

PRODUCTS LIABILITY IN THE EUROPEAN UNION

I. INTRODUCTION

The United States, the birthplace of products liability and the only common law country with judicially created products liability law, has been a trendsetter in many respects for Europe in general and for Germany in particular.

There are many differences between the products liability laws in the United States and in the European Union. The main differences result from the fact that US products liability law has been in active development for nearly a century. Thus, a mature body of judicial, statutory, and scholarly literature is available and the courts have tackled a wealth of issues, including unavoidably unsafe products, postmanufacture changes in design, the effect of compliance with 'state of the art' and the effect of compliance with both mandatory design specifications, and regulatory requirements. The comparatively new European products liability laws have not yet had the opportunity to treat all of these issues in a sophisticated way.

This paper provides an overview of European products liability laws, in particular of the Strict Liability Directive. Since the relationship of the Strict Liability Directive to other product safety measures is likewise significant, a brief introduction to the Products Safety Directive¹ will also be provided. The Product Safety Directive is particularly significant because it declares a right of consumers throughout the EU to a minimum level of product safety and establishes the policy that infractions will be sanctioned by governmental authorities.² The effort to unify technical standards creates more strict safety requirements thereby increasing a product producer's liability exposure.

¹ Council Directive 92/59 of 29 June 1992 on General Product Safety, 1992 O.J. (L228) 24.

² In the United States, there are federal laws, state laws and regulations that protect consumers from defective and harmful products. For example, on the federal level, these are the Consumer Product Safety Act; the Food, Drug, and Cosmetic Act; and the National Traffic and Motor Vehicle Safety Act (resulting in automobiles being recalled for repairs). Although these enactments indicate a public policy supporting consumer safety, they do not by themselves create a general duty of safety like the European Product Safety Directive.

II. THE STRICT PRODUCTS LIABILITY DIRECTIVE

A. PURPOSE

The Council adopted the Products Liability Directive on July 25, 1985. The Directive required all Member States to issue conforming strict products liability laws.³ Article 19 of the Directive provided that Member States were to “bring into force, not later than [July 30, 1988], the laws, regulations and administrative provisions necessary to comply.” As of today, all members of the EU have adopted the Directive.⁴ Furthermore, its provisions have also served as a model for products liability laws in numerous other States, including the EFTA States,⁵ Hungary and Russia.

The primary concern of the Directive was to prevent the ‘distortion of competition’ resulting from the divergence of the laws of the Member States concerning liability for defective products and therefore “to harmonize the internal laws of the Member States to ensure that liability for defective products does not become a focus of unfair economic competition between the states.” This approach differs from the United States, where attempts to create a uniform federal products liability legislation have failed and sources such as Restatements are not binding on any court. It was possible because, unlike Restatements in the United States, Council Directives in the European Union are binding on Member States.⁶ The other concern addressed by the Directive was the uniform protection of consumers in Europe.⁷

³ The terms, however, are not self-executing. The Directive does not provide a cause of action for products liability, and it can take effect only by the enactment of implementing legislation by each of the Member States.

⁴ In addition, Norway, which rejected membership into the EU, has adopted the principles of the EU Products Liability Directive into its national laws.

⁵ Iceland, Liechtenstein, Norway and Switzerland.

⁶ A Directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities choices of forms and methods of implementation. It becomes binding after it is adopted by the Council by a majority vote. If a Member State fails to comply with the Directive, the Commission may bring an infringement proceeding before the Court of Justice. The Court also has jurisdiction to give preliminary rulings on questions regarding interpretations of acts of the Member States or statutes enacted by the Council, or to rule on such matters that have no remedy under national law.

⁷ The Commission has recently adopted a Green Paper on producer liability to examine how the rules in the Products Liability Directive are really applied and to assess their impact on the operation of the internal market, consumer protection and the competitiveness of European businesses.

B. ANALYSIS OF THE PRODUCTS LIABILITY DIRECTIVE

(1) Definitions

a) The Scope of Liability

As the Preamble states “liability without fault . . . is the sole means of adequately solving the problem . . . of the risks inherent in modern technological production”, the Directive provides in Article 1 for strict liability. By setting forth that “the producer shall be liable for damage caused by a defect in his product,” liability is to be based not on the “fault” or “unreasonableness” of the conduct of the defendant, i.e. negligence, but solely on the fact that a defect in a product caused the harm complained of. The elements of a claim, which must be proven by the claimant under the liability regime envisioned by the Directive are:

- the defendant producer manufactured a “product” containing a “defect”
- legal causation
- injury/damage to the claimant

The Directive is mostly silent on matters of procedure; it consigns treatment of such issues to local legislation.

b) Product

Article 2 defines the term “product.” As used in the Directive, “product” means “all movables even though incorporated into another movable or into an immovable. ‘Product’ includes electricity.” This definition includes component parts and raw materials as well as finished products.

c) Producer/Persons liable

First, strict liability attaches to persons qualifying as “producers”. This term is defined in Article 3(1) of the Directive, which provides that “producer” includes all manufacturers of a product:

- the manufacturer of a finished product;
- the producer of any raw material;
- the manufacturer of a component part; and
- any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer.

Since producer status attaches to persons engaged in the production of finished products, components, and raw materials,⁸ Article 3 potentially includes all persons within the stream of commerce.

