on working conditions or voluntary codes of conduct), this - and not external regulation - should be the chosen route, although it cannot always be assumed that the players concerned will actually reach an agreement. Moreover, self-regulation does not preclude flexible arrangements for protecting third parties adversely affected by failure to comply or for penalizing those who infringe rules they agreed to abide by; in fact, it makes such arrangements even more necessary.

Nor should one reject the idea of combining external and self-regulation in a way which publicly identifies the objectives to be attained within a predetermined period and which gives an opportunity to the operators concerned (provided they are not the public generally or a large, widely dispersed group of operators) to agree on the means needed to achieve those objectives. Similarly, public investment in systems of analysis and dissemination of "best practices" could well constitute the most suitable form of action. This holds not only where achieving specific objectives is felt to be desirable in fields where there is self-regulation (as in the case of industrial collective bargaining) but also where access to information is difficult or the cost of devising regulatory mechanisms is very high. At all events, it is only if the operators concerned fail to reach agreement within the time allowed that external regulation should step in.

When the regulatory route is taken, the second level at which the principle of subsidiarity should be applied is that of harmonization by objectives, the latter being set at Community level as objectives, principles or rights, with each Member State expected to achieve them on time and through its own institutions. Subsidiarity and proportionality are thus complementary principles and do not rule out public intervention: they determine the way in which it operates, irrespective of the level at which it occurs. Identifying specific objectives, setting deadlines and making an assessment of the most suitable means of meeting them is a requirement of regulatory restraint that needs to become a routine both for the EU and for the Member States and the other public authorities in the Community, as made clear in the basic principles and in the guidelines for the application of the principle of subsidiarity and Article 3b of the Treaty, which the European Council adopted at its meeting in Edinburgh on 12 December 1992 (the declaration adopted earlier in Birmingham, to the effect that it is for each Member State to decide how to exercise its powers in its own national context, will at all events have to be complied with).

This new emphasis on legislative and administrative simplification throughout the EU is essential to improving the European economy's competitiveness and ability to create jobs, but it cannot be limited to future measures, losing sight of the fact that Europe as a whole is now an area whose markets in products and, above all, in services (including those

relating to the building industry) are still subject to many regulations and restrictions. In all these fields, which in most Member States have a strong tradition of regulation, the EU can play a very active role in the process of simplification, just as it did with the Action Programme for the Internal Market, when, in each specific market, it replaced fifteen regulations by a single one. This tended to be a simple regulation, administered by market mechanisms under the new approach and featuring in-built arrangements for constantly adapting to changes arising from technical progress.

As far as markets in goods are concerned, the single market programme can now be regarded as almost fully implemented, apart from the final step: transposal and simultaneous repeal of earlier regulations by the Member States and effective implementation of the programme by all. There are still areas where the removal of barriers to the movement of goods is dependent on mutual recognition, but where quick and effective means of ensuring that Member States fulfil that obligation have yet to be found. Practical arrangements are needed as soon as possible or - if no suitable formula is found - markets in which barriers persist must be regulated at Community level, so that at the end of the process the new regulations applicable to all markets will be the same throughout Europe. This in turn will help to fashion a real market without frontiers and, thereby, enable businesses to improve their productivity through economies of scale. It must be realized, however, that the resulting improvement in European industrial productivity will not open up fresh direct employment opportunities, given the considerable growth in productivity that can be achieved through economies of scale in most traditional industries and the high degree of decentralisation of production undertaken. The best that can be hoped for is to minimize the sort of direct job losses that have been recorded in the past, and to maximize the opportunities for new indirect jobs.

It is to be assumed that, as full advantage is taken of the opportunities afforded by the single market for improving the efficiency of European firms, a major reallocation of resources will take place, away from traditional activities and towards those of the future. This reallocation will be carried out mostly through the restructuring of firms, and great importance will attach to the legal mechanisms available throughout that process (among them, the insolvency laws). A number of countries already have up-to-date legislation which can facilitate the restructuring process, dispel uncertainty without impairing the protection afforded to creditors and still reduce the barriers to exit erected by traditional laws. Other countries are in the process of updating or are planning to update that legislation. Since the process will take place in the context of the single market, with firms that operate in a number of Member States, there is a strong case for harmonizing all this legislation, or a few of its basic components. An effort should therefore be made to overcome the present differences - which stand in the way of progress on harmonization in this field - between advocates of the principle of territoriality and those who see this issue in terms of the personality of firms.

However, it is only through a growing and fully competitive service industry that new job opportunities can be created rapidly in Europe. In many cases this means that existing regulations need to be liberalized first. In others, uncertainty about possible future regulations will have to be dispelled. It must be remembered here that the regulatory tradition in most Member States has tended to act as a powerful brake on initiative in all these sectors, with many entrepreneurs preferring to wait for new rules rather than take a risk and invest effort and capital in an anticipatory and innovative manner in activities whose future profitability might be seriously jeopardized by subsequent regulation that is almost certain to come. In many Member States the constitutional principle of freedom

of enterprise - whereby anything not expressly prohibited or regulated is allowed - only begins to operate effectively once the State has acted to regulate the activity concerned.

This is an extremely serious problem in terms of employment and of dynamism of our economies since, in practice, it restricts entrepreneurial initiative - always a rare factor - in the most dynamic parts of industry and the service sectors, confining it to "territories" demarcated in advance by government, which has taken it upon itself to "open up" each new frontier by regulation. There are two reasons why it is also a serious issue in terms of the competitiveness of the firms that spring up in these new fields of activity: firstly, the new initiatives tend to originate not in Europe but elsewhere and, when they do arrive, European firms already have their opportunities restricted because their competitors have by then moved further along the learning curve, giving them a precious competitive edge. Second, since economies of scope or diversity - those achieved by producing or providing a wide and varied range of products and/or services in the same firm or through the same distribution channel - tend to prevail in such activities, current limitations coupled with slow and progressive liberalization make it difficult for nascent firms to achieve those economies and, thereby, rapidly build up the required competitiveness.

The European Union and the other public authorities in Europe must therefore, as a matter of urgency, adopt an aggressive attitude and dispel uncertainty of this type at the earliest possible stage. Quickly producing *green papers* - a term which should be reserved for liberalization documents - which clarify first of all the areas of activity where there are no plans to regulate, while taking more time over the preparation of regulation where it is planned, is one of the greatest possible contributions to competitiveness and job growth in Europe, given the business initiative it may unleash. We would thus have a new form of "soft" economic intervention which, paradoxically, consists in announcing the intention not to intervene but which can prove, and in some cases is already proving (as, for example, in air transport and in telecommunications), extremely effective economically. And this recommendation could be applied more widely: all public authorities should announce in advance what their intentions are in terms of regulation - by providing programmes, timetables and guidelines, along the lines of what was done to establish the single market - and of other proactive intervention - as in the case of the Delors White Paper - or simply state that it is their intention not to intervene in activities which were previously regulated or to liberalize them.

Action must be taken to change the present European culture on economic intervention and to transform the EU into a zone of "lean regulation", going with the European firms in their efforts to undertake "lean production", as a means to increase competitiveness and employment.

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Madrid, 9 February 1995

Contribution finale au Groupe de Simplification Législative et Administrative

par

le Professeur Kostas Vergopoulos

10 juin 1995

Contribution de M. Kostas VERGOPOULOS sur la simplification et la déréglementation

L'insistance d'utiliser outre mesure le terme "déréglementation" me paraît déplacé. C'est un problème de sémantique pour l'orientation de notre travail et non point une querelle scolastique. Ce terme ne me paraît pas approprié par rapport aux objectifs de notre mandat, pour les raisons suivantes:

a) nous avons souvent convenu qu'il fallait chercher une bonne, simple et efficace réglementation et point du tout l'abolition de toute réglementation;

b) si malgré tout, une confusion persiste entre la simplification et des règles existantes et leur abolition totale ou partielle, cela serait sans doute digne du nom de "déréglementation", mais ne ferais pas nécessairement partie de la tâche de laquelle nous avons été chargés par notre mandat.

Dans ces conditions, l'usage fréquent du terme en question risquerait d'induire de fâcheux malentendus pour nos futurs lecteurs et pour nous-mêmes. Je conviens sans aucune difficulté que l'ensemble de réglementations tant nationales que communautaires sont à revoir, à remettre à jour du point de vue de la simplification, de l'efficacité et bien entendu pour promouvoir l'emploi en Europe. Cependant, on n'avancera dans la bonne direction qu'en nous démarquant des slogans généraux et abstraits et des idéologies "préfabriquées", pour nous occuper des problèmes précis, dans les contextes spécifiques et aussi concrètement que possible.

Les réglementations communautaires que nous cherchons à simplifier ont été élaborées sous une double exigence:

a) l'harmonisation parmi les législations nationales et

b) la construction d'un espace économique et social communautaire, en tant que base de convergence au sein de l'Union Européenne dans son ensemble.

Dans ces conditions, le travail de simplification législative et administrative devrait se démarquer résolument des interprétations périlleuses qui risqueraient, le cas échéant, de mettre en cause soit l'objectif de l'harmonisation soit la dynamique de convergence économique et sociale européenne. Ce n'est peut-être pas un hasard qu'à présent les plaidoiries les plus virulentes en faveur des déréglementations en général sont exprimées précisément par ceux qui ont toujours refusé de voir dans

l'Union Européenne autre chose qu'une simple "zone commerciale". Pour ma part, je pense que notre travail de "simplification pour l'emploi" n'aura de sens que dans la mesure où il renforcera la dynamique de l'harmonisation et la convergence structurelle au sein de l'Union Européenne.

A présent, le travail de simplification administrative et législative devrait bien se démarquer des tentations suivantes:

a) la confusion entre simplification des réglementations existantes et leur abolition pure et simple. La réduction du nombre des règlements communautaires et du champ de leur application peut mener à des situations inextricables, en raison du probable essor des règlements nationaux et régionaux parmi les pays et les régions européennes. Une telle éventualité risquerait de bloquer ou de retarder le travail de l'harmonisation et de la convergence européenne.

b) dans une problématique différente partant du principe tant débattu de "subsidiarité", certains sont tentés de simplifier les règlements communautaires par l'alourdissement des règlements nationaux. Or outre le caractère illusoire d'une telle simplification - étant donné qu'il n'existe pas de territoire communautaire non soumis en même temps à une juridiction nationale -, il devrait être déjà clair que cet usage de la "subsidiarité" multiplie en fait les contraintes à l'exercice de l'activité économique, tout en rallumant une dynamique de divergence à l'intérieur de l'Union Européenne.

c) souvent l'absence de règlement européen est justifiée par un argument de taille: le souci de permettre aux partenaires sociaux de donner des solutions adéquates de leur choix. Toutefois, si l'on donnait à ce principe une portée générale, rien ne pourrait garantir que les décisions des partenaires sociaux dans les différents pays de l'Union iraient effectivement dans le sens de l'harmonisation et de la convergence. Mais, il y a par ailleurs une objection encore plus grave: outre le fait que les négociations bilatérales profitent toujours au partenaire social le plus fort au dépens du partenaire social le plus faible (le travail), le risque serait grand de remplacer l'uniformité de régulations européennes par une multitude de réglementations *ad hoc*, disparates et circonstanciées, plus compliquées que celles qu'on voulait au départ simplifier.

d) dans la série de confusions à éviter, on ne devrait pas omettre de relever celle qui consiste à inclure dans la simplification la réduction du champ des responsabilités civiles, économiques et sociales de l'entrepreneur. Or les responsabilités de l'entrepreneur n'ont jamais été considérées comme de nature conventionnelle dérivant du contrat de travail, mais elles ont toujours été reconnues de caractère objectif, public et social. Dans l'hypothèse de la "privatisation" de la politique européenne sur les normes des machines et les accidents de travail, le

risque serait grand d'éloigner encore plus, au lieu de rapprocher, les conditions de travail au niveau communautaire.

e) normalement, la simplification administrative et législative ne devrait pas avoir de retombées sur les droits fondamentaux déjà reconnus aux travailleurs européens. Le droit d'être tenu informé et consulté permet d'introduire les travailleurs dans la vie de l'entreprise, tout en assurant par ailleurs une crédibilité accrue aux décisions ainsi élaborées et mises en application.

f) parmi les confusions à éviter, il y a aussi celle qui s'accommode d'une simplification s'exerçant aux dépens du niveau et de la qualité de protection des travailleurs, des consommateurs, des citoyens. Pourtant, même la déréglementation pure et simple affiche comme ambition d'améliorer tant le niveau que la qualité de ces services. Mais, la réduction ou la "privatisation" des politiques de santé, de sécurité sur les lieux de travail, des contrôles hygiéniques des aliments, du degré de pollution et du respect de l'environnement comportent le risque de pérenniser des situations d'extrême diversité et donc le dysfonctionnement du grand marché européen. Dans ce cas, l'efficacité du système économique européen dans son ensemble risquerait de se trouver sérieusement réduite.

Comme on peut le constater, une bonne partie des "exigences" auxquelles le sujet de l'activité économique en Europe doit se soumettre, même si elles apparaissent comme des contraintes administratives et législatives, elles expriment principalement un caractère par excellence positif: elles correspondent aux normes positives de comportement dans les domaines économique, social, sanitaire, sécuritaire, environnemental. Si ces normes européennes étaient mises en cause, fût-ce partiellement, la construction de l'édifice européen risquerait de se voir retardée.

La compétitivité du coût du travail européen

Certains ont tendance d'inclure dans la notion de simplification des préoccupations de compétitivité du coût du travail européen. Or il s'agit en l'occurrence d'une confusion conceptuelle non moins difficile à soutenir que les précédentes. S'il est vrai que la compétitivité des prix des marchandises dépend du coût du travail, il est également vrai que les coûts du travail dépend à son tour de la productivité du travail et de l'économie dans son ensemble. Comme Paul Krugman l'a montré, si l'on cherche la compétitivité des coûts salariaux à l'échelle mondiale, sans tenir compte des niveaux de vie dans chaque partie du monde et dans la productivité sociale moyenne au sein de chaque économie nationales, l'activité économique globale serait déstabilisée et contractée, même si certaines branches exposées à la concurrence internationale pouvaient en profiter et survivre pour un petit laps de temps. En fait, la compétitivité des branches exposées ne peut s'améliorer de manière durable que par l'amélioration de la productivité en volume de l'ensemble de secteurs d'une économie nationale.

Malgré tout, la question du coût du travail européen reste de toute façon posée: - Le coût élevé du travail serait-il un facteur explicatif du rapide développement du chômage en Europe? La compétitivité des productions européennes pourrait-elle être relancée par des contrôles drastiques sur le coût direct et indirect du travail en Europe? Les capitaux européens seraient-ils à présent incités à tourner le dos au vieux continent pour aller s'investir massivement dans les pays asiatiques en raison de leurs faibles coûts salariaux ?

D'abord, pour mesurer l'impact de la concurrence internationale, rappelons que la production européenne reste essentiellement orientée vers les marchés communautaires: seulement 9% du produit européen est exporté en dehors de l'Europe, contre 11% pour les produits américains et 10% pour celui du Japon. Cela implique que pour plus de 9 entreprises européennes sur 10, les coûts salariaux versés fonctionnent aussi au sens de l'élargissement permanent du marché interne. A présent en Europe notamment en France on cherche la reprise économique par la relance de la consommations et des bas salaires. Des études empiriques ont montré que des éléments comme la proximité des grands marchés et la spécialisation du travail constituent des facteurs beaucoup plus dynamiques et décisifs intervenant dans la localisation des investissements que les coûts du travail en tant que tels. De plus, au cours des 12 dernières années, les coûts unitaires relatifs du travail ont baissé de 12% en Europe, tandis qu'ils se sont accrus de 27% au Japon et sont restés stationnaires aux Etats-Unis. Cette évolution défavorable des coûts salariaux comparés n'a pas empêché les deux grands concurrents de l'Europe d'avoir de meilleures performances que le vieux continent dans le domaine de l'emploi. Il est vrai qu'en Europe les politiques de rigidité des taux de change monétaires ont annulé les avantages obtenus dans le domaine des politiques salariales, mais dans ce cas le chômage européen actuel pourrait avoir une explication plutôt monétaire que salariale. Par conséquent, il serait particulièrement hasardeux de soutenir en règle générale et en dehors de tout contexte spécifique que les coûts du travail constituent toujours le facteur déterminant les investissements, l'activité économique et donc l'emploi. N'oublions pas que les coûts salariaux, même s'ils diminuent, peuvent pourtant paraître en gonflement, dans un contexte de ralentissement durable de la croissance, ce qui n'est pas sans rappeler l'état de l'économie européenne au cours des dernières années.

En général, l'Europe peut-elle sérieusement craindre la concurrence des nouveaux pays industriels asiatiques? Notons que l'ensemble de 9 Economies Dynamiques d'Asie sans le Japon - il s'agit des pays suivants: Corée, Taïwan, Hongkong, Thaïlande, Malaisie, Chine, Inde, Indonésie, Singapour - réalisent à présent 18% des exportations mondiales, contribuent à raison de 19,4% aux importations mondiales. Autrement dit, plutôt que de constituer une menace pour l'Europe, les pays dynamiques asiatiques s'avèrent une chance pour le vieux continent, puisque leurs marchés internes s'élargissent beaucoup plus rapidement que ceux des vieux pays industriels. Les "dragons" industriels asiatiques subissent déjà depuis 1993 une balance commerciale extérieure déficitaire et en cours de dégradations rapide, tandis que l'UE présente un solde commercial positifs de 120 milliards de dollars par an et en cours d'amélioration. On relevera que 70% du surplus commercial européen est imputable à l'Allemagne qui pourtant maintient les coûts salariaux les plus élevés.

Comme on peut le constater, les coûts salariaux sont loin de constituer le facteur décisif sur le plan de la compétitivité et sur celui du solde du commerce extérieur. Il s'en suit que, dans ce domaine, les raccourcis seraient pour le moins hasardeux: il n'y a pas de détermination évidente et incontestable entre le niveau historique du coût du travail dans un pays et les fluctuations conjoncturelles de l'activité économique et de l'emploi.

Dans le contexte européen actuel, des spécialistes font observer que le marché du travail est loin d'être unifié: les niveaux des salaires parmi les régions européennes varient de 1 à 5 et les taux de chômage de 1 à 10. Autrement dit, tant l'emploi que le chômage ne sont pas diffusés de manière égale et comparable parmi les régions européennes, mais au contraire restent concentrés donnant lieu à des polarisations: les régions éloignées du centre de l'Europe sont en même temps les plus touchées par le chômage et par la pénurie des investissements, mais elles sont aussi simultanément les foyers principaux des bas salaires. Il n'y a pas en Europe une mobilité suffisante du travail pour compenser les disparités de l'emploi et de salaires, mais il n'y a pas non plus une forte mobilité de capitaux intra-communautaire pour corriger les polarisations manifestées sur le marché du travail.

A ce jour, les règlements communautaires ont tenté d'unifier les marchés du travail qui gardent encore un caractère particulier fort, national ou régional. Si demain, sur ce fond disparate, des déréglementations intervenaient visant à rendre plus compétitif le coût salarial, il est fort probable que les polarisations existantes risqueraient de s'accentuer, les discontinuités dans la répartition des revenus pourraient s'approfondir, les disparités parmi les ensembles nationaux et régionaux pourraient s'avérer plus menaçantes pour la stabilité de l'économie européenne dans son ensemble. Dans cette éventualité, il n'est pas évident que l'emploi se renforcerait, mais des effets pervers déstabilisateurs pourraient se manifester à plusieurs niveaux. Les discontinuités dans la répartition des revenus érigent de véritables barrières à une reprise significative de l'activité économique, transformant ainsi le chômage cyclique en chômage structurel.

En conclusion, ce que je soumets à la réflexion n'est pas la déréglementation comme principe général, qui de toute façon se situe en dehors du domaine de notre mandat, mais l'application concrète de cette notion dans le contexte européen actuel qui n'a pas encore atteint dans les faits les conditions et les caractères d'un marché de travail et de facteurs unifiés: une éventuelle déréglementation au stade actuel risquerait de s'avérer prématurée et fatale, puisqu'elle donnerait libre cours à la cristallisation des particularismes nationaux et régionaux, éloignant de la simplification recherchée, de l'harmonisation et de la convergence tant souhaitées.

10 juin 1995 Kostas VERGOPOULOS

Definitiver Bericht an die Gruppe unabhängiger Experten für die Vereinfachung der Rechts- und Verwaltungsvorschriften bettrefend "Machines Standards"

von

Herr Hugo Sattler

Bericht "machines standards"

Endgülitge Fassung
(Rapporteur: RA Sattler)

A. Community policy in the field

I. "Der Binnenmarkt umfaßt einen Raum ohne Binnengrenzen, in dem der freie Transport von Waren, Personen, Dienstleistungen und Kapital gemäß den Bestimmungen dieses Vertrages gewährleistet ist", (Artikel 7 a Abs. 2 EGV).
Die Verwirklichung dieses Binnenmarktes erfordert die Beseitigung von technischen Handelshemmnissen. Dazu stehen der europäischen Politik drei Instrumente zur Verfügung:

- Die gegenseitige Unterrichtung
- Die gegenseitige Anerkennung
- Die gezielte Harmonisierung.

1. Gegenseitige Unterrichtung

Seit 1983 verpflichtet eine EG-Richtlinie die Mitgliedstaaten, neue technische Vorschriften und Normen der Europäischen Kommission bereits vor ihrem Inkrafttreten mitzuteilen. Das Ziel dieser Richtlinie ist die Beseitigung oder Verringerung von Handelshemmnissen aufgrund nationaler Regelungen durch Förderung der Transparenz der nationalen Maßnahmen und nationaler Disziplin im Falle von Maßnahmen auf EU-Ebene.[1]

2. Gegenseitige Anerkennung

Sie soll den ungehinderten Handel innerhalb der Gemeinschaft gewährleisten. Ihre Grundlage ist die berühmte "Cassis de Dijon"-Rechtsprechung[2] des Europäischen Gerichtshofes. Aus ihr folgt, daß ein rechtmäßig in einem Mitgliedsland hergestelltes und vermarktetes Produkt grundsätzlich freien Zugang zu den Märkten aller Mitgliedstaaten erhalten muß. Allerdings läßt sich durch die gegenseitige Anerken-

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[1] Richtlinien 83/189/EWG des Rates vom 28.03.1983 über ein Informationsverfahren auf dem Gebiet der Normen und technischen Vorschriften. Geändert durch folgende Maßnahmen: Richtlinie 88/182/EWG des Rates vom 22.03.1988 sowie Richtlinie 94/10/EG des Europäischen Parlaments und des Rates vom 23.03.1994.

[2] Beginnend mit EuGHE 1979, 649; s. auch die Mitteilung der Kommission über die Auswirkungen des EuGH vom 20.02.1979 in der Rechtssache 120/78, ABl. 1980, C 256, S. 2.

nung das Problem von technischen Handelsbarrieren nicht restlos lösen. Solange keine Gemeinschaftsregelung besteht, können die Mitgliedstaaten auf der Grundlage von Art. 36 des EG-Vertrages die Einfuhr von Waren z.B. aus Gründen des Umwelt-, Gesundheits- und Verbraucherschutzes beschränken. Diese Bestimmungen dürfen jedoch weder willkürlich sein noch eine verschleierte Handelsbeschränkung darstellen.Exporteuren aus anderen Mitgliedstaaten, die diese spezifischen Auflagen nicht erfüllen, kann daher der Marktzugang verweigert werden.

Diese Rechtsprechung und die konsequente Anwendung des Prinzips durch die Europäische Kommission[3] selbst hat schon zu einem erheblichen Rückgang des Harmonisierungsbedarfs geführt. Das Prinzip der gegenseitigen Anerkennung hat nicht nur nachhaltige Auswirkungen auf das "Ob", sondern auch auf das "Wie", d. h. die Methode der Harmonisierung. Angeglichen wird heute nur noch, was zur Erreichung der gegenseitigen Anerkennung unbedingt notwendig ist. Die technische Harmonisierung beschränkt sich seit 1985 daher auf Eckwerte und Grundsätze.

3. Gezielte Harmonisierung

a) Beschränkung auf die Grundsätze der gegenseitigen Anerkennung und der Rückgriff auf private Normung sind die Bausteine der neuen Methode der Rechtsangleichung. Einzelheiten werden in einer Entschließung dargelegt, die vom Ministerrat der Europäischen Gemeinschaften am 07.05.1985 verabschiedet wurde.[4] Durch die Konzentration auf grundlegende Anforderungen erspart sich der Gesetzgeber eine Menge Arbeit. Der Industrie gibt der neue Ansatz einen größeren Spielraum bei der Erfüllung der Anforderungen. Richtlinien nach der Neuen Konzeption ergehen auf der Basis von Art. 100 a Abs. 3 des EG-Vertrages. In den Bereichen Gesundheit, Sicherheit, Umwelt- und Verbraucherschutz müssen sie daher von einem "hohen Schutzniveau" ausgehen, welches in der gesamten Gemeinschaft gilt (Prinzip der sog. totalen Harmonisierung). Jede Richtlinie nach der Neuen Konzeption bestimmt:

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[3] Siehe dazu "Die Anwendung des Grundsatzes der gegenseitigen Anerkennung" bei Industrieerzeugnissen, informatorische Aufzeichnung des Dienstes des Sprechers der Europäischen Kommission Nr. P-75, Juni 1988. Diese Politik muß auch weiterhin die Richtschnur des Handelns der Europäischen Kommission sein. Denn die gegenseitige Anerkennung ermöglicht ohne großen gesetzgeberischen und verwaltungsmäßigen Aufwand einen ungehinderten Marktzugang. Davon profitieren besonders die mittleren und kleineren Unternehmen; entfällt doch für sie die Notwendigkeit, sich mit ständig neuen und fremden Rechtsgebieten vertraut machen zu müssen. Leider haben die Mitgliedstaaten der Europäischen Union bisher auch nicht von Art. 100 b des EG-Vertrages Gebrauch gemacht. Siehe zu diesem Punkt auch den sog. **Sutherland-Bericht "Der Binnenmarkt nach 1992"**, Abschnitt I "Vielfalt in einem Binnenmarkt", S. 23 bis 25

[4] Entschließung des Rates vom 07.05.1985 über eine Neue Konzeption auf dem Gebiet der technischen Harmonisierung und der Normen, ABl. Nr. C 136 vom 04.06.1985, S. 1.

- Den Anwendungsbereich der Richtlinie.
- Die grundlegenden Sicherheitsanforderungen.
- Die Konformitätsverfahren, die dem Produkt die Übereinstimmung mit der Richtlinie bestätigen.

b) Eine besondere Rolle spielen bei der Neuen Konzeption die **technischen Normen**. Die Neue Konzeption wird deshalb auch als "Rechtsetzung mit Normverweis" umschrieben. Produkte müssen den grundlegenden Anforderungen entsprechen, wenn sie in den Verkehr gebracht werden. Es liegt bei den Herstellern zu bestimmen, wie ihre Produkte gestaltet und konstruiert/hergestellt werden, damit sie den grundliegenden Anforderungen entsprechen. Da die Richtlinien nach der Neuen Konzeption für ein breites Produktspektrum und für Gefährdungen, die durch ein solches Produkt verursacht werden, gelten, ist von Fall zu Fall ein unterschiedlicher Spielraum zwischen den grundlegenden Anforderungen und ihrer praktischen Anwendung bei der Gestaltung der Produkte gegeben. Deshalb sollen harmonisierte EU-Normen den Herstellern Hilfen bei der technischen Konkretisierung der grundlegenden Anforderungen geben. Die europäischen Normungsorganisationen sind von der Europäischen Kommission beauftragt worden, technische Lösungen zu Konkretisierungen der jeweiligen grundlegenden Sicherheitsanforderungen zu entwickeln. Die Anwendung dieser Normen ist für Hersteller freiwillig.[5] Die Hersteller dürfen auf dem Gemeinschaftsmarkt auch weiterhin Erzeugnisse anbieten, die anderen oder gar keinen technischen Normen genügen. Selbstverständlich müssen diese Produkte die Konformitätsbewertungsverfahren nach der jeweiligen Richtlinie erfolgreich durchlaufen haben. Bei den nach harmonisierten Normen hergestellten Erzeugnissen wird jedoch davon ausgegangen, daß sie die grundlegenden gesetzlichen Anforderungen erfüllen (sog. Konformitätsvermutung):[6]

Zusammenfassung:

Die "Neue Konzeption" verbindet eine Harmonisierung der einzelstaatlichen Vorschriften und technischen Normen mit einer gegenseitigen Anerkennung der Prüf- und Zertifizierungsergebnisse. Basis der Neuen Konzeption zur technischen Harmonisierung sind drei Grundsätze:

- Harmonisierungsrichtlinien legen die grundlegenden Anforderungen fest, denen Erzeugnisse beim Inverkehrbringen genügen müssen, damit sie in der Gemeinschaft vertrieben werden können. Gewöhnlich gilt eine Richtlinie nach der Neuen

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5 Entschließung vom 07.05.1985, aaO, Anhang II "Grundprinzipien", 3. Spiegelstrich.
6 Siehe Fußnote 5, 4. Spiegelstrich.

Konzeption für ein breites Produktspektrum, z.B. für Maschinen.

- Technische Spezifkationen/harmonisierte Normen für die Herstellung und das indenverkehrbringen von Produkten werden von den europäischen Normungsorganisationen festgelegt[7]. Die Anwendung der harmonisierten Normen ist für den Hersteller freiwillig. Beruft sich ein Hersteller auf harmonisierte Normen, bindet dies die zuständigen Behörden[8]: Sie müssen sich die oben dargelegte Vermutungswirkung entgegenhalten lassen: bei einem Produkt, das mit der Festlegung einer harmonisierten Norm übereinstimmt, wird vermutet, daß es mit den gesetzlichen Grundvoraussetzungen zum Schutze von Gesundheit und Sicherheit von Verbrauchern und Umwelt übereinstimmt.

- Erzeugnisse, die den grundlegenden Anforderungen der entsprechenden Richtlinie(n) genügen, sind daran erkennbar, daß sie die "CE-Kennzeichnung" tragen. Die Kennzeichnung zeigt außerdem an, daß sich der Hersteller allen für sein Erzeugnis vorgesehenen Bewertungsverfahren unterworfen hat.

II. Auf der Grundlage der "Neuen Konzeption" ist auch die Richtlinie 89/392/EWG des Rates vom 14.06.1989 zur Angleichung der Rechtsvorschriften der Mitgliedstaaten für Maschinen[9] ergangen **(Bild 1)**. Von Ausnahmen abgesehen (s. Art. 13 der Maschinenrichtlinie) ist sie im Europäischen Wirtschaftsraum grundsätzlich seit dem 01.01.1995 anzuwenden. Sie wurde seitdem mehrfach geändert:

- Durch die Richtlinie 91/368/EWG des Rates vom 20.06.1991[10].

- Durch die Richtlinie 93/44/EWG des Rates vom 14.06.19993[11].

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[7] Europäische Normenorganisationen:

CEN (Europäisches Komitee für Normung)
Rue de Stassart 36, B-1050 Brüssel
Tel.: (32) 2 519 68 11, Fax: 2 519 68 19

Cenelec (Europäisches Komitee für elektronische Normung)
Rue de Stassart 35, B-1050 Brüssel
Tel.: (32) 2 519 68 71, Fax: 2 519 69 19

ETSI (Europäisches Institut für Telekommunikationsnormen)
F-06921 Sophia Antipolis Cedex
Tel.: (33) 92 94 42 00, Fax: 93 65 47 16

[8] Siehe dazu bei der Maschinenrichtlinie Art. 5 Abs. 2.
[9] ABl. Nr. L 183 vom 29.06.1989, S. 9.
[10] ABl. Nr. L 198 vom 22.07.1991, S. 16.
[11] ABl. Nr. L 175 vom 19.07.1993, S. 12.

- Durch die Richtlinie 93/68/EWG des Rates vom 22.07.1993[12].

III. Eng verbunden mit dem Gemeinsamen Markt ist Rechtsangleichung im Dienst gemeinschaftlicher Sozialpolitik. Dementsprechend wurde in den EG-Vertrag Art. 118 a eingefügt. Er ermöglicht es, Richtlinien zu erlassen, die eine Verbesserung der Arbeitsumwelt bewirken und die Schaffung eines einheitlichen Mindeststandards für die Sicherheit und Gesundheit der Arbeitnehmer in den einzelnen Mitgliedstaaten zum Ziel haben. Die Richtlinien nach 118 a EG-Vertrag stellen einheitliche Mindestvorschriften dar, die von den einzelnen Mitgliedstaaten in nationales Recht umgesetzt werden müssen. Dabei steht es jedem Staat frei, national einen höheren Standard beizubehalten oder festzuschreiben, sofern dies mit dem EG-Vertrag vereinbar ist. Aus den höheren Anforderungen an die Beschaffenheit von Maschinen dürfen sich daher keine Handelshemmnisse ergeben.

Von zentraler Bedeutung ist die "Richtlinie 89/391/EWG des Rates vom 12.06.1989 über die Durchführung von Maßnahmen zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Arbeitsnehmer bei der Arbeit".[13] Sie wird kurz als Arbeitsschutz-Rahmenrichtlinie bezeichnet und gilt als das Grundgesetz der EU für Sicherheit und Gesundheitsschutz. Art. 16 der Arbeitsschutz-Rahmenrichtlinie sieht vor, daß für bestimmte Bereiche Einzelrichtlinien erlassen werden. Im Bereich der "machines standards" ist einschlägig die "Richtlinie 89/655/EWG des Rates vom 30.11.1989 über Mindestvorschriften für Sicherheit und Gesundheitsschutz bei Benutzung von Arbeitsmitteln durch Arbeitnehmer bei der Arbeit"[14]. Sie gilt für die Benutzung aller Arbeitsmittel, d. h. aller Maschinen, Apparate, Werkzeuge oder Anlagen, die bei der Arbeit benutzt werden. Zum Benutzen von Arbeitsmitteln gehören Schalten, Gebrauchen, Transportieren, Instandhalten, Umbauen und Reinigen.

Im europäischen Gesetzgebungsverfahren befindet sich zur Zeit ein Vorschlag[15] für eine Richtlinie des Rates zur Änderung der Richtlinie 89/655/EWG über Mindestvorschriften für Sicherheit und Gesundheitsschutz bei Benutzung von Arbeitsmitteln durch Arbeitnehmer bei der Arbeit.[16]

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12 ABl. Nr. L 220 vom 30.08.1993, S. 1.
13 ABl. Nr. L 183 vom 29.06.1989, S. 1.
14 ABl. Nr. L 393 vom 30.12.1989, S. 13.
15 ABl. Nr. C 104 vom 12.04.1994, S. 4.
16 Die besonderen Probleme der Maschinen mit diesen Richtlinien werden abgehandelt von einem anderen Berichterstatter im Kapitel "Employment and social policy", dort im Abscnitt "Health and Safety at work".

B. Analysis oder "Der Geist des Gesetzgebers muß der Geist der Mäßigung sein"[17]

I. Seit Jahren warnen Ökonomen vor den schädlichen Folgen einer regulierungsbedingten Verkrustung des Wirtschaftssystems (Eurosklerose). Dabei wird die Diskussion unter den verschiedensten Begriffen geführt, z.B. Verrechtlichung, Deregulierung, Vereinfachung, um nur einige zu nennen. Andere Schlagworte sind Privatisierung, Bürokratisierung, Normenflut oder auch ein Übermaß an "Staat". Zusätzlich korrespondiert jeder dieser Begriffe mit unterschiedlichen Theorien über das Verhältnis von Organisation und Markt, Politik und Recht.[18]

Ziel dieses Gutachtens ist es nicht, eine weitere Theorie vorzutragen. Sondern ausgehend von der Tatsache, daß die Vorschläge zur Rechtsvereinfachung im Bereich der "machines standards" die Neue Konzeption **ausdrücklich bejahen!** soll am Beispiel der "machines standards" gezeigt werden, wo in der Rechtspraxis bessere Regeln möglich sind. Es geht hier also nicht um Alternativen **zum** Recht, sondern um Alternativen **im** Recht. Nicht das **"Ob"** der Harmonisierung im Bereich der "machines standards" steht zur Diskussion, sondern ihr **"Wie"**[19].

Verkehrt wäre es aus Sicht des Rapporteurs, Deregulierung schlicht mit Staatsabbau gleichzusetzen. Vielmehr ist die "quantitative Komponente durch eine qualitative zu ergänzen. Die Zielpunkte einer solchen qualitativen Deregulierung werden durch das Dreieck von Freiheit, Schutz von Gemeinschaftsgütern und Effektivität bestimmt. Es ist ein magisches Dreieck, weil die gesetzten Maßnahmen die einzelnen Zielpunkte unterschiedlich tangieren. Was den einen Zielpunkt fördert, kann für den anderen abträglich sein..."[20]

Eindeutige Maßstäbe, wie die Zielkonflikte zu lösen sind, gibt es nicht. Augenscheinlich besteht ein Spannungsverhältnis zwischen den einzelnen Zielen. Es zu leugnen oder zu nivellieren wäre von Grund auf falsch. Selbstverständlich sind auch die Vorschläge des Berichterstatters in dieses Spannungsverhältnis einge-

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17 Montesquieu, zitiert aus "Der Staat der Philosophen", Sentenzen aus drei Jahrtausenden von Dr. H.-H. Dreßler.

18 Siehe z.B. nur "Wo regeln Bremsen ... Deregulierung und Privatisierung im Vormarsch", Neue Zürcher Zeitung 1995.

19 Siehe dazu auch Art. 3 h EG-Vertrag: "Die Tätigkeit der Gemeinschaft im Sinne des Art. 2 umfaßt ... h) die Angleichung der innerstaatlichen Rechtsvorschriften **soweit dies für das Funktionieren des Gemeinsamen Marktes erforderlich ist**".

20 Wimmer/Mederer "Regulierung und Deregulierung zur Herstellung eines offenen und funktionsfähigen Marktes", Wien 1993, S. 9.

bunden. Ich bin mir bewußt, daß meine Gewichtung, d.h. Lösungsvorschläge, nicht immer Jedermanns Zustimmung finden werden. Notwendig ist eine Auseinadersetzung mit dem Spannungsverhältnis selbst. Die Lösung kann dann nur so erfolgen, daß ermittelt wird, welches Ziel bei der Entscheidung einer konkreten Frage jeweils das höhere Gewicht hat. In diesen Fragen hat dann allerdings die Politik das letzte Wort.

Deregulierungspolitik darf auch nicht als eine bloße rechtstechnische Angelegenheit verstanden werden. Angesprochen ist ein Wandel der inneren Einstellung der "Gesetzesmacher". Gefordert sind nicht nur der Gesetzgeber, sondern alle, die in den Rechtsetzungsprozeß einbezogen sind, also auch die Wirtschaft, Interessengruppen oder sonstige Institutionen. Notwendig ist ein Wandel der Rechtskultur, bei der die Frage nach dem **rechtstatsächlichen Handlungsbedarf** an erster Stelle zu stehen hat. Wird er nicht eindeutig nachgewiesen, hat die Regelung zu unterbleiben. Beweispflichtig für neue Regelungen ist derjenige, der sie vorschlägt. Unterbleibt eine Regelung, bedeutet dies nicht, daß ein "rechtsfreier Raum" entsteht. Es gilt dann immer noch das nationale Recht und das originäre Gemeinschaftsrecht, insbesondere der Grundsatz der gegenseitigen Anerkennung auf der Basis von Art. 30/36 EG-Vertrag.

II. Der gemeinsame Markt für "machines standards" auf der Basis der Neuen Konzeption wird, wie gesagt, ausdrücklich gewollt und begrüßt. Dazu zählt auch die neue Methode der "Rechtsetzung mit Normverweis"[21].

Was vielfach bemängelt wird, ist die "unendliche Auslegungsfähigkeit" des Gesetzestextes, z.B. die Definition von "Maschinen" im Sinne von Art. 1 Abs. 2, 3, Maschinenrichtlinie. "Wegen der Schwerfälligkeit der Vorschriften"[22] entstünden ihnen Kosten dadurch, daß sie Sonderberater zur Erläuterung hinzuziehen müßten. Hinzu kommt eine "bürokratische Sicherheitsdokumentation", z.B. bei den "Bescheinigungen" nach Anhang II der Maschinenrichtlinie oder beispielhaft beim Umfang der Betriebsanleitung gem. Anhang I Nr. 1.7.4 der Maschinenrichtlinie. Gerade die Sicherheitsdokumentation wird von kleineren und mittleren Unternehmen beklagt. Der Dokumentationsaufwand sei übertrieben und nicht durch berechtigte Sicherheitsinteressen gedeckt.

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[21] Wegen weiterer Einzelheiten wird verwiesen auf den "Leitfaden für die Anwendung der nach dem Neuen Konzept und dem Gesamtkonzept verfaßten Gemeinschaftsrichtlinien zur technischen Harmonisierung", erste Fassung, Teil D, S. 35 ff.

[22] Zitat aus dem "Fragebogen für die Organisationen", Frage A 4, 2. Spiegelstrich.

Vielfach bestehen auch Abgrenzungsprobleme mit anderen Richtlinien nach der Neuen Konzeption, was weiteren Unmut auslöst (Siehe dazu Art. 1 Abs. 4 u. 5 Maschinenrichtlinie). Die Vorteile des freien Warenverkehrs werden als gering angesehen, ja die Akzeptanz des Gemeinsamen Marktes steht angesichts der Anwendungsprobleme[23] in Frage. Es ist ja nicht nur die Maschinenrichtlinie, die Veränderungen im Unternehmensalltag bewirkt. Seit der Umsetzung des Weißbuches aus dem Jahre 1985 müssen sich die Unternehmer auf ein umfangreiches neues EU-Recht aus allen Gebieten[24] einstellen, z.B. andere Richtlinien nach der Neuen Konzeption, Produkthaftungsgesetz, Gesellschaftsrecht, Mehrwertsteuersysteme usw. Eine Zusammenschau all dessen, was ein Unternehmer an neuem Recht zu beachten hat, fehlt indes. Jeder sieht nur sein Segment, ohne nach rechts und links zu schauen[25]. Beim Unternehmer bündeln sich jedoch alle Vorschriften, was dann zur Klage über eine Verrechtlichung unserer Gesellschaft führt. Es ist deswegen unabdingbar, durch institutionelle Vorkehrungen sicherzustellen, daß die einzelnen Teil-Gesetzgeber besser zusammenarbeiten.

C. Proposals

I. Generelle Vorschläge

Einige Antworten warnen davor, im Bereich der "machines standards" Änderungen vorzunehmen. Man habe sich auf die neue Rechtslage eingestellt, notwendig sei eine Phase der Konsolidierung. Dieser Einwand ist berechtigt. Denn vollständig angewendet werden muß die Richtlinie erst ab dem 01.01.1995. Daher spricht einiges dafür, zunächst über einen gewissen Zeitraum Erfahrungen mit dem neuen Recht zu sammeln, bevor Gesetzesänderungen in Betracht gezogen werden. Andererseits sind schon nach ein paar Monaten erhebliche Auslegungsfragen zu Tage getreten. Bei der Abwägung zwischen einem "Stillstand der Gesetzgebung" (Rechtsgut: Rechtssicherheit) einerseits und dem "Reformbedarf" (Rechtsgut: Rechtsklarheit) andererseits spricht angesichts der Anwendungsprobleme mehr für ein behutsames Reformieren. Viel wäre schon gewonnen, wenn der Ausschuß nach Art. 6 Abs. 2 als ein Instrument genutzt wird, um unbürokratisch und effektiv Anwendungsprobleme zu lösen, die im Verwaltungsvollzug lösbar sind.[26]

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23 Siehe dazu auch den Sutherland-Bericht, "Bedeutung für Verbraucher und Unternehmer" a.E., S. 10.

24 Siehe dazu bereits im Sutherland-Bericht "Empfehlung 14", S. 42-44.

25 Siehe dazu bereits im Sutherland-Bericht "Empfehlung 15", S. 42-44; ebenso jetzt auch der "Bericht der Deutsch-Britischen Deregulierungsgruppe", S. 27: "Für sich betrachtet mag eine Regelung nicht besonders belastend wirken. Die kumulative Auswirkung dieser einzelnen Regelung kann jedoch beträchtliche Kosten verursachen".

26 In diesem Zusammenhang ist auch an Art. 5 des EG-Vertrages zu erinnern: "Die Mitgliedstaaten treffen alle geeigneten Maßnahmen allgemeiner oder besonderer Art zur Erfüllung der Verpflichtungen, die sich aus diesem

Rechtsbereinigungen, die ohne Gesetzesänderungen nicht möglich sind, sollten spätestens in einem Jahr nach Inkrafttreten der Richtlinie eingeleitet werden.

1. Viele Antworten äußern ihre Sorge z.B. über eine "inadequate market surveillance", über eine "wrong use of CE-marking" oder eine "wrong national implementation of community legislation in the member states". Die Probleme, die der Sutherland-Bericht unter Abschnitt IV "Durchsetzung der Regeln im Wege der Partnerschaft" abhandelt, scheinen daher bei der Umsetzung der Maschinenrichtlinie immer noch zu bestehen. Leider sind die Antworten in diesen Punkten nur allgemein, so daß nicht gezielt bestimmten Problemen nachgegangen werden konnte. Nur in Bezug auf Italien wird die fehlende Umsetzung der Maschinenrichtlinie beklagt. Wenn denn Zweifel bestehen, "was die Aussichten für eine einheitliche und wirksame Durchsetzung der Binnenmarktvorschriften in der gesamten Gemeinschaft betrifft"[27] ist es mehr als folgerichtig, wenn der Rat die Entschließung vom 16.06.1994 gefaßt hat. Die Entschließung lautet: Entschließung des Rates vom 16.06.1994 über die Entwicklung der Zusammenarbeit der Verwaltungen bei der Anwendung und Durchsetzung des Gemeinschaftsrechts im Rahmen des Binnenmarktes.[28] Vor dem Hintergrund der mitgeteilten Sorge über eine uneinheitliche Anwendung der Maschinenrichtlinie ist die Entschließung vom 16.06.1994 von allen Beteiligten[29] konsequent mit Leben zu füllen.

2. Die Maschinenrichtlinie ist ein neues europäisches Recht. Wie jedes neue Recht, ist es mit viel Unsicherheiten und Anwendungsproblemen behaftet. Daher ist es mehr als verständlich, wenn die von der Richtlinie Betroffenen häufig danach fragen, wer ihnen "verbindliche Antworten" auf ihre drängenden Fragen geben kann. Die Idee des Sutherland-Berichtes, "Rechtsdurchsetzungs-Leitfäden"[30] zu erlassen, hat daher viel für sich. Es ist bekannt, daß der Beratende Ausschuß nach Art. 6 Abs. 2 der Maschinenrichtlinie bereits eine Liste mit "75 Fragen und Antworten" herausgegeben hat, die sich mit der Durchführung und Anwendung der Maschinenrichtlinie befaßt. Diese Liste könnte als ein Teil eines Rechtsdurchsetzungs-Leitfadens angesehen werden. Wenn die Erfahrung nicht trügt, müßten von dem Ausschuß jedoch die Fragen und Antworten schneller erarbeitet, beantwortet und von den Mitgliedstaaten zügiger publiziert werden.

Vertrag oder aus Handlungen der Organe der Gemeinschaft ergeben. Sie erleichtern dieser die Erfüllung ihrer Aufgabe. Sie unterlassen alle Maßnahmen, welche die Verwirklichung der Ziele dieses Vertrages gefährden."

27 Zitiert nach dem Sutherland-Bericht, S. 64, 2. Abs. oben.

28 ABl. Nr. C 179 vom 01.07.1994, S. 1.

29 Siehe Fußnote 28.

30 Empfehlung 37 des Sutherland-Berichtes.

3. Die Empfehlung 10 des "Sutherland-Berichtes" besagt, daß systematischere und nachhaltigere Anstrengungen unternommen werden sollten, um die Kodifizierung des Gemeinschaftsrechtes zu beschleunigen. Hand in Hand damit müßten entsprechende Anstrengungen der Mitgliedstaaten gehen, damit gewährleistet sei, daß die Transparenz ihrer Vorschriften zur Umsetzung des Gemeinschaftsrechtes eine ähnlich hohe Priorität erhielten. Dem kann nur nachdrücklich zugestimmt werden. Z.B. fehlt auch eine Kodifizierung der Maschinenrichtlinie auf der Basis der oben dargestellten Änderungen[31] . Verführe man so, würde alleine schon dadurch die "Lesbarkeit" des Gemeinschaftsrechtes wesentlich erleichtert.

II. Reduzierung des Dokumentationsaufwandes

1. Versendung der "Bescheinigungen" nach Anhang II

Beim Inverkehrbringen einer Maschine müssen jeder Maschine "Bescheinigungen" nach Anhang II der Maschinenrichtlinie beigefügt sein:

- EG-Konformitätserklärung für Maschinen (Anhang II A)
- Erklärung des Herstellers oder seines in der Gemeinschaft niedergelassenen Bevollmächtigten gem. Art. 4 Abs. 2 (Anhang II B)
- EG-Konformitätserklärung für einzeln in Verkehr gebrachte Sicherheitsbauteile (Anhang II C)

Dies folgt aus Art. 5 Abs. 1 Satz 1 und aus Art. 4 Abs. 2 Satz 1 Maschinenrichtlinie. Die andere Richtlinien nach der Neuen Konzeption , wie z.B. die

- Niederspannungsrichtlinie
- die elektromagnetische Verträglichkeits-Richtlinie
- die Telekommunikationsendeinrichtungs-Richtlinie
- Medizinprodukte-Richtlinie usw.

verlangen dies nicht. Dort sind die "Bescheinigungen" als Teil der **Produktdokumentation** beim Aussteller der Erklärung (Hersteller oder Bevollmächtigter) aufzubewahren. Dies sollte auch für die Maschinenrichtlinie gelten. Denn häufig ist es so, daß für die Maschinenbauer auch andere Richtlinien nach der Neuen Konzeption einschlägig sind. So wird eine Kohärenz mit diesen Richtlinien hergestellt, eine Kohärenz, die bereits im Sutherland-Bericht angemahnt wurde.[32]

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[31] Siehe S. 4

[32] Siehe dazu die Empfehlungen der Sutherland-Kommission Nr. 14, 15.

1. Vorschlag:

Auf das Erfordernis, beim Inverkehrbringen jeder Maschine bzw. Sicherheitsbauteil eine "Bescheinigung" nach Anhang II beizufügen, wird verzichtet. Statt dessen bewahrt der Aussteller der "Bescheinigungen" diese für die Überwachungsbehörde auf (analog Anhang V Ziff. 4 b).

2. Technische Dokumentation

Bevor der Hersteller oder sein in der Gemeinschaft niedergelassener Bevollmächtigter die EG-Konformitätserklärung ausstellen kann, muß er sich vergewissert haben und gewährleisten können, daß in seinen Räumen zum Zweck einer etwaigen Kontrolle eine sog. "Technische Dokumentation" vorhanden ist, Anhang V Ziff. 3 der Maschinenrichtlinie. Im Gegensatz dazu bestimmt Art. 10 der Richtlinie über die elektromagnetische Verträglichkeit[33], daß bei Geräten, bei denen der Hersteller die in Art. 7 Abs. 1 genannten Normen angewendet hat (das sind die sog. Harmonisierten EN-Normen) die Übereinstimmung der Geräte mit den Vorschriften nach der ENV-Richtlinie ausschließlich durch eine vom Hersteller oder von seinem in der Gemeinschaft niedergelassenen Bevollmächtigten ausgestellte EG-Konformitätserklärung bescheinigt wird. Nur für den Fall, daß der Hersteller keine harmonisierten EN - Normen angewendet hat, muß er für die zuständigen Behörden eine Technische Dokumentation bereithalten, Art. 10 Abs. 2 der Richtlinie über die elektromagnetische Verträglichkeit[34].

2. Vorschlag:

Die Anforderungen der Maschinen-Richtlinie an eine technische Dokumentation sollten vereinfacht werden, wenn eine Maschine nach harmonisierten EN-Normen gebaut wird. In solchen Fällen sollte ein einziges Schriftstück auf der Grundlage der Konformitätserklärung ausreichen.

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33 Richtlinie 89/336/EWG des Rates vom 03.05.1989 zur Angleichung der Rechtsvorschriften der Mitgliedstaaten über die elektromagnetische Verträglichkeit, Amtsblatt ABl. Nr. L 139 vom 23.05.1989, S. 19; zuletzt geändert durch Richtlinie des Rates 93/68 EWG vom 22.07.1993, ABl. Nr. L 220 vom 30.08.1993, S. 1.

34 Vgl. Fußnote Nr. 13

3. Die Sprachfassung der Bescheinigungen nach Anhang II der Maschinenrichtlinie sowie der Betriebsanleitung nach Anhang I Nr. 1.7.4 b

Anhang I Ziff. 1.7.4 b hat folgenden Wortlaut:

"Die Betriebsanleitung wird vom Hersteller oder seinem in der Gemeinschaft niedergelassenen Bevollmächtigten in einer der Gemeinschaftssprachen erstellt. ***Bei der Inbetriebnahme einer Maschine muß die original Betriebsanleitung und eine Übersetzung dieser Betriebsanleitung in der oder den Sprache(n) des Verwendungslandes mitgeliefert werden.*** *Diese Übersetzung wird entweder vom Hersteller oder von seinem in der Gemeinschaft niedergelassenen Bevollmächtigten oder von demjenigen erstellt, der die Maschinen in dem betreffenden Sprachgebiet einführt...*

Im Anhang II ist folgende Fußnote zu der Sprache der "Bescheinigungen" angebracht:

(1) "Diese Erklärung ist in derselben Sprache wie die original Betriebsanleitung abzufassen, und zwar maschinenschriftlich oder in Druckbuchstaben. ***Ihr muß eine Übersetzung in einer der Sprachen des Verwendungslandes beigefügt sein. Für diese Übersetzung gelten die gleichen Bedingungen wie für die Betriebsanleitung."***

Die Anforderung, die Betriebsanleitung in der Originalsprache des Herstellers **und** (!) des Absatzlandes zu liefern, wird für unsinnig gehalten. Der spätere Verwender könne mit einer Betriebsanleitung in einer fremden Sprache wenig anfangen, sie sei auch mit außerordentlichen Kosten verbunden und nicht dem Umweltschutz(Papierverschwendung) zuträglich. Ausreichend müsse es sein, nur **eine** Betriebsanleitung zur Verfügung zu stellen.

Generell gilt, daß das Verbot, eine Betriebsanleitung in einer anderen Sprache als der Sprache oder den Sprachen des Landes zu erstellen, in dem sie **erstmals** in Verkehr gebracht wurden, eine Behinderung des innergemeinschaftlichen Handels[35] darstellt. Die aus anderen Mitgliedstaaten stammenden Erzeugnisse müssen mit einer anderssprachigen Betriebsanleitung versehen werden, was zusätzliche Kosten verursacht. Dieses "Hindernis"muß daher auch im Sinne der Rechtsprechung des EuGH Art. 30/36 EG-Vertrag gerechtfertigt sein. Die Information des Benutzers in der Sprache des Verwenderlandes ist sicherlich ein geeignetes Mittel

[35] Sinngemäß zitiert gem. Ziff. 13 des Urteils des EuGH, Urteil vom 09.08.1994 - rs. C-51/93.

zum Schutz des Verbrauchers. Zusätzlich noch die Originalbetriebsanleitung - in einer fremden Sprache! - mitzuliefern, dürfte dagegen nicht mit dem Verhältnismäßigkeitgrundsatz vereinbar sein.

Die Sprachfassung der Betriebsanleitungen ist ein generelles Problem der Neuen Konzeption. Denn z.B. die Niederspannungsrichtlinie, die Richtlinie zur elektromagnetischen Verträglichkeit oder auch die Richtlinien über Telekommunikationsendeinrichtungen machen keine Aussagen zur Sprachfassung. Maßstab für eine generelle Lösung könnte Artikel 4 Abs. 4 der Medizinprodukte Richtlinie[36] sein:

> "Die Mitgliedstaaten können verlangen, daß die ..."Angaben"(Verfasser).... bei der Übergabe an den Endanwender in der bzw. den jeweiligen Landessprachen oder in einer anderen Gemeinschaftssprache vorliegen..."

Im Anhang I, Ziffer 7.2 des Richtlinien Entwurfes[37] über **Aufzüge** heißt es z.B.:

> "Jedem Aufzug ist eine Betriebsanleitung beizugeben, die in der Sprache des Landes abgefaßtsein muß, in dem der Aufzug eingesetzt wird."

Diese Regelung sollte kurzfristig auch bei der Maschinen-Richtlinie angewendet werden.

3. Vorschlag:

Es wird empfohlen, Anhang I Ziff. 1.7.4 b Satz 2 der Maschinenrichtlinie wie folgt zu fassen:

"Bei der Inbetriebnahme einer Maschine muß eine Übersetzung der Betriebsanleitung in der oder den Sprache(n)[38] des Verwendungslandes mitgeliefert werden."[39]

Diese Anforderung sollte dann auch für die "Bescheinigung" nach Anhang II gelten.

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[36] ABL. Nr. L 169 vom 12.7.1993, S.1

[37] ABl. Nr.C 062 vom 11.03.1992, S. 12; geänderter Vorschlag ABl. Nr. C 180 vom 02.07.1993, S. 11

[38] Für den praktischen Vollzug und die Übersetzungstätigkeiten der Unternehmer wäre es hilfreich, zu erfahren, ob die Sprache(n) des Verwenderlandes gleichzusetzen ist (sind) mit der (den) Amtssprachen nach Art. 217 EG-Vertrag. Eine Mitteilung der Kommission dazu ist wünschenswert.

[39] Zum Ganzen siehe auch "Mitteilung der Kommission an den Rat und das Europäische Parlament betreffend den Sprachengebrauch für die Information der Verbraucher in der Gemeinschaft", KOM (93) 456 endg. vom 10.11.1993.

4. Vorschlag:

Es wird empfohlen, die Fußnote 1 im Anhang II wie folgt zu fassen:
"Diese Erklärung ist in derselben Sprache wie die Betriebsanleitung abzufassen, und zwar maschinenschriftlich oder in Druckbuchstaben".

Vorschlag Nr. 4 sollte noch weiter reformiert werden. In einigen Antworten auf den Fragebogen wird angeregt, die Vertragsparteien darüber entscheiden zu lassen, welche Amtssprache der EU verwendet wird. Wenn so verfahren würde, hätten die Vertragspartner eine wesentlich höhere Verantwortung für den sicheren Umgang mit Maschinen, d. h. die zivilrechtliche Produkthaftung ist stärker zu beachten. Und bei der Benutzung von Maschinen durch Arbeitnehmer kommt die Richtlinie[40] 89/655/EWG zur Anwendung (Siehe dort Artikel 6, insbesondere auch Absatz 3).

5. Vorschlag:

Anhang I Ziff. 1.7.4 b Satz 1 und 2 (neue Fassung) wird um folgenden Satz **ergänzt:**
"In begründeten Fällen kann eine andere für den Verwender der Maschine leicht verständliche Sprache vorgesehen werden."

4. Umfang der Betriebsanleitung

Jede Betriebsanleitung einer Maschine muß mit Mindestangaben gem. Ziff. 1.7.4 des Anhangs I versehen sein. Dies sind sehr detaillierte Vorgaben, die pauschal auf jede Maschine Anwendung finden, unabhängig vom jeweiligen Risikopotential der jeweiligen Maschine. Kleinere und mittlere Betriebe sprechen sich für eine mehr differenzierte Betrachtung aus, auch vor dem Hintergrund der Produkthaftung.[41]

6. Vorschlag:

Ziff. 1.7.4 des Anhangs I sollte eingangs wie folgt beginnen:
Satz 1: "Müssen nur zur Verhütung von Gefahren bestimmte Regeln bei der Verwendung, Ergänzung oder Instandhaltung einer Maschine beachtet werden, so muß jede Maschine mit einer Betriebsanleitung versehen sein."

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[40] ABl. Nr. L 393 vom S.13

[41] Art. 6 Abs. 1 a lautet: "Ein Produkt ist fehlerhaft, wenn es nicht die Sicherheit bietet, die man unter Berücksichtigung
aller Umstände, insbesondere **der Darbietung des Produktes** ... zu erwarten berechtigt ist." (Richtlinie 85/374/EWG vom 25.07.1985, ABl. Nr. L 210, S. 29)

Satz 2: "Die Betriebsanleitung ist entbehrlich, wenn die vollständig sichere Verwendung der Maschine ohne Betriebsanleitung gewährleistet ist."[42]
Satz 3: "a) Notwendige Betriebsanleitungen enthalten folgende Mindestangaben: ..."
Dabei sollten die Anforderungen an den Inhalt der Betriebsanleitungen auf das unbedingt notwendige Maß beschränkt werden.

5. CE-Kennzeichnungs-Wirrwarr bereinigen

Eine immer wiederkehrende Frage ist die, ob die Maschine die sog. CE-Kennzeichnung[43] nach Art. 10 tragen darf bzw. muß. Auslöser für die vielen Fragen ist die Tatsache, daß die Maschinenrichtlinie selber "ihre Maschinen" in sieben verschiedene Arten einteilt. Welche dies sind, zeigt Bild 4. Von diesen sieben Arten dürfen jedoch nur drei die CE-Kennzeichnung tragen! Vor dem Hintergrund der Rechtsfolge, die sich mit einer unzulässigen CE-Kennzeichnung verbindet (s. Art. 10 Abs. 2 und 3 i.V.m. Art. 7), handelt es sich um eine sehr gewichtige Abgrenzungsfrage. Die CE-Kennzeichnungspflicht (ja oder nein) wird noch verwirrender, wenn man z.B. den Blick mit auf die Richtlinie die Niederspannungsrichtlinie lenkt. So müssen elektrotechnische Produkte spätestens ab 1997 eine CE-Kennzeichnung nach der Niederspannungsrichtlinie tragen. Diese Produkte können aber z.B. als Sicherheitsbauteile für den Einbau in eine Maschine bestimmt sein und dürfen nach der Maschinenrichtlinie nur eine Konformitätserklärung haben. Eine CE-Kennzeichnung unter der Maschinenrichtlinie ist nicht erlaubt. Darin kommt eine weitere Unlogik der CE-Kennzeichnung zutage: Wieso sicherheitsrelevante Sicherheitsbauteile keine CE-Kennzeichnung tragen dürfen, möglicherweise weniger "gefährliche" Maschinen ohne CE-Kennzeichnung jedoch nicht verkehrsfähig sind. Von der Logik her müsse es doch umgekehrt sein: wenn schon Maschinen CE-gekennzeichnet sein müssen, dann erst recht auch die Sicherheitsbauteile.

Zusätzlich variiert die **Art und Weise** der CE-Kennzeichnung[44]. Unter der Niederspannungsrichtlinie kann z.B. die CE-Kennzeichnung auf dem Erzeugnis selbst, auf

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[42] Diese Formulierung wird vorgeschlagen analog der Richtlinie 93/42/EWG des Rates vom 14.06.1993 über Medizinprodukte (ABl. Nr. L 169 vom 12.06.1993, S. 1), Anhang I Ziff. 1.3.1 am Ende, S. 17 des Amtsblattes.

[43] CE = Communautes Europèenes = Euroäische Gemeinschaften

[44] Hinzu kommt auch eine inhaltliche Vieldeutigkeit der CE-Kennzeichnung bezogen auf die jeweiligen Konformitäts-Bewertungsverfahren, die Anwendung gefunden haben. Bei der Maschinenrichtlinie kann dies das (Herstellererklärung) gem. Art. 8 Abs. 2 a sein oder das (EG-Baumusterprüfung i.V.m. einer Konformitätserklärung) gem. Art. 8 Abs. 2 b und c. Andere einschlägige Richtlinien kennen noch mehrere verschiedene Konformitäts-Bewertungsverfahren, für die jeweils nur die eine CE-Kennzeichnung gilt.
*Weitere Beispiele für die Anwendungsprobleme im Zusammenhang mit der CE-Kennzeichnung belegt der **Antwortenkatalog der Kommission zur Maschinenrichtlinie** vom 20.01.1995, dort die Fragen und Antworten 33, 51, 61.*

der Verpackung oder auf den Begleitunterlagen angebracht werden. Unter der Richtlinie zur elektromagnetischen Verträglichkeit ist die CE-Kennzeichnung auch auf dem Erzeugnis, und wenn dies nicht möglich ist, auf der Verpackung oder auf den Begleitunterlagen anzubringen. Unter der Maschinenrichtlinie ist die CE-Kennzeichnung auf dem Erzeugnis selbst anzubringen.

Bei diesem Kennzeichnungs-Wirrwarr und den Abgrenzungsschwierigkeiten nach den Maschinenarten (s. Bild 3) stellt sich die Frage, ob nicht auf die CE-Kennzeichnung verzichtet werden kann.

Die CE-Kennzeichnung ist von ihrer Konzeption her ein Verwaltungszeichen, das sich an die Überwachungsbehörden richtet. Es unterrichtet die Behörden darüber, daß das gekennzeichnete Produkt richtlinienkonform ist. Die CE-Kennzeichnung richtet sich also nicht an die Abnehmer und Verbraucher, es ist somit kein Qualitätszeichen und auch kein Normenkonformitätszeichen[45]. Inhaltlich sagt die CE-Kennzeichnung damit nichts anderes aus, als daß der Hersteller die gesetzlichen Vorgaben erfüllt hat, die er aber sowieso erfüllen muß, um sein Produkt auf den Markt bringen zu dürfen. Im Ergebnis symbolisiert das CE-Zeichen damit etwas selbstverständliches: daß der Hersteller die Gesetze beachtet hat. Eine Begründung für diese Selbstverständlichkeit ist schwer auszumachen. Anderes EU-Recht, wie z.B. Lebensmittel, Kraftfahrzeuge oder Arzneimittel sehen denn auch keine zusätzlichen Zeichen für den Tatbestand der Gesetzeskonformität vor. Eine CE-Kennzeichnung ist weder in der Entschließung[46] vom 07.05.*1985* über eine neue Konzeption auf dem Gebiet der technischen Harmonisierung und Normung vorgesehen noch ist es Gegenstand der wesentlichen Zielsetzungen und Aussagen der Mitteilung vom 11.06.1989 über ein globales Konzept für Zertifizierung und Prüfwesen[47]. Für die Marktüberwachung selbst hat es keinen besonderen Wert. Denn ein Produkt kann mit und ohne CE-Kennzeichen sicher bzw. unsicher sein. Entscheidend für die Marktüberwachung ist nach der Neuen Konzeption nicht ein Zeichen, sondern die technische Dokumentation gem. Anhang V Nr. 3 der Maschinenrichtlinie i.V.m. der EG-Konformitätserklärung. Soweit heißt es unter Anhang V Nr. 3 Satz 1:

"... Bevor der Hersteller oder sein in der Gemeinschaft niedergelassener Bevollmächtigter die EG-Konformitätserklärung ausstellen kann, muß er sich vergewissert haben und Gewähr leisten können, daß in seinen Räumen zum Zweck einer etwai-

[45] Siehe dazu Ziffer 9 d. Vorschlages für eine VO des Rates über die Anbringung u. Verwendung des CE-Zeichens, ABl. Nr.C 160 v. 20.6.1991, S 14
[46] Siehe Fußnote 4.
[47] ABl. Nr. C 231 vom 08.09.1989, S. 3, und ABl. Nr. C 267 vom 19.10.1989, S. 3.

gen Kontrolle** die nachstehend definierten Unterlagen vorhanden sind und verfügbar bleiben werden: ... Werden die Unterlagen auf gebührend begründetes Verlangen der zuständigen Nationalbehörde nicht vorgelegt, so kann dies ein ausreichender Grund dafür sein, **die Übereinstimmung mit den Bestimmungen der Richtlinie zu bezweifeln. ..."

7. Vorschlag:

Angesichts der Tatsache, daß

- die CE-Kennzeichnung ein gesetzlich vorgeschriebenes Zeichen ohne erkennbaren Wert für Verbraucher und Anwender ist,

- innerhalb einer Richtlinie vielfältige Formen der CE-Kennzeichnung auftreten und entsprechende Unsicherheiten hervorrufen,

- eine inhaltliche Vieldeutigkeit bezogen auf die jeweiligen Konformitäts-Bewertungsverfahren der einzelnen Richtlinien besteht,

- es zwischen den Richtlinien zu Abgrenzungsproblemen führt,

- es eine Selbstverständlichkeit zusätzlich dokumentiert,

wird **empfohlen**, auf die CE-Kennzeichnung zu verzichten, d.h. Artikel 10 i.V.m. Anhang III wird gestrichen. Für die Unternehmer ginge damit eine ungeheure Verwaltungsvereinfachung einher.

6. Maschinen-Definition präzisieren

a) *"Im Sinne der Richtlinie gilt als "Maschine" eine Gesamtheit von miteinander verbundenen Teilen oder Vorrichtungen, von denen mindestens eines beweglich ist, sowie ggf. von Betätigungsgeräten, Steuer- und Energiekreisen usw., die für eine bestimmte Anwendung, wie die Verarbeitung, die Behandlung, die Fortbewegung und die Aufbereitung eines Werkstoffes, zusammengefügt sind."*
Allein der Wortlaut zeigt schon die Weite und Unbestimmtheit der Definition. Dies hat den Vorteil, daß damit für eine große Produktpalette der freie Warenverkehr herbeigeführt wird. Andererseits führt dies zu vielen Anwendungsproblemen, über die häufig kleinere und mittlere Betriebe klagen. Dabei sind diese Schwierigkeiten

mit dem zu Art. 4 Abs. 2 dargestellten Problem der "nicht verwendungsfertigen Maschine" (s. oben unter B II 6) verbunden.

8. **Vorschlag:**

Ohne den weiten Anwendungsbereich der Maschinenrichtlinie zu beschränken, sollte im Benehmen mit den Beteiligten versucht werden, die Definition der Maschine exakter zu fassen und dabei den Begriff der "verwendungsfertigen" Maschine einzuführen. Eine mögliche Definition könnte die folgende sein:

"Im Sinne dieser Richtlinie gilt als Maschine eine ***verwendungsfertige***[48] *Gesamtheit von miteinander verbundenen Teilen oder Vorrichtungen, von denen mindestens eines beweglich ist, sowie ggf. von Betätigungsgeräten, Steuer- und Energiekreisen usw.,* ***die für die*** *Verarbeitung, die Behandlung, die Fortbewegung und die Aufbereitung* ***von Gütern*** *oder eines Werkstoffes zusammengefügt sind".*

Für die Empfehlung, die Maschinenrichtlinie nur auf verwendungsfertige Produkte zu beziehen, spricht auch eine Protokollerklärung[49] des Rates vom 14.06.1989 : *"Der Rat und die Kommission stimmen darin überein, daß mit dem Begriff der Inbetriebnahme auf die Arbeitsgänge abgestellt wird, die erforderlich sind, damit die Maschine anschließend* ***sicher funktionieren und sicher benutzt*** *(=* ***verwendungsfertig/Verfasser)*** *werden kann."*[50]

Im Zusammenhang mit der Überarbeitung der Maschinendefintion sollte überdacht werden, ob nicht der Bereich der "Sonderanfertigungen" ganz aus dem Anwen-

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[48] Es wäre wohl nicht viel gewonnen, wenn die Verwendungsfertigkeit nicht definiert würde. Sie erscheint unumgänglich. Der maßgebliche Gesichtspunkt, nur komplette Maschinen zu erfassen ist der, daß für den Hersteller oder den sonstigen Normenadressaten nur bei einer fertigen Maschine zu übersehen ist, welche Maßnahmen, insbesondere konstruktiver Art gem. Anhang I Ziff.1.1.2 b, getroffen sein müssen, damit die Maschine vorschriftsmäßig ist. Von diesem Gesichtspunkt aus spielt es keine Rolle, ob der Hersteller die Maschine fertig zusammengesetzt ausliefert oder ob er alle Teile liefert, aus denen die Maschine am Verwendungsort zusammengesetzt wird. Deswegen ist mit daran zu denken, daß für den Fall, daß die Maschine nur noch aus gelieferten Teilen zusammengesetzt werden muß, sie als eine verwendungsfertige Maschine anzusehen ist. Hierunter fallen in der Regel Einrichtungen, die wegen ihrer Größe oder ihres Gewichtes in Teilen geliefert und an Ort und Stelle erst zusammengebaut werden (s. dazu auch Art. 8 Abs. 6 Satz 2 1. Halbsatz). Weiter wäre zu überlegen, ob als verwendungsfertig auch Maschinen anzusehen sind, die nur noch angeschlossen oder aufgestellt werden brauchen. Mit diesen Gedanken soll nur die Richtung angedeutet werden, in die die Diskussion gehen müßte. Auf jeden Fall ist eine ausführliche Anhörung mit allen Beteiligten notwendig.

[49] 6889/89

[50] Die Hereinnahme des Begriffes "verwendungsfertig" in die Maschinendefinition hat noch weitere Vorteile:So macht Art. 1 Abs. 2 2. Unterabsatz immer dann Probleme, wenn bei einer komplexen Anlage Komponenten enthalten sind, die nicht unter die Maschinenrichtlinie fallen, z.B. Dampfkessel (nach Art. 1 Abs. 3 ausgenommen) und solche, die unter die Richtlinie fallen (z.B. Kohlestaub-Mahlanlagen, Kohlestaubfeuerung u.a. Nebenanlagen). Wird der Begriff "verwendungsfertig" in die Maschinendefinition aufgenommen, wären die Einzelkomponenten wohl nicht verwendungsfertig im Sinne dieser Definition.

dungsbereich der Richtlinie herausgenommen wird (Artikel 1 Abs. 3). Insbesondere Großanlagenhersteller haben erhebliche Probleme damit, wie sie ihre Anlagen in die Richtlinie einordnen sollen. Ein anderes Problem ist, ob Hochspannungs-Schaltgeräte von der Maschinendefinition nach Art. 1 Abs. 2 erfaßt werden (sollen).

b) Mit einer präziseren Fassung der Maschinenrichtdefinition ist auch **Art. 2 Abs. 1** zu ändern, d. h. das **Inverkehrbringen .** Zur Zeit ist der Richtlinie nicht eindeutig zu entnehmen, ob das Inverkehrbringen "jedes Überlassen an andere" umfaßt **oder** nur das "erste Überlassen"[51] der Maschine vom Hersteller an andere. In Abstimmung mit den Grundsätzen der Neuen Konzeption sollte das Inverkehrbringen in der Richtlinie selbst als **erstmaliges Inverkehrbringen** definiert werden. Dies würde sehr viel zur Rechtsklarheit beitragen. Gleichzeitig sollte mit überlegt werden, ob nicht auf den Begriff der "Inbetriebnahme" in Artikel 2 Absatz 1 mit Blick auf Vorschlag 8 verzichtet werden kann.

9. Vorschlag:

Art. 2 Abs. 1 wird wie folgt geändert: *"Die Mitgliedstaaten treffen alle erforderlichen Maßnahmen, damit die Maschinen oder Sicherheitsbauteile im Sinne dieser Richtlinie nur in den Verkehr gebracht....(und in Betrieb genommen).... werden dürfen, wenn sie die Sicherheit und Gesundheit von Personen und ggf. von Haustieren oder Gütem bei angemessener Installierung und Wartung und bei bestimmungsgemäßem Betrieb nicht gefährden. Als Inverkehrbringen[52] gilt die erstmalige entgeltliche oder unentgeltliche Bereitstellung auf dem Gemeinschaftsmarkt für den Vertrieb und/oder die Benutzung im Gebiet der Gemeinschaft".*

7. Bescheinigungen nach Anhang II B/C abschaffen

Unmittelbar im Zusammenhang mit der Maschinendefinition steht auch Art. 4 Abs. 2 Satz 1 lautet:

"Die Mitgliedstaaten dürfen das Inverkehrbringen von Maschinen nicht verbieten, beschränken oder behindem, wenn diese entsprechende Erklärung des Herstellers oder seiner in der Gemeinschaft niedergelassenen Bevollmächtigten gem. Anhang II Abschnitt B in eine Maschinen eingebaut oder mit anderen Maschinen zu einer

[51] Die Medizinprodukte-Richtlinie definiert ausdrücklich das Inverkehrbringen als ein **erstes Inverkehrbringen**, siehe Artikel Abs. 3 h),a.a.O. (35).

[52] Entnommem dem "Leitfaden für die Anwendung der nach dem Neuen Konzet und dem Gesamtkonzept verfaßten Gemeinschaftsrichtlinien zur technischen Harmonisierung/ Erste Fassung 1994; ISBN 92-826-8582-9

Maschine im Sinne dieser Richtlinie zusammengefügt werden sollen, außer wenn sie unabhängig voneinander funktionieren können."

Die Feststellung, wann Maschinen im Sinne von Art. 4 Abs. 2 "unabhängig voneinander funktionieren können", führt in der Praxis zu großen Schwierigkeiten. Verstärkt werden diese noch durch Anhang II B der unter dem 2. Spiegelstrich festlegt:

"Beschreibung der Maschine oder der ***Maschinenteile****".*

Teile sollen ja gerade nicht mit der Herstellererklärung versehen werden, sondern nach dem Wortlaut von Art. 4 Abs. 2 lediglich **nicht** verwendungsfertige **Maschinen**. Es ist deswegen irreführend, wenn in Anhang II B von Maschinen**teilen** gesprochen wird. Diese Dinge haben zu einer heillosen Verwirrung und zu einer sinnlosen Papierdokumentation in bezug auf die Herstellererklärung (Anhang II B) geführt. Die Unübersichtlichkeit wird noch dadurch gesteigert, daß eine CE-Kennzeichnung für diese nicht verwendungsfertigen Maschinen verboten ist.

Die Maschinenrichtlinie bezieht auch **Sicherheitsbauteile** in ihren Geltungsbereich ein, Art. 1 Abs. 2 Satz 2. Die Definition dieser Sicherheitsbauteile ist auch sehr ungenau, so daß die Praxis nicht eindeutig feststellen kann, was die Richtlinie darunter versteht. Für diese Sicherheitsbauteile sieht die Maschinenrichtlinie nun auch wieder den bürokratischen Aufwand einer Konformitätserklärung im Sinne von Anhang II C vor, die CE-Kennzeichnung ist jedoch verboten.

Wenn die Maschinenrichtlinie zukünftig eindeutig auf komplette Maschinen Anwendung findet (siehe Vorschlag 8), sollte auch die Notwendigkeit entfallen, bürokratische Dokumentationen für diese "Bauteile" vorzusehen. Denn derr Hersteller insgesamt ist verpflichtet, über das einwandfreie Funktionieren seiner Maschinen auf der Basis des Anhanges I Rechenschaft abzulegen, d. h. er muß bei der Sicherheitskonzeption und Entwicklung und dem Bau seiner Maschine auch die Sicherheitsbauteile und nicht verwendungsfertigen Maschinen entsprechend mitberücksichtigen. Deswegen sollte der Dokumentationsaufwand gem Anhang II B/C entfallen.

10. Vorschlag:

Mit der Prüfung, die Maschine-Richtlinie nur auf verwendungsfertige Maschinen Anwendung finden zu lassen , sollte auch geklärt werden, ob nicht auf die Bescheinigungen gem. Anhang II B/C verzichtet werden kann.

8. Gebrauchtmaschinenmarkt erhalten

Aus dem Wortlaut der Richtlinie läßt sich - wie unter C II 7 - dargestellt, nicht eindeutig entnehmen ob das Inverkehrbringen als "jedes Überlassen an andere" zu interpretieren ist oder als ein "erstmaliges Inverkehrbringen". Im ersten Fall entstehen Probleme für Betriebe, die Maschinen warten, überholen oder mit gebrauchten Maschinen handeln. Denn dann liegt auf jeder Stufe der Absatzkette ein erneutes "Inverkehrbringen" vor. Rechtsfolge: die Maschinen-Richtlinie findet auf gebrauchte Maschinen Anwendung. Diese Richtlinie ist in ihren technischen Anforderungen jedoch so aufgebaut gebaut, daß die technischen Anforderungen nur von Maschinen erfüllt werden können, die **neu** konstruiert werden. Diese Verpflichtungen bei gebrauchten Maschinen einzuhalten soll technisch vielfach nicht möglich bzw. mit erheblichen Kosten verbunden sein. Betroffen von diesem Problem sind Maschinenhersteller, die Gebrauchtmaschinen in Zahlung nehmen, der Maschinenhandel und die Maschinenimporteure. Auch dies ein Grund mehr, das Inverkehrbringen i.S.v. Vorschlag 9 zu definieren. Denn solange mit der Wartung der gebrauchten Maschinen keine wesentlichen Veränderungen der Maschine einhergehen, die die gebrauchte Maschine zu einer "neuen" machen, liegt kein "erstmaliges Inverkehrbringen" vor.

Etwas anderes gilt aber für gebrauchte Produkte, die aus **Drittlandsmärkten** in die Gemeinschaft eingeführt werden. Aufgrund der Definition des Inverkehrbringens - erstes Inverkehrbringen auf dem Gemeinschaftsmarkt - fallen diese gebrauchten Produkte bei der Einfuhr unter die für sie geltenden Richtlinien. Sie müssen also die Maschinen-Richtlinie erfüllen, was dann zu den oben beschriebenen Problemen führt.

Eine Lösung des Problems könnte darin liegen, den Tatbestand des Inverkehrbringens von Art. 2 Abs. 1 nicht nur auf das erstmalige Inverkehrbringen zu beziehen, sondern zusätzlich auch nur auf neue Maschinen. Würde so verfahren, fielen gebrauchte Maschinen, die in den Markt der EU gebracht werden, nicht in den Anwendungsbereich der Maschinenrichtlinie (89/392/EWG), müßten jedoch die Anforderungen der Richtlinie 89/655/EWG bzw. 92/59/EWG über die allgemeine Produktsicherheit einhalten.

11. Vorschlag:

Art. 2 Abs. 1 (neue Fassung, s. oben Vorschlag ...) wird um folgenden Satz 3 ergänzt: *"Als Inverkehrbringen gilt nicht das emeute Überlassen einer Maschine nach seiner Inbetriebnahme an einen anderen Anwender, sofern sie nicht wesentlich verändert worden ist."*

Ein weiteres Problem für gebrauchte Maschinen besteht aufgrund der "Arbeitsmittel-Benutzer-Richtlinie" (89/655/EWG)[53]. Da sie Gegenstand des Berichtes zum Kapitel "Health and safety at work" sind, wird hier nicht weiter darauf eingegangen.