- importers

Any person importing into the EU a product for sale, hire, leasing, or any form of distribution in the course of his business “shall be deemed to be a producer within the meaning of Article 1” (Article 3(2)). This liability is of significance insofar as it allows an injured plaintiff an avenue of recovery against the importer, thereby surmounting possible problems of jurisdiction. Importer liability attaches “without prejudice to the liability of the producer,” so that both the manufacturer and the importer are potential defendants.⁹

- suppliers of the product

Article 3(3) extends liability even further. It treats all “suppliers of the product” as “producers,” if the manufacturer or importer cannot be identified. By and large, suppliers consist of those who are “middle sellers” of products, such as distributors and retailers. Therefore, distributors and retailers of a product, regardless of their country of origin, may be held strictly liable for damage caused by the product. A supplier, however, shall not be deemed a “producer” if he “informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.”

In this respect, the Directive differs from US products liability law, where all sellers of a product can be held jointly and severally liable. This includes all persons in the chain of distribution like carriers and retailers. In contrast, the Directive allows parties who can point to another producer further up in the chain of distribution to exclude themselves from the definition of “producer.”

The same rule is applicable to the importer of a product from outside the European Union. If, however, the importer of a product manufactured abroad and imported into the EU cannot be identified, the supplier remains liable as a producer even though the name of the manufacturer is indicated

⁸ Article 7 which lists defenses to liability, provides an escape from liability for component (and presumably raw material) sellers whose product is itself unobjectionable. Where the alleged defect “is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product,” the component manufacturer is exculpated.

⁹ By the terms of Article 5, liability, where proper against multiple defendants, is joint and several.

on the product unless he informs the injured person of the identity of the importer within a reasonable time.¹⁰

Therefore, the Directive places a higher burden on products liability defendants than they face under US law, where the burden of proof for identifying the defendant rests with the plaintiff.

d) Defect

Article 6(1) defines “defect” according to consumer expectation. It states that “[a] product is defective when it does not provide the safety which a person is entitled to expect.”

In contrast, the consumer expectation test was decidedly rejected in the US,¹¹ where defect has been defined by the risk-utility test. Under this test, a product is defective if it is unreasonably dangerous, that is if it possesses features whose risk outweigh its benefits. The product’s defectiveness is assessed through a balancing of its use and its potential perils.¹² A manufacturer may therefore attempt to justify a product’s risks by referring to the social benefits derived from imposing them. In practice, this is the same kind of balancing that would occur if the cause of action were based on negligence.

In the EU, the courts are called upon to make a factual determination as to whether a defect exists. In reaching its conclusion, the court is to take “all circumstances into account.” The most significant of these are set forth in the Directive. “All circumstances” include, but are not limited to, the following three factors:

- the presentation of the product

If a product seller induces justifiable reliance on product safety through communications and representations, a consumer can legitimately claim disappointed expectation when he suffers injury because those same expectations have not been fulfilled. In determining consumer expectation the question arises whether the reasonable expectations of the individual consumer may be taken into account. The Preamble provides that “[t]he

¹⁰ Although most Member States have adopted this flexible ‘reasonable time’ formulation, some EU Member States and EFTA States have departed from the Directive and provide a more specific time period.

¹¹ See Model Uniform Product Liability Act (1979) (MUPLA) which is incorporated, in some form, into products liability laws in many states.

¹² It might be argued that the test for defect under Article 6 allows room for consideration of a risk-utility type of approach since it demands consideration of “the time when the product was put into circulation.” However, this is only one of the factors to be considered under the general pronouncement that defectiveness is defined by “the safety which a person is entitled to expect.”

defectiveness of the product should be determined not by its fitness for use but by the lack of the safety which the public at large is entitled to expect. . . .” Yet the language is flexible enough to allow recovery to a consumer whose assurances of safety, through direct promotion and sale by the producer, are greater than that of other users of the same product. It might be said that any member of the “public at large” in such a situation would be entitled to expect a greater level of safety.

- the use to which it could reasonably be expected that the product would be put

By referring to the producer’s reasonable expectations as to a product’s use the question of “misuse” is addressed. The inquiry is not whether the consumer has used the product reasonably, but whether the misuse could reasonably be anticipated by the producer. These issues are often interwoven with issues of product presentation because what a manufacturer might reasonably expect is often tied to how the product appears and is marketed.

- the time when the product was put into circulation.

In determining whether a “defect” exists, the “circumstances” to be considered shall not include any reference to a subsequent, improved product (Article 6(2)). This provision differs from the rule of evidence in some US courts that permits a claimant to introduce evidence of subsequent remedial measures against a manufacturer.¹³ Under the Directive, in contrast, if a manufacturer later redesigns a product in order to make it safer, this fact alone cannot be used to show the existence of a defect in the original product.

Types of defects:

The Directive does not expressly distinguish between defects. The question arises whether by neglecting to outline these differences, the Directive forces Member States to delineate them on their own, either through their enabling legislation adopting the Directive or through cases later brought under that legislation. Either method would lead to dissimilar results in different countries, a consequence the Directive was designed to avoid.