III. Abgrenzung zu anderen Richtlinien

1. Art. 1 Abs. 5 lautet:

"Gehen von einer Maschine hauptsächlich Gefahren aufgrund von Elektrizität aus, so fällt diese Maschine ausschließlich in den Anwendungsbereich der Richtlinie 73/23/EWG des Rates vom 19.02.1973 zur Angleichung der Rechtsvorschriften der Mitgliedstaaten betreffend elektrische Betriebsmittel zur Verwendung innerhalb bestimmter Spannungsgrenzen."

Es ist äußerst schwierig festzustellen, welche Maschinen aufgrund von Art. 1 Abs. 5 aus der Maschinenrichtlinie herausfallen und der Niederspannungsrichtlinie zuzuordnen sind. Da unterschiedliche Auslegungen bezüglich der Maschinenrichtlinie zu diesem Punkt bestehen, werden trotz der europäischen Harmonisierungsfortschritte weitere Handelsbeschränkungen aufgebaut.

12. Vorschlag:

Es reicht nicht aus, in Art. 1 Abs. 5 lediglich festzuhalten, daß dann, wenn von einer Maschine hauptsächlich Gefahren aufgrund der Elektrizität ausgehen, diese ausschließlich vom Anwendungsbereich der Niederspannungsrichtlinie erfaßt wird. Es sollte vom Gesetzgeber auch gesagt werden, welche Gefahren im einzelnen gemeint sind und wann diese Gefahren als hauptsächliche Gefahren angesehen werden können.[54]

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[53] Siehe Fußnote 14

[54] Es ist dem Rapporteur bekannt, daß DG III in ihrem "Follow up of the Hearing of Mr. Luis Montoya " vom 09.12.1995 im Annex I unter Ziff. 8 dargelegt haben, daß dieses Problem aufgrund einer Einigung zwischen CEN/CENELEC gelöst worden sei. Es wird angeregt, daß die Lösung allgemein bekanntgemacht wird.

Bei der Revision von Artikel 1 Absatz 5 ist Artikel 1 Absatz 4 mit zu betrachten. Dem Hersteller - und damit natürlich auch der Überwachung - sollten klare Kriterien gegeben werden, nach denen er das erforderliche Verfahren zur Bewertung der Konformität bestimmen kann, wenn mehrere Richtlinien anzuwenden sind.

2. Die Richtlinie 92/59/EWG des Rates vom 29.06.1992 über die allgemeine Produktsicherheit ist als eine umfassende horizontale Rahmenvorschrift konzipiert worden. In den Erwägungsgründen heißt es:

"Wenn in geltenden spezifischen Gemeinschaftsvorschriften, die auf eine vollständige Harmonisierung abzielen, insbesondere solchen, die auf der ***Grundlage der Neuen Konzeption*** *verabschiedet wurden, Anforderungen hinsichtlich der Produktsicherheit*[55] *festgelegt sind, ist es nicht notwendig, den Wirtschaftssubjekten im Bezug auf die Vermarktung der unter solchen Vorschriften fallenden Produkte weitere Verpflichtungen aufzuerlegen."*

Von diesem Erwägungsgrund ist in Art. 1 Abs. 2 der Produktsicherheits-Richtlinie jedoch nur unzureichend Gebrauch gemacht worden. Art. 1 Abs. 2 der Produktsicherheits-Richtlinie lautet wie folgt:

"(2) Die Bestimmungen dieser Richtlinie gelten, soweit es im Rahmen gemeinschaftlicher Rechtsvorschriften keine spezifischen Bestimmungen über die Sicherheit der betreffenden Produkte gibt.
Enthält eine spezifische gemeinschaftliche Rechtsvorschrift Bestimmungen, in denen die Sicherheitsanforderungen für bestimmte Produkte festgelegt werden, so finden ***insbesondere*** *(!) die Art. 2, 3 und 4* ***auf keinen Fall*** *(!!) Anwendung auf diese Produkte.*
Enthält eine spezifische gemeinschaftliche Rechtsvorschrift Bestimmungen, die nur bestimmte Gesichtspunkte der Sicherheit der betreffenden Produkte oder Risikokategorien für die betreffenden Produkte regeln, so finden diese Bestimmungen in bezug auf diese Sicherheits- bzw. Risikogesichtspunkte Anwendung."

Aus diesen Bestimmungen ist für die Marktteilnehmer nicht ersichtlich, welche Richtlinie für sie nun gilt, die Maschinenrichtlinie oder zusätzlich auch die Produktsicherheits-Richtlinie. Wenn, wie in Erwägungen dargelegt, es wirklich gewollt ist, im Bereich der Richtlinien der Neuen Konzeption "den Wirtschaftssubjekten in be-

[55] ABl. Nr. L 228 vom 11.08.1992, S. 24.

zug auf die Vermarktung der unter solche Vorschriften fallenden Produkte (keine) weiteren Verpflichtungen aufzuerlegen", dann muß dies deutlich gesagt werden.

13. Vorschlag:

Entsprechend Art. 1 Abs. 3 zur Maschinenrichtlinie sollte in Art. 1 Abs. 2 der Allgemeinen Produktsicherheitsrichtlinie geregelt werden, daß die Maschinenrichtlinie - und die insoweit weiteren einschlägigen Richtlinien nach der Neuen Konzeption - vom Anwendungsbereich der Allgemeinen Produktsicherheitsrichtlinie ausgenommen sind. Der entsprechende Wortlaut könnte wie folgt aussehen:

"Vom Anwendungsbereich dieser Richtlinie sind ausgenommen
a) Maschinen (und ggf. auch Sicherheitsbauteile, s. 9. Vorschlag) im Sinne der Richtlinie 89/392/EWG des Rates vom 14.06.1989."
b) ...
c) ...

IV. Art. 8 Abs. 2 ff vereinfachen

1. Maschinen für den Eigengebrauch vom Anwendungsbereich der Maschinenrichtlinie ausnehmen

Art. 8 Abs. 6 Satz 2 legt fest, daß bei Maschinen oder Sicherheitsbauteilen, die für den Eigengebrauch hergestellt werden, die umfangreichen Anforderungen einschließlich des enormen Dokumentationsaufwandes mit eingehalten werden müssen. Sinn und Zweck dieser Regelung wird von vielen Firmen nicht eingesehen. Die Maschinenrichtlinie gilt der Harmonisierung des Warenverkehrs innerhalb der EU. Bei der Herstellung von Maschinen oder Sicherheitsbauteilen für den Eigengebrauch findet ein Warenverkehr nicht statt. Satz 2 von Art. 8 Abs. 6 der Richtlinie 89/392/EWG sollte daher gestrichen werden. Unternehmer, die Maschinen für den Eigengebrauch herstellen, unterliegen dann immer noch der Produkthaftung und insbesondere auch der Maschinen-Benutzerrichtlinie, der Richtlinie 89/655/EWG. Würde so verfahren, würde auch der "logische Bruch" zum Begriff des Inverkehrbringens von Art. 2 Abs. 1 vermieden.

14. Vorschlag:

Vom Anwendungsbereich der Maschinenrichtlinie werden Sicherheitsbauteile und Maschinen, die für den Eigengebrauch hergestellt werden, nicht erfaßt. Art. 8 Abs.

6 Satz 2, 2. Halbsatz, wird gestrichen. Gegebenenfalls müßte dies ausdrücklich in Art. 1 Abs. 3 gesagt werden.

2. Anhang IV der Maschinenrichtlinie überprüfen

Viele Unternehmer beklagen, daß die Auflistung der sog. "risikobehafteten Maschine" und Sicherheitsbauteile in Anhang IV nicht nachvollziehbar sei. Die Liste der in Anhang IV aufgeführten Maschinen und Sicherheitsbauteile sei willkürlich, es wäre nicht erkennbar, warum die dort aufgeführten Maschinen einer Sonderbehandlung unterzogen werden müßten. Auch seien viele harmonisierte Normen noch nicht vorhanden, so daß Prüfungen durch notifizierte Stellen notwendig seien. Anhang IV würde jedoch von den notifizierten Stellen verschieden interpretiert. Bemängelt wird, daß sie einen zu großen Ermessensspielraum hätten. So gingen z.B. innerhalb der Mitgliedstaaten die Ansichten darüber auseinander, ob sich die Baumusterprüfung auf das Risiko beschränken soll, das dafür verantwortlich ist, daß die Maschine in den Anhang IV aufgenommen wurde, oder ob die Maschine komplett geprüft werden müß. Unterschiedliche Auffassungen bestehen auch bei der Definition von Maschinentypen und den daraus zu beachtenden Konformitäts-Bewertungsverfahren. Z.B. wird eine in Italien hergestellte Stanze als nicht unter Anhang IV der Maschinenrichtlinie fallend angesehen. Eine in Deutschland baugleich hergestellte Maschine wird als Presse definiert. Zur Zeit bestehen noch keine harmonisierten Normen für Pressen, so daß das vereinfachte Konformitäts-Bewertungsverfahren für Anhang IV-Maschinen nach Art. 8 Abs. 2 keine Anwendung finden kann. Durch die notwendigen Baumusterprüfungen entstehen erhebliche Gebühren.

Zusätzlich fragt man sich, warum mit großem Aufwand Prüfstellen errichtet worden sind, die nach dem Erscheinen der harmonisierten Normen keine oder nur noch sehr eingeschränkte Aufgaben haben werden, weil dann die vereinfachten Konformitäts-Bewertungsverfahren nach Art. 8 Abs. 2 Anwendung finden. All diese Argumente führen zu folgendem Vorschlag:

15. Vorschlag:

Anhang IV der Maschinenrichtlinie ist mit dem Ziel zu überprüfen, auf gesonderte Konformitäts-Bewertungsverfahren für die dort genannten Maschinen zu verzichten, d. h. generell die Verpflichtungen des Herstellers gem. Artikel 8 Abs. 2 a) i. V. m. Anhang V u. Abs.4 als ausreichendes Konformitäts-Bewertungsverfahren im Rahmen der Maschinenrichtlinie anzusehen.

3. Die Konformitäts-Bewertungsverfahren vereinfachen

Art. 8 Abs. 2 c 1. Tiret besagt, daß der Unternehmer, der harmonisierte Normen verwendet, Unterlagen für risikobehaftete Maschinen gem. Anhang VI zusammenstellen und sie einer gemeldeten Stelle übermitteln muß, die den Empfang dieser Unterlagen unverzüglich bestätigt und sie aufbewahrt. In den Erläuterungen der Kommission zur Maschinenrichtlinie 89/392/EWG heißt es insoweit auf S. 27 unten: *"Die Stelle nimmt keinerlei Prüfung vor, sondern muß lediglich den Eingang der Unterlagen bestätigen und diese aufbewahren."* Warum dies aufwendige Verfahren, wenn nicht mehr "geprüft" wird? Wenn man zusätzlich bedenkt, daß auch für diese gemeldete Stelle in vollem Umfang das Notifizierungsverfahren nach Anhang VII zur Anwendung kommt, ist der Aufwand im Hinblick auf die Aufgabe der gemeldeten Stelle nicht nachvollziehbar.

16. Vorschlag:

Art. 8 Abs. 2 c 1 Tiret wird gestrichen.

V. Marktorientierte Normungen schaffen

Der Vorteil der "Rechtsetzung mit Normverweis" wird allseits begrüßt. Teilweise wird jedoch die Sorge geäußert, daß dieser Vorteil durch eine "neue Unübersichtlichkeit" aufgrund von zu vielen harmonisierten Normen wieder zunichte gemacht wird. Die gefürchtete "Unübersichtlichkeit" bezieht sich auf mehrere Bereiche:

a) Zu viele sog. B-Normen und zu wenig sog. C-Normen. Die wesentlichen Anforderungen des Anhanges I könnten, wenn nicht besonders sorgfältig vorgegangen würde, zu einer ganzen Reihe von Normen führen. Die Gefahr besteht, daß das Normenwerk zu kompliziert wird. Für Maschinen, die mit Druckluft oder Verbrennungsmotoren angetrieben würden, könnte eine ganze Reihe von Vorschriften und Regelungen gelten. Für elektrisch angetriebene Werkzeuge gilt jedoch nur eine Sicherheitsnorm. Es wäre besser, alle wesentlichen Anforderungen in einer begrenzten Zahl von Normen für konkrete Porduktgruppen zusammenzufassen. Anzustreben ist eine Konkretisierung der grundlegenden Anforderungen gemäß Anhang I durch wenig Normen, mit einem produktspezifischen Bezug.

b) In anderen Antworten wird der Umfang der harmonisierten Normen gerügt. Die Normenorganisationen müssen sicherstellen, daß ihre Vorschriften und

Regelungen praktisch und, kaufmännisch gesehen, realistisch sind.

c) Bei der Erstellung von Normen müssen die Bedürfnisse von KMU besonders berücksichtigt werden. Es gibt Anzeichen dafür, daß die KMU in den Arbeitsgruppen, die Normen erstellen, nicht gut vertreten sind. Außerdem bereitet ihnen die Feststellung, welche Normen unter der großen Zahl von Regeln und Regelungen für ihre Produkte gelten, äußerst große Schwierigkeiten.

Zur Rolle der Normungsarbeiten konkrete Empfehlungen auszusprechen, ist angesichts der Vielschichtigkeit der Thematik äußerst schwierig. Daher können nur allgemeine Anregungen gemacht werden.

17. Vorschlag:

Die Arbeitsgruppe empfiehlt der Europäischen Kommission, in ihrer geplanten "Mitteilung der Kommission an den Rat und an das Parlament über die stärkere Nutzung der Normung in der Gemeinschaftspolitik" das Thema einer "restriktiveren Mandatspolitik im Rahmen der europäischen Richtlinienarbeit" beim Kapitel "Das Neue Konzept" mit zu erörtern.[56]

[56] In der o. g. Mitteilung (Entwurf) wird auch auf die Rolle der Klein- und Mittelbetriebe im Rahmen des Normungsprozesses eingegangen. Einige Antworten auf den Fragebogen bringen auch in diesem Zusammenhang die Sorge zum Ausdruck, daß es gerade für kleine und mittlere Unternehmen weder möglich sei, in den verschiedenen Gremien mitzuarbeiten noch aus der in der Vielzahl entstehenden Vorschriften die für ihr Produkt jeweils richtigen Normen herauszufinden. Die Legislative and Administrative Simplification Group begrüßt es daher, daß die Kommission sich auch dieses Themas verstärkt annimmt.

BILD 1

Die wesentlichen Festlegungen der Maschinen-Richtlinie (89/392/EWG)

Geltungsbereich

Ist aufgrund der sehr extensiven Definition des Wortes "Maschine" sehr breit.

Kernforderung

Maschinen dürfen Sicherheit und Gesundheitsschutz von Personen bei angemessener Installierung und Wartung und bei bestimmungsgemäßem Betrieb nicht gefährden.

Grundlegende Sicherheitsanforderungen ...

... die bei Konzipierung und Bau von Maschinen zu erfüllen sind, werden in Anhang I aufgeführt.

Bescheinigungsverfahren ...

... läßt grundsätzlich die "Konformitätserklärung" in Eigenverantwortung des Herstellers zu, ausnahmsweise Baumusterprüfung erforderlich.

CE-Zeichen ...

... dient der Kennzeichnung, daß eine Maschine Richtlinienkonform ist.

Übergangsregeln ...

... ließen die Anwendung nationaler Normen und Spezifikationen bis Ende 1994 zu (Ausnahmen).

BILD 2

	EG-Konformitätserklärung nach Anhang II		Erklärung nach Art. 4 Abs. 2 Anhang II	CE-Kennzeichnung
	Teil A	Teil C	Teil B	
Maschinen nach Art. 1 Abs. 2 Satz 1	X			X
Gesamtheit mehrerer zusammenwirkender Einzelmaschinen (Art. 1 Abs. 2 Satz 2)	X			X
auswechselbare Ausrüstungen nach Art. 1 Abs. 2 Satz 3	X			X
Ersatzteile (Art. 1 Abs. 2 Satz 3)				
Werkzeuge (Art. 1 Abs. 2 Satz 3)				
einzeln in Verkehr gebrachte Sicherheitsbauteile (Art. 1 Abs. 2 Satz 4)		X		
nicht verwendungsfertige Maschinen (Art. 4 Abs. 2 Satz 1)			X	

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Bonn, den 30.06.1995
II/Sat/Pz

Final Report to the Legislative and Administrative Simplification Group on Food Hygiene

by

Dr. Peter Nedergaard

Food Hygiene

The importance of the food sector

1. [paragraph to describe the importance of the food sector, trade within the Community, imports and exports, employment trends etc.]

Community policy

2. Food hygiene legislation deals with food at different stages of processing from the level of the farm and before they enters the kitchens of private homes and it is an inseparable part of the market integration process of the European Union aiming at the establishment of a free market and a level playing field for food produce. There are two basic objectives of EU food hygiene legislation. One is the protection of public health and consumers. The second is the removal of barriers to trade in order to improve competitiveness and create more employment. Actual food hygiene policy involves considerations of both objectives. The first objective often lead to complex regulations based on longstanding traditions in the individual Member States. Besides, the first objective is often used in order to impede trade in food products.

3. According to Article 30 "Quantitative restrictions on imports and all measures having equivalent effect shall [...] be prohibited between Member States." Never the less, according to Article 36 these provisions "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security: the protection of health and life of humans, animals or plants; [...]; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discriminations or a disguised restriction on trade between Member States." Also Article 43 remains a legal basis for regulating the production and marketing of agricultural products, and Article 43 is the Article far most referred to in Directives on food hygiene. Furthermore, Article 100 A states that the Commission in its proposals "concerning health, safety, environment protection and consumer protection, will take as a base a high level of protection."

4. The following products-specific (or vertical) food hygiene directives are the most important ones currently in force:

- Council Directive 72/462/EEC of 12.12.1972 on health and veterinary inspection problems upon importation of bovine, ovine and caprine animals and swine, fresh meat or meat products from third countries.
- Council Directive 77/96/EEC of 21.12.1976 on examination for trichinae (trichinella spiralis) upon importation from third countries of fresh meat derived from domistic swine.
- Council Directive 88/657/EEC of 14.12.1992 laying down the requirements for the production of, and trade in, minced meat, meat in pieces of less than 100 grams and meat preparations.
- Council Directive 92/46/EEC of 14.6.1992 laying down the health rules for the production and placing on the market of raw milk, heat treated milk and milk-based products.
- Council Directive 92/5/EEC of 10.2.1992 on health problems affecting intra-Community trade in meat products.
- Council Directive 92/120/EEC of 17.12.1992 on conditions for granting temporary and limited derogations from specific Community health rules on the production and marketing of certain products of animal origin.
- Council Directive 91/498/EEC of 29.7.1991 on the condition for granting temporary and limited derogations from specific Community health rules on the production and marketing of fresh meat.
- Council Directive 92/116/EEC of 17.12.1992 amending and updating Directive 71/118/EEC on health problems affecting trade in fresh poultrymeat.
- Council Directive 91/492/EEC of 15.7.1991 laying down the health conditions for the production and the placing on the market of live bivalve.
- Council Directive 91/495/EEC of 27.11.1990 concerning public health and animal health problems affecting the production and placing on the market of rabbit meat and farmed game meat.
- Council Directive 91/497/EEC of 29.7.1991 on health problems affecting intra-Community trade in fresh meat.
- Council Directive 92/116/EEC of 17.12.1992 on health problems affecting trade in fresh poultry.
- Council Directive 91/493/EEC of 22.7.1991 laying down the health conditions for the production and the placing on the market of fishery products.
- Council Directive 89/437/EEC of 20.6.1989 on hygiene and health problems affecting the production and placing on the market of egg products.

5. It is in a company's own interest not to compromise on the safety of a product and every effort is made to avoid hazards to health. Self-regulation is therefore an essential part of the quality management of a company which is in turn crucial in ensuring consumer satisfaction with a product. Systems have been developed in order to ensure delivery of this responsibility. These systems often involve partnership with other parts of the food chain. However, public control of company based self-regulation measures is needed in the interest of consumers and the thrust of importers.

6. An extensive use of the principle of subsidiarity will counteract the philosophy of the Single Market as the Member States have already decided that the market integration take place at the level of the European Union. References to the principle of subsidiarity as an argument for more specific national rules and more national derogations contradicts the Single Market because this, in practise, leads to more technical barriers to trade. This is the result of lacking thrust between the Member States as far as the quality and enforcement of each others food hygiene standards are concerned. The key words as far as simplification of food hygiene legislation is concerned are "harmonization" and "elimination".

7. Therefore, mutual recognition is of no help as a general principle in order to simplify food hygiene legislation in the European Union. Because of the health risks involved even reasonable recommendation of the principle of mutual recognition would most probably lead to a situation where Member States would increase the use of veterinary provisions as barriers to trade as they would probably have to implement specific national measures to control that the products that were recognized were also safe and healthy. In products areas that are less sensitive for human health and less regulated at the national level, mutual recognition might be an appropriate principle. But for political and practical reasons mutual recognition is not feasible as a general principle in food hygiene.

8. Food hygiene is an area of policy which is of great political sensitivity in Member States. Governments consider that they have a primary duty of care towards their citizens in respect of food hygiene. They have frequently been reluctant to cede their right to impose requirement on particular foodstuffs to the Community as a whole. This has historically constrained the Community in achieving a true internal market in food products whilst maintaining commonly agreed levels of food safety.

9. The view of Community effectiveness in food hygiene policy in this report and the proposals for simplification takes place against this background. As a result of national pressures and the constraints which they impose, food hygiene legislation has become fragmented and overlapping. Therefore, legislation punish food industry and ultimately the consumer disproportionately because of higher costs. At the same time, legislation is poorly adopted to changing patterns of production and innovation. In addition, national pressures whilst ostenibly justified on the basis of national standards of hygiene may in fact be protectionist and counteract trade.

10. Three major areas of concern have been identified in which a systematic programme of simplification would bring significant benefits:

* **Harmonization**: The current structure of product-specific and vertical directives has created inconsistences and ambiguities. They do not allow for innovation; particularly in combined

ingridient products; they are not adopted to the multi-product distribution chain in which various families are handled concurrently during distribution and retailing; the regulations are typical of single product processing industry, and do not fit the needs of advanced processing as well as the requirements of commercial and retail environment. Whilst the Council has agreed on a new horizontal directive (93/43/EEC) it is neither comprehensive, nor far reaching enough to overcome these difficulties.

* **International trade:** The food industry is increasingly global; European consumers have new sources of supply (for example year round fresh vegetables from Africa) and new opportunities for export (for example Danish pork to South Korea). However, the lack of harmonization at the European level and the weak position of the Commission in the international negotiations on Codex (which governs world trade in food stuffs) are significant constraints in realising the full potential of these new opportunities.

* **Proportionality:** The principle that the costs should be proportionate to the benefits is accepted by the Community. However in the food hygiene there is evidence that the principle is frequently not applied. As a result food processing companies face highly prescriptive legislation, even for products which are made and distrubuted locally. These disproportionate costs have three probable effects; first they discourage the growth of SME's (for example in adding value "on the farm"); secondly they may discourage innovation; and finally they encourage an ever encreasing number of requests for derogations which in turn put the Single Market at risk.

In addition to these concerns on the design of regulations, the issue of enforcement must be considered. Whilst taken up more generally in chapter 2, there are specific issues which need to be tackled with regard to food hygiene. In particular inconsistences across the Community in the application of inspective requirements. Our proposals in respect of these issues are also described in this chapter.

I: Improving harmonization

11. In European food hygiene legislation there is lack of coherence between vertical hygiene Directives concerning food hygiene both among each other and in relation to the general hygiene Directive 93/43/EEC. At the same time their general philosophies differ fundamentally. Directive 93/43/EEC will be into force from the end of 1995. The Directives concerning the hygiene of products of animal origin contain a number of requirements which are similar (approval procedures for establishments, internal checks, approval conditions and hygiene requirements in establishments, procedures for the imports of products from third countries etc.). These common requirements should be brought together in a single horizontal text. This exercise would at the same time allow to eliminate certain differences which unfortunately exist between the different Directives, and to improve transparency. For example, the use of temperature requirements in the European Union must be harmonised as these are barriers to trade owing to differences in national legislation in all Directives concerning food hygiene. Also the lack of a single definition of certain commodities (eg. "meat") can result in unfair market competition and consumers being misled/deceived (eg. the UK has a unique requirement to declare the % Added Water on certain cured meat). These definitions should be harmonised and the general definitions of "meat" in the various vertical Directives should be used in national legislation.

12. The large number of specific texts, including overlap and inconsistencies, make it very difficult for many producers to have a clear insight in food hygiene legislation of the European Union. This problem is especially relevant for producers using raw materials covered by different EU Directives. For example, a producer of culinary products might have to deal with a whole range of fish, meat and egg vertical Directives and the general Directive 93/43/EEC. There are many examples of the lack of harmonized rules and definitions in national legislation on food hygiene in the European Union, for example in the areas of microbiological criteria, self-supervision measures, temperatures[1], shelf life for food products, and the ability to trace origins of product.

13. Therefore, on the basis of an investigation, the vertical directives should be simplified and consolidated and brought into conformity with each other. Commission services is in the proces of doing so. For the sake of clarity and overview Commission services should present one document embodying all common provisions for all products in a general section with annexes for the specific rules for the individual products. This new consolidated basis of legislation should be build into the new version of the horizontal Directive 93/43/EEC.

Proposal 1:
A single set of hygiene rules should be created, which should incorporate producer specific hygiene arrangements in its annexes. This implies an upgrading of Directive 93/43/EEC.

Proposal 2:
Existing producer specific Directives should be revised to ensure consistency with a single set of hygiene rules (se also proposal 5).

14. There are also a number of pieces of legislations on food products that should be eliminated. Seen strictly from a hygiene point of view control measures are superflous in, for example, the compound food industry is often using dried meat, meat powder and meat extracts (e.g. instant soups). These products are completely stable at room temperature and pose no special risk. The use of meat powder and meat extract is exempt from special legislation, whilst the use of dried meat pieces is regulated by the full extend of Directive 92/5/EEC for meat products. This necessitates for the use of the dried meat investments that cannot be justified by proportionality based on proper risk analyses.

Proposal 3:
The use of dried meat should by exempt from special legislation

15. Also the marking of food products and transport documentation poses problems to business. These Directives often oblige producers to place so called health marks at their labels as identification that the product originates from an approved establishment. The objective of health marking (i.e. identification number) is identification of the production unit to facilitate traceability of foodstuffs. Many of the vertical Directives contain the obligation to place a health mark and/or the registration number of the factories and/ or other specific declarations on transport documents. Within the directives, the use of the health mark and/or the registra-

[1] This can lead to a situation where labels bear indications such as "keep at 7 C - Belgium, keep at 5 C - UK".

tion number of the factories and/or other specific declarations is not consistent. It is sometimes not possible to properly identify the product categories that must have the health mark applied. Interpretations may also differ within and between the Member States.

16. Therefore, procedures for marking and tranport documentation often poses a heavy burden on trade. Concrete examples are distribution centres, where many products of different origin (and thus different registration numbers) are wrapped together. The hygiene directive for milk requires that each separate number is mentioned in the documents. It is often not clear to what level in the trade transport documents must be used (does this include the retail?). Documents should only be required for bulk transport.

Proposal 4:
The requirement to use health marks and transport documents should be less strict and more proportionate. A radical revision of this set of rules is needed.

17. There are many examples in the food hygiene directives where the rules are not understandable: First, Directive 91/497/EEC should allow the chilling of fresh meat during transportation under certain requirements. Second, the microbiological standards in Directive 88/657/EEC should be revised. Third, industry should come up with its own definition of what it understands by the terms "meat", "milk" or "fish" or the provisions of 79/112/EEC should be applied to ensure that as long as the nature of the product is clearly indicated and the consumer is not mislead, any product marketed in one Member State should be able to be marketed in any other Member State. Fourth, in Directive 91/497/EEC there is a problem because it might place a disproportionate burden on some small abattoirs. Therefore, the Commission should review the directive, particularly with a view to modifying the requirements for a veterinary surgeon to carry out an ante-mortem inspection in the abattoir and to be present at the slaughter of casualty animals on the farm. Fifth, the legal status of prepared meals (article 2, (c) of Directive 92/5/EEC) should be revised. There is no reason to single out the prepared meals.

These problems of present hygiene legislation should be straightend out no matter whether a new general food hygiene Directive is adopted or not.

Proposal 5:
There should be a general review of all product-specific Directives with a view to ensuring that they are understandable and eliminating ambiguity in definitions, terminology and requirements.

18. The Commission has always presented its proposals to the Council under the form of Regulations. The Councils has every time again amended the form of the act into a Directive. These acts often constitute for the Member States a harmonisation of already existing rules. Directives allow the legal and administrative structures frequently already existing for several decades in certain Member States to be kept in place albeit with certain adoptions in some cases. However, the transposal in national law has provoked important distortions between Member States as a result of sometimes very important delays, or due to incorrect or incomplete transposal. Therefore, Regulations should replace Directives as the primary legal instrument in some cases of Community legislation on food hygiene. However, Regulations may not always be the best approach, as interpretations may differ from Member State to

Member State. At the same time, Directives have to be implemented in national legislation and subsequently notified to the Commission. The latter implies a control mechanism, which enables both Commission, other governments and organisations to measure to some degree the national interpretation of the provision. Therefore, the approach of transforming Directives into Regulations should only by envisaged in order to ensure uniform application of Community legislation in cases where differences of interpretation and application risk comprising the functioning of the Internal Market and can not be resolved by other means. Therefore, it is recommended that Regulations are used in the future if and when a new general hygiene Directive has to be adopted.

Proposal 6:
Regulations at the European level should be used in preference to Directives in those areas where the proposed single set of hygiene rules is not appropriate.

II. Encouraging World Trade

19. European legislation on food hygiene should use the Recommended International Code of Practice, General Principles of Food Hygiene of the Codex Alimentarius (basis of free trade within the scope of the WTO Agreement) as a reference and be based on principles used to develop the system of HACCP, as described in Article 3 (2) of Directive 93/43/EEC. Efforts must therefore be made to harmonise all European legislation on food hygiene with Codex Amimentarius, whereby the age of Codex standards should be considered. For example, common positions on microbiological standards for pathogens, Listeria and Salmonella in particular, should be developed. In order to make sure that this will happen, the Commission in Codex should play a strong and independent role in Codex.

Proposal 7:
European food hygiene legislation should be based on the Codex Alimentarius' standards where these are up-to-date.

Proposal 8:
The Commission should play a stronger role in developing a common Community position to be presented by Member States.

III. Achieving Proportionality

20. Directive 93/43/EEC is basically designed to complement mandatory measures with voluntary, sector-specific measures detailed in the "Guidelines for good hygiene practice" or similar codes. This principle is not stated with sufficient clarity, and this failing should be remedied to safeguard companies' freedom of choice and to protect those for which no additional measures are necessary. The same applies to the safeguarding of companies' right to determine for themselves the appropriateness of hygiene measures when these standards are in compliance with standards set by legislation. Although Directive 93/43/EEC provides for this possibility in principle, it does not make sufficient mention of it.

Proposal 9:
Companies should always have the right to determine for themselves the appropriate hygiene measures as long as these are in compliance with standards set by legislation. This principle

should be stated clearly in the horizontal Directive.

21. The Commission should introduce a new Control according to Good Agricultural Practices for inputs used at the farm (pesticides, veterinary medicines, feed additives etc.) and for environmental factors like heavy metals. The Commission should also promote the use of Good Animal Husbandry and Hygiene Practices in order to maintain and monitor the health status of herd and feed to prevent against zoonotic agents (salmonella etc.) and pathogens. As part of the same framework, at the level of processing plant HACCP (Hazard Analysis and Critical Control Points) principles should be introduced together with modernized post mortem inspection in order to ensure feedback from slaughterhouse to farm when problems are detected.

Proposal 10:
The Commission should apply a holistic approach as they introduce a new Control according to Good Agricultural Practices combined with the use of Good Animal Husbandry and Hygiene Practices.

22. Still another problem facing business and consumers is the unpracticable features in the present food hygiene legislation. Directive 91/497/EEC on health problems affecting intra-Community trade, production and marketing in fresh states (Annexe I, Chapter XIV) that "fresh meat must be chilled immediately after the post-mortem inspection and kept at a constant internal temperature of not more than + 7 degrees Celsius for carcases and cuts and + 3 degrees Celsius for offal. Freezing of fresh meat may be performed only in rooms of the same establishment where the meat has been obtained or cut or in an approved cold store, by means of appropriate equipment". However, allowing the chilling of fresh meat during transportation under certain requirement could lower costs for companies because they can deliver the fresh meat to their customers earlier. This is also a problem because Directive 91/497/EEC places a disproportionate burden on, in particular, small abattoirs.

Proposal 11:
Directive 91/497/EEC should be changed in order to allow the chilling of fresh meat during transportation to the benefit of both companies and consumers.[2]

23. Directives should base the rules on a consistent use of risk assessment for all products involved and be unequivocal between the various products categories. Today, large differences exists for products where the risk involved between categories is the same. Therefore, it is proposed that in all food hygiene Directives references are made to risk assessment as a basis for future measures. The adequate risk assessment, however, also comprises taking into account the size of the manufacturing unit, as the speed of execution, or other crireria exercising an influence on the identification of critical control points. In general, risk analyses should also be used to see whether or not a group of simple or composite products should be subject to rules laying down ways of controlling such risks and whether existing Community rules should be replaced or amended.

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[2]The Directive should be changed even if, today, the refrigeration facilities in some lorries are still only just powerful enough to maintain cold storage temperatures.

Proposal 12:
In all food hygiene Directives references should be made to risk assessment as a basis for future measures.

24. The abovementioned approach must be based upon further development of existing provisions for risk assessment including (a) improved health data in respect of both human and animal populations, (b) improved data on the risks throughout the food production chain, (c) improved coordination and cooperation between services, laboratories etc., and (d) improved information and education of farmers, trade and industry and the consumers.

Proposal 13: Data for risk assessment should be improved.

Proposal 14: There is a need for the development of public information programmes to address misconceptions and enhance safety awareness.

25. The HACCP (Hazard Analysis and Critical Control Points) system which is a system of improved control mechanisms imposed on industry giving them primary responsability that standards are enforced according to adopted rules. At the same time, under HACCP it is the responsability of the controlling authority to check the HACCP plan by the company, to check the laboratory analyzing the microbiological checks, to verify the records of the company to see what corrective action has to be taken.

26. However, it is the principle of the HACCP which should be used rather than the system itself since all twelve stages of the latter would be far too unwieldly for SMEs and some parts of the food distribution sector. Methodology should remain the responsibility of producers and not be the subject of additional legislation of the European Union as has been the case with HACCP procedures for the fish industry. However, attitudes towards the concept of "Milk Solids" vary widely; in some areas (eg. Euroglaces Code and UK practice), it is clear that minimum &s for the milk content of ice cream should comprise milk solids in their natural proportions. It is unclear whether this is reflected in practices within a number of M/S, where "reassembled milk" is treated as whole milk. Besides, milk based products containing other foods (eg. meat) should comply with Directive 92/46/EEC and not Directive 92/5/EEC. Also, in Directive 92/46/EEC and possibly in others as well, it is required that employees are submitted to medical examination prior to employment. Such examination has no value at all, as infection may occur the following day. Such requirement are also highly discouraged by WHO. Also the differences between the definition of HACCP (Hazard Analysis and Critical Control Points) in Article 3 of Directive 93/43/EEC and the wording in the various vertical Directives should disappear.

Proposal 15:
The principles of HACCP should be used as the foundation of all food hygiene legislation.

27. Also the practice of derogations, which is the result of overly detailed and rigid texts leading to distortions in competition, should not only be curbed but tailored to individual situations. SMEs which cannot comply with a certain rule should be object to certain limitations on their marketing and distribution.

28. Derogations are granted by national authorities and communicated to the Commission. Article 10 of Directive 92/5/EEC provides for the possibility of temporary and limited derogations from certain technical requirements for establishments which have not yet classified as falling under either Article 8, or Article 9 and/or do not yet comply with all requirements by the date that this Directive comes into force. According to reports, some 6000 establishments within the meat chain have been granted such derogations. Many companies fear that by 1 January 1996 many of these will still not be in compliance and the question then arises whether the Commission and Member States will ensure that those who have invested are not penalised.

29. This is also an issue in the dairy industry, where a comparable number of temporary derogations have been granted according to Directive 94/695/EC. The number of derogations is also here a severe problem. In relation to the Milk Hygiene Directives (92/46/EEC and 92/47/EEC) possibilities for permanent and transitional derogations are numerous:

* transitional derogations according to Directive 92/47/EEC are approximately 4000 dairy plants,
* derogations for limited productions, which currently are negotiated, may include approximately 2000 plants on a permanent basis,
* derogations for "traditional" products are currently discussed and may include approximately 1000 products, and
* derogations for "cheese not sold before 60 days of maturation". The number of derogations in these case is unknown to the rapporteur.

30. Except for the first bullet point, products manufactured under circumstances, which derogate from common provisions in the Directive, may move freely within the Union. The practice of derogations, which is the result of overly detailed and rigid texts leading to distortions in competition, should not only be curbed but tailored to individual situations. SMEs which cannot comply with a certain rule should be object to certain limitations on their marketing and distribution.

Proposal 16:
General review of all product-specific directives with a view to ensuring that existing derogations are largely removed and replaced by appropriate application by producers of HACCP principles.

IV. Creating Confidence in Legislation and Enforcement

31. The Single Market for food products also implies common control mechanisms at the external borders. There are cases where lenient control in some Member States' harbours have increased their role as preferred harbours for importers of food products at the expense of other harbours and, possibly, the health and safety of EU's consumers. Therefore, there should be regular contact between food control authorities and industry at European level in order to harmonise differences in the application of food control at the external borders. Today the conditions in form of public health protection measures applicable to the importation of foods of animal origin from third countries outside the European Union are harmonised. This should lead to a situation where control measures for food products are at the same level no matter whether they are imported or internally produced. Optimally, these control mechanisms should be supervised by an enforced team of Commission inspectors.

32. The inspection by Community inspectors in the future should be by the way of unannounced visits to a selected number of establishments together with the controlling authority. Instead of a snapshot view of the situation, one would get a more valid description of actual cpmpliance. This model of unannounced visits should equally be applied inside the Community.

33. Also enforcement practices should be related to real risks. In order to be both effective and economic, enforcement should be proportionate. Costs of ensuring compliance with legal requirements clearly relate to the attention and time taken by industry by virtue of its own responsibilities. A good internal Quality Assessment system should have the effect of reducing the costs incurred by official control bodies.

Proposal 17:
Legislation should be based on careful and explicit assessment of scientific evidence; analysis of costs of implementation and thorough consultation with affected parties.

Proposal 18:
In the absence of genuine mutual recognition Member States' inspection systems, the Commission inspectorates' role should be strengthend to create confidence in even enforcement of harmonized requirement.

Proposal 19:
The European Union should develop a programme in order to support good internal Quality Assessment systems in all parts of the food chain.

Rapport final au Groupe de Simplification Législative et Administrative relatif à la politique sociale

par

le Professeur Antoine Lyon-Caen

RAPPORT RELATIF À LA POLITIQUE SOCIALE

par

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1. Le présent rapport comporte trois parties. La première s'efforce d'envisager les rapports entre la politique sociale de l'Union - dont ont été exclues les initiatives prises dans le domaine de la santé et de la sécurité au travail, analysées dans un autre rapport - et tant la compétitivité que la création ou le maintien de l'emploi (I). La seconde propose, exemples à l'appui, une sorte d'économie législative et se présente donc essentiellement comme une série de suggestions de méthode (II). Enfin, la troisième, regroupant certaines observations faites dans les deux premières parties, suggère des orientations répondant aux enseignements qu'elles livrent (III).

2. À l'orée de ce rapport, trois remarques sont encore nécessaires.

La première concerne le champ couvert : il ne s'agit que de la politique sociale de l'Union, et non de la politique sociale communautaire, qui, comme le terme le suggère, recouvre aussi bien la première que les politiques sociales des États membres. Et encore au sein de la politique sociale de l'Union n'ont été envisagées que les initiatives qui se sont traduites par des directives du Conseil.

La deuxième remarque a trait à l'écriture même du rapport. Il ne s'agit ni d'une recherche nouvelle, qui exigerait la présentation détaillée d'hypothèses et de méthodologies, ni d'un plaidoyer tendant à dénoncer, au nom de présupposés plus ou moins explicites, telle ou telle orientation. Le rapporteur a toujours cherché à donner les motifs de la position qu'il adopte, mais compte tenu du

cadre même de ce rapport, l'exposé des motifs est nécessairement succinct (et la bibliographie citée, plus encore).

Enfin, ultime remarque, la progression suivie a pour conséquence que les propositions présentées sont essentiellement regroupées dans la deuxième et la troisième partie. Toutefois, le rapporteur souhaite qu'en dépit des inéluctables critiques ou réserves qu'appelle le présent document et bien sûr du libre usage susceptible d'être fait de son travail par le groupe d'experts indépendants auquel il est destiné, les propositions faites ne soient pas isolées de leur contexte.

I. POLITIQUE SOCIALE DE L'UNION, COMPÉTITIVITÉ ET CRÉATION D'EMPLOIS

3. Le premier trait marquant de la politique sociale de l'Union, telle que traduite dans des directives, est son extrême modestie. Si, par convention, sont exceptées les directives et règlements adoptés dans le secteur des transport routiers, les directives relatives à l'égalité professionnelle des femmes et des hommes - qui prolongent un principe fondamental de l'Union - ce sont sept directives, qui sont en vigueur, et dont l'objet peut être rappelé :

- la directive 75/129 révisée par la directive 92/56 sur les licenciements collectifs ;
- la directive 77/189 relative aux transferts d'entreprises ou d'établissements ;
- la directive 80/987 sur la protection des salariés en cas d'insolvabilité de l'employeur ;
- la directive 91/533 relative à l'information du travailleur sur les conditions applicables au contrat ou à la relation de travail ;
- la directive 93/104 concernant certains aspects de l'aménagement du temps de travail ;
- la directive 94/33 sur la protection des jeunes au travail ;
- la directive 94/55 dite, pour simplifier, sur le comité européen d'entreprise.

Déjà, par sa modestie actuelle, la politique sociale de l'Union ne peut, sans parti pris, être regardée comme créant des obstacles à la compétitivité des entreprises et de l'économie européennes ou à la création d'emplois.

4. Mais, on ne peut s'en tenir à cette constatation. Les travaux disponibles, émanant de chercheurs adeptes de paradigmes même les plus orthodoxes, attestent que les règles sociales ne sauraient être vues comme les fruits du progrès économique, produit lui-même par d'autres voies. Certes dans cette vision, il y a place virtuelle pour une tension entre les règles sociales et l'efficacité économique, surtout lorsque la croissance a cessé d'être soutenue et que le chômage s'est développé.

Mais les règles sociales n'ont pas de justifications purement éthiques ou morales. Elles ont des justifications économiques. Elles constituent des ressources essentielles pour un développement économique équilibré et soutenu. Et nombre de recherches empiriques récentes insistent sur l'importance de l'environnement, notamment du système de relations professionnelles, de la politique sociale et des systèmes de protection sociale, comme conditions de réussite de stratégies fondées sur l'innovation, tant technique que dans l'ordre de l'organisation.

En somme, si l'on prête la plus attention aux travaux de chercheurs aussi divers que W. Sengenberger, G. Bosch, D. Marsden et J.J. Silvestre, ainsi qu'aux toujours prudentes analyses du Bureau International du travail, la mise en cause (la dégradation) des règles sociales n'offre aucune garantie d'essor de la compétitivité. Pire, elle risque fort de ruiner une stratégie qui, sans doute enracinée dans l'Europe communautaire et son histoire, inspire les entreprises, une stratégie d'amélioration constante de la qualité du travail.

5. Admettre que la politique sociale de l'Union a de solides justifications économiques ne résoud pas tout.

Tout d'abord, en effet, la politique sociale de l'Union est, dans sa consistance concrète, très modeste. Or, un certain degré de congruence doit exister entre l'espace crée par l'intégration économique communautaire, le marché intérieur économique, et l'espace des règles sociales. C'est dire que peut être relevé un déficit de politique sociale commune et non pas son contraire. Comment

combler ce déficit ? Telle est une première question cruciale qu'affronte la construction européenne.

D'autre part, alors même qu'elles constituent des conditions de l'amélioration de la qualité du travail et de la compétitivité, les règles sociales ne procurent pas nécessairement la garantie que le développement économique se traduit dans une croissance de l'emploi. C'est cette constatation, parfois amère, qui incite certains à dénoncer les règles sociales et à réclamer leur démantèlement, en dépit de leurs justifications notamment économiques. Mais si la lutte contre le chômage et l'exclusion ne passe pas par la mise en cause des règles sociales, comment faire pour établir et rendre efficace une politique active ayant ces fins ? Telle est l'autre question fondamentale que les États membres et l'Union rencontrent depuis bientôt vingt ans.

En vérité, si le chômage et l'exclusion sont des problèmes qui ne peuvent être résolus par de simples changements du droit du travail (et des systèmes de protection sociale), il existe cependant un besoin de nouvelles règles d'une part pour tenir compte des évolutions des marchés du travail et des nouvelles formes d'inégalité qui se sont développées et d'autre part, pour mieux assurer une cohérence et une efficacité des différents niveaux et formes de régulation. Se dessine ainsi un vaste champ où l'invention est requise. Mais le pire danger serait de croire que cette invention passe par la négation de règles sociales, et en particulier de règles sociales communes.

6. Dans cette voie, l'analyse coûts-avantages, appliquée aux règles sociales, ne saurait servir de guide car elle comporte, elle-même, plus d'inconvénients que d'avantages. Ses défauts majeurs sont bien connus. D'une part, elle ne se prête pas, à l'égard de telles règles, à une instrumentation convaincante. En particulier, si elle conduit à souligner les coûts induits par telle ou telle règle pour une entreprise, elle ne parvient pas à intégrer ce qui est essentiel, les coûts induits par son changement ou sa suppression pour le système dans son entier, les coûts systémiques. Elle réduit, par ailleurs, les règles à des contraintes, alors que de nombreux travaux démontrent que les règles sont irréductibles à des pures contraintes.

D'autre part, les études empiriques, portant même sur des règles établissant des mesures quantifiables, telles les règles sur les salaires minimaux, et

fondées sur des calculs coûts-avantages assortis des enrichissements les plus fins , ne justifient pas la suppression des règles en vigueur.

Il faut ajouter qu'appliquée à des règles sociales communautaires, une analyse coûts-avantages fait fi des différences qui séparent les systèmes nationaux et les secteurs. Les coûts, s'ils peuvent être évalués, varient d'un pays à l'autre. Ainsi, par exemple, la directive 92-85 dont l'objet concerne la sécurité et la santé des travailleuses enceintes, accouchées ou allaitantes au travail n'a pas suscité les mêmes réactions d'un État membre à l'autre ; les arguments en termes de coûts n'y ont eu ni la même place ni la même intensité. L'Union, dans sa politique sociale, ne peut donc trouver un fil conducteur dans une analyse coûts-avantages. Tout au plus, cette dernière peut avoir un certain rôle dans une réflexion sur le choix des moyens d'une politique sociale dont les objectifs, tant généraux que spécifiques, auraient été, au préalable, définis.

7. De ce qui précède, résulte une *première proposition*.

> *L'analyse avantages-coûts ne saurait servir de guide à l'élaboration de la politique sociale de l'Union.*

II. POUR UNE ÉCONOMIE LÉGISLATIVE DE L'UNION

8. Les fondements économiques de la politique sociale de l'Union sont une chose ; sa concrétisation en est une autre. Et c'est à ce stade qu'une véritable réflexion tendant à une simplification a sa justification.

Encore ne faut-il pas se méprendre sur les limites de cette réflexion, limites qu'il vaut mieux souligner plutôt que feindre de les oublier. En effet, les défauts la politique sociale de l'Union, qui se manifestent à différents niveaux analysés successivement (A à D), sont largement imputables à des facteurs que la simple raison pratique ne peut corriger. Trois d'entre eux méritent, au moins d'être rappelés. En premier lieu, la complexité de certaines directives, dont la directive 93/104 fournit une illustration éclairante, provient des désaccords persistants entre États membres, qu'enregistre la directive elle-même, sur les objectifs spécifiques poursuivis. On parvient, en somme, à cacher les divergences relatives aux objectifs sous la multiplication des propositions

normatives, énonçant des règles et des exceptions multiples aux règles. La question lancinante, est, dans pareilles hypothèses, toujours la même : vaut-il mieux renoncer à une initiative parce qu'un ou quelques États membres y sont hostiles ou se satisfaire d'un compromis peu intelligible ?

En deuxième lieu, il ne faut pas négliger l'importance des processus de décision organisés par le droit communautaire. Le rôle prééminent joué dans les processus par des experts, qui privilégient parfois les différences culturelles, juridiques et lexicologiques au détriment de la recherche d'une grammaire commune, et par les fonctionnaires nationaux, souvent marqués par les traits de leur système et attachés à les défendre, ne contribue pas à la simplicité des compromis.

Enfin, la complexité des problèmes sociaux eux-mêmes ne doit pas être tenue pour négligeable. Peut-on par exemple à la fois promouvoir des garanties contre la perte d'emploi, nécessaires à la recherche constante de l'amélioration de la qualité du travail et de la compétitivité, et prétendre que le recrutement de demandeurs d'emploi requiert d'écarter ces garanties ? Il est clair qu'un appel à une plus grande rationalité dans la mise en oeuvre de la politique sociale de l'Union ne suffit pas à faire disparaître, comme par enchantement, ces facteurs de complexité.

Il n'en demeure pas moins qu'une économie législative doit être plus rigoureusement pensée. Elle porterait sur au moins quatre dimensions.

A. Le choix des objectifs et la préparation des initiatives

9. Les objectifs généraux de la politique sociale de l'Union sont définis par le Traité lui-même. À ce stade, il serait inconvenant de les discuter. Ce sont donc les objectifs spécifiques, propres à une initiative donnée, dont il sera là question. À ce titre, deux séries d'observations s'imposent.

10. 1° La préparation des initiatives

Ce qui frappe le plus dans l'examen du processus de préparation des initiatives, c'est sa relative opacité. Certes, la Commission a pris l'habitude de présenter son programme de travail, à travers l'élaboration de programme d'action, et même de Livre vert, suivi de Livre vert. Et c'est une bonne chose.

Il faut sans nul doute aller plus loin et assurer une plus grande transparence, une plus grande publicité à l'élaboration des initiatives.

a) Dans un processus de décision, dans lequel les travaux parlementaires arrivent tard, les études et évaluations qui ont conduit à prendre une initiative et à lui donner un certain contenu ont un poids considérable. Elles doivent être connues des citoyens communautaires, dès que le principe d'une initiative est arrêté.

Proposition n° 2

Tous les travaux notamment d'expertise, sur la base desquels une initiative communautaire est prise, doivent être publiées concomitamment à l'initiative même.

b) Légitimes ou non, les réactions que suscite une initiative communautaire s'emparent souvent de deux séries de difficultés, réelles ou non : les difficultés d'intégration dans les systèmes nationaux et les difficultés d'ordre lexicologique.

Ces difficultés doivent être prises au sérieux, même s'il s'agit d'en démontrer la vanité.

Proposition n° 3

La Commission doit, dans la préparation d'une initiative, faire étudier l'intégration de celle-ci dans les États membres et rendre publics les résultats de cette étude.

Proposition n° 4

La Commission doit procéder ou faire procéder à une évaluation lexicologique et en rendre publics les résultats.

c) Une initiative est, comme il est normal, soutenue par certains États et contestée par d'autres. L'opposition de certains États n'a nulle raison de rester dans le secret douillet des procédures communautaires. Une pédagogie de l'opposition doit être promue.

Proposition n° 5

Les raisons de l'opposition d'un État à une initiative communautaire doivent être rendus publiques.

d) D'une façon plus générale, l'Union doit disposer des moyens d'évaluer régulièrement les résultats des initiatives déjà prises, qu'une révision d'une directive soit envisagée ou non. Et de la même façon que les études sur la base desquelles une initiative a été prise doivent être rendues publiques, les évaluations régulières doivent être assorties d'une publicité appropriée. Cet impératif est d'ailleurs à mettre en relation avec l'application (la mise en oeuvre ou implémentation) des directives (v. infra D).

Proposition n° 6

Des procédures d'évaluation régulière des résultats d'une initiative communautaire doivent être instituées.

Proposition n° 7

Les évaluations régulières doivent être rendues publiques.

11. 2° La spécification des objectifs

Le rapporteur a conscience que toute proposition, en ce domaine, est emprunte d'une certaine candeur, tant la spécification des objectifs dépend de négociations complexes, dans lesquelles les partenaires sociaux, les représentants des gouvernements, l'administration communautaire jouent des rôles eux-mêmes complexes.

Toutefois, on ne peut renoncer à espérer une meilleure et plus intelligible définition des objectifs d'une initiative communautaire. Au demeurant, s'il fallait y renoncer, ce serait, du même coup, renoncer à tout effort de contrôle des moyens utilisés. Le principe de proportionnalité suppose, en effet, pour être appliquée, que les objectifs poursuivis puissent être définis ou repérés.

Deux exemples méritent ici d'être cités qui peuvent aider à comprendre tous les avantages que présenterait une spécification plus claire des objectifs.

Le premier exemple est fourni par la directive 91-533 sur l'information du travailleur sur les conditions de travail. À lire son exposé des motifs, plusieurs

ambitions sont poursuivies : protéger les travailleurs salariés contre une éventuelle méconnaissance de leurs droits, offrir une plus grande transparence sur le marché du travail, faciliter la mobilité intra-communautaire ...

Peut-être est-ce trop à la fois ; et sans doute faut-il voir là l'une des explications du contenu de la directive, qui allie principe, précisions détaillées et exceptions. Une autre voie était possible qui aurait simplifié l'initiative communautaire, charger les États ou les partenaires sociaux de l'essentiel de la réglementation et assurer un caractère contraignant à l'instrument communautaire. En suivant l'exposé des motifs, il se serait agi d'établir au niveau communautaire "l'obligation générale selon laquelle tout travailleur doit disposer d'une document contenant des informations sur les éléments essentiels de son contrat ou de sa relation de travail". Cette obligation découlerait du droit de tout travailleur d'être informé, dans les plus brefs délais, de ses conditions de travail, de rémunération et d'emploi. Ensuite ce serait aux États ou aux partenaires sociaux de donner consistance à cette obligation sous un contrôle communautaire.

Proposition n° 8

> *Il y aurait lieu d'affirmer au niveau de l'Union le droit de tout travailleur salarié d'être informé, dans les plus brefs délais, sur ses conditions essentielles de travail (au sens large) et l'obligation corrélative de l'employeur de lui fournir par un document les informations correspondantes. La directive 91-533 perdrait alors son utilité.*

Ajoutons que ce droit devrait être général. Et l'on reviendra sur la nécessité du caractère "universel" de tel droit ou principe (v. III).

12. L'autre exemple est fourni par la directive en discussion sur la condition des travailleurs ayant une relation de travail atypique. L'initiative de la Commission est déjà ancienne et un accord semble difficile entre les partisans d'une intervention afin d'éviter les distorsions de concurrence et les tenants d'une concurrence entre systèmes nationaux. Les études qui ont, dans les récentes années, porté sur le travail à temps partiel sont pourtant fort instructives. Le développement du travail à temps partiel constitue, sans doute, l'une des voies les plus prometteuses de réduction du chômage, mais pour que le mouvement soit ample et produise des résultats significatifs, il faut que le travail à temps partiel cesse d'être concentré sur des emplois de faible

qualification et qu'il devienne attrayant (v. en ce sens le rapport du Professeur G. Bosch et les recherches sur lesquelles il s'appuie - Europe sociale supplément 1/95). En bref, l'initiative communautaire doit se fixer un objectif simple, la création d'emplois et si cet objectif est retenu, l'objet même de l'intervention communautaire acquiert aussi des traits simples : il s'agit d'établir au moins l'égalité de traitement entre les travailleurs à temps partiel et les travailleurs à temps plein. On peut imaginer d'aller plus loin et d'instituer au profit de ces travailleurs des actions positives.

Mais pour l'heure, il faut seulement noter que le raisonnement esquissé a d'avantage de fonder une intervention communautaire qui est à la fois parfaitement légitime (au nom de la promotion de l'emploi) et d'une indéniable simplicité.

Proposition n° 9

> *Si l'Union entend développer des formes flexibles d'emploi, elle doit prendre les initiatives requises pour qu'au moins une égalité de traitement soit établie entre les travailleurs ainsi employés et les travailleurs disposant d'un emploi traditionnellement regardé comme normal.*

Référence est faite dans la dernière proposition à des initiatives, sans autre précision. C'est en effet une réflexion particulière qu'appelle le choix des instruments.

B. Le choix des instruments

13. Une réflexion générale et renouvelée sur les instruments communautaires est devenue nécessaire, surtout si parmi eux, une place est occupée par les variétés possibles de négociation ou de dialogue européen.

Comme le présent rapport ne saurait avoir une telle ambition, il se limitera à deux séries d'observations.

La première a trait à l'usage du règlement. C'est la directive 94/55 dite sur le comité européen d'entreprise qui permet d'introduire l'analyse. Cette directive présente, en effet, deux caractères. En effet, elle ne constitue pas une directive d'harmonisation, au sens propre, parce que les relations dont elle se préoccupe, ne sont pratiquement pas régies par des règles nationales. En simplifiant, on peut dire que son objet est, par définition, transfrontière ou

transeuropéen. D'autre part, elle a fait choix, pour l'établissement de procédure d'information et de consultation dans les grands groupes ou entreprises à dimension européenne, de privilégier la négociation collective, et de prévoir de modèles qu'en cas d'échec de la négociation. Dans ces conditions, l'intervention communautaire par voie de directive parait inappropriée. L'Union dispose d'un titre légitime pour établir des règles communes et non pas pour tenter d'imposer dans chaque État membre des législations harmonisées. Et la directive suscite immanquablement des débats, annonciateurs de discordances, lors de sa transposition dans les systèmes nationaux. Il semble particulièrement fâcheux, par exemple, que les processus de négociation puissent être appréciés différemment, alors qu'ils sont par définition, européens, selon la loi nationale applicable ou encore que les notions fondamentales puissent recevoir des interprétations variables. Certes, il est vrai que l'accord dit à 11 sur la politique sociale, sur la base duquel la directive a été adoptée ne prévoit pas, de manière expresse, le recours à un règlement. Mais cette carence devrait être corrigée.

Ajoutons que si la directive 94/55 est sobre et plutôt dépouillée, ce qui est une de ses qualités, il n'y a nulle raison pour qu'il en aille autrement d'un règlement.

En somme, chaque fois que les situations qu'il s'agit de régir sont transeuropéennes par définition même, le recours à un règlement devrait être possible et envisager par priorité.

Proposition n° 10

> *Chaque fois que les situations qu'il s'agit de régir, sont transeuropéennes par définition même, le recours à un règlement devrait être possible et envisagé par priorité.*

14. L'accord à 11 (promis à l'appellation d'accord à 14) a, par ailleurs, considérablement promu, à leur demande, l'activité des partenaires sociaux. Il est, bien sûr, trop tôt, pour apprécier les résultats de cette promotion d'un "espace contractuel européen". Les partenaires sociaux ont pris d'ailleurs beaucoup de précaution, dans leur accord du 31 octobre 1991, qui préfigure le contenu de l'accord à 11, pour éviter d'être prisonniers de formules trop rigides : consultation, dialogue, concertation, accord, accord prolongé par une décision du Conseil, les termes sont nombreux pour décrire leur possible activité.

C'est sans doute avec le temps que se dégagera une conception de leurs accords au niveau européen. Pour l'heure, les partenaires sociaux ont l'expérience des avis communs, que l'on peut estimer modeste dans ses effets, ils connaissent l'expérience des négociations nationales qu'ils savent ne pas pouvoir reproduire, telle quelle, au niveau communautaire. Leur inventivité nécessaire est, au fond, de même ordre que celle dont les autorités communautaires ont dû faire preuve - avec des résultats mitigés - en recourant aux directives de l'article 189 du traité : définir des objectifs communs, charger les systèmes de relations industrielles de traduire ces objectifs et instaurer des mécanismes garantissant la transposition progressive des premiers par les seconds, tels sont, en effet, ce à quoi ils doivent parvenir.

Le modèle de la directive pourrait ainsi servir de trois façons : il fixerait la consistance de l'activité des partenaires sociaux qui rendrait inutile une intervention des autorités communautaires, il aiderait à concevoir ce que les partenaires sociaux appellent un accord-cadre, et enfin il inviterait à réfléchir aux procédures de transposition de tels accords et aux contrôles dont leur application doit être assortie.

Proposition n° 11

> *La notion de directive doit servir de modèle à l'activité communautaire des partenaires sociaux, lorsque cette activité doit remplacer l'intervention des autorités communautaires.*

C. Le contenu des directives

15. La directive 91/533 a déjà été citée (v. supra n°11) comme exemple d'initiative qui aurait pu être simplifiée. Un objectif aurait pu être fixé, sans trop de peine, et les moyens, destinés à l'atteindre, renvoyés aux États membres sans qu'il soit indispensable, au moins dans une première période, d'établir de manière détaillée, dans l'instrument communautaire, le contenu et les modalités de l'information à laquelle tout travailleur a droit.

La directive 93/104 du 23 novembre 1993 est, pour sa part, riche d'autres enseignements. Selon le mot d'un auteur (A. Supiot), elle présente un aspect schizophrénique caractérisé : dans un premier mouvement, des règles sont posées, dont, dans un second mouvement, réduit à deux articles (art 17 et 18), la directive écartent, dans une très large mesure, l'impérativité. Il en résulte trois conséquences. D'abord, si l'on excepte le rôle reconnu à la négociation

collective, qui peut constituer une ambition heureuse de la directive, celle-ci n'a guère d'objectifs clairs. Par là-même, il devient presque impossible d'appliquer à une telle initiative un contrôle de proportionnalité des moyens aux fins poursuivies. Ensuite, la complexité de l'articulation des règles et des dérogations ouverts rend la directive peu lisible, mieux, peu intelligible. Enfin, cette directive atteste que l'inflation législative est étroitement associée à une recherche de flexibilité : plus la diversité de modèles légalement organisés de temps de travail est grande, plus nombreuses sont les règles.

La méthode, on le voit nettement, n'est pas satisfaisante. Et si l'on conserve comme exemple le temps de travail, il est possible de concevoir une méthode à la fois plus simple et plus claire qui permette de définir le rôle d'une directive.

16. Il est d'abord certains principes (certains droits fondamentaux) qui doivent être affirmés ou réaffirmés avec une force particulière, parce qu'ils inscrivent les réglementations du temps de travail, qu'elles soient l'oeuvre des législateurs nationaux ou des partenaires sociaux ou des deux à la fois, dans leur dimension profonde, par définition peu sensible à la conjoncture. Il s'agit, au moins, de la protection de la santé et de la sécurité (avec notamment le droit au repos journalier, hebdomadaire et annuel), de l'égalité entre hommes et femmes, et des droits à la formation professionnelle (on peut ajouter la libre circulation en ce qu'elle fonde un transfert d'un État à l'autre de certains droits). C'est avec la plus grande puissance juridique que ces droits fondamentaux doivent être établis, ce qui, on le notera, ne conduit pas nécessairement à une réglementation communautaire détaillée.

De multiples considérations (évolution des modes de vie, développement d'une flexibilité du temps de travail...) invitent par ailleurs à repenser l'organisation du temps de travail et à stimuler ce que certains appellent une flexibilité positive. Mais cet effort est complexe, car il oblige à tenir compte des liens entre le temps de travail et le temps du contrat, ou encore la condition des travailleurs, des liens entre le temps de travail et les obligations extérieures au travail, ce que par exemple la recommandation 92/241 du 31 mars 1992 relative à la garde des enfants à déjà pris en considération. En même temps, cette plus grande individualisation du temps ne doit pas être recherchée au prix d'un sacrifice complet des rythmes collectifs sans lesquels il n'y a pas de vie possible dans la famille et dans la société. Qu'on songe, à cet égard, aux débats que nombre de pays connaissent sur le repos dominical.

Ce programme ne se prête pas, en l'état, à une directive. Et cet instrument doit être réservé à des sujets circonscrits sur lesquels des objectifs simples et clairs ont pu être déterminés. Ce sont plutôt un livre vert, puis un livre blanc, et éventuellement un programme d'action qui constitueraient les supports appropriés à cette maturation communautaire.

Proposition n° 12

Sur des sujets aussi complexes que l'aménagement du temps de travail, l'Union doit établir les principes et droits fondamentaux dans lesquels s'inscrivent les initiatives tant communautaires que nationales.

Proposition n° 13

Sur des sujets aussi complexes que l'aménagement du temps de travail, l'Union doit, avant toute directive, qui ne peut porter que sur un thème circonscrit, établir les justifications et les voies à suivre, en recourant à des procédures d'analyse et d'échanges (Livre vert) et ensuite en fixant des orientations d'action (Livre blanc ; programme d'action).

D. L'application des directives.

17. Les réponses au questionnaire envoyé par le groupe d'experts indépendants ont montré, au moins, un point d'accord des organisations destinataires : elles s'inquiètent des distorsions qui résultent des différences dans le rythme et dans le contenu de la transposition des directives. L'inquiétude est-elle toujours justifiée ? Au fond, peu importe, car il suffit de quelques exemples avérés pour que la suspicion naisse et que soit démontrée l'utilité d'une plus grade attention portée à la transposition des directives.

Ajoutons que la suspicion génère sans doute des effets malheureux : elle explique, en effet, pour partie au moins, l'abondance de précisions que comportent certaines directives, cette abondance étant considérée comme une sorte de garantie préventive contre les réticences ou les résistances de certains États lors de la transposition. Mais, ce qui au fond est le plus préoccupant, c'est l'atteinte au crédit des initiatives communautaires qui proviennent des distorsions, réelles ou même supposées, dans l'application des directives.

18. Une application plus efficace et plus harmonieuse doit-elle être recherchée du côté d'un renforcement des voies juridictionnelles ouvertes aux particuliers (action en responsabilité) ou aux autorités communautaires et aux États membres (recours en manquement) ? Sans doute. Mais d'ores et déjà des mesures pratiques pourraient être proposées et adoptées qui montreraient que l'efficacité dans l'application constitue un objectif prioritaire de l'Union.

En particulier, la Commission devrait avoir un rôle plus actif dans la recherche d'une plus grande efficacité des directives.

Proposition n° 14

> *La Commission doit, de façon systématique, assurer une action de coordination entre États membres dans la transposition des directives.*

Proposition n° 15

> *La Commission doit user, aussi fréquemment que possible, de notes explicatives pour préciser les orientations du droit communautaire.*

Un pas supplémentaire devrait pouvoir être franchi. Certaines directives ont prévu l'institution d'un comité de suivi ; les institutions communautaires ont mis en place divers observatoires ; on évoque dorénavant la possible organisation d'une inspection communautaire du travail ou la coordination des inspections nationales. Doit-on craindre qu'à multiplier les procédures d'observation et de contrôle, on en vienne à oublier l'impératif principal ? En tout cas si l'efficacité est sérieusement recherchée, il faut veiller à ce que ces procédures remplissent certaines conditions : les États membres ne doivent pas avoir le monopole de la fourniture des informations et analyses sur l'état de leur propre système ; une capacité autonome d'investigation doit être ménagée aux instances de contrôle ; les partenaires sociaux doivent, d'une façon ou d'une autre, être associés à ces procédures d'analyse et de contrôle ; la publicité de leurs résultats doit être assurée.

Proposition n° 16

> *L'application dans les différents pays des directives doit faire l'objet de procédure(s) d'analyse et de contrôle confiées à des instances capables d'effectuer des investigations sans recourir aux autorités publiques nationales.*

III. QUELQUES ORIENTATIONS

19. S'il semble possible de promouvoir une meilleure qualité des interventions communautaires (v. supra n° 8 à 18), cet effort se heurte à des obstacles, dont les moindres ne sont pas l'absence de références fondamentales communes dans le domaine social, et les discussions persistantes qui existent sur le niveau et la forme adéquates de régulation (niveau communautaire ou niveau national, dialogue social ou intervention publique).

Ces obstacles cesseraient d'être des sources profondes de trouble pour l'intervention communautaire si l'Union était dotée d'un ensemble de droits et de principes fondamentaux susceptibles d'être invoqués par tous et opposables à tous. Cette proclamation de nature constitutionnelle serait un facteur essentiel de simplification à la fois pour la définition des objectifs de la régulation et pour la détermination du niveau et de la forme qu'elle doit revêtir.

D'abord, en effet, la proclamation de droits fondamentaux et de principes de valeur constitutionnelle limiterait l'opportunisme législatif des États membres, en ce qu'elle ne leur permettrait toute sorte de surenchères dans leur choix normatifs. Mais en même temps que cette proclamation donnerait une consistance minimum à l'Union, elle ne dicterait pas à chaque État membre une stratégie uniforme. Il suffit d'ailleurs d'étudier les expériences de certains États membres pour s'en convaincre : leurs Constitutions sociales peuvent être très proches et les politiques sociales, qui s'y déploient, différentes. Ce ne sont pas les seuls États membres qui seraient ainsi liés par des droits fondamentaux et principes communs. Les institutions de l'Union aussi le seraient, et cette soumission aurait une incidence directe sur la définition des objectifs que leur action doit poursuivre (v. à propos du temps partiel, supra n° 12). Elle simplifierait l'action normative de la Communauté ; et, dans une large mesure, ne la rendrait plus toujours nécessaire, car ces droits et principes fondamentaux s'imposeraient à tous les États membres.

D'autre part, l'existence d'une Constitution sociale rendrait en effet beaucoup moins aiguès les querelles sur le niveau de régulation (niveau communautaire ou niveau national), car sans impliquer une répartition des compétences entre l'Union et les États membres, elle les soumettrait aux mêmes références

communes. Le principe de subsidiarité perdrait, par là même, une large partie de sa charge polémique.

Quant aux rapports entre l'action des institutions publiques et celle des partenaires sociaux, ils gagneraient en clarté si parmi les droits et principes fondamentaux figurait l'autonomie collective ou le droit à la négociation collective.

20. La reconnaissance de droits et principes fondamentaux aurait au fond trois mérités généraux : elle serait économiquement bénéfique, si l'on veut bien se souvenir de l'importance des règles sociales dans la formation d'une économie compétitive, elle serait socialement souhaitable, car elle éviterait de réduire la Constitution de l'Union a un principe de marché, et elle emporterait une plus grande simplicité dans l'activité normative.

Mais encore faut-il bien préciser les caractères requis de ces droits et principes fondamentaux. Ils doivent être proclamés, en effet, réunir trois conditions si on veut en attendre les bénéfices mentionnés :

- dans leur contenu, ils doivent être pour partie substantiels, pour partie procéduraux,

- dans leur application, ils doivent être universels,

- dans leur formulation, ils doivent se prêter à des adaptations.

Leur contenu doit être, pour certains, substantiel. Il en va ainsi des droits qui assurent la protection de l'individu, tels le droit de choisir une activité et le droit au respect de la vie privée et de la vie familiale. Leur contenu doit être, pour d'autres, procédural, tel le droit à la négociation collective.

Il est essentiel que ces droits et principes soient généraux ; à défaut, en effet, ce sont des exclusions que l'on établit ou que l'on s'interdit de combattre ou de réduire.

Enfin, par leur formulation, ils doivent être ouverts à des évolutions et des adaptations à des situations variées. Force est ici de rappeler ce que des études ont déjà bien montré : la généralité des droits et principes fondamentaux et leur capacité d'adaptation marchent ensemble. Toutefois cette capacité d'adaptation ne saurait aller jusqu'à une totale indétermination des formules. Dans ce cas, elles ne sont d'aucune utilité et elles cessent de

fournir des références communes sur lesquelles chacun peut compter et prendre appui.

Au fond entre la concurrence des systèmes sociaux qu'emporte la pleine autonomie maintenue des politiques sociales des États membres, concurrence qui, dans son principe et dans ses résultats, va à l'encontre de la construction de la Communauté et risque de lui faire perdre tout crédit et l'essor, difficile, de directives souvent compliquées, il y a place et même une place nécessaire pour une ambition, à la fois plus exigeante et plus simple, celle d'une reconnaissance par l'Union, de droits et principes fondamentaux.

Proposition n°17

> *La Communauté doit se doter d'un ensemble de principes et droits fondamentaux applicables à tous et opposables à tous.*

Final Report to the Legislative and Administrative Simplification Group on Health and Safety

by

Dr. Patrick Ussher

Dr. Ussher
FINAL REPORT
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Health and Safety

The importance of health and safety

1. We fully support the need for proper health and safety precautions in the work place. We are required by our terms of reference to consider competitiveness, and are therefore bound to mention that there is a logic which dictates that competitiveness of industry is enhanced by a diminution in health and safety considerations. This logic is socially and culturally unacceptable in Europe and to us. Certainly, there are competing with Europe emerging economies whose dynamism for the time being is reinforced by a disregard of the rights of labour, but it is likely that their resultant competitive edge will in the normal course be eroded by the social enhancement that follows industrial development. In any event, we consider that an effectively functioning, and therefore competitive, economy depends to a large extent on the stability to be derived from non-confrontational industrial relations (in which health and safety issues have always been prominent). Not least there is also the general economic cost of a neglect of health and safety at work. According to the Commission, accidents and ill-health at work account for approximately 7% of all social security expenditure in the EU, affecting 10 million workers every year at an overall cost of 20 billion ECU.

Community policy

2. The legal bases of the EU intervention in health and safety are the subject of some controversy which we are bound to record, but upon which we do not propose to attempt to adjudicate. The interventions fall into two phases. The first set of directives is purported to be made under Article 100 of the Treaty, and the second under Article 118a of the Treaty, introduced by the Single European Act of February 28, 1986 which had the primary purpose of bringing about the internal market.

3. By Article 100 of the Treaty the Council acting unanimously on a proposal from the Commission was bound to

> *"issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market"*

Upon this legal justification, considered by some to be tenuous, the Council issued directives on safety signs at places of work, on the protection of workers from chemical, physical and bilogical agents at work, on electrical equipment for use in potentially explosive atmospheres in mines, and on the protection of workers from noise. Those of the eight Directives emanating from Article 100 and still in force are listed in Annex I to this Chapter. They are destined to be repealed and their subject matter incorporated in fresh directives to be made under the second and now primary source of health and safety directives, Article 118a of the Treaty.

4. Article 118a imposed duties on Member States, the Council and the Commission In the following terms:

> *"1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers,*

and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.

2. In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, ... shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States."

5. The Community Charter of the Fundamental Social Rights of Workers of December 9, 1989, though not strictly a Community instrument, has been an impetus to action by the Community, and therefore must be mentioned. It recites that

> *"the completion of the internal market must offer improvements in the social field for workers of the European Community, especially in terms of ..... health and safety at work"*

and contains the following Article 19:

> *"Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken to achieve further harmonisation of conditions in this area while maintaining the improvements made. These measures shall take account, in particular, of the need for the training, information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them. The provisions regarding implementation of the internal market shall help to ensure such protection."*

6. One interpretation of Article 118a is that the "objective" mentioned in both paragraphs is harmonisation, that the primary duty to harmonise lies on the Member States, but that the Council must assist in the manner described. An objective of harmonisation accords with the Single European Act's purpose of creating a single market: if a Member State were to skimp on health and safety, its industry might attain a competitive advantage over industry in other Member States.

7. A different interpretation has been adopted by both Commission and Council. It is stated thus in the recitals of each directive:

> *"Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of Directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers".*

This is not an ancillary role; the Council at the instance of the Commission has taken the lead. There is no mention of harmonisation. Starting with a Framework Directive (89/391/EEC) laying down general duties, there has followed a wave of individual (or "daughter" directives) covering in detail a wide range of topics, and the process is set to continue. A list of health and safety Community legislation under Article 118a is set out in Annex II to this Chapter. They cover the workplace, work equipment, personal protective equipment, the handling of loads, work with display screen equipment, exposure to carcinogens, exposure to biological agents, work at temporary or mobile construction sites, safety signs at work, the protection of pregnant and workers who have recently given birth or are breastfeeding, mineral extracting through drilling, surface and underground mineral-extracting industries, and work on board fishing vessels.

8. The Commission admits that it is not aware of all details of national legislation which might exist apart from EU legislative provisions; nor, according to its representatives, does it aspire to initiate a process of harmonisation, save to the extent that, inevitably, EU rules achieve a

harmonisation by superseding national laws on the same topics. This happens because the EU rules though describing themselves as "minimum requirements" are expressed in such absolute terms and with so much prescriptive detail as to be in fact exhaustive of the topic chosen.

9. A failure to assume the burden of harmonisation carries with it a freedom to ignore some of the issues addressed by national laws, even fundamental issues. One such fundamental issue concerns nature of the system.

10. A health and safety code may be designed simply to prevent accidents and ill-health. In that case, its enforcement is in the public domain, and the sanction for breach is usually a criminal penalty, imposed through the courts or through an administrative process. Or the code may give an individual a remedy for compensation for loss suffered as a result of a breach of the code, a civil remedy. Or the code may do both. If a civil remedy is given, there will be a private system of workers' compensation; industry must bear the cost of its casualties, and those costs are potentially so high that compliance with the code becomes a matter to be treated seriously by industry; the workers, those most interested in the observance of the code, are directly given the remedies, and are therefore in a sense the enforcers of the code. If the system is criminal alone, the effectiveness depends on the energy and resources given to enforcement and the level of penalties in each Member State. The chief virtue of a criminal system is that compliance with a view to preventing accidents may be enforced by a public inspectorate, whereas traditionally the civil system has chiefly been concerned with the pathology of industrial life, namely dealing with the consequences of damage that has already occurred.

11. The directives are not concerned with compensation. That they are concerned only with a public system is the understanding of the Commission, and implicit in Article 4 of the Framework Directive [89/391/EEC]:

> *"1. Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.*
>
> *2. In particular, Member States shall ensure adequate controls and supervision."*

We are faced therefore solely with a preventive system. Accordingly, we do not discuss issues of compensation.

12. Another fundamental issue which a legislator freed from the burden of harmonisation may perhaps ignore is the relationship between basic concepts, relationships essential to the coherence of a system. We isolate some of these, and make proposals about them. [See Proposals: II Risk and responsibility].

13. The absence of Community policy or purpose on the matters mentioned in the three preceding paragraphs, leaving them therefore to Member States, may result in divergences in the conditions upon which work is done, some consequent distortion of competition, and uncertainty.

14. We have received the impression that the Community legislation was formulated without sufficient regard to the century or more of experience accumulated in Member States. In many respects, the Community legislation is more the product of the imagination than experience. Put another way, the approach is "top down", rather than "bottom up". To be noted in this connection is the Article 118a Treaty requirement that there be "regard to the conditions and technical rules obtaining in each of the Member States."

15. Article 118a attempts to safeguard small and medium sized enterprises (SME's) in the following words:

> *"Such directives shall avoid imposing administrative, financial and legal constraints in such a way which would hold back the creation and development of small and medium-sized undertakings."*

To this should be added, as an aid to interpretation, a "Declaration on Article 118A (2) of the EEC Treaty", annexed to the Final Act. This Declaration noted that it had been agreed that

> *"the Community does not intend, in laying down minimum requirements for the protection of the safety and health of employees, to discriminate in a manner unjustified by the circumstances against employees in small and medium-sized undertakings."*

This means that employees of a SME must, if possible, enjoy the same level of protection as those in a larger undertakings. It does not preclude the means for attaining that end from being different, from being better adapted to the structure and resources of small undertakings. We shall be making a proposal in that regard.

The effectiveness of Community policy

16. The effectiveness of Community policy in the improvement of health and safety cannot be properly evaluated until transposition is complete, and has been in operation for some time. The present state of purported transposition is summarised in Annex III.

17. Directorate General V has doubts about the lawful compliance of some Member States, but refused to disclose to us those doubts or their evaluation of the lawfulness of transposition on the stated ground that such matters were potentially *sub judice.*

18. Our chief criticism is that as a practical code this well-intentioned legislation is flawed, and that concepts must be modified in order to render it administratively workable, without any practically perciptible loss of attainable quality of care, and with, in some respects, its enhancement.

19. To this end, we will propose

- adjustments in an employer's level of duty
- a recasting of obligations in a less detailed but not too generalised form
- increasing employers' motivation by simplifying the means of fulfilling duties, and instilling fairness into duties perceived as unfair

20. We also address

- central unresolved questions of risk and responsibility
- the failure properly to integrate the health and safety code with directives on other topics, particularly an employer's obligations in respect of machines deemed to comply with EU safety standards
- the imposition of unnecessary costs which tend to bring the system into disrepute
- the problems of SME's
- discrimination against certain categories of employment, particularly manual labourers
- an over-ambitious definition of health.

PROPOSALS

I. Adjusting the level of duty

The overriding duty

21. Article 5(1) of the Framework Directive imposes on the employer an overriding duty stated in absolute terms:

"The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work."

This overriding duty is carried into the specific topics of each "daughter" directive by Article 16.3 of the Framework Directive and by Article 1 of each "daughter" directive.

22. Article 5(4) of the Framework Directive allows Member States to reduce an employer's responsibility below the above-stated absolute:

"... Member States [may] provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care."

23. The standard of behaviour expected of an employer must be attainable.

24. It follows that an employer should not be responsible for events beyond its control. By this is meant events causing harm to workers which could not have been prevented by the intervention of the employer.

25. The permissible derogation does not necessarily satisfy this requirement because to absolve the employer from liability, the events "beyond the employers' control" must be "unusual" and "unforeseeable", and because the unavoidable events must also be "exceptional." These qualifying words are imprecise. "Unusual" depends on context: a raid by armed robbers is not unusual in society, but may be unusual in a particular office or factory. "Unforeseeable" leaves unanswered the questions of the attributes of the person deemed to be foreseeing (the average person, the informed person ?) and of the degree of foreseeability (foreseeable as probable, as likely, as possible). "Exceptional" presupposes a norm: what norm? The formula in Article 5(4) came about as a result of a compromise in the Council. All its words, save the word "exceptional," were proposed by the Commission, and were derived from part of a *force majeure* concept developed in a different context by the European Court of Justice: in particular, the *Internationale Handelsgesellschaft Case* , 11/70 [1970] E.C.R. 1125, 1137-8, concerning the forfeiture of a deposit on the expiry of an export licence. This case concerned the consequences of failure to fulfil something clearly defined in advance; it does not translate well to the failure to prevent an occurrence the nature of which is not known until it has happened. The word "exceptional" was added at the suggestion of a Member State.