¹³ In the US, evidence of a subsequent remedial measures is inadmissible on the issue of fault. Thus, the fact that a manufacturer redesigns or in some way makes a product safer is not admissible to prove a claim of negligence (Fed. R. Evid. 407). However, some Courts have held that such evidence may be offered to prove the existence of a defect for purposes of a strict liability claim, reasoning that fault is not an element of strict liability. See *Ault v. Int’l Harvester Co.*, 13 Cal.3d 113, 117 Cal. Rptr. 812 (Cal. 1974).

However, it is established that the Directive includes the following categories of defects:

- manufacturing defect

A manufacturing defect occurs when an individual product does not meet the manufacturer's own specifications for the particular series. By definition, this type of defect originates not at the conceptual level of developing the product but only in the manufacturing process, and is not present if the product has been correctly manufactured.

- design defect

A design defect exists if the design of the product poses a danger to the consumer. A design defect is necessarily present in each individual product in a series. Its existence is generally determined by reference to industry custom, usage, the state of scientific and technical knowledge, competitors' products, and economic factors as well as consumer expectations.

- warning defects

The third type of defect is the failure to warn adequately of danger inherent in a product. A 'warning defect' can exist even though neither a manufacturing defect nor a design defect is present in the product. This defect exists if the label, packaging, instructions, or even safety-specific statements in advertising do not make sufficiently clear to the consumer that the product is dangerous. The main issue in a failure-to-warn case is the adequacy of a warning, and this often has involved the question of the manufacturer's knowledge of the danger to the consumer.

e) Damages

- (i) As Article 9 sets forth, the Directive requires only that liability be imposed for:

- death and personal injuries; and
- property damage

The property must be of a type that is ordinarily intended for private use or consumption and the property must have been used for private use or consumption. No liability is imposed under the Directive for damage to commercially-used property.

Additionally, the Directive allows Member States to place a financial limit on damages.

(ii) The following types of damages are not included in the scope of the Directive:

- Purely economic losses

Thus, recovery for damage to the product itself, for lost profits, or for other purely economic damage will not necessarily be available under the national legislation implementing the Directive. Such economic or financial losses, however, may be recoverable if the national legislation or applicable prior laws of products liability permit such recovery.

- non-material damages

Non-material damages such as pain and suffering, are not mandated by the Directive, but Member States may provide for it in their implementing legislation.

(2) Defenses to Liability

a) Exclusions to Liability

The defenses provided for are similar to the ones in the United States. According to Article 7 of the Directive, a producer shall not be liable if it proves any of the following:

- it did not put the product into circulation;
- under the circumstances it is probable that the defect did not exist at the time the product was put into circulation;
- it did not manufacture the product for sale or distribution for any economic purpose;
- the defect is due to compliance with mandatory regulations;
- the state of scientific and technical knowledge did not permit the producer to detect the defect's existence (development risks);

As to the state of the art issue, the Directive offers a defense - defeasible by Member States - to producers who can show that at the time of production "the state of scientific and technical knowledge . . . was not such as to enable the existence of the defect to be discovered." By using the terms "scientific and technical knowledge," the Directive makes clear that it will not suffice to invoke common trade practice or custom as a defense. A producer can only stand behind the state of the art defense where available knowledge did not allow discovery of the defect.¹⁴ In the

¹⁴ Note that the Directive speaks in strict terms, allowing no escape for a manufacturer who can show reasonable diligence in attempting to keep up

case that the dangers were known, but could not be eliminated, the Directive suggests that liability could be imposed. However, the developmental risk defense would not be available. For such unavoidable unsafe products, liability will depend on whether the product was accompanied by a proper warning.

- in the case of a component part, the defect is attributable to the design of the finished product or the instructions given by the producer of the finished product.

The Directive is silent on how broadly the defenses of compliance with mandatory regulations and development risk will be construed. Even if they are to be narrowly applied, they are nonetheless absolute defenses. This distinguishes them from US law, in which the compliance of a product with government regulations or with the current state of the art is not generally regarded as an absolute defense.

b) Reduction: Comparative Fault

Article 8 provides that the liability of a producer may be reduced or disallowed if the injury results from both a defect in the product and the fault of the injured person or of any person for whom the injured person is responsible. In the civil law Member States, this contributory negligence provision will be applied on a comparative basis.

The area of comparative fault is an important difference between the Directive and US law. While different jurisdictions in the US have developed doctrines permitting or prohibiting comparative or contributory negligence defenses, as well as the defense of assumption of risk, the Directive does not specify how the reduction of liability is to be applied or calculated. Ultimately, the answer will be left to the Member States.

c) Statute of Limitations

Article 10 establishes a three-year statute of limitations. The claim must be brought within three years from “the day on which the claimant became aware, or reasonably should have become aware, of the damage, the defect and the identity of the producer.” The Directive does not answer the question whether the running of the statute will be delayed until the plaintiff can reasonably make a causal connection between the product exposure and the injury. The issue of tolling or suspension of the statute of limitation is determined by the Member States.

d) Statute of Repose

with scientific and technological developments.

Article 11 provides a ten-year period of repose. “The rights conferred upon the injured person . . . shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage.” The commencement of an action stops the period of repose from running.

e) Effective Date of the Directive

Article 17 provides that the Directive “shall not apply to products put into circulation before the date on which the provisions” of the national legislation implementing the Directive enter into force. Thus, a producer may defend an action on the ground that the product was put into circulation before the effective date of the Directive.

C. IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES

Although all Member States have adopted laws to implement the Directive, there is still considerable divergence among the legislatures. In accordance with that, the preamble of the Directive itself recognizes that “the harmonization . . . cannot be total at the present stage.”

First, there are three areas where the Member States were free to implement the Directive in different ways:

- to impose liability for unprocessed agricultural products and game;¹⁵
- to allow a development risk defense;

The development risks defense, which has been adopted in all Member States except Luxembourg and Finland, is potentially more liberal to producers in design-defect cases than the risk-utility test’s requirement of a reasonable alternative design. A producer of defective products who could not have discovered the defect might not be liable under the Directive.

- to impose a maximum amount of damages of 70 Mio. ECU for personal injuries caused by identical products with the same defect (ceiling on damages).

There are also areas where the rules of the Directive expressly preserve the law of each individual Member State:

- as to rights of contribution or recourse (Article 5)
- and as to liability for non-material damage (Article 9)

In addition, while there are few reported decisions, some courts seem to require proof that the manufacturer could have designed the product more safely, which is consistent with

¹⁵ The definition of Product was amended by Directive 1999/34/EC to include agricultural products. This amendment is in response to the outbreak of “Mad Cow” disease in the U.K.

the US risk-utility test. For example, in a 1990 case in Germany¹⁶, the plastic handle on a piece of exercise equipment had broken, causing an elastic band to snap and resulting in injury to plaintiff's eye. The German Federal Supreme Court (Bundesgerichtshof) emphasized that the weakness in the handle "could have been avoided simply by rounding off the notched indentation."

Finally, the fact that after a Member State has enacted the Directive, a plaintiff may still employ that country's previously available tort and contract remedies, unless the individual country's enabling legislation eliminated them, is of significant importance.¹⁷

(1) Austria

Bundesgesetz über die Haftung für ein fehlerhaftes Produkt of 21 January 1988, as amended 11 February 1993 ("APLA")¹⁸

a) Options

Under APLA, the natural products of agriculture and forestry and game are excluded from liability as long as they have not undergone initial processing (§ 4). Further, liability is excluded if the producer or importer proves that, according to the state of scientific and technical knowledge at the time when he put the product into circulation, its defective characteristics could not be recognized as such (§ 8(2)). Finally, APLA imposes no limit of liability.

b) Special Features

APLA as enacted in 1988 differed substantively from the Directive in numerous provisions. These provisions remain valid for products put into circulation prior to 1994. As amended, APLA still differs from the Directive, but these differences are merely formal in character and reflect linguistic or terminological differences. Other differences are probably

¹⁶ Re Product Liability (Case VI ZR 103/89), [1991] ECC 204 (9 Jan. 1990).

¹⁷ A plaintiff may pursue all applicable remedies simultaneously, thereby increasing his chances of recovery under at least one theory of liability. Therefore, if a plaintiff brought suit in a country which previously operated under a negligence regime but did not limit damages, and that country adopted the Directive with a limit on damages, the plaintiff might seek recovery in negligence so as to receive a greater damage award.

¹⁸ The Austrian Products Liability Act was enacted on January 21, 1988 and entered into force on July 1, 1988. It was substantially amended on February 11, 1993 in order to bring several of its provisions into compliance with the Directive. At that time, Austria was not an EU Member State. However, it has signed the Convention on the European Economic Area (EEA Convention) requiring compliance with the Directive and thus making the 1993 amendments necessary. The amendments entered into force, along with the EEA Convention itself, on January 1, 1994. The Austrian Products Liability Act (APLA) applies to products put into circulation after its entry into force.

within the discretion granted by the Directive to the national States in promulgating their respective laws.

(1) Relation to Civil Code

The Austrian legislature incorporated provisions of the Civil Code to a greater extent than the express provisions of most laws enacted pursuant to the Directive.¹⁹ The consequence of this is seen in the types of damages recoverable under APLA prior to the 1993 amendments, as discussed below.

(2) Put into circulation

Although the Directive left this key element of liability to be construed by the courts, APLA § 6 defines this term by providing expressly that a product is “put into circulation when the commercial enterprise has put it into the control of another or has applied it to the use of another” with “dispatch to the customer being sufficient” in this regard. This broad test applies “regardless of the nature of the transaction,” so that in the commercial-user context it may be difficult to determine precisely when APLA enters into force with respect to a particular product, when liability attaches, when the applicable limitations period commences, etc.

(3) Recoverable Damages

Generally, damages are recoverable under APLA for bodily injury, property damage, and possibly, for certain kinds of pure economic loss. As noted, unless APLA provides otherwise, APLA § 14 incorporates the provisions of the Civil Code, and this incorporation entails some noteworthy consequences. Pursuant to Civil Code § 1325, damages recoverable for personal injury include medical costs, loss of earnings, loss of support. Further, a disfigurement, if the injured person “is of the female sex,” may require further compensation “if the disfigurement can hinder her in attaining a better life.” Another provision that is important for bodily injury cases is that APLA, pursuant to Civil Code § 1325, provides for recovery of damages for pain and suffering.