Proposal 1
Article 5(4) should be repealed, and the following should be substitued
"The employer shall not be responsible for any consequences whose causation was due to factors predominantly beyond the employer's control"

26. The standard of behaviour expected of an employer must be administratively workable, *i.e.* it must allow the employer to act in a sensible and practical way, without measurably diminishing the level of protection to workers.

27. The overriding duty in Article 5(1) carries with it an implicit obligation to assess risks. It is complemented by the obligation to produce a written risk assessment: Articles 6 and 9.

28. We do not oppose written risk assessment, of which much complaint is made, as such. The requirement of writing enables the enforcement authorities to ensure that the employer has in fact addressed itself to questions of health and safety, and to monitor the extent and effectiveness of preventive action.

29. But the absolute, unqualified nature of the overriding duty can lead to unfairness, unreality and uncertainty. It is unfair to impose criminal responsibility on an employer for events which were unpredictable or so very remotely possible that they belonged (until they happened) more in the realms of the imagination than in the practicalities of life. It is unfair to impose criminal responsibility on an employer who in relation to an unavoidable risk has taken every precaution recommended by the best authorities. It is unreal to expect an employer to assess unreal risks, and to write them down. This causes genuine difficulties in complying with the risk assessment procedure; it is an unproductive diversion of management time, and brings the risk assessment procedure, and the law, into disrepute. The only boundary around this exercise at present is the limit of the imagination. The absolute standard is uncertain. This is the uncertainty, despite having taken all reasonable precautions, of not knowing whether one has fulfilled one's duty. Liability remains a contingency.

30. The derogation in Article 5(4) does not solve these problems. See the discussion in paragraph 25: in particular, the risks may be technically foreseeable under an extreme degree of foreseeability, and may theoretically have been controllable.

31. By the laws of the United Kingdom and of Ireland, the burden of the precautions to be taken against a genuine risk may occasionally be weighed against the magnitude of the risk in a kind of cost/benefit analysis, such that the employer is entitled to disregard a small risk which would entail large precautions. In other words, only precautions which are "reasonably practicable" need be taken. The desirability of this formula was the subject of controversy during the making of the Framework Directive, and was ultimately rejected in favour of the unsatisfactory compromise contained in Article 5(4). We wish to make it absolutely clear that our proposal to resolve the problems outlined above does not revive the "reasonably practicable" test.

32. The behaviour expected of an employer must be measurable, or, in other words, tied to a stated standard. This means that it must exhibit the desired attributes of a hypothetical person. In this context, that person should be experienced in all aspects of the enterprise and well-informed about all known risks associated with it. What can be measured can be controlled.

Proposal 2
The following sentence, or a formula to similar effect, should be added to Article 5(1): "An employer need not to have regard to the risk of something happening which an employer, experienced in all aspects of the enterprise being conducted and well-informed about all known risks associated with it, would regard as most unlikely to happen."

Other absolute duties

33. There are also throughout the Directives a myriad of other duties imposed on an employer, some in very general terms and some concerned with small details. All of them, save a very few, are expressed likewise in absolute terms.

34. An example, taken at random, from the host of more minute duties is found in the Workplace Directive [89/654/EEC] Annex I, para. 11.9:

"Mechanical doors and gates must function in such a way that there is no risk of accident to workers"

35. An example of a more generally expressed duty is found in Article 3 of the Manual Handling Directive [90/269/EEC]:

"1. The employer shall take appropriate organisational measures, or shall use appropriate means, in particular mechanical equipment, in order to avoid the manual handling of loads by workers.

2. Where the need for manual handling of loads by workers cannot be avoided, the employer shall take the appropriate organisational measures, use the appropriate means or provide workers with such means in order to reduce the risk involved in the manual handling of such loads..."

"Manual handling of loads" is defined in Article 2 as meaning:

"any transporting or supporting of a load, by one or more workers, including lifting, putting down, pushing, pulling, carrying or moving of a load, which by reason of its characteristics or of unfavourable ergonomic conditions, involves a risk particularly of back injury to workers."

36. We shall illustrate the absurdity of the absolute standard by reference to the Manual Handling Directive. It is clear from Articles 2 and 3 that if the lifting of a load involves a risk, particularly of back injury to workers, and if a machine could do the job, then a machine must do it. A shopkeeper receives a delivery of four sacks of potatoes a week. She has a strong young man working for her. To get the potatoes to the store room, she must lift the sacks herself, or hire a fork-lift truck. There is a trench to be dug. The employer has available manual labourers equipped with picks and shovels. They must not do the work. A mechanical excavator must do it. There are genuine risks in heavy manual work, such as digging, but they are taken by sensible employers and workers countless times every day.

37. To inject some common sense into the absolute duties, one must subject them as well to the standard suggested in Proposal 2, but with this caveat: if there is indeed conduct to be absolutely required or prohibited, then a directive must be free to say so expressly.

Proposal 3
Add to Article 5(1) of the Framework Directive, as proposed to be amended, this sentence:
"This applies to all duties imposed on an employer by this directive and by all individual directives within the meaning of Article 16(1), unless the contrary is expressly stated."

Getting rid of the detailed rules

38. Closely related to the foregoing is the problem of prescriptive detail. Employers' organisations complain that the "daughter" Directives, particularly their Annexes, offer prescriptive, detailed solutions to safety problems. The complaint, in essence, is that the detail is prescriptive. "Prescriptive" is used in the sense of something that must be done, something that creates an obligation.

39. Whilst most of the detail is prescriptive, not all of it in fact is. The close detail of the work place Directive [89/654/EEC], the work equipment Directive [89/655/EEC] and the visual display unit Directive [90/270/EEC] is prescriptive. The detailed precepts in others are stated to be guides only (*e.g.* Annexes to the protective equipment Directive [89/656/EEC], the manual handling Directive [90/269/EEC], the carcinogens Directive [90/394/EEC] and the biological agents Directive [90/679/EEC]).

40. The essence of the complaint is that prescriptive detail results in inflexibility, that an employer is prevented from devising more efficient or appropriate solutions to safety problems, or is bound, sometimes at considerable cost, to change adequate current practices for others not manifestly better. In effect it is being said that with all credit to the imagination of the draftsman, the proper person to solve a problem is the person faced with it.

41. Examples of the problem abound throughout the code. We take two small examples.

(a) The visual display equipment directive [90/270/EEC], Annex, para. 1(e) concerns the work chair:
" The work chair shall be stable and allow the operator easy freedom of movement and a comfortable position.
The seat shall be adjustable in height.
The seat back shall be adjustable in both height and tilt."

An employer and a particular worker together choose for that worker a chair which is perfect for that worker, but since neither the seat nor the seat back is adjustable the employer is in breach of duty. Furthermore, if the chair swivels, which the particular worker wants, one may question whether it is "stable".

(b) We revert to the previous example of the shopkeeper with a few sacks of potatoes to shift to her store room (para. 36, above). Suppose that there is no access for a machine such that the sacks must indeed be "manually handled". She is then obliged by Article 6 of the Manual Handling Directive [90/269/EEC] to give the lad "precise information" on the "centre of gravity of the heaviest side" of the sack, it being "eccentrically loaded".

42. Many would like all the detail to be swept away, even to the extent of wholly suppressing all the "daughter" directives, leaving in place only the Framework Directive. All topics in the "daughter" directives are of necessity covered by the Framework Directive because of its general terms.

43. To this solution it may be objected on behalf of the workers that the detail serves the useful purpose of drawing attention to aspects of safety which ought to be considered, and which might otherwise be ignored if the employer's duty were to be confined to a general formula.

44. The compromise we propose is that the areas of concern which prompted the inclusion of the detail be expressly included as headings which the employer must address in the fulfilment of his general duty (as amended), but that the specific solutions proffered by the directives be deleted. Thus the goals [with sub-goals where desirable] will be defined, but not the methods of achieving those goals. The consequence would be that an employer, acting in accordance with the standard imposed by Proposal 2, must attain prescribed goals [and sub-goals] such as those contained in the following non-exhaustive list:

- a safe system of work in accordance with recognised ergonomic principles,
- safe work place, [adequately ventilated, with efficient emergency exits..and so on]
- proper training in the lifting of loads
- safe work equipment

- provision of protective equipment
- and so on.

45. The present prescriptive and non-prescriptive detail can be retained as guidelines, or recommendations. Failure to follow a guideline or recommendation would not of itself break the law but would tend to indicate that the employer had failed in its duty as restated, and the onus would be on it to justify itself.

Proposal 4
Obligations imposed by the directives should not be unduly detailed. An obligation should be defined by reference to a general description of the specific topic which an employer is bound to consider.

Proposal 5
Detailed requirements filling out the content of obligations should rank only as guidelines, or recommendations.

46. The substantive content of the "daughter" directives, reduced in accordance with the foregoing principles to stated goals and sub-goals, can be inserted into the Framework Directive.

Proposal 6
The "daughter" directives be repealed, and their content, modified as aforesaid, be consolidated into the Framework Directive [89/391/EEC]

Reliance on consultants

47. If sufficient expertise on health and safety cannot be found within the undertaking, the employer is obliged to go outside it. This is understandable and sensible. The relevant Article 7(3) states:

"If such protective and preventive measures cannot be organized for lack of competent personnel in the undertaking and/or establishment, the employer shall enlist competent external services or persons."

48. The need to go outside for advice, if necessary, is inherent in the overriding duty, and would remain inherent in that duty as proposed to be amended by Proposal 2 in view of the obligation to be "well informed about all known risks" associated with the enterprise.

49. At present, the employer does not necessarily fulfil its duty by causing expert advice to be implemented. This is another consequence of the absolute nature of the employer's duty to ensure the health and safety of workers: Article 5(1) of the framework directive. Article 5(2) reinforces this conclusion:

"Where, pursuant to Article 7(3) an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area"

50. As a consequence, the employer can never be assured that it has obeyed the law, thereby bringing the law into disrepute, and denying an obvious incentive to the conscientious employer.

51. This is particularly damaging to SME's for whom, as has been stated, the law requires the directives to have special regard.If Proposal 2 is adopted, Article 5(2) should be repealed.

Proposal 7
An employer who has taken reasonable care to ensure that the external services or persons referred to in Article 7(3) of the framework directive ("the advisor") was

experienced in all aspects of the enterprise being conducted (or similar enterprises) and well-informed about all known risks associated with it, may rely upon the recommendations of the advisor.

II. Risk and responsibility

Unavoidable risks

52. There are activities, intrinsically hazardous, from which known risks cannot be eliminated even by the taking of every reasonable precaution. The framework directive acknowledges this in Article 6(2)(b) by which an employer in carrying out his risk assessment is to evaluate "the risks which cannot be avoided". Despite this, the directive refrains from taking the further step of diminishing the employer's liability in respect of such risks, save in favour of public authorities. Article 2(2) of the framework directive states:

> *"This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces and the police, or to certain specific activities in the civil protection services inevitably conflict with it. In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive"*

53. It is contrary to the European law principle of equality that this necessary concession should be confined to the public sector. Not only is this demarcation unfair, but also anti-competitive in that it tends to preserve for the public sector some activities which might be conducted by the private sector.

54. The adoption of the new standard of responsibility proposed in Proposal 2 will not mitigate the employer's responsibility in this regard.

55. The logical, but absurd, consequence of the present situation is that private sector activities involving unavoidable risks to employed persons should cease altogether, even, to illustrate the absurdity, some sporting events such as horse racing with employed jockeys and football with employed players.

> **Proposal 8**
> **Where an activity involves a known, unavoidable risk to a worker, the employer shall not be obliged to take more than all reasonable precautions against that risk consistent with the continuance of the activity, provided that the worker knows the full extent of the risk and has voluntarily accepted it.**

Workers' duties

56. There are "Worker's Obligations" set out in Section III, Article 13 of the Framework Directive. There is a general duty in Article 13(1):

> *"It shall be the responsibility of each worker to take care as far as possible of his own safety and health and that of other persons affected by his acts or Commissions (sic: "omissions"?) at work in accordance with his training and the instructions given by his employer"*

There is an extensive list of more detailed duties, for example, by Article 13(2) workers must *".... make correct use of the personal protective equipment supplied to them..; [and] ...refrain from disconnecting ... safety devices"*

57. If these are to be legal duties (and Article 4 of the Framework Directive states that they should be), a Member State is obliged to impose a sanction for the breach of them. We consider it harsh that a worker injured partly through her or his own fault should incur, in addition to pain and suffering, a criminal penalty. If the "Workers' Obligations" are not to have the status of legal duties, they should not be in a directive.

Proposal 9
The role of the "Workers' Obligations" should be reconsidered. In particular, a worker should not incur a criminal penalty solely in respect of self inflicted harm

58. An employer incurs criminal responsibility for an accident caused wholly through the fault of a worker. This is a consequence of the employer's overriding duty in Article 5(1) of the Framework Directive "to ensure the safety and health of workers in every aspect related to the work." Article 5(3) confirms this:

"The workers' obligations in the field of health and safety at work shall not affect the principle of the responsibility of the employer"

Proposal 10
An employer who is without fault in the training and reasonable supervision of its worker should not be criminally liable for failing to prevent an accident caused wholly by the fault of that worker.

III. Integrating directives

Machines

59. Article 4 (1)(a) of the Work Equipment Directive [89/655/EEC] requires an employer to ensure that work equipment provided after 1992

"complies with .. the provisions of any relevant Community directive which is applicable," and

"complies with the minimum requirements laid down in the Annex [to the Work Equipment Directive] to the extent that no other Community directive is applicable or is so only partially"

60. Much "work equipment" is also "machinery". Article 4(1)(a) may be interpreted as requiring an employer to ensure that new machinery she installs in fact complies with the Machinery Directive [89/392/EEC], as transposed. If so, the main purpose of the Machinery Directive is disregarded, namely that the purchaser of machinery bearing the EC mark should be entitled to rely on that machinery as conforming to essential health ans safety requirements.

Proposal 11
An employer should not be obliged independently to evaluate machinery bearing the EC mark to ensure that it conforms to the health and safety characteristics imposed by the Machinery Directive. An employer should not be responsible for a defect in those characteristics, unless the defect has been revealed during the operation of the machine

61. Only a small percentage of new machinery now available on the market meets the health and safety requirements of Annex I of the Machinery Directive[1]. Reflecting this situation, Directorate-General III of the Commission by a letter dated December 22, 1994 informed the ambassadors of the EU Member States that machines put into circulation after January 1, 1993 could still be accepted without the EC mark and without a conformity certificate if they afforded a high enough level of safety. The reason given was the existence of warehoused stocks of non-conforming machinery. The problem is however more fundamental: manufacturers of machinery have not conformed to the new standards.

62. The defects, in descending order of prevalence, are that the machines (i) do not sufficiently reflect ergonomic principles, (ii) rules designed to safeguard hygiene (where, as in the food industries, machines are required to be hygienic), and (iii) rules designed to safeguard the health of workers, "health" here being used in the very broad sense of the directives. [See the discussion in VII, below].

63. In the area of safety, as traditionally understood, i.e. the avoidance of injury through accidents, the newly manufactured machines conform well.

64. In these circumstances, the obligations placed on employers are premature.

65. The ergonomic and "health" deficiencies can be met by adopting Proposal 20 in VII, below which proposes that an employer's responsibility be confined to preventing illness and injury caused by a failure to protect against risks associated with the employment.

66. Also, the abolition of prescriptive detail as proposed in Proposal 4 would alleviate this problem.

67. But immediate action is required. Thus, in any event, Article 4(1)(a) must be withdrawn until market conditions enable an employer to comply with it.

Proposal 12
Article 4(1)(a) of the Work Equipment Directive should be withdrawn. If it is to be re-imposed, re-imposition should be effected sector by sector, only when manufacturing industry has sufficiently conformed to the Machine Directive.

68. The Machinery Directive is concerned not only with the inherent qualities of machines, but also with their subsequent use. Annex I, para. 1.7.4 of this directive requires all machinery to be accompanied by instructions for "safe" putting into service, use, handling assembly, dismantling, adjustment, maintenance (servicing and repair), and, where necessary, training instructions.

Proposal 13
The employer shall not be responsible for injury caused through following instructions accompanying a machine bearing the EC mark unless he had grounds for believing the instructions to be erroneous.

Personal protective equipment

69. The Personal Protective Equipment at the Workplace Directive [89/656/EEC] imposes duties on employers. The Personal Protective Equipment Directive [89/686/EEC] imposes standards on such equipment. Those conforming may bear the EC mark.

[1] According to a report [SEC/854795, April10, 1995] to the Group from Professor Radant of Berufsgemossenschaft Nahrungsmittel und Gaststätten Kdör.

Proposal 14
An employer in fulfilling his duties in relation to personal protective equipment should be able to rely on the EC mark, and his duties modified correspondingly in the manner suggested above

IV. Unnecessary costs

70. We discuss here some of the costs which directives force industry to incur uselessly, or prematurely, or unwisely.

Work equipment in use before 1993

71. Employers must before the end of 1996 make such work equipment accord with the detailed prescriptions of the Annex to the Work Equipment Directive [89/655/EEC]. This Annex is modelled in many aspects on Annex I to the Machinery Directive [89/392/EEC], which contains detailed safety requirements to be fulfilled by any new machine which is to bear the EC mark.

72. A prescription for the design and characteristics of a machine not yet built is not an appropriate guide for the adaptation of a machine already in existence. Adaptation to such a prescription is severely impractical, or impossible.

73. A requirement to adapt interferes with the investment cycle, and thereby perpetuates old work equipment.

74. A requirement to adapt which unduly flouts the normal investment cycle is contrary to the principle of "gradual implementation" imposed by Article 118a of the Treaty.

75. The costs are astounding. They run into billions of ECU's. French estimates speak of an approximate cost of 30 billion FF's for adapting existing machines in the French metal industries alone. Taking from Germany examples of particular items of equipment in particular trades, we find that 20,000 bakeries with dough mixers installed before 1989 must modify at a cost per machine of DM 2000 - 10,000, and that some mixers can not be modified at all, and that some 300,000 businesses will be obliged to modify their meat slicers modified at a cost of DM 1000 - 2000 per machine.

76. Health and safety requirements in respect of existing machines are found not only in the Work Equipment Directive and its Annex. Existing machines may impede the realisation of the broad concept of "health" implicit in the Framework Directive, and its related ergonomic principles.

77. A study indicates that larger undertakings could adapt their work equipment to safety requirements in the short term, to health requirements in the medium term, to hygiene requirements in the medium to long term, and to ergonomic requirements in the long term. In the area of ergonomics in particular, solutions to identified problems are still lacking. Medium sized enterprises would also be able to adapt to safety requirements in the short term, but adaptation to all other requirements would be long term objectives. In small companies and micro-enterprises, even safety requirements would take longer to incorporate, while the other requirements would be difficult or impossible to meet.

78. We are not suggesting that an employer should be entitled to ignore genuine risks arising out of work equipment currently in use. The employer's overriding duty as modified by Proposal 2 ensures that the employer should address such risks. In addressing them, it will be found

that ensuring safe methods of work yields more solutions than the adaptation of machines. Predominantly these are problems more of organisation than of engineering.

79. The ergonomic and "health" deficiencies can be met by adopting Proposal 20 in VII, below, which proposes that an employer's responsibility be confined to preventing illness and injury caused by a failure to protect against risks associated with the employment.

80. Also, the abolition of prescriptive detail as proposed in Proposal 4 would alleviate this problem.

81. Nonetheless, although the following proposal is an alternative, such is the urgency of the present situation that we must put it forward in any event.

Proposal 15
Without prejudice to an employer's general duty of care, work equipment need not be replaced by equipment conforming to the Annex to the Work Equipment Directive until it has been fully depreciated on accepted accounting principles.

Display screen equipment

82. So widespread in every day life are the consequences of the Display Screen Equipment Directive [90/270/EEC] that we held a special hearing to evaluate it. Directorate General V of the Commission was invited to produce medical and scientific evidence to support the directive, but declined to do so.

83. The general attitude to health surveillance is reflected in Article 14 of the Framework Directive [89/391/EEC]. Workers should receive "health surveillance appropriate to the health and safety risks they incur at work". There is no evidence that VDU screen work actually causes eye defects. Yet, Article 9 of the Display Screen Equipment Directive imposes on an employer the duty to subject screen workers to regular eye tests. The costs are substantial; in Britain a standard eye sight test costs £15, and in Belgium BF1000. The tests in 95% or more of cases yield no reason for further action.

Proposal 16
Article 9 of the Display Screen Equipment Directive should be repealed

84. Screen workstations in use before 1993 must be adapted before 1997 to comply with the prescriptive detail set out in the Annex to the directive. Most equipment already complies with most of those criteria. But some of the criteria with which they tend not to comply are unnecessary, and even impossible. For example, it is not really necessary that the screen should "swivel", or that the keyboard should be "tiltable"; and it is impossible to get an image totally free of "flickering". Again, the adaptation costs are considerable.

85. Adoption of Proposal 4 suggesting the abolition of prescriptive detail would solve this problem. The employer in pursuance of his general duty would be bound to address this area merely as one of many to which sound ergonomic principles should be applied. Our next proposal is therefore an alternative to that preferred solution. The proposal takes into account the fact that much visual display equipment becomes rapidly obsolete.

Proposal 17
Without prejudice to an employer's general duty of care, visual display equipment in use on or before 1993 need not conform to the Annex to the Display Screen Equipment Directive.

V. Small and medium-sized undertakings

86. There is no reason to suppose that SME's are any the less the source of accidents and illness at work than larger organisations; indeed, some of our evidence suggested the contrary.

87. The cumulative effect of our Proposals will be beneficial to SME's, some disproportionately so, such as an SME which would be relieved from the burden of unnecessarily replacing the greater part, perhaps all, of its machinery.

88. The directives make few distinctions in favour of SME's. Member States may ameliorate duties by reference to the size of the undertaking, e.g. an employer may designate himself as safety officer provided he is competent (89/391/EEC, article 7(7)); the content of written risk assessments, and accident lists and reports may be modified (89/391/EEC, article 9); the duty to inform workers may be modified (89/391/EEC, article 10(1)).

89. It has been represented to us that for an SME the requirements to report accidents in writing and keep lists of accidents are burdensome. We do not agree. If accidents are as rare as they should be, reporting them is not a burden. An accident report is a useful guide to an enforcement authority of where to concentrate its resources.

90. It has also been represented that the requirement that risk assessments be written is unduly burdensome. Again, we do not agree. The written risk assessment performs the function of proving that the employer has addressed its mind to risk. Anyway, our proposals will render risk assessment more realistic, and hence less burdensome.

91. We do note however that the directives give the impression of being designed for a large enterprise. It would be worth considering having a code with procedures specifically designed for the micro-enterprise (1-9 employees), rather than being drawn from a vastly different model, and artificially imposed. Taking an analogy, corporate enterprises with few participants are granted a simplified corporate structure by most national laws. The object in the context of health and safety would be to allow greater flexibility, informality and shared responsibility between employer and employee, and all this without diminishing the present objectives.

Proposal 18
Health and safety procedures appropriate to the actual structure of micro-enterprises be researched with a view to legislation

VI. Destroying employment

92. Laws which increase the burdens of giving employment tend generally to discourage employment. In that sense, our whole discussion could fall under the present heading, since all our proposals so far have been designed to lighten those of the burdens which are unnecessary whilst maintaining the standards of protection. However, we are concerned here with a different aspect of the same theme. Some directives declare war on certain categories of work, and will thereby diminish work in those categories.

93. One such category is work which the legislator regards as unpleasant, perhaps degrading The prime examples are manual labour and monotonous work. The directives discriminate against the first by decreeing that if a machine can do the job, it should [Manual Handling Directive, 90/269/EEC, Articles 2 and 3], and against the second by requiring an employer to choose "working and production methods, with a view, in particular, to alleviating monotonous work" [Framework Directive, 89/391/EEC, Article 6(2)(d)]. The natural consequence is mechanisation.

94. Another category is work which the legislator without good grounds has chosen to over-regulate. The Display Screen Equipment Directive [90/270/EEC] is the example here. We have received evidence that the unnecessary burdens on employers here have led to the contracting out of VDU work to self-employed persons with a loss of traditional employment.

Proposal 19
Directives should not discriminate against any particular category of lawful, normal work

VII. The concept of health

95. The true lesson to be drawn from the foregoing section is that it is desirable to narrow the conception of "health" which informs the directives. That conception is drawn from the World Health Organisation's definition of health as being

> "*a state of complete psychic, mental and social well-being and does not merely consist of an absence of disease or infirmity*"

This is admirable in its place. Translated to health and safety in employment it becomes the Nordic view that safeguarding health at work implies addressing physical, psychological and social aspects of work, such as monotony, lack of social contacts at work, or a rapid work pace.

96. Whilst such an aspiration is admirable in an advanced society, if affordable, and if supported by a social consensus, it has defects. In some aspects, particularly the employer's responsibility for social well-being and the spiritual connotations of the word "psychic", it assumes an unduly broad dependence of a worker on his or her employer, a passivity, a helplessness; in particular, it implies an ability on the part of an employer to interfere, as a provider and decider, with aspects of another person's life which most reasonably robust people, worker or not, would declare to be no one else's business. Also some degree of non-harmful stress is inevitable in life as in employment, especially when the going gets rough, and in challenging, stimulating work; and monotony is inherent in many jobs. One cannot legislate against the unavoidable realities of life. The obvious remedies of self-help, self-improvement, job mobility and, as a last resort, stoicism are not part of the philosophy which informed the directives.

97. Such an all-embracing definition of health is a most surprising inclusion as one of the "minimum requirements" stipulated by Article 118a of the Treaty.

98. We see manifestations of this broad view in such requirements as the employer's general obligation to consider "social relationships" as part of a "coherent overall prevention policy" [Framework Directive, 89/391/EEC, Article 6(2)(g)], to "alleviate monotonous work and work at a predetermined work rate" [ibid., Article 6(2)(d)], in his obligation to analyse workstations with a view to possible "problems of mental stress" [Display Screen Equipment Directive, Article 3(1).] and in the employer's duty to ensure that new machinery he installs complies with the Machinery Directive [89/392/EEC], Annex I, para. 1.1.2 (d) : "discomfort, fatigue and psychological stress faced by the operator must be reduced to the minimum possible taking ergonomic principles into account."

99. We find this concept of health over-ambitious.

Proposal 20

An employer's responsibility should be confined to preventing illness and injury caused by a failure to protect against risks associated with the employment. Illness here includes stress induced illness.

ANNEX I : List of the Directives made under Article 100.

- Council Directive 78/610/EEC of the 29 June 1978 on the approximation of the laws, regulations and administrative provisions of the Member States on the protection of the health of workers exposed to vinyl chloride monomer.
- Council Directive 80/1107/EEC of the 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work.
- Council Directive 82/130/EEC of 15 February on the approximation of the laws of the Member States concerning electrical equipment for use in potentially explosive atmospheres in mines susceptible to firedamp.
- Council Directive 82/605/EEC of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC).
- Council Directive 83/447/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC).
- Council Directive 86/188/EEC of 12 May 1986 on the protection of workers from the risks related to exposure to noise at work.

ANNEX II : List of the Directives made under Article 118A.

- Council Directive 88/364/EEC of 9 June 1988 on the protection of workers by the banning of certain specified agents and/or certain work activities (Fourth individual Directive within the meaning of Article 8 of Directive 80/1107/EEC.
- Council Directive 88/642/EEC of 16 December 1988 amending Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work.
- Council Directive 89/391/EEC of 12 June 1989 on the introduction of the measures to encourage improvements in the safety and health of workers at work.
- Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- Council Directive 89/656/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use by workers of personal protection equipment at the workplace (third individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- Council Directive 90/269/EEC of 29 May 1990 on the minimum safety and health requirements for the manual handing of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

- Council Directive 90/270/EEC of 29 May 1990 concerning the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Artcle 16(1) of Directive 89/391/EEC).
- Council Directive 90/394/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work (sixth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

- Council Directive 90/679/EEC of 26 November 1990 on the protection of workers from the risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- Council Directive 91/322/EEC of 29 May 1991 on establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work.
- Council Directive 91/382/EEC of 25 June 1991 amending Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC).
- Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements and the safety at work of workers with a fixed duration employment relationship or a temporary employment relationship.
- Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessel.
- Council Directive 92/57/EEC on the implementation of minimum safety and health requirements or mobile construction sites (eight individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)
- Council Directive 92/58/EEC on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- Council Directive 93/103/EEC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- Council Directive 93/88/EEC of 12 October 1993 amending Directive 90/679/EEC on the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time.

Annex III

Directives	A	B	DK	D	E	FIN	F	GR	IRL	I	L	NL	PT	S	UK
89/391 Framework	C	C	C	C	NC	C	C	C	C	C	C	C	C	C	C
89/654 Workplaces	C	C	C	C	NC	C	C	C	C	C	C	C	C	C	C
89/655 Work equipment	C	C	C	C	NC	C	C	C	C	C	C	C	C	C	C
89/656 Personal protective equipment	C	NC	C	C	NC	C	C	C	C	C	C	C	C	C	C
90/269 Manual handling of loads	C	C	C	C	NC	C	C	C	C	C	C	C	C	C	C
90/270 Display screen equipment	C	C	C	C	NC	C	C	C	C	C	C	C	C	C	C
90/394 Carcinogens	C	C	C	C	NC	C	C	C	C	C	C	C	C	C	C
90/679 Biological agents	C	NC	C	C	NC	C	C	C	C	C	C	C	28/11/95	C	C
91/382 Asbestos		C	C	C	C		C	1/01/98	C	C	C	C	C		C
92/29 Medical assistance on board of vessels	NC	NC	NC	NC	C		C	NC	NC	NC	NC	NC	NC	NC	NC
92/57 Construction		NC	C	NC	NC	C	C	NC	NC	NC	C	C	NC	C	C
92/58 Health and safety signs	C	NC	C	NC	NC		C	C	NC	NC	NC	C	NC	C	NC
92/91 Drilling		NC	C	NC	NC		NC	C	NC	NC	C	NC	NC	C	NC
92/104 Mining		NC	C	NC	NC		NC	NC	NC	NC	C	C	NC	C	NC
93/88 Amendment of biological agents(90/679)	C	NC	C	C	NC	C	C	C	C	C	C	C	31/12/95	C	NC
91/322 Limit Values		C	C	C	NC		NC	NC	NC	C	C	C	NC		C
88/642 Amendment of framework 80/1107/EEC		C	C	C	NC		NC	C*	NC	C	C	C	NC		C
93/103 Fishing Vessels (23/11/95)															

C Communication of national Legislation
C* Communication of national legislation received after the last table (25/04/95)
NC No communication of national legislation

Source : European Commission - DG V/F

Environmental Regulations : Case Illustrations

by Mr. Winsemius

- McKinsey & Company, Inc. Amsterdam -

Environmental Regulation: Case Illustrations

GROUPE DE SIMPLIFICATION
LÉGISLATIVE ET ADMINISTRATIVE

March 24, 1995

Contents

Overview

European environmental regulation is by no means a burden across the board to the private sector. While many options exist for simplification of current regulation, the Groupe de Simplification Législative et Administrative may consider stressing in its report to the European Commission the need to look forward to the next generation of environmental regulation. Our investigation suggests that in the short term, the private sector is more concerned about enforcement of regulation (evenness) than about missed opportunities for simplification. Many observers also note that, in the longer term, selective re-regulation could increase the environmental yield and/or the cost savings. Successful future policy is likely not only to take account of the constraints in which the private sector operates, but also to harness its vast potential for innovation and efficient management of costs.

BACKGROUND

This report presents the five environmental policy case studies that the Groupe de Simplification Administrative et Législative asked McKinsey & Company, Inc. to undertake in January 1995:

- Large-scale emissions: SO2 and NOx
- Emissions to surface water
- Packaging: solid and corrugated board
- Combustible non-hazardous waste
- Environmental Impact Assessment (EIA).

These case studies were designed to supplement the Groupe's ongoing work in assessing the success of European Union regulation and identifying options for simplification. With regard to environmental policy, the Groupe has posed two questions: What has been the experience of the private sector in working within environmental regulation; and what opportunities exist for improving that regulation?

To draw out comparable lessons from diverse sectors, the McKinsey team used three criteria: **effectiveness** (i.e., how successful a policy has been at protecting the environment); **efficiency** (i.e., the policy's cost-effectiveness for society as a

whole); and finally, evenness (i.e., the relative burden-sharing among companies affected by regulation).

The five chapters that follow discuss each of the case studies in turn, and should be referred to for more in-depth discussion of the conclusions outlined here. The first two sections of each case describe the status of regulation, and the experience to date as indicated by interviews and analysis. Each case then concludes with a section that lays out thoughts on opportunities for improvement.

LESSONS IN THE INTEGRATED CHAIN FRAMEWORK

A number of general lessons arise from the case studies illustrating how the EU can stimulate and support a long-term trend towards more effective, more efficient and more even (i.e., less competitively distorting) environmental policy. These lessons can best be understood using the framework of the integrated chain management of substances.

Policy should ideally be designed to achieve a required level of environmental quality, balancing known emissions with the "carrying capacity" of the environment (i.e., the threshold of pollution below which the environment is not significantly damaged), and minimizing "leaks" such as uncontrolled waste or fugitive emissions. Simultaneously, policy must also take into account the costs to industry of reaching the targeted level of environmental quality, and trade off those costs against losses in competitiveness or employment.

The key to successful environmental policy is integrated chain management of substances. An integrated chain can be visualized as a loop diagram with at most six links and four control valves that regulate the volume of raw materials used, products consumed, substances emitted, and waste recycled (Exhibit 1). In theory, policy must adjust the valves in order to 1) match throughput of the substance with the sustainable level of production; and 2) minimize "leaks" from the system. For example, an integrated chain approach to paper and board would focus on the system by which cellulose fiber is transformed from wood to pulp and paper and then recycled, incinerated, or - if such treatment is impossible - disposed to landfill. Using such an approach, policy would attempt to match consumption of cellulose fiber to the sustainable rate of harvesting of forests.

Three aspects of integrated chain management provide a useful framework for synthesizing lessons from the case studies:

- Processes: the start of the chain, where goods are produced. The first two case studies (large-scale emissions; emissions to water) in particular provide insights for more efficient policies for managing environmental impacts from production.

- Products: the end of the chain, where goods are distributed to society and ultimately disposed of. Evidence for alternative approaches can be derived from the third and fourth case studies (packaging: solid and corrugated board; combustible non-hazardous waste).
- Procedures: the overall management of the integrated chain. As illustrated by the fifth case study (environmental impact assessment) and supported by most other cases, well-designed procedures can enhance effectiveness, efficiency, and evenness of policy.

Processes

A greater emphasis on environmental quality objectives would have significant impact on the efficiency of EU environmental regulation without loss of effectiveness. Given the variations in carrying capacity among different water bodies, the EU should base regulation on environmental quality objectives determined locally, rather than induce excessive costs through a harmonized policy. Beyond this, a continued focus on an environmental quality objective of a specified level of acidification instead of on emissions from specific point sources per se might lead to the redirection of next-generation EU policy towards other sources such as traffic (producing NOx) or agriculture (producing ammonia). Such policy, based on environmental quality objectives, is likely much less costly than, for example, a further tightening of BAT for large combustion plants, or higher reduction targets for existing large plants. Also, highly complex and non-transparent regulation, such as that applying to water emissions, can be considerably simplified by applying composite parameters (i.e., AOx, BOD, toxicity) that once again are based on considerations of environmental quality objectives.

Major efficiency improvements can be realized by allowing industry a greater degree of freedom in choosing how to implement specified emission targets. Recent European and North American experience with more flexible instruments for reducing SO2 and NOx emissions to air is highly promising. Larger and more sophisticated companies in particular have developed much more efficient approaches with no detrimental effect on the environment. Such policies also could have major potential for other large-scale emissions, such as those of CO2 to air or composite substances to water.

A fundamental rethinking of environmental policy should also emphasize subsidiarity, for instance with respect to emissions to water and waste processing (landfilling, incineration). Following the example of the Large Combustion Plant Directive on SO2 and NOX emissions, the EU could adopt a twin approach, mandating BAT for new facilities and setting national targets for combined emissions from existing sources; this approach has also been used successfully in the Rhine Action Plan. The new policy could include three tracks to reflect socio-economic differences between member states, and could also mandate tighter targets for particularly environmentally sensitive areas or bodies of water.

Products

Effective policy requires an integrated chain perspective. As forcefully illustrated by the case of solid and corrugated packaging board, a policy that targets a specific product (e.g., packaging board) without maintaining a proper substance focus (e.g., cellulose fiber) can prove counterproductive to the environment, and thus a waste of societal resources.

Given the problems of matching waste processing capacity to demand and achieving economies of scale in recycling and incineration, the EU should discourage barriers to shipment. The proximity and self-sufficiency principles now governing EU waste policy should gradually be replaced by a "prior consent" system, in which local governments have control over the import of waste. This would allow the more efficient use of the more environmentally effective facilities. It would also stimulate the development of a mature market for waste processing services, which would probably give rise to substantially greater efficiency and innovation.

Future EU product waste policy should place greater emphasis on voluntary agreements at EU level. As with water policy, the complexity of substances which could potentially enter the environment at the end of the integrated chain makes direct regulation of products (and their waste streams) extremely difficult. Problems can also be compounded by subsidiarity: different policies in different member states can lead to major inefficiencies and unevenness, and, by increasing resistance to environmental measures, eventually undermine environmental effectiveness. Emphasizing self-responsibility by using contracts or covenants with industry groups would give the private sector the freedom to explore the most efficient methods of achieving targets. However, to avoid competitive distortion, the EU must insist on a high degree of harmonization on waste policy or - at minimum - mutual acceptance of national measures. Moreover, permanent vigilance is required to prevent unwanted cartel-like behavior.

Procedures

To create a solid base for effective, efficient, and even environmental policy, the EU should further stimulate member states to enforce minimum standards. Current variations in, for instance, water policy lead to major uncertainty, inefficiency, and unevenness. Discrepancies in waste policy and the resulting differences in tariffs invite undesirable "waste tourism" and hinder the market development of an environmentally sound and economically healthy waste processing industry. Also, gaps in enforcement lead to rampant skepticism among industrial players and hence undermine the willingness to cooperate in new initiatives.

As environmental policy increasingly shifts responsibility to the private sector, procedures must change to reflect the greater freedom allowed to industry. With more emphasis placed on self-control, governments need to develop procedures to

"control the controllers", for example by using a system of spot-checks. In addition, governments may consider setting up systems in which approved environmental accountants check statements of firms' emissions and waste flows, and prepare official annual reports on their clients' environmental performance.

Given the positive impact of EIA on the private sector in many member states, the EU should put a greater emphasis on forward-looking procedures that may prevent rather than remedy environmental issues. Such procedures must be clear and simple, particularly in spelling out government involvement and required public disclosure. Areas to pursue could include eco-auditing and environmental reporting.

1 Large-scale emissions: SO2 and NOx

STATUS OF REGULATION

The EU program for reducing point source emissions of SO2 and NOx is well established. The Large Combustion Plant Directive (LCPD) of November 1988 laid out its two parts: a standards approach based on best available technology (BAT) for all new plants (i.e., those licensed after July 1, 1987) and national reduction targets for emissions from existing plants.

The new plant standards were intended to level the playing field and secure low future emissions by harmonizing national emission limits for new plant at the level of leading-edge member states. The reduction targets for existing plants were intended to push forward national clean-up efforts despite great differences in member states' commitment and resources.

The new plant initiative has been operational for several years. EU guidelines for installations above 50 MW have been reflected in national legislation in all member states. In practice these guidelines have largely succeeded in creating a common new plant emissions standard for SO2. The only variation between states lies in different monitoring practices (every half-hour vs. average daily readings). For NOx the guidelines set an EU baseline for emission, with several member states imposing stricter targets (Exhibit 2).

National reduction targets for existing plants were agreed by all member states at the time of the LCPD, in line with the goal of an overall EU reduction of 60 percent for SO2 and 30 percent for NOx by 2003 relative to 1980 levels. The national targets ultimately adopted varied widely, embodying a "three-track" approach to environmental policy (Exhibit 3). Once the national reduction targets were set, member states were given full freedom to design their own implementation programs. In practice this has meant a heavy reliance on command and control, with limestone-based smokestack scrubbing units (FGD) widely mandated by regulators.

Still, there have been some experiments with more flexible implementation. These have involved sector covenants, where government and industry agree a flexible program for reduction, or company "bubbles", where each utility is assigned an annual emission reduction target and then left free to determine the most cost-efficient mix of compliance measures. Denmark, the Netherlands, the UK and Belgium have all experimented with these instruments.

The Commission is currently considering a tightening of the new plant emission standards for both SO2 and NOx, in line with recent advances in BAT. There is no discussion of changes in the basic dual policy of technical emission standards for new plants and reduction targets for existing plants.

EXPERIENCE TO DATE

According to most managers interviewed, EU regulation has resulted in improved environmental quality, but at high and unequally distributed cost.

Effectiveness: significant reduction in emissions

The Large Combustion Plant Directive is widely recognized to be delivering significant reductions in SO2 and NOx. Total EU emissions from large combustion plants have already dropped 45 percent for SO2 and 40 percent for NOx from 1980 levels, an annual reduction of 7 million and over 1 million tonnes respectively.

In terms of national targets, all member states are on track to meet their interim 1998 reductions for SO2, with the EU already at its 1998 reduction goal. With NOx the performance is better still. According to 1993 inventories, most member states had already exceeded the targets they had set for themselves for 1998.

Efficiency: high costs of compliance

The costs of these environmental gains are high and have fallen heavily on the power industry. The EU acid rain program has been estimated to add in the range of 0.2 ECU ct/kWh to the price of electricity across the EU. This amounts to more than ECU 4 billion in annualized expenditure for electricity generators. Germany alone is budgeting ECU 12 billion in capital expenditures for its electricity sector clean-up activities in the former GDR[1]. In very rough terms, the current EU program is reducing acid emissions at an average cost of some ECU 300 to 350 per tonne of SO2 and ECU 350 to 400 per tonne of NOx.

1 Of course, Germany's decision to exceed the Directive's standards *for new plant* by a factor of three is a contributor to high costs.

Evenness: unequal burden-sharing

The burdens of compliance are not equally shared. Given their high generating capacity and their aggressive targets, Danish and Dutch generators are predicted to incur 3 to 4 times higher costs (per tonne of SO2 removed) than their counterparts in France and the UK (Exhibit 4), and a higher multiple still for NOx. The unequal burden-sharing is further reinforced by the fact that EU policy is directed entirely at point sources, which leaves non-point source polluters bearing none of the costs of clean-up.

OPPORTUNITIES FOR IMPROVEMENT

While generally viewed as effective, EU regulation controlling large-scale emissions could be improved through the following measures.

Improving effectiveness: align with Second Sulphur Protocol, update BAT regularly

To avoid confusion and keep EU regulation up to date, observers recommended adjusting reduction targets on existing plants to match the commitments made by EU member states in the UNECE Second Sulphur Protocol.[2] Minor improvements could also be achieved through more regular updates of BAT standards for new plants. Most generators indicated that EU standards could be tightened on the SO2 side for coal plants and on the NOx side for gas. Tightened standards for NOx from coal plants were opposed, however, since they would require installation of catalytic reduction equipment (SCR) and trigger a major jump in costs. Finally, BAT standards could be introduced for the first time for new gas turbines.

Improving efficiency: encourage flexible instruments/ look at wider sources of acidification

Experience in some member states and the U.S. points to improvement potential through the increased use of new instruments, such as bubble concepts, covenants, tradable permits, emission charges, and joint implementation. By establishing economic penalties for emission or setting overall reduction goals without defining plant emission standards, these instruments give companies greater room to innovate and to tailor their compliance strategies. In practice to

[2] Signed in 1994, the Protocol commits states in Europe to a reduction of total SO2 emissions. Its reduction targets are slightly higher than those in the current LCPD; they must be met sooner (2000 instead of 2003), and they cover all, rather than just existing, plant emissions.

date with SO_2 and NOx, they appear to be producing strong "learning effects", leading to significant cost savings.

One illustration of the "learning effect" can be found in the tradable permit system operating under the 1990 U.S. Acid Rain Program. Since the program's initiation, there has been a steady drop in permit prices, and with it regular downward revisions of the expenditures required to meet the program's 10 million tonne SO_2 reduction target (Exhibit 5). Some of this is attributable to the continued fall in the costs of FGD scrubbers, the traditional command-and-control option. But much of it appears attributable to learning. Left to innovate, U.S. utilities have been learning to do more without scrubbing, and have quickly become relatively sophisticated at managing a portfolio of less expensive techniques (i.e., fuel switching, plant utilization changes, new combustion techniques). As a result, demand for the relatively expensive FGD scrubbers has been much lower than originally forecast (only 10 to 15 GW of electricity plant instead of the 40 to 46 GW expected).

The U.S. Environmental Protection Agency anticipates that the tradable permit program could deliver a 40 percent savings over the command-and-control alternative. A recent survey of the responses of all U.S. power plants to the 1990 Clean Air Act Amendments showed that while the administrative costs of the permit scheme were high, power generators were more than compensated by the savings in operating and investment costs from the increased flexibility.

The experience of member states with bubble concepts and sector covenants likewise points towards steep learning curves and improved cost efficiency. Of these experiments, the Danish bubble for its two energy companies, Elsam and Elkraft, is the most advanced (see box). According to one of the companies, the bubble's increased flexibility has yielded estimated cost savings of 40 to 60 percent on the NOx side and 20 to 30 percent on the SO_2 side compared to an emissions standard approach. If applied across the EU, with every country introducing company emissions bubbles for its generators, that would translate into annual cost savings on the order of ECU 1 to 2 billion per year.

Danish bubble

The Danish bubble simplifies the LCPD into annual reduction ceilings for each of the two national utilities, Elkraft and Elsam, for all their SO2 and NOx emissions, whether from new or existing plants. Reflecting the increasing integration of Denmark into the Nordic electricity market, these emission ceilings are then subject to adjustment for net imports or exports. Added emission credit is given for exports and the ceiling is lowered for imports, both based on an average system emission per kWh. No trading is allowed, but each utility is otherwise left entirely free to choose its reduction strategy.

In practice this has led to very careful least-cost planning and significant deviations in strategy from practices dictated by BAT. Thus for NOx reduction, Elsam has developed a dynamic programming model to calculate the least-cost combination of the NOx measures for its total park. It is now implementing a broad portfolio of selected measures, which will satisfy the overall reduction target while yielding emissions from individual coal plants through 2003 ranging all the way from 70 to 450 mg/MJ. For SO2 it has allowed both companies to avoid FGD for plants below 200 MW by adjusting dispatch, and altering the replacement schedule instead.

Member states' experiments also suggest impressive savings potential in "joint implementation" projects - i.e., investing in clean-up efforts in pollution-intensive regions abroad for credit against reduction targets at home. The approach makes environmental sense for acid emissions where countries share an airshed, as most northern EU countries do with Central European and Baltic states.

The potential for joint implementation projects is large. Poland alone emits almost a tenth as much sulphur dioxide as the entire EU (Exhibit 6). Eastern European industry is several orders of magnitude more polluting due to a combination of antiquated combustion techniques and high-sulphur fuels. This makes the cost differential between further action at home and reduction abroad compelling for northern EU countries.

The Dutch have pioneered in this area with their project in Poland (see box) which has turned out to be six times more cost-effective than the investment it replaced in the Netherlands. Swedish utilities, faced with the tightest emission standards in the EU, have been investigating similar projects which would be eight to ten times more cost-effective than those at home.

There have been at least two obvious political barriers to such projects: the lack of a formal mechanism for claiming reduction credit, and national government discomfort with spending to clean up "someone else's" backyard. But the first

barrier was recently addressed in the Second Sulphur Protocol, which called for the encouragement of joint implementation in meeting national targets. And the second barrier may be crumbling as marginal clean-up costs at home rise, successful projects become publicized, and national governments begin to accept the logic of joint implementation.

Joint implementation in Poland

The clean-up project undertaken by the Dutch electricity generating board in Belchatow, Poland, was negotiated under the board's environmental covenant with the Dutch government. The DFL 60 million investment forms a quarter share in an FGD scrubbing program at the massive 4.3GW lignite-fired station that will remove 120,000 tonnes of SO_2 per year. Under the deal, the Dutch generator was released from its Dutch covenant commitment of investing a comparable sum to scrub one of its smallest units running on low-sulphur coal. The same investment in Poland resulted in six times more SO_2 being removed. With the Netherlands already exceeding its LCPD sulphur targets, no attempt was made to gain reduction credits.

One feasible initiative for the EU could thus be to establish a crediting mechanism for joint implementation within the LCPD. The EU could in effect operate a kind of "clearing house" where member states can claim credits for their LCPD obligations against their activities in Eastern Europe.

Given the high level of clean-up expected from current policy, the EU should consider options to reduce other sources of acidification. In particular, policy to cut NOx emissions from traffic or ammonia emissions from agriculture is likely to reduce acidification at lower cost than stricter controls on large combustion plants.

Improving evenness: strengthen three-track policy

Given that evenness is currently addressed by the three-track policy, most observers do not believe that significant modifications are necessary. The principal challenge in the future will be to ensure that member states meet their commitments.

Market mechanisms may also help improve the equity of EU acidification policy by spreading some of the burden to non-point sources. Swedish experiences with SO2 and NOx emission charges on non-industrial users have been particularly successful. The sulphur tax in particular, applied according to fuel sulphur content since 1991, had an immediate effect in reducing non-point emissions (Exhibit 7). In practice it led to a wholesale shift in the home heating fuel industry to low sulphur oil.

2 Emissions to surface water

STATUS OF REGULATION

The future direction of EU policy on the emissions of toxics to surface water is currently uncertain. To date EU policy has been defined by the approach laid down in 1976 in the Dangerous Substances Directive. This has meant substance-by-substance control through standardized limits on effluent concentrations. These concentration limits are defined according to best available technology (BAT). The directive drew up a list of 129 (later 132) priority or "List I" toxics with the intention of setting EU discharge standards for each, as well as a "List II" grouping of further substances to be controlled through standards chosen by member states. Furthermore, the Directive allowed the UK to maintain its alternative, quality standards approach, by translating effluent concentration standards into limits for specific receiving waters.

The process of setting EU discharge limits for List I substances was stopped in 1989, by which time standards for 18 of the largest volume substances had been completed. This left member states responsible for developing their own individual standards for the remaining 114 List I substances and for all List II substances.

Meanwhile, much activity by member states has been taking place outside the framework of the Directive. Through the Rhine Action Plan, the Northeast Atlantic Treaty Convention, and the Baltic Treaty Convention, member states have embarked on major clean-up programs, aiming primarily at national and regional substance-reduction targets. Meeting these targets has forced many member states to adopt and sometimes tighten EU substance standards, and to draw up their own new national or regional standards for remaining List I and II substances. The EU participates in these international bodies but the connection between the new conventions and the Dangerous Substances Directive appears to be unclear to the private sector.

Two new directives currently under discussion could fundamentally change EU water toxics policy, though industry is uncertain whether, taken together, they will merely supplement the current substance and BAT based approach or signal a new direction. The potential impact of the Integrated Pollution Prevention and Control (IPC) Directive is clear enough. By requiring an integrated, single permit for all air and water emissions from large industrial plants, it would change the process for issuing permits, but not the approach. Smaller plants would continue

to be regulated by the Dangerous Substances Directive. The Commission has agreed a moratorium on further changes in water policy until the IPC Directive has been adopted.

The draft Ecological Quality of Water Directive (EQW) has the potential to bring about a large policy shift. Its focus on water quality rather than discharge standards and the generality of its definition of quality put it in potential conflict with the substance and BAT-based program of the Dangerous Substances Directive. It would commit member states to achieving "good ecological" quality, defined as that "suitable for the needs of the ecosystem." It sets out goals in this regard (e.g., toxics levels posing no threat to aquatic species, dissolved oxygen allowing survival of animals), but leaves it up to member states to decide their own numeric parameters for 'good quality' and to decide whether to take a substance-by-substance approach and whether to control based on discharge or quality standards. In practice, how each member state defines "good quality" will determine future national approaches and the role of the Dangerous Substance Directive limits.

EXPERIENCE TO DATE

Most observers believe that it is difficult to attribute improved water quality standards directly to the effect of EU policy. That policy has been costly for industry and has contributed to an unlevel playing field.

Effectiveness: unclear direct results

The current EU policy has made some headway in introducing substance standards and improving quality, but it has not come very far with its goal of creating consistent and rigorous control of toxic substance emissions to water across the EU.

There have, in fact, been substantial reductions in emissions in the period after the introduction of the Dangerous Substances Directive. In the EU surface waters for which reliable data exist, concentrations of cadmium and mercury, levels of absorbed halogens (AOx), chemical oxygen demand (COD), biological oxygen demand (BOD) and heavy metals have all shown steady - in some cases dramatic - declines (Exhibit 8).

The Directive appears to have played a role in this improvement. However, its contribution is of course linked to that of the regional and national target-setting initiatives (the Rhine Action Plan, the Northeast Atlantic Treaty program), as well as to general technological trends in industry. In practice, the Directive has provided northern member states with some of the discharge standards for their national reduction programs.

All told, however, the impact of the Directive has been decidedly unbalanced. For example, between 1985 and 1992, the annual load of zinc decreased by 82 percent in the Ems but increased by 47 percent in the Humber. Over the same period, the annual load of copper decreased by 30 percent in the Weser, but increased by 16 percent in the Elbe (Exhibit 9). In the rest of the EU, the absence of national or river basin monitoring data in itself testifies to the limits of the changes the Directive has brought.

The limited reach of the Directive is also evident from the differing levels of formal implementation across EU countries. Only a handful of countries - Denmark, Germany, the Netherlands - now have standards and controls in place for the majority of List I and II substances (Exhibit 10). The rest have controls over limited sets of toxics, although in some cases this is because they only emit a small percentage of the substances covered by the Directive. In general, progress with standards for remaining List I and List II substances has been modest.

Efficiency: high costs of compliance

Companies across member states report substantial differences in compliance costs. In general, the costs involved with EU toxic water policy are high. The current Dangerous Substances Directive is estimated to require ECU 13 to 18 billion in investments, and the Commission predicts that the IPC and EQW Directives will add another ECU 2 billion if adopted.

The significant costs and cost differentials can be illustrated by the case of the chemicals industry, one of the largest sources of water toxics. Here, overall costs and cost differentials are both large enough to have potential competitive impact. For example, several large-scale sites on the Rhine reported total environmental expenditures for waste water of the order of 3 to 5 percent of sales, with two thirds typically going to decentralized measures for controlling toxics and one third to central biological treatment. But a competitor in Belgium also running secondary biological treatment cited costs of 1 to 2 percent of sales, and confirmed that compliance with German standards (especially for AOx) would have raised these costs by 60 to 70 percent.

From our interviews it is evident that industry is uncertain whether to look to the EU, the international treaty conventions, or national governments for the lead on water policy, and faces higher expected costs as a result. As indicated above, progress with the Dangerous Substances Directive was effectively devolved to the member states in 1989. In the interim, the new international bodies have pushed ahead in developing their own programs and laying out sector BAT standards.

Today, however, the IPC and EQW Directives are seen as new signs of EU activism. But they do little to clarify the future direction of EU policy - for

example, whether in practice it will continue down the substance list path, match German BAT standards, or shift to a quality standards approach. In addition to the general sense of unease that this uncertainty produces, there appears to be a tendency towards shorter time horizons in thinking about environmental investments.

Evenness: uneven playing field

One result of the lack of clarity has been a wide discrepancy in compliance among member states, regions, and even localities. In part this arises from a wide variation in quality between water bodies: some require drastic action to clean up pollution, e.g., the Rhine; others are relatively uncontaminated. However, this discrepancy contributes to an unlevel playing field and robs companies of the chance to standardize reduction techniques across their plants.

Even for the 18 standardized substances, there are major differences in actual emission standards. For example, BAT-based emission standards for mercury vary from 0.003 mg per liter based on a daily average for a plant in Denmark to 0.03 mg per liter in Spain. Similarly, for cadmium from the electroplating industry, permits for 19 plants in Germany set limits between 0.001 and 5.0 mg per liter, based on a two hourly composite sample. For substances where no Directive standard is given, standards in member states vary even more widely.

These differences are compounded by variations in parameters used, and in measurement techniques. For example, German legislation translated many substance limits into sum parameters (i.e., AOx, BOD, COD), and in the process it effectively tightened the standards for chlorinated organics by a factor of 2. Even in a single region, parameters can differ. A Belgian chemicals plant has a substance-by-substance based permit and must meet set standards for each substance. For a neighboring plant the regulators have designed a permit based on sum parameters.

Different degrees of compliance tilt the field still further. In France in 1988, for example, there were 33 reported violations of standards for mercury, cadmium, carbon tetrachloride or lindane, while in Germany, the corresponding number was 4 (Exhibit 11). These figures must be judged against the fact that four member states did not report any data at all on compliance to the Commission.

OPPORTUNITIES FOR IMPROVEMENT

Current regulations could be improved by focusing policy on environmental quality objectives, by regulating composite parameters and by strengthening monitoring and enforcement.

Improving effectiveness: adopt environmental quality objectives

The success of the Rhine Action Plan in adopting environmental quality objectives for establishing a river basin approach to clean-up suggests one way to raise the effectiveness of EU policy and at the same time somewhat reduce differentials in costs and standards. In the relatively short time since its introduction, the Rhine Action Plan has achieved substantial reductions in toxic loads and has mobilized government and industry throughout the region. Although the Plan is not designed as an ongoing harmonization and emissions control effort, some of its features are clearly in line with other EU environmental policy. As with the previously discussed LCPD, its reduction program is fixed term. The Plan sets reduction targets for individual regions, who must then develop their (sometimes very different) standards and approaches for meeting those targets.

Beyond this, the Plan's river basin focus fits well with a quality standards approach of the kind suggested by the EQW directive. To be environmentally effective, a river basin approach must be based on some basin-wide quality objectives. By the same token, a quality standards effort requires a river basin approach to be politically acceptable. Certainly if the EQW in practice moves the EU towards a water quality approach, river basin-wide programs will be needed to discourage upstream countries from using up all the emissions allowable for "good quality." The right to emit to quality limits will need to be allocated to sources along the entire basin to ensure evenness and political acceptability in downstream countries.

Improving efficiency: move to composite parameters

Moving to composite parameters appears to offer improvement potential to both regulators and industry, without sacrificing environmental effectiveness.

From the point of view of regulators, taking the substance-by-substance approach and writing standards for 132 toxic compounds has proved an extremely slow, difficult, and thus expensive process. The EU itself took 6 years to develop its first substance standards for mercury and cadmium. After the EU abandoned this process for other substances, few member states have made headway with regulation.

An alternative regulatory approach based on composite parameters offers hope for more efficient policy. Several of the Northeast Atlantic Conference signatories and German regulators have come farther quicker using this approach. They have established comprehensive standards for toxics based on a few sum parameters (BOD, COD, AOx) and a general toxicity parameter. Environmentally leading-edge companies likewise rely on sum parameters to set and manage their internal environmental standards. Meanwhile, the

Commission is investigating the practicality of monitoring multi-residue parameters (e.g., heavy metals) using newly developed analytical techniques.

Most observers believe that a composite parameters approach would reduce the now heavy burden of monitoring and significantly increase flexibility in compliance. Both gains would translate into lower costs.

Several companies claimed that substance-by-substance monitoring is becoming unworkable. The difficulties and costs of monitoring substance-by-substance permits at the concentration limits required by EU policy are significant. A large chemicals site may be required to measure and control 20 to 30 substances at the parts-per-billion level. At one sample plant, this effort occupies 15 people and costs ECU 300,000 to 400,000 per year. Shifting to sum parameters would mean monitoring a group of substances, typically at parts per million, rather than trying to track a single substance at parts per billion. The costs of monitoring most substances rises by roughly a factor of 10 going from parts per million to parts per billion. Even from a purely technical point of view, the substance approach is suspect, with the accuracy of measurements becoming increasingly doubtful at these low concentration levels. Moreover, shifting to a few composite parameters could improve senior management control and communication, giving a clearer overview of the compliance performance of plants than a list of 20 to 30 substances.

The added flexibility from investing to meet a heavy metals parameter or an AOx parameter instead of a hydrocarbon or chloroform limit is also welcomed by industry. The practical room for trading off substances and innovating lower cost solutions largely depends on how tightly the parameter is set. In Germany, with AOx standards far higher than the equivalent EU substance standards, room for trade-off appears to be limited. But at EU standard levels, room for trade-off increases. And with waste water costs representing between 1 and 5 percent of sales in many companies, the cost efficiency gains can be considerable.

Improving evenness: strengthen monitoring and enforcement

Uneven monitoring and enforcement are the most immediate and obvious barriers to increasing the effectiveness of EU water policy. Whatever direction EU policy takes with the EQW Directive, there is a pressing need to raise the basic measuring, reporting and permitting processes in lagging countries to the level where they provide the necessary mechanisms to realistically manage a toxics control program. The new IPC Directive could help to clarify the information required of member states. This Directive in itself, however, will not address the basic problem of monitoring and enforcement, which is a matter of resources and priorities, aggravated by the decentralized nature of issuing pollution permits in some member states.

3 Packaging: solid and corrugated board

STATUS OF REGULATION

Packaging regulation in Europe is in a state of flux. Following the adoption of the Packaging Directive in December 1994, member states have been given 18 months in which to adopt legislation to ensure compliance. In the meantime, a handful of states (e.g., Germany, France and Belgium) will continue to enforce their own policies, which have had mixed success in achieving their stated objectives.

The Packaging Directive specifies two types of target, but leaves member states free to select mechanisms for reaching those targets. First, each member state is expected to recover a minimum of 50 percent of its total packaging volume within five years of implementing the Directive (i.e., probably 2001). Second, each member state is expected to recycle a minimum of 25 percent of its total packaging, and a minimum of 15 percent of any individual material.

Plans for future regulation are currently confined to implementation of the Packaging Directive.

EU regulation was preceded in 1991 by the German packaging ordinance (the Verpackungsverordnung), which mandated recovery and recycling targets for a wide cross-section of packaging materials. To meet their recovery obligation under the Verpackungsverordnung, packaging users set up the Duales System, a clearing house whose mission was to guarantee the recovery and recycling of materials from retailers and consumers in return for a fee from product manufacturers. Firms paying a fee to the Duales System are permitted to label their packages with a "Green Dot." In a parallel development, waste processors set up niche companies to organize the collection and recycling of transport packaging, which by definition remained in the hands of distributors and retailers.

In contrast to the German system, the Dutch packaging covenant of 1991 illustrates a more flexible approach. Rather than imposing direct regulation, the Dutch government signed a covenant with the Stichting Verpakking en Milieu (SVM), which represents a cross-section of packaging manufacturers, users and retailers. In the covenant, the SVM promised that its members would meet an agreed schedule of recovery and recycling targets.

Solid and corrugated board is a major component of transport packaging, and examining its use provides an insight into the consequences of packaging regulation.

EXPERIENCE TO DATE

Most observers believe that packaging legislation based on broad targets has been successful in reducing usage; however care is needed to design regulatory targets which are not counterproductive. Furthermore, experience in Germany suggests that costs can be high and the distribution of economic burdens may be uneven.

Effectiveness: target setting successful but care needed

As a result of the German Verpackungsverordnung many firms report decreases in the use of packaging materials. One large producer of consumer goods recently reported that it had reduced total packaging by over 6 percent since 1990 and thus had saved roughly half what it had paid into the Duales System. In doing so it had cut its use of transport packaging by 36,000 tonnes, thus saving around ECU 50 million.

However, current policies to protect the environment may also prove to be counterproductive. For instance, reducing board use may actually increase volumes of waste for disposal. Since the quality of fibers required for board compared to paper is low, board acts as a "vacuum cleaner" for waste fiber material. In the Netherlands in 1992, board accounted for 43 percent of the total waste fiber used, while consuming only 6 percent of the virgin fiber. Similarly, in Germany in 1990 (before packaging regulation) packaging consumed 79 percent of total waste fiber but only 3 percent of total virgin fiber used. Removal of board from the fiber chain in 1990 in the Netherlands would have increased the volume of unusable waste fiber by 28 percent by 2000 (Exhibit 12).

Efficiency: high costs of compliance

German legislation on board recovery appears to be inefficient, particularly when compared to the Dutch packaging covenant, which makes no distinction between board and other fiber-based packaging materials. In Germany the price of waste board collection has remained at around ECU 130 per tonne, approximately 10 percent of the price of new printed boxes. In the Netherlands, the price of collection is roughly ECU 60 per tonne.

Evidence from the fees for collection of sales packaging could provide further evidence of inefficiency. In Germany, the Green Dot fee is currently ECU 0.18

per kg, while in France and Belgium the corresponding fees are currently ECU 0.05 and ECU 0.02 respectively. However, observers note that the French and Belgian systems are relatively new, and that over time their fees will probably rise.

Evenness: competitive distortion

Experience with the Verpackungsverordnung illustrates how packaging legislation can introduce significant economic imbalances, giving an advantage to some countries over others, large retailers over small retailers and other players in the chain, and large producers over small producers. In addition, problems of enforcement lead to widespread free-riding.

A lack of recycling facilities and the unexpected success of the Verpackungsverordnung led to a glut of waste paper in the market in 1992, and a fall in the price of some grades of waste paper from 100 (1985 index) to below minus 30 (i.e., paper users were ready to pay mills to take their paper away). German mills thereby gained a significant cost advantage over their European competitors, who were bound to long-term contracts with suppliers. Meanwhile, Interseroh (the German waste haulers' marketing company) found markets for ECU 27 million worth of waste paper exports. In other EU countries, the sudden availability of cheap waste paper from Germany produced economic dislocations. In France, net imports of corrugated board jumped from 144,000 tonnes to 178,000 tonnes between 1991 and 1992, while in the UK the comparable figures were 8,000 and 40,000. Furthermore, in the UK poor anticipation of the effects of the Verpackungsverordnung led to a loss of 10 percent of paper-making capacity in 1992, as firms were unable to escape from long term supply contracts.

Large retailers and large producers appear to be at an advantage relative to their smaller rivals. Although large players have high public visibility and are obliged to comply with the ordinance, their dominance permits them to pass on costs down the chain. Smaller players have less room for maneuver. For example, two major European producers of consumer goods reported that owing to the need to price products competitively, they typically absorb 2 to 3 percent of the fees paid to the Duales System, while some smaller players report absorption of more than 5 percent of the fees. In addition, large retailers have the space to store packaging waste, money to invest in shredding equipment, and frequent deliveries to ensure rapid take-back.

Finally, problems with enforcement of the Green Dot fee have led to widely reported incidence of free-riding. In response, some major retailers have begun to require suppliers to provide evidence of payments to the Duales System as a contractual condition.

OPPORTUNITIES FOR IMPROVEMENT

As national regulations develop in response to the Packaging Directive, their success will depend on three key factors: stressing environmental quality objectives, competition in collection systems, and coordinated national policies.

Improving effectiveness: focus on environmental quality objectives

Although targets for packaging recovery may offer users some incentive to cut volumes, they do not provide a guarantee of overall waste reduction in society. Still, when properly applied, evidence from the Netherlands suggests that reduction targets can have dramatic effects. For example, as a consequence of the 1991 packaging covenant, Dutch packaging users pledged to reduce waste paper and board to 1000 kilotonnes per year. By 1993, waste production had already fallen from almost 1700 kilotonnes to around 1450 kilotonnes, and rates of recycling had risen to 56 percent, close to the target for 2000 of 60 percent.

Improving efficiency: ensure competition in recovery systems

The cost of recovery systems operated by the Duales System suggests that a lack of free competition can make national recovery systems particularly expensive. Other countries are attempting to design systems which reflect lessons from the German experience. In Sweden five new companies have been established to bid competitively for packaging recovery and disposal contracts. In France, Eco-Emballages, the government-approved counterpart to the Duales System, is experimenting with different models of competition, with the aim of proposing a national system in the near future.

Improving evenness: level the playing field

Executives raise three main points regarding the implications of the Packaging Directive for a level playing field. First, uncoordinated national policies may cause economic imbalances in the packaging industry. Although the Packaging Directive requires member states to ensure that their policies do not inhibit the free market, most executives believe that disputes will be resolved through the Court of Justice long after companies have gone out of business.

Second, smaller players question the process which governments will use to design policy. They fear that governments will formulate policy in response to lobbying from powerful players such as large retailers or plastics manufacturers, rather than according to objective economic analysis.

Third, all players expect that debate over interpretation of the Directive will lead to significant delay in implementation, and therefore sustained uncertainty over business conditions.

4 Combustible non-hazardous waste

STATUS OF REGULATION

In the last three years, EU waste policy has evolved to emphasize local disposal solutions, with legislation based on two main premises: that waste should be treated within national borders (the "self-sufficiency principle") and as close to the point of creation as possible (the "proximity principle"). Within this framework, government authorities may draw up waste management plans that direct the development and use of disposal facilities. Following a ruling of the European Court in 1992, authorities appear to be able to invoke those plans to effectively ban the transport of waste across borders.

The Commission has worked hard to raise the standards of incineration facilities in the EU. The proposed Directive on the Incineration of Hazardous Waste, which is currently awaiting final approval by the Parliament, replaces the 1989 Directives on air pollution, and aims to bring EU standards into line with those in Germany. The rapid development of this legislation reflects the pace of technological change in emissions control. In addition, the Commission is drafting legislation on the incineration of non-hazardous waste, and is considering extending the standards for incinerators to cover substances such as nitrogen oxides.

Policy on waste incineration is heavily influenced by the economics of the two practical alternatives, landfill and recycling. The EU is currently considering a landfill directive, which will set minimum standards for landfill construction and operation, and will hold the operator responsible for post-closure care and monitoring. Recycling industries are expected to be affected by the new Packaging Directive, which stipulates that a minimum of 25 percent of total packaging must be recycled by 2001.

The Commission is currently conducting a comprehensive review of waste policy.

EXPERIENCE TO DATE

While incineration regulation is considered to be successful, existing regulation on landfill of non-hazardous waste is viewed as inadequate to protect the

environment, and proposed changes are expected to be costly. Observers note a wide variation in costs of government-run collection and disposal services.

Effectiveness: mixed success/potential problems from barriers to shipment

In practice, emissions from municipal incinerators appear to meet or exceed standards from the 1989 Directives. However, the public perceives incinerators to be highly damaging to the environment, and has successfully defeated many proposals to build new capacity. By blocking the construction of incinerators, environmentally concerned citizens may actually promote environmental damage by shifting waste to a more harmful disposal track.

Most firms agree that landfills in several parts of the EU are of poor quality, and that higher standards are necessary to protect the environment. In 1994, a leading waste management company informed the UK Department of the Environment that not one of 158 sites it reviewed for potential acquisition met its own internal standards for operation. A second company reported that it had withdrawn from many tenders in southern Europe on similar grounds. In Italy, where waste policy is determined regionally, several regions share the disposal burden with local authorities by permitting the sequential construction of small (often only one hectare) landfills where mandatory systems to control leachates and the build-up of methane gas produce exorbitant costs. These sites are often filled by the region in less than a year and subsequently closed.

As many states attempt to rapidly reduce their waste volumes, barriers to waste shipment may actually contribute to increased environmental damage by exacerbating poor capacity planning within states and different definitions of waste between states. Further imbalances arise from variation between states of so called "priority ladders" - preferred disposal routes built into legislation.

Barriers to shipment may help sustain imbalance between neighboring states with different capacity problems and thereby keep disposal costs high. In the Netherlands, even under conservative assumptions, waste volumes destined for incineration could fall from 7.9 million tonnes in 1994 to 5.0 million tonnes by 2000, while 5.6 million tonnes of incineration capacity is planned by the end of the century (Exhibit 13). In neighboring Germany, where a new law will effectively prohibit the landfilling of organic material by 2005, most observers estimate that between 40 and 70 new incinerators will be needed in the next 10 years. Since the average length of the planning process is historically 10 years and only 12 incinerators are currently planned, Germany could face a critical shortage of incineration capacity, if initiatives to reduce waste are ineffective.

Where differences in national legislation lead to the definition of a substance as a waste in one state but not in its neighbor, firms may be unable to dispose of unwanted substances. A Dutch chemicals firm is currently faced with delays in

exporting a waste defined as hazardous under Dutch law but not under European law (see box).

Sludge disposal on Dutch/Belgian border

Under recent Dutch law, the waste sludge produced near the Belgian border by a chemicals firm is now classified as hazardous, even though the concentration of the most toxic component, zinc, is less than one-third the European threshold. The only method of disposal is to export the waste, ideally just a few kilometers across the border to Belgium, where its high calcium content makes it an ideal raw material for the cement industry. However, owing to barriers to shipment, the firm must apply for two licenses, one from the Dutch authorities to export the sludge, and a second from the Belgian authorities to import it. The licensing process has already lasted several months, and there is no guarantee of success. If approval is not given, the firm faces the costly task of reprocessing the sludge.

Disposal choices in some states are affected by nationally determined priority ladders. In Germany, for example, waste must be recycled wherever possible rather than incinerated. In France however, no preference between recycling and incineration is legislated. By removing the flexibility to choose the disposal route, priority ladders could compound capacity problems.

Efficiency: high costs from proposed standards and barriers to shipment

Although the private sector recognizes the need to set standards to protect the environment, it is apprehensive that the forthcoming incineration and landfill directives will add significantly to the cost of waste disposal. Implementing the proposed incineration standards in the EU will require an investment of between ECU 12 billion and ECU 26 billion, pushing gate fees upward by around 50 percent. The new standards will resemble those in Germany, and it appears that the bulk of required investments must be made by France, the UK and Italy (Exhibits 14 and 15).

Underutilization of incineration capacity is costly, and permitting transborder shipments to ensure full capacity utilization could reduce costs considerably. For example, for an incinerator with a capacity of 500,000 tonnes per year, the cost per tonne rises from approximately 100 ECU per tonne at full capacity to almost 200 ECU per tonne at half capacity. According to one recent estimate, less than 80 percent of installed incineration capacity in the European Union is currently fully utilized.

Many observers believe that sustained barriers to trade in waste components could also hamper the development of new markets by preventing firms from securing economies of scale in reprocessing industries. As initiatives to recover packaging spread throughout Europe, a temporary recycling capacity shortage may emerge. If other markets cannot be found, the remainder must either be stored (at great expense) or disposed of via incineration or landfill. In Germany in 1992, for example, recycling capacity for plastics was around 160,000 tonnes per year, far below the 450,000 tonnes per year collected under the Duales System[3].

Evenness: wide variation in collection and disposal costs

Evidence from the profits and manpower levels of private sector waste haulers indicates that local authorities do not provide cost-effective waste collection and disposal services. In 1993, the operating profit of leading private sector waste disposal firms was between 12 and 16 percent. Anecdotal evidence suggests that private sector firms are typically 30 percent cheaper than local authorities performing comparable waste collection services.

Further evidence of inefficient management is suggested by the regional variation in the price of waste collection services. In Denmark, the most expensive service is 3.5 times the price of the cheapest service. In the UK, and factor is 2.5, while in Belgium, one observer claims that the factor may be as high as 6.5.

OPPORTUNITIES FOR IMPROVEMENT

The current regulatory environment could be improved by selectively lowering barriers to shipment, rapidly adopting landfill standards, introducing a three-track approach to incineration standards, and encouraging liberalization of government services.

Improving effectiveness: lower barriers to shipment and rapidly adopt landfill standards

To help regions or states with waste disposal capacity problems take advantage of the least harmful disposal facilities, the EU could consider options for lower barriers to shipment of non-hazardous components of the waste stream. In

[3] Under the German packaging ordinance, product manufacturers are obliged to guarantee the recovery of packaging materials after use. The Duales System was set up to offer manufacturers a guarantee of collection and recycling in return for a fee on each package.

addition, early adoption of the Landfill Directive appears essential to protect the environment, particularly the quality of ground water.

Improving efficiency: introduce three-track approach to new incineration standards

The EU could borrow principles from the Large Combustion Plant Directive to make the costs of compliance with incineration standards acceptable to all member states, and thereby ultimately enhance the probability of implementation. While requiring all new incinerators to meet proposed standards, the EU could take a three-track approach to imposing standards on existing plants. States such as Germany, Luxembourg, and the Netherlands, whose incinerators come close to meeting the proposed standards, could form the fastest track, proceeding with immediate implementation. A second track would be reserved for wealthier states such as France, the UK, Denmark, Belgium and Italy, who can afford to make the significant investments required to upgrade their facilities. The remaining states would occupy a third track, with implementation delayed until they are realistically able to meet the necessary costs.

Improving evenness: encourage liberalization of services

In order to lower the cost of waste collection and disposal services, the EU could consider an approach to liberalization like that adopted in the telecoms and electricity sectors. A Europe-wide, phased transition to liberalized services would likely stimulate cost reduction as well as technological innovation. However, in order to guarantee "universal service" and to ensure that minimum service standards are provided, competition would have to be carefully regulated.

5 Environmental Impact Assessment

STATUS OF REGULATION

European Union regulation on environmental impact assessment (EIA) is currently undergoing revisions. Draft modifications are being considered by the European Parliament; concurrently, the Commission is studying proposals to expand the focus of environmental assessment from a project to a regional ("strategic") level.

The existing EIA regulation dates from 1985, when the EIA Directive was established. This Directive reflected three key principles: (1) that adequate environmental protection requires control of project development at a European level; (2) that total costs to industry will be lower if problems are prevented rather than solved; and (3) that harmonized policy is fairer to industry than different national procedures.

In building on these principles, the Directive attempted to balance the benefits of harmonization with the subsidiarity principle. The latter is particularly important given the wealth of long-standing planning legislation in member states. As a result, the Directive has been positioned as a framework document that augments rather than replaces national statutes.

The Directive specifies two types of projects: those which must be assessed under all circumstances (Annex I), and those which must be assessed if they are likely to have significant environmental impact by virtue of their nature, size or location (Annex II). To standardize the Annex II list, member states may establish criteria or thresholds. Projects requiring EIA must follow a prescribed procedure, during which a scientific analysis of the potential environmental impacts of the proposed project (the environmental impact statement) is reviewed both by the relevant local authority and the public. At the end of the procedure, the local authority uses the information in its overall assessment of the project's eligibility for approval.

In 1992, the Commission reviewed experience with the Directive, and found that (1) the Directive did not go far enough to ensure the protection of ecologically sensitive sites in the Union; (2) developers of Annex II projects were frustrated with the apparent arbitrariness of the decision as to whether they should submit to EIA; and (3) the type and quality of information actually submitted in the EIA process varied widely, leading to confusion and excessive cost to developers.

To address these issues, the Commission has proposed a series of modifications. These modifications are now being considered by the Parliament and the Council, and include the following:

- Adding more types of projects to the annexes and tightening the screening process by which member states judge whether a project is covered by an annex.
- Providing clearer guidance on information to be submitted in the EIA process in a "list of considerations" for member states. The Commission hopes that in future member states will supply developers with process guidelines ahead of time, rather than wait for an unsolicited submission.

In light of its conviction that each project and its environment are unique, the Commission has proposed not to attempt to merge the Annex I and Annex II lists.

While these modifications are being considered for adoption, the Commission has begun to study options for complementing project-level EIA with strategic environmental assessment (SEA). The intention with SEA is to improve the effectiveness of environmental assessment by ensuring that government planning incorporates an analysis of environmental impacts. A typical example would be to evaluate the environmental impact of alternative national energy policies rather than simply focusing on individual power plants. Although plans are not well advanced, the Commission is considering regulation on SEA which would maintain the need for EIA at the project level.

EXPERIENCE TO DATE

The current EIA Directive is generally viewed as a success on all three key dimensions: effectiveness, efficiency and evenness.

Effectiveness: high at project level/low at strategic level

Most observers believe that the Directive has had a positive effect on the environment, although its focus on the project level has meant that the environmental impacts of national, regional, or local development plans often go unassessed. In most states, the Directive has either sharpened the focus of already successful national planning legislation, or has actually induced government authorities to examine the potential environmental impacts of projects. However, EIA is limited in its ability to take account of the wider implications of developments. For example, earlier this year a strategic approach to environmental assessment upstream in Germany, Belgium, or

south-east Netherlands could have helped prevent high volume flows in the Maas and Waal rivers.

Efficiency: high in most member states

In general, the environmental protection offered by the EIA Directive has been achieved at relatively low cost. The cost of an EIA process is typically less than 1 percent of the total investment in question: around ECU 150,000 for a medium-sized project (investment ECU 75 million to ECU 150 million), and up to ECU 2 million for a large project (investment ECU 750 million).

In several cases, firms reported that conducting the EIA may have saved them money. For example, a UK chemicals company claims that the process has helped avoid expensive public inquiries, which would have cost up to ECU . 750,000.

Where cost problems were reported, they were typically attributable to three failings on the part of government authorities. First, there has been procedural delay: in Ireland a chemical company has faced a five-year legal battle with environmental groups over the EIA for a ECU 250 million pharmaceutical plant. Despite confusion in the courts over the legal status of the EIA, the company has pressed ahead with construction. Meanwhile, another chemicals company in Ireland recently abandoned a similar investment rather than risk planning permission being revoked. A second problem has been government interference with project design procedures: in Denmark, an oil and gas company estimates that restrictions placed by the government on the design of an underground storage facility increased total project costs by 4 percent (see box). Third, there has been government pressure for EIA for minor plant modifications: in the Netherlands, the government insisted that a chemicals company conduct an EIA for a small modification to a plant in the huge Terneuzen complex.

Excessive costs from EIA in Denmark

In Denmark, an oil and gas company estimates that the EIA process has increased the cost of a recently completed underground gas storage project by 4 percent. The requirement that EIA submissions must be highly detailed and submitted early during planning has altered the project cycle dramatically, since companies must invest heavily in the planning phase at a stage when they are uncertain of the optimal design of the project. Although the oil and gas company's EIA was accepted, the authorities later refused to allow minor changes to the plans, such as raising the height of buildings or changing the orientation of a well without a further EIA. As a result, planning was delayed by several months, and the estimated additional cost of the disrupted project cycle was estimated at ECU 3 to 6 million.