Pure economic loss is expressly precluded insofar as the loss is based on damage to the product itself (§ 1(1)). However, another consequence of APLA’s incorporation of the damages provisions of the Civil Code is that lost profits may be recoverable. Liability might exist under APLA for (1) lost profits of an enterprise due to a defective product that causes an interruption of operations and (2) lost profits due to damage caused by a defective component part that “infects” an entire finished product or series of products.

¹⁹ APLA § 14 provides that the General Austrian Civil Code of 1811 applies “unless provided otherwise in this Federal Act.”

(2) Belgium

Belgian Products Liability Act (“BPLA”)²⁰: Loi relative à la responsabilité du fait des produits defectueux

a) Options

(1) The legislature chose not to exercise the option to impose liability for primary agricultural products and game (Article 2).

(2) BPLA permits the development risk defense (Article 8e). This is important in view of the fact that Belgium signed but has not ratified the 1977 Strasbourg European Convention on Products Liability regarding bodily injury and wrongful death, and thereby has at least approved the Convention’s provision imposing liability for development risks.

(3) BPLA imposes no maximum limit on liability

b) Special Features

BPLA expressly provides that claims for pain and suffering may be brought under the products liability law (Article 11). The threshold amount of damages for stating a claim under BPLA was fixed at BEF 22,500²¹ (Article 11, § 2).

(3) Denmark

Danish Products Liability Act (“DPLA”): Lov om produktansvar²²

a) Options

The Danish legislature opted to restrict the liability of manufacturers under two of the options.

(1) agricultural products of the soil, stock farming, fisheries, and hunting are excluded so long as they have not undergone initial processing (DPLA § 3).

²⁰ Belgian legislation implementing the EU Directive was enacted into law on February 25, 1991; the Belgian Products Liability Act (BPLA) entered into force on April 1, 1991.

²¹ Equivalent to US \$630.

²² The Directive was implemented into Danish law by Law No. 371 of June 7, 1989, which entered into force on June 10, 1989.

(2) DPLA permits the development risk defense. Thus, liability is excluded if the producer or importer proves that, according to the state of scientific and technical knowledge at the time when the product was put into circulation, the defective characteristics of the product could not be recognized as such (§ 7(4)).

(3) The Danish legislature chose to impose no limit of liability.

b) Special Features

(1) Supplier

DPLA goes further in imposing liability than is required by the Directive as regards suppliers. DPLA § 10 provides that “a supplier shall be directly liable to the injured person and to another supplier further on in the chain of distribution.” Thus, every seller has a claim for indemnity against the manufacturer and every other prior seller in the chain of distribution.

(2) Several Persons Liable

DPLA § 11(2) represents a departure from the Directive insofar as it provides that “if several persons are liable pursuant to § 4(1), then, unless provided otherwise by agreement, the liability shall be apportioned among them, taking into account the existence of liability insurance and other circumstances.”²³

(3) Limitations Period

Another departure from the Directive is found in the first sentence of DPLA § 14(1), which provides a limitations period of three years. This provision differs from the Directive because its limitations period is made applicable not only to claims brought under the DPLA, but also to claims brought “pursuant to the general law of contract or tort liability.” The limitations period is interrupted if the claimant takes legal steps within a specified time, for example, by filing suit or petitioning for bankruptcy.

(4) Period of Repose

The period of repose contained in DPLA § 14(2), is ten years after the product was put into circulation. This applies only to claims brought under the DPLA and not to claims under the general law for which the period of repose is 20 years.

(4) Finland

²³ This is consistent with Danish liability law in general. The Compensation Law, for example, provides that the existence of liability insurance in cases involving multiple tortfeasors is a factor to be considered in apportioning liability.

Toutévastuulaki/Produktansvarslag of August 17, 1990 as amended January 8, 1993 (“FPLA”)²⁴

a) Options

As to each of the Directive’s three options, Finland chose the alternative that imposes the more stringent liability. First, FPLA extends liability to agricultural products, even if the product has not undergone initial processing. Second, FPLA does not permit the use of the development risk defense. Finally, FLPA imposes no maximum amount of liability for personal injuries caused by a product or by identical products with the same effect.

b) Special Features

(1) Component’s Part Lack of Safety

Although there is counterpart in the Directive, FPLA § 4 provides that a component part’s lack of safety is affirmatively presumed to be a defect of both the finished product and the component part.

(2) Damages recoverable

As originally enacted, FPLA § 8 did not define the scope of the damages recoverable but simply incorporated the pertinent provisions of the Finish tort statute, the Compensation for Damages Act. The consequences of this incorporation were (a) that FPLA imposed no maximum amount of damages; (b) that “property damage” is limited to things intended for private use; (c) damages for pain and suffering are provided for; and (d) pure economic loss having no direct relation to personal injury or property damage is compensable only insofar as the damage resulted in direct relation to a criminal act. The 1993 amendments added a second paragraph to FPLA § 8 which complies with the requirement of the Directive that property damage be compensable only for amounts exceeding a certain threshold. In Finnish Marks, that amount is FIM 2350, which is equivalent to about US \$450.

(5) France

De la Responsabilité du Fait du Defaut de Sécurité des Produit²⁵

²⁴ Finland’s Products Liability Act (FPLA) was enacted on August 17, 1990 and has effect from September 1, 1991. On January 8, 1993 it was amended to comply with the Directive, which amendments were to become effective simultaneously with the EEA Convention (January 1, 1994).

²⁵ Draft Act as of June 11, 1992. France has still to implement the products liability directive. The Court of Justice has condemned France for not communicating the measures taken to transpose in French legislation the Directive.

France's Draft Act provides for liability for agricultural products and allows a development risk defense. It imposes no maximum amount of liability. The Draft adheres in most of its provisions very closely to the terms of the Directive.

(6) Germany

Gesetz über die Haftung für fehlerhafte Produkte (Produkthaftungsgesetz - ProdHaftG)²⁶

a) Options

(1) Primary agricultural products and game

These are excluded from liability unless they have undergone initial processing.

(2) Development risks defense

A development risks defense is included in the Act as § 1 II, No. 5. This corresponds to the situation under current German law in which liability for development risks is rejected with the exception of medical preparations. The duty to observe development risks for specific products - as developed by case law - remains unaffected by the ProdHaftG. Even if a manufacturer is able to exonerate himself under § 1 II, No. 5 of the ProdHaftG, the manufacturer may nevertheless be answerable under tort principles if the development risk became known after the product was introduced onto the market and if he failed to avoid the occurrence of the damage by means of a subsequent warning notification.

(3) Limit on total liability

The liability for personal injuries which are caused by a product or a number of products with the identical defect is limited to 160 million DM. It should be noted that the limit has not only been introduced for serial damages, for example, in respect of damages by "identical products with identical defects" but also for damage which has only been caused by one individual product.

b) Special Features

The text of the German ProdHaftG is almost identical to the Directive. There are the following special features.

(1) Suppliers

²⁶ Gesetz über die Haftung für fehlerhafte Produkte (Produkthaftungsgesetz - ProdHaftG) v. 15. Dezember 1989 (BGBl. I S. 2198). The Products Liability Act entered into force on January 1, 1990.

The “reasonable period of time” within which a supplier can avoid liability by specifying the producer, importer or other supplier has been fixed at one month from the date of the appropriate request from the injured person.

(2) Nature of damages

The ProdHaftG includes a specific provision that compensation shall be paid (i) for medical treatment, pecuniary loss experienced during illness, funeral expenses, (ii) for loss of financial support suffered by a third party dependent on the injured deceased, (iii) by periodic payments for future loss of earnings or future needs or future support of a third party.

(7) Greece

Act No. 1961 of 1991

The Greek products liability law is found in Act No. 1961 of 1991 (hereafter “the 1991 Act”).²⁷ The 1991 Act imposes strict liability in tort on manufacturers of products for bodily injury and property damage caused by a defect in the product (Article 7). The product liability provisions of the 1991 Act are essentially similar to the Directive, although the text of the Act departs substantially from the Directive. It must be noted, however, that some provisions of the 1991 Act probably conflict with the Directive, and that issues concerning the validity of these deviations from the Directive are not yet settled. Several of these deviations are discussed below.

a) Options

(1) The Greek legislature opted to restrict the liability of the manufacturer as to all three options. Under the 1991 Act, primary agricultural products and game that have not undergone initial processing are not products within the meaning of the Act (Article 8(2)).

(2) Further, the 1991 Act permits the development risk defense in a form that appears to deviate from the Directive. It is a complete defense to liability if the producer can show that, at the time the product was put into circulation, the producer “was not reasonably aware nor could he reasonably have been in a position to know of the existence of the defect” (Article 10(e)). This defense appears to be broader than that permitted by the Directive because its formulation is less objective. Indeed, the use of a reasonableness standard in this manner would seem to defeat, to that extent, the Act’s central provision of strict liability.

²⁷ The 1991 Act became effective on September 3, 1991, and was substantially amended thereafter by Act No. 2000 of December 24, 1991.

(3) Finally, the 1991 Act does impose a maximum limit of liability. The liability of the producer for claims for wrongful death or bodily injury caused by identical products having the same defect is limited to a maximum amount of GRD 7,203,804,000 which is equivalent to US \$26 Mio. and such claims will be limited proportionately (Article 14). This amount is much lower than the ECU 70 Mio. provided for by the Directive.

b) Special Features

The 1991 Act contains numerous consumer-protection provisions that go far beyond the requirements of the 1985 Directive.

(1) Article 4 imposes a general duty to supply the market with safe products; under Article 5, a product will be presumed to be safe if it complies with the requirements of applicable European Community and Greek law. Under Article 6, the State may intervene to control the safety of a product on grounds of public health and safety.

(2) Producer

Article 7 appears to narrow the definition of “producer” as regards packaged products and bulk products. Thus, Article 7(2) provides that “sole liability” for packaged products shall lie “with the producer or with the person responsible for distribution to the market, as mentioned on the packaging.” Similarly, Article 7(3) imposes “sole liability” for bulk products on “the person distributing the product to the consumer.” These provisions appear to conflict with the terms of the Directive.

(3) Damages

In another departure from the Directive, the 1991 Act provides that moral damage, for example, a limited form of damages for pain and suffering that is recoverable pursuant to Article 932 of the Greek Civil Code, are also recoverable under the new product liability law (Article 8(4)(c)). This provision, however, does not conflict with the Directive.