More fundamentally, several companies have complained of costs associated with the choice of thresholds for EIA. For example: a chemicals company experienced delays of up to six months in approval of a power station project when the local authority failed to specify a clear capacity threshold above which EIA would be required. As plans developed, the authority changed its mind several times, finally concluding that the project should be assessed.

The decision that all projects emitting hazardous waste are Annex I and therefore require EIA has also proved costly, particularly to small operators. In the Netherlands, a company recycling glue dispensers was obliged to conduct an EIA even though it had satisfied the local authority that the project's environmental impact would not be significant. The cost of the EIA added approximately 15 percent to the total investment.

Evenness: uneven playing field

Differences in implementation across member states have produced an unlevel playing field for companies. Concern focuses on the definition of Annex II projects, and on the degree to which governments view EIA as an important part of the planning process.

The flexibility inherent in Annex II projects is a double-edged sword. On the one hand, states can use that freedom to avoid unnecessary cost to industries proposing to locate in less-sensitive ecosystems. On the other hand, states are not obliged to base their Annex II definitions on demonstrable environmental criteria, and in practice appear to be quite arbitrary in their decisions. Two examples are illustrative. In Denmark, gas pipelines are subject to EIA if longer than 1 km, while in Ireland, the minimum distance is 80 km. In Denmark, underground gas storage facilities are subject to EIA, while in France and Germany they are not.

According to the Commission's recent analysis of compliance with the Directive, widely varying approaches to the use of EIA in member states create an unlevel playing field. In France, approximately 5000-6000 EIAs per year are conducted, of which 70 percent were judged to be of poor standard. In the UK, approximately 200 EIAs were conducted per year, but only 40 percent were judged poor standard. In Germany, owing to incompatibility with national legislation, the Directive has not yet been implemented, and EIA as defined by Brussels is not carried out (Exhibit 16).

OPPORTUNITIES FOR IMPROVEMENT

According to most observers, the current initiatives to strengthen government ability to manage the assessment process and to clarify procedures will help

make legislation more efficient and more equitable. The effectiveness of environmental assessment in the EU could be improved by introducing strategic environmental assessment.

Improving effectiveness: introduce strategic environmental assessment

Looking to the future, a broader strategic approach to environmental assessment is important in ensuring a certain level of environmental protection within the EU. However, unless SEA regulation is carefully formulated, the process may be costly and may in fact hinder economic development unnecessarily.

It is clear that project-based environmental assessment has only limited ability to protect the environment. Project developers typically have little insight into the wider environmental consequences of their proposals, particularly regarding trade-offs with alternative developments. A good example is the expansion of port facilities, which may be environmentally acceptable on a local scale, but which may indirectly cause other environmental impacts by drawing traffic from other port facilities. Similarly, where several developers are proposing to extract a large resource, individual project EIAs are unlikely to provide a synthesis of the combined impact of multiple exploitation.

There are three potential pitfalls to SEA. Raising the level of assessment may actually fail to protect the environment - without specific project proposals, governments may find it difficult to review the environmental impacts of all possible development options for an ecosystem. The SEA process could also introduce another layer of costs in the planning process. Those costs are likely to be funded by the general taxpayer, or to become another charge on industry choosing to locate in the area in the future. Finally, if they become a political weapon wielded by third party groups, SEA reports may actually prevent future developments.

Exhibit 1

THE INTEGRATED CHAIN

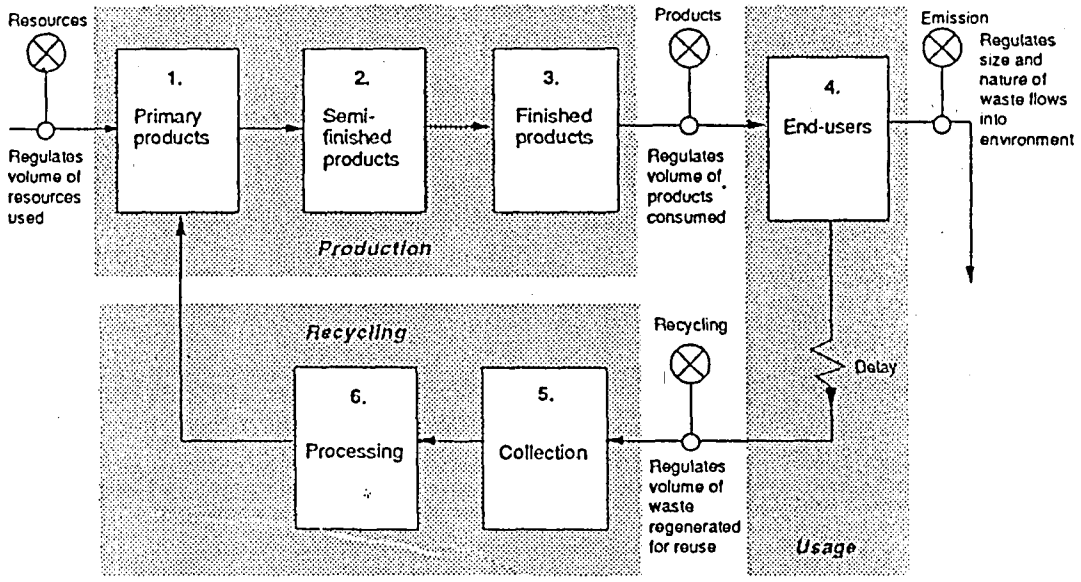
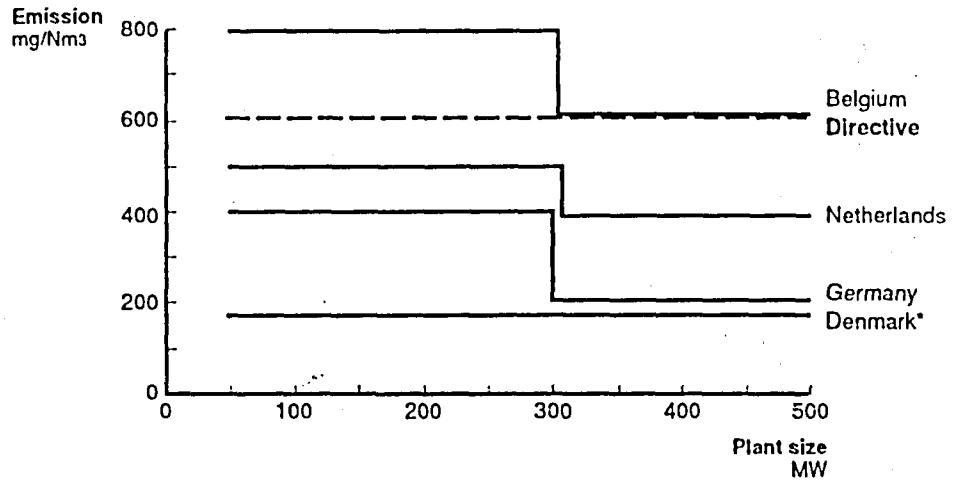


Exhibit 2

NEW PLANT STANDARDS - NOx

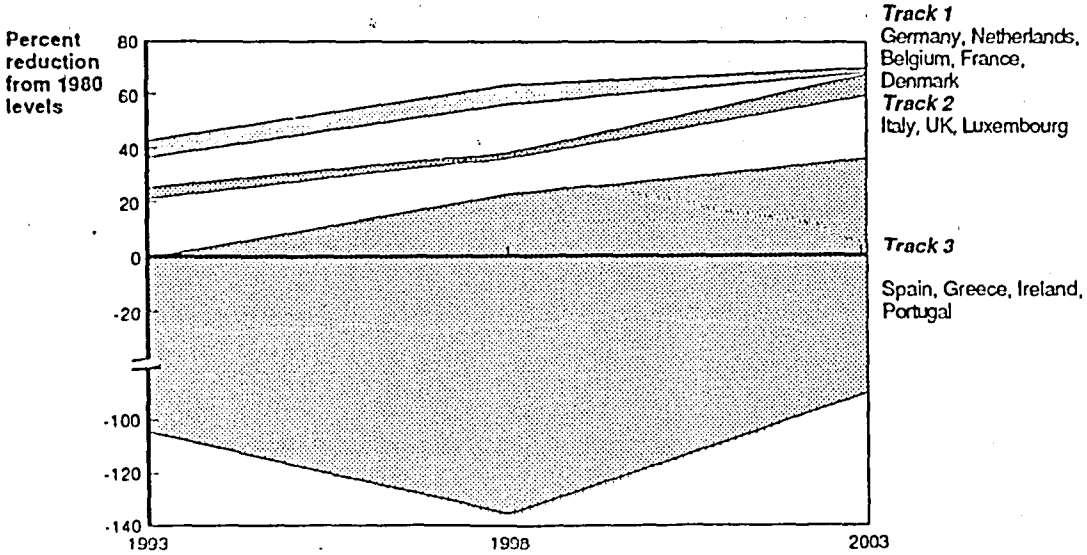
COAL-FIRED STATIONS



*For plants authorized after January 1, 1992
Source: Unipede, 1994

Exhibit 3

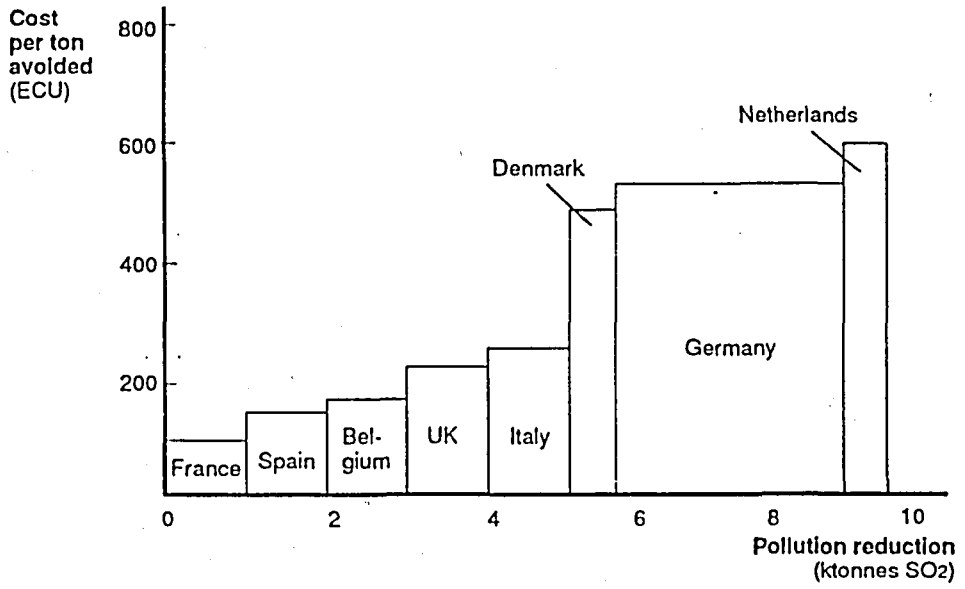
THREE-TRACK POLICY FAVORING SOUTHERN EUROPEAN PRODUCERS
SO_2 reduction trajectories



Source: European Commission Report on LCPD Implementation

Exhibit 4

NATIONAL CLEAN-UP BURDENS - SO2

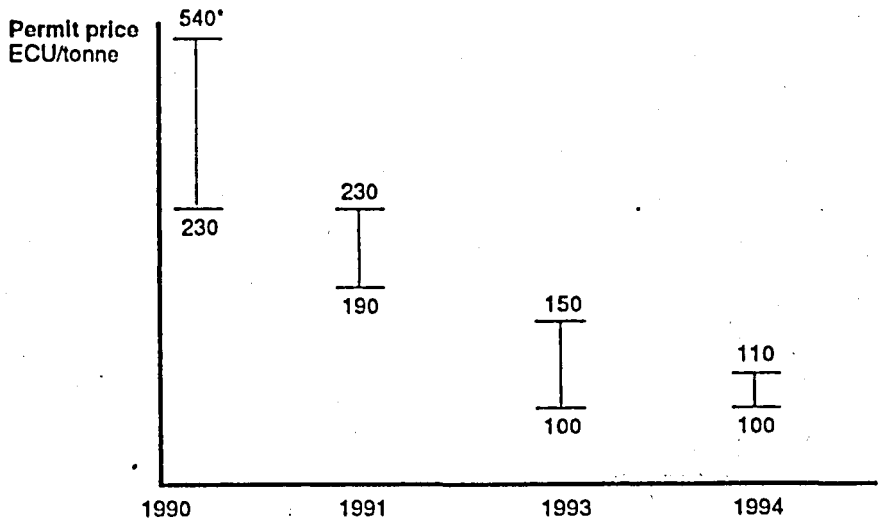


Source: ERM; McKinsey analysis

Exhibit 5

LEARNING: DROP IN PRICE OF TRADABLE PERMITS

US ACID RAIN PROGRAM



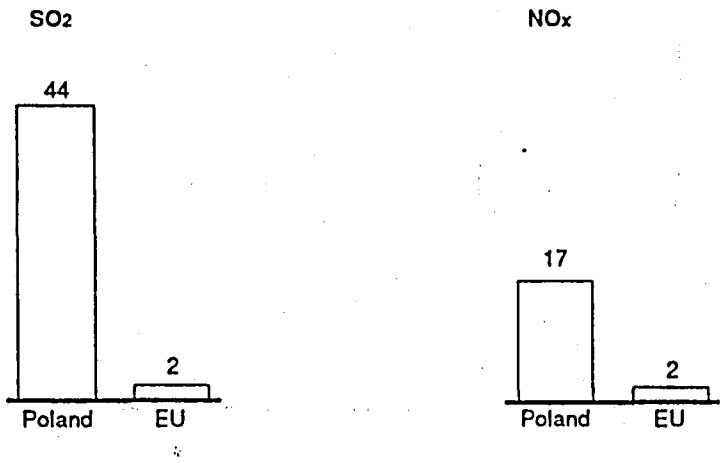
* Forecasts

Source: Journals; Pollution on the Market; Utility Environment Report

Exhibit 6

EMISSION COMPARISON - POLAND AND EU

Tonnes per billion ECU GNP

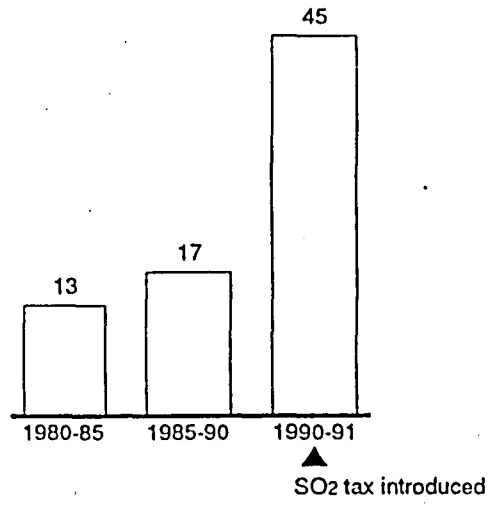


Source: Energy Policies Poland; IEA; McKinsey research and analysis

Exhibit 7

EMISSION CHARGES FOR NON-POINT SOURCES* - SWEDEN

Annual percentage reduction SO_2



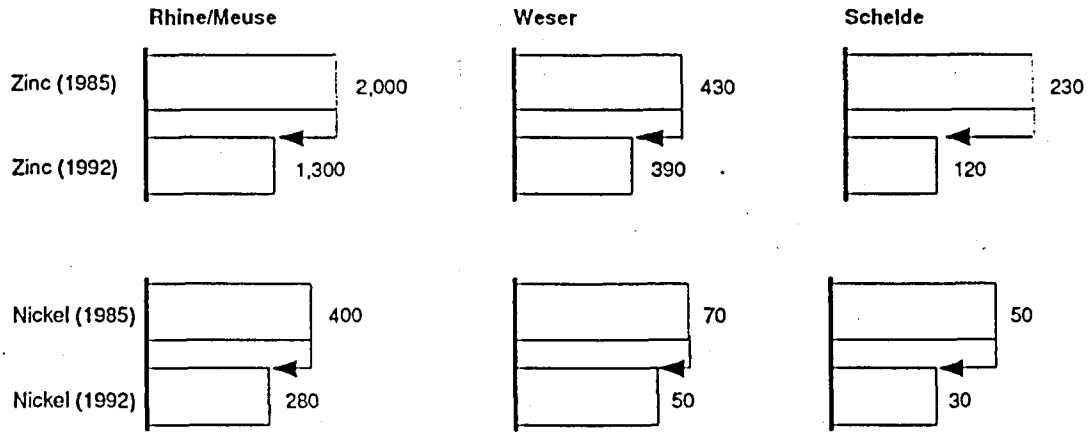
* Normalized for shifts in domestic use from fossil fuels to electricity

Source: NUTEX; McKinsey analysis

Exhibit 8

REDUCTION IN TOXIC DISCHARGES TO SURFACE WATER

Tonnes per year

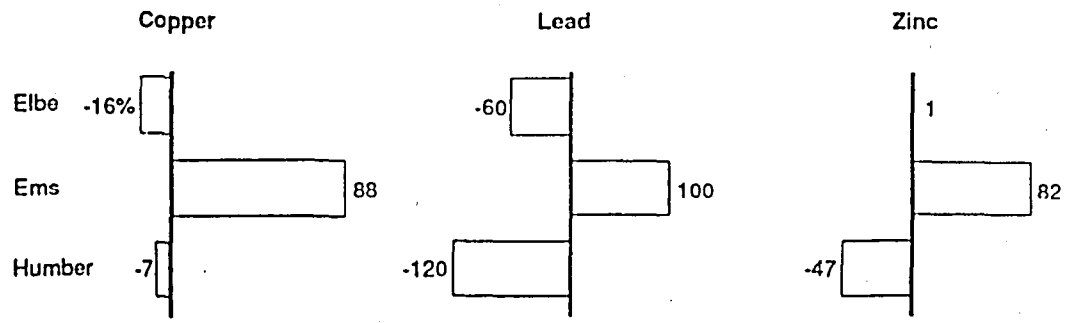


Source: ICWS

Exhibit 9

WIDE VARIATION IN MAGNITUDE OF REDUCTIONS 1985-1992

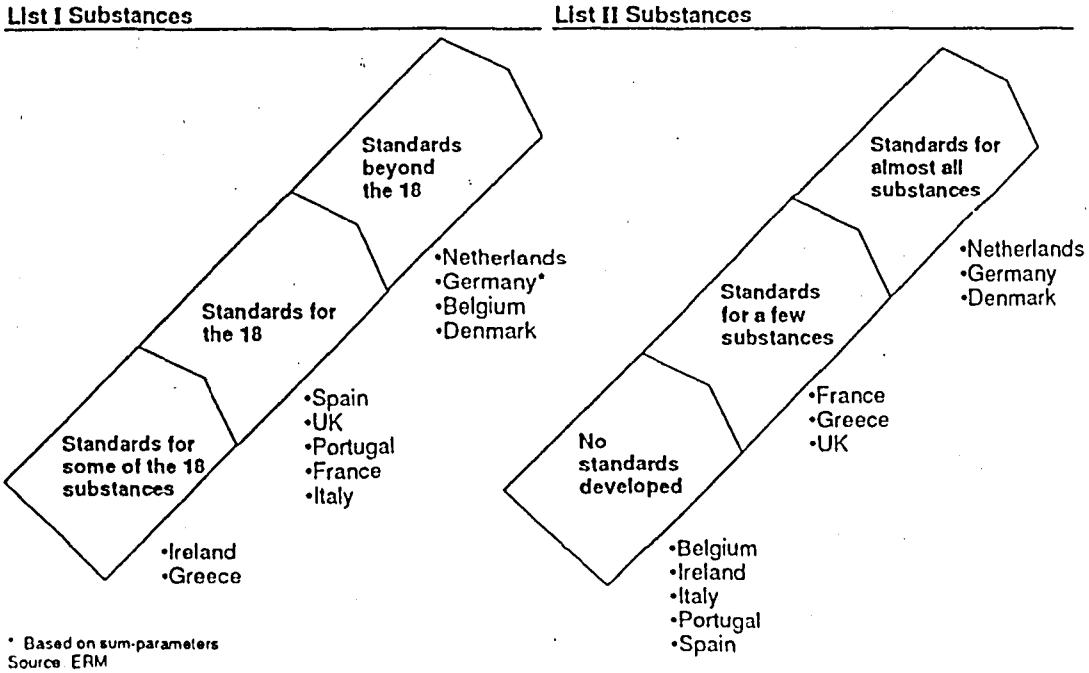
Percentage reduction



Source: ICWS

Exhibit 10

IMPLEMENTATION OF EU DANGEROUS SUBSTANCES DIRECTIVE



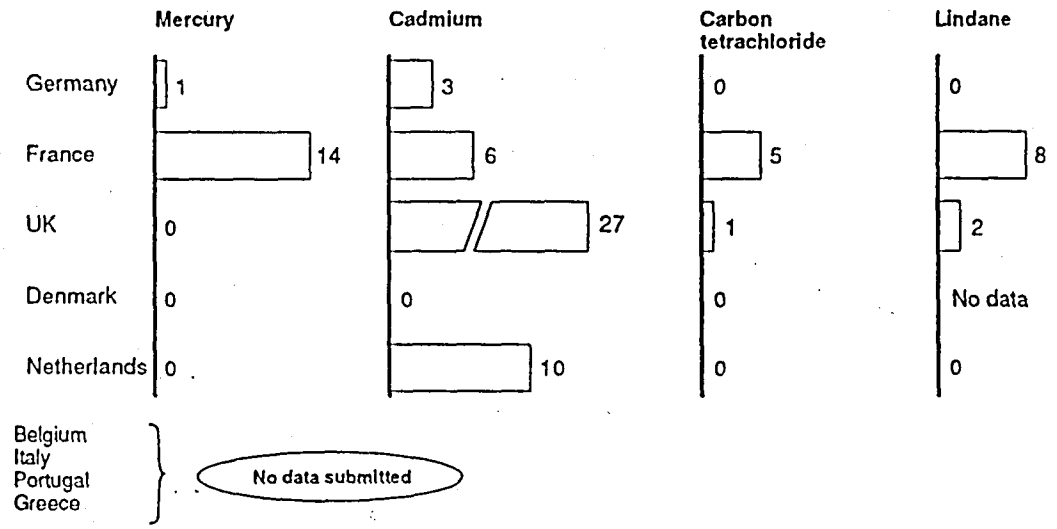
* Based on sum-parameters

Source: ERM

Exhibit 11

UNEVEN NATIONAL REPORTING AND COMPLIANCE - 1988

Number of plants exceeding standards



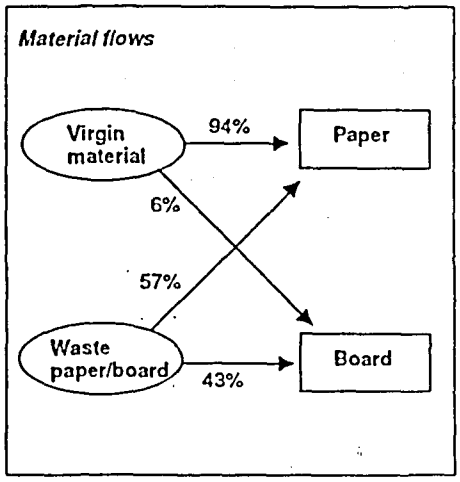
Source: European Commission

Exhibit 12

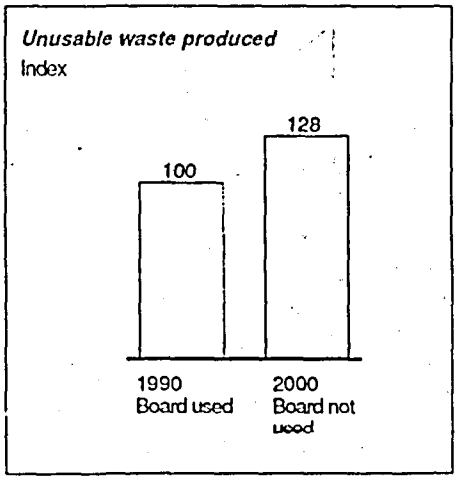
REDUCING BOARD WOULD BE COUNTERPRODUCTIVE

DUTCH EXAMPLE

Solid/corrugated board:
Key role in absorbing waste



Focus may be counterproductive

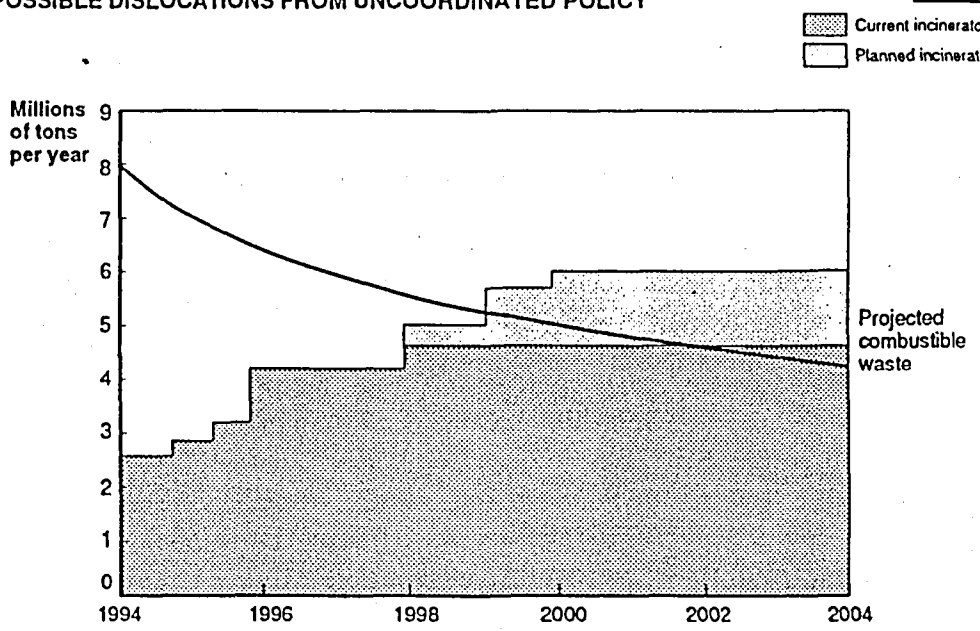


Source: McKinsey analysis

Exhibit 13

POSSIBLE DISLOCATIONS FROM UNCOORDINATED POLICY

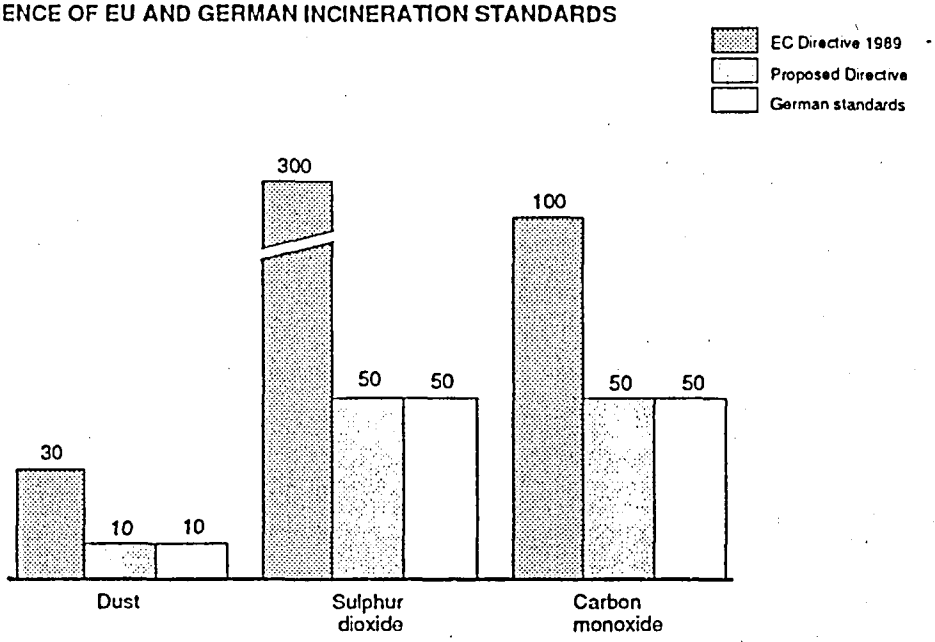
DUTCH EXAMPLE



Source: McKinsey analysis

Exhibit 14

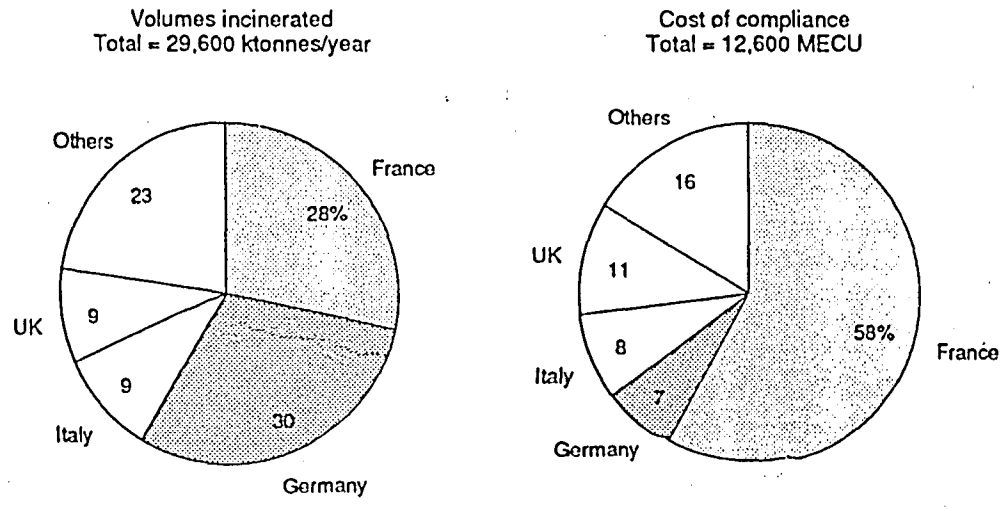
CONVERGENCE OF EU AND GERMAN INCINERATION STANDARDS



Source: TNO

Exhibit 15

UNEVEN COSTS DISTRIBUTION OF NEW INCINERATION DIRECTIVE
Percent

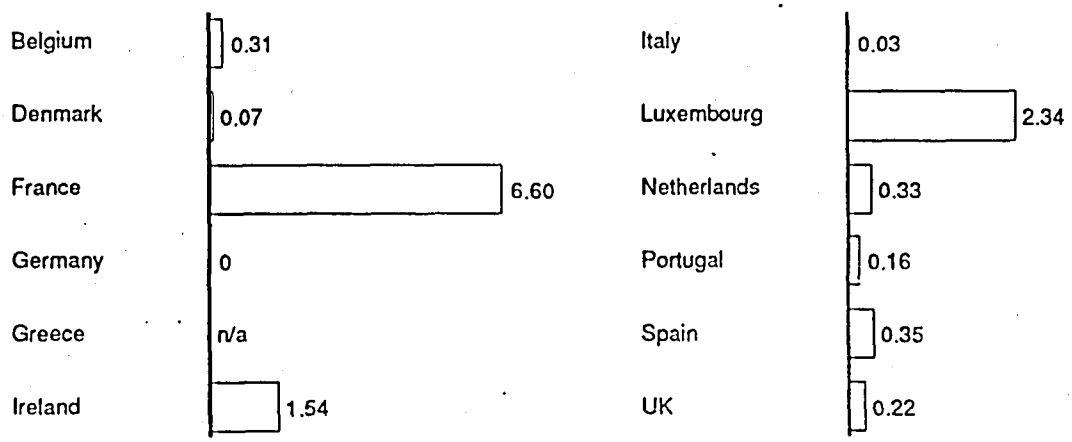


Source: TNO

Exhibit 16

WIDE VARIATION IN NUMBER OF ENVIRONMENTAL IMPACT ASSESSMENTS

EIAs per year per unit GDP*



* Units calibrated to purchasing power standard
Source: European Commission

Final Report to the Legislative and Administrative Simplification Group on Small and Medium Size Enterprises

by

Prof. Emilio Fontela

Final Report to the Legislative and Administrative Simplification Group on Small and Medium Size Enterprises

by
Prof. Emilio Fontela
Universidad Autónoma de Madrid, Université de Genève

1. Community Policies in the area of SMEs and the need for legal and administrative simplification.

The Council Decision 89/490/EEC of 28 july 1989 on the improvement of the bussiness environment and the promotion of the development of enterprises, and in particular small and medium-sized enterprises in the Community, established both DG XXIII and a process of evaluation of the impact on bussiness of national and Community administrative and legal procedures.

Since then the Council has stressed on several occassions the importance of legal and administrative simplification for the creation and development of SMEs.

> Council Resolution
> of 10 October 1994
> The Council of the European Union,
> EMPHASIZES that it is a priority concern of enterprise policy in the Community.... to improve the legislative and administrative environment for enterprises.....
> CONSIDERS it necessary to step up action in favour of SMEs to improve and simplify the legislative and administrative environment.....

At the end of 1993, the Commission's White Paper on Competitiveness and Employment further emphasized the importance of a simple administrative and legal framework for SME's and their key role in job creation.

The importance of SMEs for growth and employment has been widely aknowledged in all OECD countries and specific policies for their creation and development have been established, with a large variety of instruments including easier access to capital, training or technology. In all countries it has been recognized that the complexities of the administrative and legal environment might be detrimental to SMEs, and within the general processes of legislative and administrative and legal simplification, special chapters have been devoted to SMEs.

Within the EC, existing policies for SME's have been consolidated in the framework of the Multiannual Programme in Favour of Enterprises (Decision 93/379 of June 1993). In the area of administrative simplification the EC action takes place along two main lines:

- **the first line of action deals with the examination of new EC legislation having an impact on bussiness and devoting special consideration to the impact on SMEs;** the Council Resolution 93/C331/02 on administrative simplification for enterprises, specialy small and medium-sized enterprises, emphasized the importance of the Commission's impact assessment system and invited the Commission "to ensure that full acount is taken of the costs and benefits to enterprises by preparing an impact assessment on all Commission proposals which may give rise to a substantial burden for enterprises". The ex-ante assessment of the impact on bussiness of community legislation, started soon after the 1985 decision to create the Internal Market, has been improving over the years, and these assessments, that usually involve a consultation of representative organisations of bussiness and other social and economic agents, are available for all relevant recent EC Directives and Regulations.

  Current practices establish that the annual Commission's Legislative Programme lists the proposals with a possible impact on bussiness and starts the assessment procedure, including well defined consultation steps.

  The impact assessment procedure has already proven to be a useful instrument to answer bussiness requests for legislative simplification, inducing changes of the initial EC proposals. The special needs of SMEs have often been given consideration (inducing generally the introduction of business size thresholds for the application of some legislations).

- **the second line of action deals with the development of "best practice" legal and administrative environments for SMEs and businesses in general, by promoting exchange of national experiences.** Most member countries are currently adopting policies for administrative simplification for enterprises (and particulary for SMEs) and it is widely recognized that **local, regional and national administrative environments are extremely complex and constitute an obstacle to the creation and development of SMEs far more important today than the complexity of EC directives and regulations.**

  The Integrated Programme in Favour of SMEs and the Craft Sector states that concerted actions are required in order to stimulate the exchange of "best practice" in the field of administrative and legal procedures, and has therefore set up a Group composed of representatives from organisations in the Member States who have responsability in respect of administrative simplification. This Group will consult high level representatives from business, specially on problems faced by SMEs. A first open Forum on the administrative and legal framework for the creation of new enterprises will take place in June 1995.

While these two lines of action (of the Commision and in particular of DG XXIII) have been consolidating over the years and are moving in appropiate directions (both to improve the development process of new legislation and to help simplify the existing legal and administrative framework), and while positive results have already been achieved, further strenghtening is required, in regard to the complexity of the issues and the importance of the stakes, in terms of growth, employment and competitivity.

As a matter of fact, SMEs play a fundamental role in the European economy:

The European production structure is characterized by the existence of a large number of medium size enterprises (250 to 50 employees), small enterprises (50 to 10 employees), and micro enterprises (less than 10 employees).

The role of SMEs in the EU economy

Size of enterprises	Enterprises (% of total)	Employment (% of total)	Sales (% of total)
Less than 250 employees	99,8	65,6	62,7
Less than 50 employees	98,8	50,0	43,0
Less than 10 employees	92,7	31,5	23,8

Source: EC - DG XXIII

The legal and administrative framework established by European, national, regional or local industries induces operational costs in business and establishes constraints to their activities. **These costs and constraints often interfere with market competition processes between enterprises either according to their size or according to their location.**

Essential factors for the development of SMEs are considered to be access to capital and production flexibility (including easy access to other production factors). The legal and administrative framework could possibly enhance flexibility and access to capital by SMEs, but at least it is expected not to inhibit their creation and development by the costs and constraints that it introduces.

Administrative costs are not proportional to the size of the firms; they are closer to be a fixed cost than a variable cost. Their relative weight in the cost structure of a firm decreases with its size; there are obvious economies of scale functioning in relation to these costs.

The average costs of administrative burdens per size class, enterprise and employee in the Netherlands, 1993 (in ECU).

Number of employees	Costs per enterprise	Costs per employee
0	2,800	0
1 - 9	12,100	3,500
10 - 19	20,500	1,500
20 - 29	47,100	1,400
50 - 99	62,000	ooo
100 or more	171,000	600
All size classes	9,800	1,800

Source: "Administratieve lasten bedrijven 1993" (Administrative Burdens in enterprises 1993), EIM Small Business Research and Consultancy, 1994.

The consequence of these considerations is rather obvious: **any decrease of the financial costs incurred due to the legal and administrative framework, is beneficial to the development of SMEs.**

As to the other constraints introduced by the legal and administrative framework, it is evident that in principle they are the same for any enterprise, disregarding their size, as they simply establish the fundamentals of the markets. Nevertheless, in some cases, the framework establishes constraints implying long term changes and requiring capital investments (for new equipments, for R&D) and this requires access to capital; in other cases the framework establishes rigidities in the choice of products or on the use of factors of production, including labour, thus limiting the margins for flexible reaction to market changes. As access to capital and flexibility are essential for the development of SMEs, constraints operating in these fields may constitute serious obstacles for them.

Again the consequences of these observations are obvious; **any reduction of legislative and administrative constraints imposing capital investments or limiting flexibility of production conditions, will stimulate the development of SMEs.**

Thus a careful legal and administrative framework that minimizes its costs to enterprises, that doesn't impose large capital investments and that does allow for a maximum flexibility in production operations, will meet SMEs needs, will facilitate their development, and consequently will promote employment and growth in Europe.

The possible instruments for the development of this favourable framework for SMEs could be classified into three main groups:

- **simplification** of legal and administrative bureaucratic processes (including "user friendly" communication procedures between Administrations and enterprises), of interest to all firms, but having a proportionally higher impact on costs incurred by SMEs;
- **compensation** for costs incurred in complying with some legal and administrative tasks (e.g. compensation for collecting VAT or social security contributions), again of general interest to all firms, but with higher relative impact on SMEs;
- **thresholds** for the application of some legal and administrative obligation (e.g. establishing a minimum size limit for enterprises having to charge VAT), a procedure that requires different thresholds for different purposes and raises certain operational difficulties (mainly due to the natural unwillingness to cross the thresholds in close -to-the-limit situations)

The first set of instruments is widely accepted by all economic and social agents and is strongly supported by policies favorable to an improved functioning of market mechanisms. As legal and administrative costs and constraints are mainly the result of the complex interaction and accumulation of regulations, **simplication is a permanent policy rather than a targeted instrument.**

The second set of instruments, involving the compensation made by Administrations for services performed on their behalf by other economic agents (namely,

firms), is justified from a market point of view. Collecting taxes, filling statistical forms or providing information implies costs for firms, for activities that are not directly relevant for their operations but have a direct interest for Administrations. Nevertheless, mainly for historical reasons, **direct financial compensation by an Administration remains the exception rather than the rule, and is generally replaced by the provision of public services to help enterprises, specially SMEs, to comply with these obligations.**

The third set of instruments is obviously the one that more directly deals with SMEs, as it aims to differentiate companies on the basis of their size (measured either by employment, or turnover, or capital stock, or other relevant variables). Thresholds limiting the set of constraints on SMEs (on accounting, on social prescriptions, on environmental protection, on health and hygiene controls, etc) work obviously in favour of the development of these firms, but often create opposition from other social agents (trade unions, consumers, environmentalists, large firms, etc). While it is generally recognized that some competitive disadvantages derived from size (like administrative and legal costs) should be compensated, economists tend to recommend direct or indirect compensations, rather than thresholds (that may produce incentives for creating artificial market distorsions). As a consequence of these considerations, **thresholds tend to be used mainly for pragmatic reasons** (e.g. in order to reduce the costs of enforcing a certain legislation) **and in areas where their effect on market competition is expected to be limited** (e.g. for activities with essentially local impacts).

A legal administrative framework favoring the creation and growth of SMEs should probably combine simplification, compensation and thresholds, and requires concerted action between all Administrations (local, regional, national or at Community level).

Of the three sets of instruments that are in principle available (simplification, compensation and thresholds) in order to promote a legal and administration environment favorable to SMEs, only two are presently used at EC level; **compensation** for costs incurred in fullfilling public duties can only be applied at local, regional or national levels where taxes are collected (while the EU can provide some financial aids to SMEs, these cannot be associated with the compensation for the legal and administrative burden but rather with the compensation for other handicaps of SMEs).