Recoverable damages for wrongful death under the 1991 Act include, again by reference to the Civil Code, maintenance costs, hospital expenses, and funeral expenses (Article 8(4)(a)). In cases of personal injury, recoverable damages include hospital expenses, actual loss of income and provable future loss of income. Compensation for wrongful death or personal injury is payable irrespective of and in addition to any other lump sum indemnity or pension fund payments received under social security schemes or

private insurance arrangements of the victim or of the other beneficiaries of such compensation.

Property damage recovery under the 1991 Act is subject to a threshold of GRD 50,000 which is equivalent to US \$180 (Article 8(4)).

(4) Class Actions

Class actions were not envisaged in the 1991 Act as initially passed but were introduced by the amendments in December 1991 (Articles 35, 40A). Under these provisions, consumer clubs and unions may be formed, the latter of which shall have standing to sue on behalf of their members and may even institute criminal proceedings against producers.

(5) Dispute Resolution

An optional dispute resolution procedure is introduced in the ninth chapter of the Act, but it remains to be seen whether this type of proceeding will prove to be an effective method of resolving products cases.

(8) Ireland

Liability for Defective Products Act 1991 (“LDPA”)²⁸

c) Options

As for the three options, the LDPA (1) excludes primary agricultural products that have not undergone initial processing from the definition of “product,” (2) permits development risk defense; and (3) does not provide a limitation on the maximum amount of liability.

b) Special Features

(1) Threshold

The LDPA fixes the lower threshold of recoverable property damage at IR £350 which is equivalent to US \$580. Further, LDPA § 3(1) expressly states that only an amount exceeding this sum may be awarded. The Minister for Industry and Commerce is empowered to adjust this sum according to changed circumstances.

(2) Supplier Liability

As to supplier liability in the case of a non-identifiable producer, the LDPA provides a more detailed set of provisions than the Directive in Article 3(3). The LDPA goes further and conditions

²⁸ The Directive was implemented in Ireland as the Liability for Defective Products Act 1991 (LDPA). The LDPA entered into force on December 16, 1991.

the supplier's liability on the claimant first having requested that the supplier identify the producer or its supplier (§ 2(3)(a)). This request must be made "within a reasonable time after the damage occurs and at a time when it is not reasonably practicable for the injured person to identify all those persons."

(3) Defense

Another departure from the Directive is found in the defense that the defect was prescribed by law ("due to compliance of the product with mandatory regulations"). LDPA contains no defense. Instead, it provides in § 6(d) that the producer shall not be liable if the defect is "due to compliance by the product with any requirement imposed by or under any enactment or any requirement of the law of the European Communities."

(9) Italy

Decreto del Presidente della Repubblica No. 244 of 24 May 1988²⁹

Unlike most of the other EU Member States, the Italian government implemented the Directive by way of a presidential decree. Although the text of the Decree adopts that the Directive almost verbatim, the EU Commission nonetheless has threatened to bring an enforcement proceeding against Italy to compel proper implementation of the Directive as to certain perceived deviations, which are discussed below. To date, however, no such action has been taken.


a) Options

The Decree reflects choices restricting the liability of producers as to two of the three options. Agricultural products of the soil, of stock farming, fisheries and game are excluded from the definition of "product" so long as they have not undergone initial processing (Article 2(3)). The Decree permits the producer to raise the development risk defense (Article 6(1)(e)). Finally, the Decree imposes no limit of liability for personal injury, so that the producer's liability for personal injury is unlimited (Article 16).

b) Special Features

(1) Processing

In a provision that is unique among the EU Member State legislation to date, the Decree defines in considerable detail what is meant by the "processing" of a primary agricultural product. The EU Directive is virtually silent on this point. Since "packaging" is considered to be "processing" under the Decree and since the Decree defines "producer" to mean anyone "applying his name, his

²⁹  The Decree" came into force on June 29, 1988.

trademark, or other distinctive mark to the product or its packaging,” the entire packing industry, as well as franchisees, caterers, airlines, and hotels might be viewed as potential defendant-producers under the Decree.

(2) Producer

The Decree also goes further than the Directive as regards the definition of “producer” in imposing strict liability also on those who present themselves not only as the producer but as the importer of the product into the EC (Article 3(4)).

(3) Supplier

The Decree also provides detailed rules for a claimant to inquire as to the identity of a supplier. The Decree requires that the defendant respond within three months after the inquiry (Article 4(1)). Further, if no inquiry is made, then the defendant nonetheless has three months in which to name the producer or other supplier.

(4) Defective Product

The Decree’s definition of “defective product” differs from the Directive in two respects. First, unlike the Directive, the Decree contains a definition of “manufacturing defect” (Article 5(3)). Second, the Decree’s treatment of evidence of remedial measures deviates from the Directive’s. The Decree provides: “A product shall not be considered defective for the sole reason that an improved product was, *at some other time*, put into circulation” (Article 5(2)). Thus, the Decree arguably prohibits reference to existing or even prior state of the art in proving the existence of a defect. If this reading is adopted, the Decree would question the continued validity of the design defect theory, which under existing jurisprudence is often based on reference to safety devices and considerations known to exist at the time a product is put into circulation.