The introduction of **simplification** as a way of facilitating the development of SMEs, is mainly performed, at EC level, ex ante, before the approval of a new Directive or Regulation, through the formal process of impact assesment, or, ex-post, through specific actions (amendments of Directives or Regulations, codification and consolidation of legal tests, etc).

As to **thresholds**, they have been introduced or envisaged in several Directives (on Company Law and accounts disclosure, or statistics, and on some aspects of social legislation and of environmental and consumer protection), often during the process of ex-ante impact assesment, and mostly based on pragmatic considerations.

2. Proposals for legal and administrative simplification

2.1. General level

As for all other firms, the legal and administrative framework affects SMEs at all stages of their life, from enterprise creation to its disolution. In the case of SMEs, some of these phases are particularly sensible: when capital is scarce, at the creation stage, costs and constraints are specially heavy for SMEs; when transmision of property occurs (specially in the case of inheritence) the close relationship between company and personal wealth often complicate issues.

At these crucial points, the weight of local or national administrative and legal procedures, is essential, and, up to now, Community legislation is not creating any further obstacles. As a matter of fact, relatively recently the Community policy has moved in the direction of establishing Recommendations (for taxation of SMEs or for transmision of companies) that go in the direction of orienting the administrative and legal simplification of SMEs at these local and national levels.

In line with the principle of subsidiarity, **Community legislation has been essentially oriented, in its enterprise policy, towards promoting "europeanization" or the access to the European Internal Market under conditions of perfect competition.**

At this general level of enterprise policy, the following subjects have been identified by representatives of SMEs, as requiring urgent action for simplification or for the introduction of thresholds:

- Directives on Company Law and financial reporting;
- Regulation on the European Economic Interest Grouping;
- Statistical reporting and other reporting requirements,

a) Community Directives on Company Law

Coordination of company law (following art. 54.3 g. of the Treaty of Rome) has lead to a number of Directives setting out the disclosure of information which is essential regarding the formation of a company incorporated with limited liability, operating in other Member States; the minimum capital requirement, and the rules governing changes of this capital throughout the company's existence, the measures relating to the protection of shareholders and of third parties in the case of mergers or of division of one company into several companies, and ensuring that accounts are certified every year according to similar criteria.

With the exception of a Directive on single member limited liability companies, the rest of the EC Company Law Directives has been tailored to the needs of large limited liability corporations with activities in several countries and wide responsabilities towards shareholders and creditors that had to be protected.

In order to avoid creating overcomplex functions in SMEs, the Company Law Directives were the first to introduce the threshold concept in Community legislation. In the Fourth Directive on financial reporting (78/660/EEC), limited disclosure of accounts (abridged accounts) or no need for an outside audit are envisaged for SMEs, and thresholds are defined in terms of net turnover, balance sheet total and average number of employees.

However, only a few member countries have fully implemented the derogations foreseen with these thresholds, and the Council has rejected in past proposals for their mandatory application, as well as proposals to increase their levels (beyond simple inflation-corrective adjustments). Furthermore, in the transposition process, many Member States have imposed more stringent and complex rules (e.g. increasing minimum capital requirements or imposing further accounting rules). **The transposition process has added many bureaucratic complexities**, and while it is true that the Directives have increased comparability of situations and in particular, that the Accounting Directives have raised the level of financial reporting in the EU, the administrative burden for enterprises, and specially for SMEs, has rather increased than been simplified.

As an end result of this legislative process, initiated well before the Single European Act, there is a general situation of dissatisfaction among SMEs, mainly against the Accounting Directives and probably also against the lack of sufficient success of the process followed to simplify the national frameworks in relation to Company Laws.

The adoption of other legal solutions to conduct economic activities (partnership rather than limited liability companies), or the decision not to comply with certain legal obligations (like disclosure of financial accounts) are frequent SMEs answers to this broadly unsatisfactory situation.

The need of simplification of Company Laws applicable to SMEs has been widely recognized, and justified on the basis of the principles of subsidiarity and proportionality (Report of the Commission to the Council of nov. 24, 1993, COM 93/545), but previous attempts to act in this direction have faced political obstacles (e.g. a proposal to ammend the Fourth Directive wich would have allowed Member States not to apply the Directive to small closely held companies was rejected by the Council in 1990, mainly on the basis that in matters of disclosure of accounts, to distinguish between SMEs and large companies would distort competition).

Since the adoption of the core of this European legislation, two broad developments have taken place that could be useful to orient its future evolution:

- the complete freedom of capital movements and the interconnection of capital markets, that requires uniform accounting standards and disclosure levels for listed companies, more stringent than those established by the existing Directives;

- the new approach to the integration process including minimum standards, mutual recognition and increasing systems competition.

These two developments point to the need to move in the direction of stricter, but increasingly harmonized rules for listed companies, and for simpler minimum requirements for non-listed companies (in majority, SMEs).

While proposing new legislation for listed companies falls outside the scope of the Groupe for Administrative Simplification, proposals for simplification of minimum requirements in the framework of a mutual recognition approach are developed hereafter.

The Group on Legislative and Administrative Simplification considers that a substantial increase of the existing thresholds for SMEs established in the Fourth Directive would lower the administrative burden for many SMEs without disturbing the existing equilibrium between users and providers of financial information.

Proposal 1

Amendment of the Fourth Directive on Company Law (78-660 EEC) in order to substantially increase the thresholds for abridged accounts, limited disclosure or outside auditing, and to reduce in general disclosure requirements. Additionally, Member States may determine that the annual accounts can be simply made available at the company's registered office for inspection by economic and social agents with justified interest.

While the possibilities of futher reducing the burden on SMEs of existing EC Company Laws is rather limited, it appears to the Group that the europeanization of SMEs should be made easier by the introduction of new Community legislation dealing with the simplification of some legal and administrative problems that are particularly felt by them.

Proposal 2

The Community should envisage the urgent introduction in its legislative program, of new Directives on Company Laws of specific interest for the development of SMEs, such as on the statutes of a European SME Company, or on the European functionning of financial institutions aiming at easing SMEs acces to capital (e.g. organisations providing mutual guarantee).

Proposal 3

Amendment to the Second Directive (79-91-EEC) providing that the relatively strict rules of capital protection be relaxed on condition that the shareholders guarantee the commitments of the company (e.g. under these conditions, Art. 19 (1) b. should allow the aquisition of its own shares at a higher percentage that currently allowed, Art. 23 should exempt from the pohibition of advancing funds for acquiring company shares, or Art. 24 should allow the company to accept its own shares as security).

b) Regulation on the European Economic Interest Grouping

A Council Regulation 2137/85 of July 1985 established the European Economic Interest Grouping (EEIG), an original legal instrument governed by Community - wide laws which allows Community - wide company cooperation (developing joint transnational projects while maintaining national legal status). Over 600 EEIG have been established

during the last ten years, but one could probably have expected a greater success for an instrument that provides the first legal support for transnational networks of SMEs.

The fact is that this Regulation is constrained by a set of restrictions on maximum size or on the capacity to run the operations (activities remain with the individual companies creating an EEIG). The simplest solution to make of the EEIG the instrument actually needed by business to develop their trans-european activities, is to reduce or eliminate these restrictions.

For a number of years, the Commission has been promoting new Regulations in the area of Company Law dealing with the Statutes of the European Company, the European Associations, the European Cooperative Society, and the European Mutual Society. These Regulations are to be coupled with corresponding Directives supplementing the statutes with regard to the envolvement of employees. Lengthy negotiations have not overcome the difficulties raised by these proposed Regulations and Directives.

Most probably the extension of the EEIG, could set the path towards finding a solution to this dead-look situation.

The Group on Legislative and Admministrative Simplification considers that the simplification of the rules of operation of the EEIG could greatly contribute to the development of joint activities between European SMEs favoring the development of their operation in the Single Market, and therefore stimulating their growth and competitiveness.

Proposal 4

Amendment to Council Regulation 2137/85 on the European Economic Interest Grouping in order to transform this associative form into a modern legal instrument helping to develop the economic activities of the group members and to enhance the result of these activities. The transformation envisaged should reduce or eliminate existing operational restrictions for members or the grouping itself.

b) Statistical and other reporting requirements

It order to fullfill statistical obligations and to adapt the statistical system to the functioning of the Internal Market, the Council has issued regulations that have created concern among SMEs, in so far as the relative cost of providing statistical information is higher the smaller the firm.

Council Regulation 3330/91 EEC on the statistics relating to the trading of goods between Member States, was neccessary in order to meet the statistical void created by the elimination of intra-trade customs in the Internal Market. Further regulations by the Commission introduced thresholds for enterprises using simplified declarations or even dispensing from declaration.

Most of SMEs have therefore only to incur small costs for these operations (and it should be remembered that while, in the previous system, the purely statistical reporting

function was performed by the custom's officers, cost for preparing documentation and facing delays, were probably of the same order of magnitude)

Special difficulties and extra-costs have been observed in Member States that have not properly coordinated the preparation of this trade information with the mechanism of perception at destination of the VAT in the transitory regime (ending in dec. 96) that requires also to provide detailed information related to intra-trade.

While costs are proportionally higher for SMEs, the final value of the quality of trade statistics is also proportionately lower for them. This inverse relation between cost and utility for SMEs is common to all Community statistical efforts including other Regulations like:

- Council Regulation 2186/93 EE on Community coordination in drawing up bussiness registers for statistical purposes;
- or the proposed Council Regulation on structural bussiness statistics.

The Group on Legislative and Administrative Simplification considers that the reduction of the burden of existing statistical and other reporting requirements is of great importance for all enterprises and specially for SMEs.

Proposal 5

Amendment to Council Regulation 3330/91 EEC on intra-trade statistics in order to raise the existing thresholds for SMEs to the extend possible, without sacrifizing the representative sampling quality of Community statistics.

Furthermore, as it appears that the coordination between statistical and other reporting requirements and procedures is very different among Member countries, the Group on Legislative and Administrative Simplification considers that an exchange of best practices is both necessary and urgent in this area.

Proposal 6

Recommendations to be issued on matters of statistical and other reporting requirements adressed to enterprises, and particularly to SMEs, based on existing national best practices, inluding among other subjects:

- **simplified joint-handling of intra-trade and VAT reporting;**
- **simplification of procedures for establishing Business Registers or to produce structural business statistics.**

2.2. Specific level

The Group on Legislatice and Administrative Simplification has analized Community Legislation dealing with employment and social affairs (including health and safety), food

hygiene, environment and machine standards. This legislation sets constraints in the operation of enterprises as a result of growing needs for protection of workers, consumers or the environment.

The Group recognizes that this set of legislation establishes the ground rules for market functioning and therefore that it should apply to all enterprises, whatever their size.

The EU cannot envisage applying a different social legislation to SMEs.

In the case of the health and safety of workers, the declaration on Art. 118 A (2) of the EEC Treaty, annexed to the Final Act, is rather explicit: "The Community does nor intend, in laying down minimum requirements for the protection of the safety and health of employees, to discriminate in a manner unjustified by the circumstances, against employees in small and medium-size understakings".

In the area of food hygiene, while it is generally recognized that SMEs in this sector face many problems due to the complexity of rules, the General Directive (93/43/EEC) does not establish a special treatment for small-scale and traditional food production and therefore considers that, in principle at least, SMEs should cumply with the same requirements as large-scale food enterprises.

Similar considerations, would apply to the area of environmental protection.

As the costs and constraints introduced by this legislations are proportionally higher for SMEs, it is clear that the position of SMEs is extremely favourable towards legislative and administrative simplification of the framework for enterprises.

Thus, all specific simplification proposals made in the sectorial chapters of this report, are of inmediate value for SMEs and will favour their future growth.

The legislation on health and safety, on food hygiene or the environment generally introduces operations of assessment and evaluation, control and reporting in highly complex areas, that require expertise that is not usually available in SMEs. Entrepeneurs are often obliged to incur in expenses for hiring consultants for expert advice.

This legislation often deals with specific characteristics of the production process and forces the enterprises to adopt some equipments or organizational set-ups requiring new capital investments.

In both cases, EC legislation has frequently introduced thresholds, either to reduce some technical constraints (without reducing the level od protection of workers, consumers or the environment) or to slow down the need for transformation investment in SMEs.

Thus, the framework Directive on health and safety of workers (89/391/EEC) states, with reference to the size of the firm, that an employer may designate himself as safety officer provided he is competent, and his duties to inform workers may be modified, but the same standards for health and safety have to be attained in SMEs as in any other enterprise.

Similarly, the Community veterinay legislation includes many derogations in respect of requirements for construction, facilities and equipment of establishments (for fresh meat and poultry meat, for minced meat, milk and milk-based products,egg products,.etc) but there are no derogations for hygiene requirements.

The Group of Legislative and Administrative Simplification considers that in all these sectorial legislative areas, what is essential is the deep simplification of constraints and the reduction of administrative costs for all enterprises, including SMEs.

The Introduction of thresholds for their application should be limited to rules establishing constraints on production processes that do not affect safety of workers, the basic health and hygiene requirements, or environmental objectives and standards.

Proposal 7

In order to keep the perfect functioning of markets and equivalent levels of protection of workers, consumers or the environment, strict criteria should be applied to the establishment of thresholds for SMEs. Member States should be rather encouraged, by appropiate Recommendations based on Best Practice experience, to develop institutional systems for helping enterprises, and particularly SMEs, to comply with the assessment and reporting constraints imposed by the social legislation, the legislation on health and safety, food hygiene and the environment.

2.3. Other procedural proposals

While it is well established that SMEs are specially handicaped by legislative and administrative complexity, the contribution of EC legislation to this complexity is less relevant than those of national, regional and local legislations and administrative practices.

Proposal 8

The EC could further contribute to the simplification of the legislative and administrative environment of SMEs, by intensifying the diffusion of Best Practices by way of Recommendations, in areas related to the application of EC legislation, as well as in areas concerning only national legislations and administrative practices.

It is also well established that for new legislation, the ex-ante assesment process is essential, and that it is at this stage that upmost consideration should be given to the costs and constraints for enterprises (specially SMEs), as well as to the potential benefits.

Proposal 8

In order to limit tho amount of new legislative and administrative costs and constraints for enterprises, the Community should further intensify the ex-ante impact assessment procedures, allowing for an increased consultation with representatives of SMEs, and should rapidly move in the direction of adopting and

publishing detailed cost-benefit analysis centered on impacts on growth, employment and competitivity, with a special reference to SMEs.

Summary Report to the Legislative and Administrative Simplification Group on the problems connected with the obligation to modify machinery on the basis of Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (OJ No L 393, 30.12.1989, pp. 18 et seq.) -scope - impact and cost - proposed solutions

by

Prof. Radandt

Professor Radandt 10 April 1995

SUMMARY REPORT

for the Legislative and Administrative Simplification Group on the problems connected with the obligation to modify machinery on the basis of Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (OJ No L 393, 30.12.1989, pp. 18 *et seq.*) - scope - impact and cost - proposed solutions

Introduction

Article 118a of the EEC Treaty, as amended by the Treaty on European Union, empowers the European Council to adopt, by means of so-called health and safety Directives, minimum requirements that serve to improve the general standard of health and safety at work. Article 118a of the EEC Treaty was also the basis for Directive 89/655/EEC. Article 4 of that Directive establishes an obligation to ensure that both new and used machinery complies with the health and safety requirements.

There are numerous grey areas with regard to details of the obligation to modify machinery, especially as laïd down in Article 4(1)(b) of Directive 89/655/EEC.

The problems derive from the discrepancy between the situation actually prevailing in the relevant trades and industries and the ideal situation as set out in the various Directives and from the fact that adaptation, if at all possible, is often a complex process. If the ideal and the reality are to be compared, it is necessary both to understand the philosophy and strategy underlying the Directive in question and to evaluate the substantive provisions and approaches hitherto adopted.

This cannot be treated exhaustively in the present summary report; for that reason, the report is based on a few illustrative examples.

Philosophy and strategy of the Directive as derived from Articles 118a and 100a

Article 118a, inserted into the EEC Treaty by virtue of the Single European Act, crystallizes the rules governing the social policy of the Community. It emphasizes the importance of workers' health and safety as a key component of social policy in Europe.

Guaranteeing a better level of protection of the safety and health of workers is akin to a fundamental human right. Accordingly, Article 118a is based on the advantage principle, which allows the Member States to maintain or introduce more stringent measures for the protection of working conditions. Its aim is to permit greater flexibility in adapting the European rules to the situation that obtains in a given Member State. The national legislature is thus meant to retain enough scope to harmonize the European rules with the other legislation in its own statute book.

An examination of the substance of various Directives pursuant to Article 118a reveals that in practice part of this scope has been severely curtailed.

The interpretation of Article 118a poses further problems. Its defined purpose is to improve the "protection of the safety and health of workers". The legal instrument designed to bring about harmonization in this domain focuses on the efforts to encourage improvements, "especially in the working environment".

The adverb "especially" implies that the working environment is not the only area in which the Member States set themselves the objective of harmonizing the existing conditions in order to protect the health and safety of workers.

The term "working environment" comprises not only health and safety at places of work but also ergonomic measures, the organization of production processes and relations between members of the workforce.

Because of the broad and unspecific nature of the term "working environment", standards can satisfy the need for interpretation or specification in a number of areas that fall within the scope of Article 118a, as long as such standards regulate the various aspects of the environment of the work place, including health and safety at work, in response to a Commission mandate.

The point is that new harmonized standards are derived from the health and safety targets formulated in the Directives and define these targets in greater detail.

Article 17 of the framework directive 89/391/EEC provides for technical adjustments to the individual Directives to take account of:

- the adoption of Directives in the field of technical harmonization and standardization, and/or

- technical progress, changes in international regulations or specifications, and new findings.

Article 17 of the framework Directive establishes an indirect link with standardization. This link clearly derives from the mutually complementary nature of the framework Directive based on Article 100a and that based on Article 118a. Since the relationship between these two Directives varies, it follows that the nature of the link with standardization in the individual aspects of the working environment will also be subject to a variety of factors.

Decisive factors in determining the practical impact of the interpretations and specifications that are expressed in standards (the adjustment issue) are the structure, or basic conditions, of the "Directive network" and the national instruments of implementation.

The Directives governing health and safety at work represent a comprehensive complex of laws. They lay down the general and specific regulations that are being phased in until they apply to every employment sector in the European Union, a process initiated on 1 January 1993. The intended aim is to cover a maximum of risks with a minimum of Directives.

The following aims underlie the Directives deriving from Article 118a:

The **framework Directive** is the keynote instrument in which the general principles and obligations relating to health and safety in all types of work are set forth. It expressly provides for the adoption of individual Directives to supplement it.

The **individual Directives** cover specific requirements of particular groups of employees or all aspects of health and safety in a specific occupation. Some Directives apply to areas of economic activity where employees run the highest risk of having an accident at work or of contracting an occupational disease.

Both the framework Directive and the individual Directives should be compatible with other European regulations.

This is especially true of the Directives based on Article 100a, which apply within the context of free movement of goods and lay down essential health and safety requirements for the design, manufacture and marketing of products.

Because of these objectives, overlapping occurs between the framework Directive and the specific individual Directives in the various regulated areas. Some of the general subject matter of the framework Directive is repeated, supplemented or made more explicit in the individual Directives.

But conflicts can also arise when it comes to incorporating products, such as machines, equipment and installations, into the working environment and work place to satisfy the requirements of Article 100a, because standardizing (through harmonization) one element of a complex system without considering its linkage with the other parts of the system or indeed the interaction between the parts of the system can mean jeopardizing the quality, in terms of health and safety protection, of the overall system.

The framework Directive places special emphasis on the human factor. To this end, it requires employers to design work places and to choose work equipment as well as working and production methods with special reference to the human qualities, capabilities and knowledge of their individual employees.

This approach takes the Directive a step further than most of the legal provisions in force in the Member States. It also implicitly contains an obligation upon employers to assess the risks to health and safety at places of work and to decide on the measures needed to protect their employees.

It is this very obligation that has given rise to the discrepancies between the ideal and reality.

The individual Directive on the use of work equipment (89/655/EEC) plays a special role in this area by following on from the directives adopted pursuant to Article 100a on the marketing of such products and adding a set of minimum requirements to govern their use.

The proposal for a Directive amending work-equipment Directive 89/655/EEC is intended to focus more clearly on the safety of installations and the idea of considering the system in its entirety. The definition of work equipment is broad and goes far beyond the concept of machinery. Work equipment involving a specific risk may only be used, repaired, modified, maintained and serviced by workers specifically designated to do so. If only for this reason, the annex listing minimum requirements does not fit the definition.

The divergent formulations of the individual directives with regard to the adaptation of their annexes are also an indicator of the differing importance ascribed to standardization in the various areas of health and safety at work. This importance depends primarily upon whether a complementary directive based on Article 100a actually exists or is deemed desirable or feasible. As a rule, the link with standardization is more evident in the individual directives complementary to those deriving from Article 100a.

To that extent, standardization has a very significant impact on the work-equipment Directive 89/655/EEC.

Standardization has already been the subject of manifestations of political will in the form of several Council Resolutions. The main decisions are undoubtedly those of 7 May 1985, on a new approach to technical harmonization and standards and of 18 June 1992 on the role of European standardization in the European economy.

In its resolution on the new approach, the Council adopted political guidelines, which had become necessary for several reasons related to the practice adopted up to that time in approximating laws on technological matters. The Council emphasized the "importance and desirability of the new approach, which provides for reference to standards - primarily European standards, but national ones if need be, as a transtional measure - for the purposes of **defining the technical characteristics of products**".

Although it is theoretically accurate in legal terms to say that compliance with standards is not a mandatory requirement, there is in practice a strong incentive to abide by them. The

advantages of applying standards are clearly understood by manufacturing industry: standards are hallmarks of quality and safeguards against complaint.

Documenting the state of the art in this way puts the ball in the manufacturer's court.

In its memorandum on the role of standardization in relation to the Directives issued pursuant to Article 118a of the EEC Treaty, the European Commission (DG III and DG V) referred to the Council Resolution of 18 June 1992, particularly to the Council's invitation to the Commission,

> "where appropriate, to apply the principle of referring to European standards in future draft Community legislation".

Furthermore, standards impart essential specialized technical and scientific knowledge. In view of the rapidity of technological advances, this information is important to business and industry.

According to the definition used in the Directives that follow the new approach, "harmonized standards" are technical specifications drawn up by a European standards organization on the basis of an instruction issued by the Commission pursuant to Directive 83/189/EEC and in accordance with the general Directives on cooperation between the European standards organizations and the Commission adopted on 13 November 1984.

Problems arising from the interpretation of terms

The directives drawn up in accordance with the new model contain some key concepts which are of fundamental importance to the uniform and effective application of such directives. Since the aim of these directives is to achieve complete harmonization, reference must be made here to the fundamental importance of the general clause on entry into circulation or on entry into service. These terms have to be precisely defined so that all Member States and all of the enterprises concerned are aware of the rights they acquire and the obligations they incur throughout the Community by virtue of these directives.

This is of particular importance with regard to the connection between the **"machines Directive"** and the **"work-equipment Directive"**.

ENTRY INTO CIRCULATION

Entry into circulation is the initial placing, whether or not in return for payment, of a product covered by the Directive on the Community market for sale and/or use in the territory of the Community.

A product is put into circulation when, following its manufacture, it is placed on the market and/or used in the territory of the Community. Since the term "entry into circulation" only describes the initial placing of a product on the Community market to be sold or used within

the territory of the Community, the Directives apply only to products newly manufactured in the Community and to new or used products imported from third countries.

There are two types of introduction:

- surrender of a product:

The manufacturer, his agent established in the Community or the importer transfers the product to the person who places it on the Community market or surrenders it as part of a business transaction, with or without receiving payment, to the consumer or end user, irrespecive of the legal basis of the surrender, be it sale, hire, let, lease, gift or other form of legal transaction. At the time of surrender, the product must comply with the requirements of the directive.

- offer to surrender:

The manufacturer, his agent established in the Community or the importer offers a certain product directly to the end user or consumer in his own marketing chain. From that time on, the product must comply with the requirements of the directive.

A directive applies to products put into circulation before the time of surrender, or offer to surrender, if the directive contains no provisions regarding entry into service. If it does contain such provisions, products put into service before that time do not fall within the scope of the directive.

For products complying with national regulations at the time of entry into force of the relevant directive, the directive may stipulate a transitional period during which the entry into circulation and/or service of such products will remain admissible.

A product in the manufacturer's or importer's warehouse is essentially deemed not to have been put into circulation unless otherwise envisaged in the relevant directive.

The provisions on entry into circulation apply to each individual finished product covered by a directive, irrespective of the time and place of manufacture and regardless of whether it has been custom-built or mass-produced.

ENTRY INTO SERVICE

Entry into service is the initial use of a product covered by a directive by its end user within the territory of the Community.

Entry into service takes place when a product is used or operated for the first time.

In addition, however, the Member States are entitled to enact provisions governing installation, as long as that does not involve any modification of the product manufactured in accordance with the relevant directive.

If a product is manufactured for the manufacturer's or importer's own use or is imported for that purpose from a third country, it becomes difficult to distinguish between entry into circulation and entry into service. The conformity requirement under the directive begins with the first utilization of the product.

TRANSITIONAL PERIODS

Most directives on the new model lay down a transitional period in their concluding provisions.

This transitional period must be distinguished from any that may be laid down in harmonized standards, which stipulate the date until which the old version of the revised standard may still be applied.

The transitional period begins with the entry into force of a directive and ends on a date stipulated in the same directive. During the interim period, national regulations continue to apply alongside the national legislation enacted to transpose the Community directive.

During that period, the manufacturer (or his agent established in the Community) has the choice in a Member State to put into circulation or service, as appropriate, either a product complying with the directive or a product complying with national regulations.

Once this time has elapsed, only the Community directive applies. All divergent national regulations that hitherto covered the same products and the requirements applying to them are rendered invalid.

With regard to the purposes of the transitional period, the Community, as the legislator, has charged the Member States to maintain their national regulations. This distinguishes the new-style directives from the earlier directives on optional harmonization, in which the Member States were permitted to use the directive as their sole yardstick.

This obligation to maintain existing regulations is interpreted as affecting not only all binding requirements imposed by a Member State but also every national specification with which manufacturers comply voluntarily.

Numerous products fall within the scope of several directives covering different risks. In such cases there could be confusion among trading standards authorities and users during the transition period.

Because the user (operator) in particular has to proceed on the basis of the results of his risk assessment, it is especially important that he should be familiar with the relevant constraints (rules). That is a matter for the Member States to regulate.

At the end of the transitional period, the Member States are required to repeal the domestic regulations maintained by them and to apply the Community Directives to all products, irrespective of whether or not these were subject to a previous regulation.

Once the transitional period has elapsed, such products are governed exclusively in every Member State by the legal provisions enacted to transpose the Directive and the requirements they prescribe. All other provisions are null and void. The consequence of this is that products manufactured in accordance with national regulations before or during the transitional period may no longer be put into circulation or service in the Community.

Substantive links between -

the framework health and safety Directive, the work-equipment Directive and the machines Directive

In the context of the machines Directive, the Directive on the use of work equipment is of particular relevance. It is an individual Directive that serves to flesh out the framework health and safety Directive.

The short form **"health and safety Directive"** stands for the Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC).

The short form **"work-equipment Directive"** stands for the Council Directive of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (89/391/EEC).

Since the social structures in the individual states are still not yet comparable, the perspective from which the safety of machinery and technology are viewed in the various Member States is not always the same.

The framework health and safety Directive and the work-equipment Directive therefore have a particularly direct bearing upon the safety of machinery. The former governs the general organization of health and safety at work, including the obligations and rights of employers and workers.

The latter, serving as a **social counterpart** to the machines Directive, so to speak, deals with the use of work equipment, although its scope is broader.

Given that the legislation of EU Member States on health and safety at work differs widely and needs improvement, the aim is to harmonize protection levels while making desirable changes. That is why the framework health and safety Directive cannot justifiably restrict the level of protection already achieved in individual Member States.

The employer is essentially required to ensure the protection of his workforce. This also covers the selection of appropriate work equipment.

To this end, the employer is required to keep abreast of the latest technological developments and scientific findings relating to the risks that exist in his enterprise. The human factor must also be considered in the work context, especially in the organization of working conditions, such as the alleviation of monotonous work and of work rates predetermined by the operating speed of machinery.

One consequence of this requirement is certainly that new knowledge is translated into action. **The work-equipment Directive** is an individual Directive intended to supplement the framework health and safety Directive. Work equipment comprises all machines, apparatus, tools or installations used at work. The work-equipment Directive has a broader scope than the machines Directive, being applicable both to new work equipment and to that which is already in use.

Article 4 of the work-equipment Directive is especially relevant to the machines Directive.

Under Article 4, the employer (the operator within the meaning of the machines Directive) may:

- with effect from **1 January 1993**, obtain, or provide workers with, only such work equipment as complies with the relevant Community directives, which of course includes the machines Directive, and

- continue after **1 January 1997** to use work equipment provided to workers before **31 December 1992**, i.e. four years previously, only if it complies with the minimum requirements laid down in the Annex to the work-equipment Directive.

So the following regulations apply to the employer (operator):

With immediate effect, he may only provide his workers with such new machinery as complies with the essential health and safety requirements of the machines Directive.

Machinery already in use on **31 December 1992** may continue to operate.

Such machinery, however, must be brought into line with the minimum requirements that are listed in the annex to the work-equipment Directive by **1 January 1997** at the latest; in other words, he must modify the machinery if necessary.

The minimum requirements in the annex to the work-equipment Directive are continually updated, i.e. supplemented or amended, by the Council to take account of progress in harmonization (directives and standards) and technical developments.

This means that interpretation is already required on the basis of the most recent technology relating to the aim of health and safety.

Compliance with the minimum requirements listed in the annex is a mandatory obligation. But simple compliance with the minimum requirements can be an onerous and complex option, since the burden of proof rests with those who abide by these safety criteria, which are

sometimes abstractly worded. At the same time, this option permits the detection of "non-standardized" but product-orientated solutions.

The voluntary application of standards harmonized within the Community alleviates the burden of proof for the compliant manufacturer.

The following results emerge from an examination of the obligations of machinery and work-equipment operators laid down in the various Directives:

According to Directive 89/391/EEC, the operator must avoid risks (Article 6(2)(a)), combat risks at source, which includes safety modifications to machinery and work equipment (Article 6(2)(c)), and adapt to technical progress (Article 6(2)(e)).

He must evaluate the risks to the safety and health of workers in the choice of work equipment (Article 6(3)(a)).

Directive 89/655/EEC is an individual Directive as referred to in Article 16(1) of Directive 89/391/EEC, for which reason the provisions of the latter are fully applicable to the use of work equipment, irrespective of specific provisions contained in the work-equipment Directive.

This also makes the requirement to adapt to technical progress a matter of special importance.

The technical specifications of a standard are intended to reflect the state of the art at a given point in time for a given product. They promote the use of proven techniques which have been accepted by the relevant manufacturers in general and are practised by them and which provide consumers with a product corresponding to the standard, a reliable product that certainly affords the consumer the highest level of protection available on the basis of current scientific knowledge combined with technical know-how and economic feasibility.

This level of protection is not defined *a priori*. It results from an examination of the design specifications which apply to the product in question and which represent a consensus of all interested parties in the definition of the standard. It becomes more stringent as technical progress advances.

In this context, the European norms applicable to machinery, such as EN 292, etc., play a key role in interpreting target protection levels, especially since their content now relates **for the first time** to the aim of **health and safety** as formulated in all the directives.

No other descriptions of the state of the art in the form of standards are available with the same **comprehensive** aims that underlie the directives.

What is, however, available is a definition of the substance of health and safety guarantees in respect of machinery in the form of the essential health and safety requirements contained in Annex I of the machines Directive.

This definition spells out clearly what is meant when health and safety are referred to in the context of machinery.

If this is compared with Article 3(1) of the work-equipment Directive 89/655/EEC, it emerges that appropriate adaptation of work equipment to ensure the protection of workers' health and safety must be carried out in accordance with these precepts.

If this is not possible, according to Article 3(2) of Directive 89/655/EEC, employers are to take appropriate measures to minimize the risks.

The identification of appropriate measures requires case-by-case assessment and solution.

In the absence of Article 4, the strategy prescribed by Article 3(2) could be elaborated accordingly. Article 4, however, requires two things that restrict such elaboration:

- work equipment provided to workers in an undertaking and/or establishment for the first time after **31 December 1992** must comply with the provisionas of all Community directives, and

- work equipment provided to workers prior to that date must undergo modification by **31 December 1996** to comply with the minimum requirements laid down in the annex to work-equipment Directive 89/655/EEC.

Impact and cost

If today, in 1995, we observe the market in operation, it becomes apparent that although many products (machinery, work equipment, etc.) have entered service since 31 December 1992, only a small percentage of the new machinery meets the essential health and safety requirements of the annex to the machines Directive.

An exploratory survey covering the food, beverage and tobacco industry and the hotel and catering trade (in other words, small and medium-sized enterprises) revealed that around 80% of machines delivered after 31 December 1992 had defects in terms of the basic health and safety requirements when measured against European Norms A, B and C of TCs 122, 114 and 153. This does not mean that the machines in question are unsafe but only that they do not correspond to the concept of safety reflected in Annex 1 of the machines Directive if that concept is uniformly interpreted.

In particular, the defects relate to the following parts of Annex I: items 1.1.2d, 1.2.1, 1.2.2 (ergonomic principles), 1.2.4 (stopping device), 1.2.8, 1.3.5, 1,3,8 (moving parts), 1.5.7, 1.5.8, 1.5.13 (emissions), 1.5.9, 1.6.1 and 2.1 (agri-foodstuffs machinery).

If one analyses the prevailing situation in terms of the protection of health and safety,

safety (in the "traditional" sense) is well covered,
health is only partly covered,

hygiene is only partly covered, and
ergonomics are poorly covered.

According to the above analysis, adjustments can easily be made in the domain of safety but will prove difficult in the other areas.

If the same analysis were carried out on machinery put into service prior to 31 December 1992, similar findings would probably emerge.

In the Federal Republic of Germany, the safety level of old machinery and work equipment in particular is catalogued by the safety requirements defined in the regulations for the prevention of accidents.

The object of these regulations was to prevent accidents and to combat the listed occupational diseases, which is not identical with the concept of health and safety as expressed in the EU directives.

The regulations on the prevention of accidents are divided into building and equipment regulations on the one hand and operational regulations on the other, which provides a degree of flexibility as regards the safe organization of work, precisely because the accident-prevention regulations have been individually tailored to specific processes and their addressee has always been the operator.

This integral model is not easy to preserve while transposing both the directives based on Article 100a and those based on Article 118a, because of the disparate strategies adopted.

This comes about because, when a technical specification is required to cover a particular case, reference is made to the relevant essential health and safety requirements and the accompanying standards enshrined in the fully harmonized "internal market" Directives. Accordingly, the relationship between the two harmonization methods contains a perceptible element of subordination, the health and safety directives playing an **accessory role** vis-à-vis the internal-market directives. Conversely, however, the directives based on Article 100a also contain a certain flexibility with regard to special safety requirements governing the use of certain machinery. In the machines Directive, for example, there is the so-called "*clause danoise*", which states that "the provisions of this Directive shall not affect Member States' entitlement to lay down, in due observance of the Treaty, such requirements as they may deem necessary to ensure that persons and in particular workers are protected when using the machines in question, provided that this **does not mean that the machinery is modified** in a way not specified in the Directive". (see Article 2(2) of the machines Directive).

The **differences** between the two harmonization models discussed above, which for convenience may be categorized as full harmonization and minimum harmonization, should therefore be far less significant at the level of Community legislation than in the **transposition of such legislation by Member States**.

The attempt to build a bridge for the "old stock" with the aid of section 2 of the annex to the work-equipment Directive has proved unsuccessful, not least because the problems outlined above were ignored.

Section 2 of the Annex to Directive 89/655/EEC is more of a collection of tried and tested measures for dealing with problem areas (without actually describing them) than a set of targets for minimum requirements relating to work equipment. They only focus on a narrow range of machinery (originally power-driven work equipment such as machine tools, etc.) and cannot be applied to all work equipment.

Many items of work equipment will now need modifications that would not have been necessary if the entire organization of work had been seen as the object of the safety measures (see item 2.5, for instance).

The very generalized list of measures incites us to use interpretation aids. At this point we arrive at the defined "state of the art", which is in any case unavoidable, since the annex restricts itself almost exclusively to a narrow band of traditional safety technology for certain machinery while intending the requirements to be applied to all work equipment.

An example of what the formal implementation of safety requirements without regard to the organization of work can lead to is provided by an examination of the problems connected with the modification of a meat slicer.

In the field of standardization, the safety of products is generally assessed with a view to achieving the best possible balance between numerous factors, including such non-technical factors as human behaviour, which will reduce the risks to people and property to an acceptable level.

In this context, a risk is a combination of the probability and the gravity of damage. As a rule, technical safety specifications can only go part of the way to defining an acceptable risk.

If the implementation of the directives under discussion here is understood in the narrower sense, the exploratory survey suggests that larger undertakings could adapt their work equipment to safety requirements in the short term, to health requirements in the medium term, to hygiene requirements in the medium to long term and to ergonomic requirements in the long term. In the area of ergonomics in particular, solutions to identified problems are still lacking. Medium-sized enterprises would also be able to adapt to safety requirements in the short term, but adaptation to all other requirements would be long-term objectives. In small companies and micro-enterprises, even safety requirements would take longer to incorporate, while the other requirements would be difficult or impossible to meet.

This assessment is based not only on financial considerations but also on the technical capacity for adaptation within an existing work cycle. But if we do focus on costs it becomes clear that considerable expenditure will be necessary in some areas.

For the study of the situation in small and medium-sized enterprises in the food, beverage and tobacco industry and in the hotel and catering trade, various machine manufacturers were asked about the modification costs for particular machines to the standards laid down in the relevant essential health and safety requirements and in the directives.

At the same time, the manufacturers were asked whether modification was technically possible at all. The study has not yet been completed, but its first findings indicate that modification will entail considerable costs.

With regard to the bakery trade, for instance, it emerged that standard dough mixers with non-wheeled troughs, if built after 1988, would not be expensive to modify, whereas modification of older mixers, depending on their size and age, could cost between DM 2000 and DM 10 000.

Dough mixers with wheeled troughs could not be modified to meet all of the essential requirements.

Where modification is possible, the mountings would have to be renewed, which would cost around 30% of the total price of the mixers.

Most of the mixers that were originally supplied are still in operation. One manufacturer, for instance, quoted a figure of 30 000 mixers still in operation out of some 40 000 that had been delivered. Such long service lives are commonplace for machinery in artisanal trades. Around 20 000 bakeries would be liable for modification work.

As for the meat slicers, about 300 000 businesses would need to have their meat slicers modified. The cost of modification was given as DM 1000 to DM 2000, including assembly. So for these small groups of machines alone, costs amounting to several hundred million marks could be expected.

Indications from other Member States of the European Union are that the cost of modifying their pool of machinery will be similarly high.

The French national association for the machinery and ironmongery industry, which represents 7000 French enterprises, estimates that the total cost of modifying machinery will amount to at least 30 billion francs on the basis of a projected average of at least 35 000 francs per machine and up to 200 000 francs for more complex machinery.

It is said that at least 60% of the machine pool will require modification. Ongoing studies show that other industries can be expected to come up with similar figures.

Proposed solutions

In its letter of 22 December 1994 (ref. 028419), Directorate-General III of the European Commission informed the ambassadors of the EU Member States that machines put into circulation after 1 January 1993 could yet be accepted without a CE marking and without a conformity certificate if they afforded a high enough level of safety.

The reason given was that merchants' warehouses still contain machinery which was not manufactured and certified in accordance with the Directive.

As explained above, however, it is not only a matter of machines in warehouses but also of newly manufactured machinery. In general, then, it will take some time until the market supplies the desired machines, which means that the deadline referred to in Article 4(1)(a) of Directive 89/655/EEC cannot be met.

Nor do the minimum requirements listed in the annex to that Directive offer a range of solutions to meet all eventualities.

Most of the requirements relating to control devices cannot be satisfactorily fulfilled by means of retrofitting.

The reader is referred to the comments already made on this point.

What is needed is a high degree of flexibility, with latitude for practical application. There should only be obligations to modify "old work equipment" if, because of working conditions in the enterprise (in so far as these comply with the framework health and safety Directive), it emerges that considerable danger to the health and safety of workers emanates from the work equipment itself and that such danger cannot be averted by a change in the overall organization of work.

To the extent that adjustments must in fact be made in order to comply with Directive 89/655/EEC, besides technical modifications, organizational and/or behaviour-related measures also merit consideration, and the principle of proportionality has to be respected.

An itemization for each trade and industry in the form of safety regulations and a code of practice in place of the broadly worded annex to Directive 89/655/EEC, which does not cover all work equipment, might be a useful aid to national transposition of the Directive.

For that reason it would be expedient to repeal Article 4(1) and to delete the annex. As a second step, a new version of Article 4(1) could redefine the relationship between the Directive and the essential health and safety requirements, such as those enumerated in the machines Directive.

Consideration could also be given in this context to the rules for used machinery.

The basic principle should be that modification of work equipment goes hand in hand with company investment programmes so as to ensure that Directive 89/655/EEC does not become an obstacle to investment.

It must also be made clear that the current harmonized standards for all new and used machinery cannot constitute the ultimate target.

sgd.
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