(5) Exclusion from Liability

The Decree’s exclusion from liability for defects compelled by legal norm differs from the Directive’s corresponding exclusion. The Decree exempts the producer from liability if the defect was due to “mandatory legal norms or to compulsory provisions” (Article 6(d)). The EU Commission views this passage as incorrectly implemented. However, the Decree, if valid, represents a producer-favorable law in this respect; not only mandatory regulations but also other “compulsory provisions” may form the basis for the exclusion.

(6) Development Risk Defense

The development risk defense is another point in which the Decree differs from the Directive. In contrast to the Directive, the Decree permits the defense if the state of science and technology “was not such as to enable the product to be considered defective” (Article 6(e)). Thus, the Decree calls for a value judgment that is not present at all in the objective test set out in the Directive.

(7) Put into Circulation

The Decree defines “putting into circulation” in considerable detail (Article 7). A product shall be regarded as put into circulation as soon as it has been delivered to the buyer, the user, their personnel or to the carrier or the forwarding agents even if it were meant only for viewing or testing purposes.

(8) Costs

Further, the Decree permits the court to order the defendant-producer to advance the costs for obtaining expert opinion or consulting with a technical expert if it appears probable that a defect in the product is the cause of the injury (Article 8(3)).

(10) Luxembourg

Loi du 21 avril 1989 relative à la responsabilité du fait des produits défectueux³⁰

In keeping with its relatively strict approach under prior law, the choice of the optional provisions left open by the Directive reflects the legislator’s inclination toward stiff product liability rules. “Product” includes unprocessed agricultural produce which are thus subject to liability. Further, a development risk defense is not allowed. Finally, it does not provide for a maximum amount of liability.

³⁰ Luxembourg implemented the Directive by enacting its product liability act on April 21, 1989. It became effective on May 2, 1989.

(11) Netherlands

Wet Produktaansprakelijkheid 1990³¹

d) Options

The Product Liability Act adheres in most of its provisions very closely to the terms of the Directive. As for the three options, it reflects the following choices: (1) unprocessed primary agricultural produce and game are not included in the definition of “products;” (2) the development risk defense is permitted (§ 185 e); and (3) a maximum amount of damages was not imposed.

b) Special Features

The lower threshold of recoverable property damage is fixed at NLG 1,263.85 which is equivalent to US \$650 (§ 190).

(12) Portugal

Decreto-Lei N 383/89 of November 1989

The Directive was implemented in Portugal on November 6, 1989 in the form of an executive decree-law.³²

e) Options

As regards the three options under the Directive, the Portuguese legislature opted in each instance for the lesser degree of liability.

(1) No liability is imposed for primary agricultural products as long as they have not undergone any form of processing.

(2) The Decree permits the use of the development risk defense (Article 5(e)) as that defense is stated in the Directive.

(3) The maximum limit of liability for serious personal injuries is fixed at PTE 10 billion, which is equivalent to US \$56 Mio. If it appears that this amount may be exceeded, the court may make a

³¹ The provisions of the Netherlands Product Liability Act of 1990 are contained in the new Netherlands Civil Code of 1991, which entered into force on January 1, 1992.

³² The Portuguese Constitution (Port. Const. Article 201 (1) (a)) provides for interstitial executive lawmaking in areas that are not within the exclusive jurisdiction of the legislature. In accordance with a prior executive decree issued in 1983, the new product liability decree entered into force on the Portuguese mainland on November 12, 1989, on Madeira and the Azores, on November 16, 1989, and on Macao and for cases involving Portuguese interests abroad, on December 6, 1989.

preliminary damages assessment with a reservation that damages may eventually be apportioned on a pro rata basis in the final judgment (Article 9(2)).

b) Special Features

The text of the Portuguese Decree deviates in various places from the text of the Directive. These deviations, however, do not result in substantive differences between the two.

(1) Reasonable Time

The “reasonable time” of the Directive (Article 3(3)), within which a supplier is required to name the manufacturer pursuant to plaintiff’s request, is three months under Portuguese law.

(2) Product

Electricity is not expressly included in the definition of “product.” However, in Portuguese law, electricity is considered to be a “movable” along with gas, steam and atomic energy, and as such it is considered also to be a “product.”

(3) Threshold

Article 8(2) fixes the threshold amount to be deducted from property damage at PTE 70,000, which is equivalent to US \$400.

To date no claims have been asserted under the new Decree; product liability cases are extremely rare in Portugal, although there have been several product recalls involving cars and cork products.

(13) Spain

Act 22/1994³³

The Act excludes primary agricultural and stock-farming products and fish which have not undergone initial processing and game from the application of the Act. The Act provides that the development risk can be used as grounds for a defense by producers. With regard to the amount of damages, it provides a higher maximum limit of liability than that provided in the Directive.

(14) Sweden

Produktansvarslag (1992: 18) as amended by Lag om andring i produktansvarslagen (1992: 1137) (“SPLA”)³⁴

f) Options

The SPLA contains provisions responding to all three options under the Directive. The SPLA imposes liability for the natural products of agriculture and forestry and game. Further, the Swedish legislator chose to allow the development risk defense. Finally, it imposes no limit of liability.

b) Special Features

(1) Lack of Safety

The SPLA defines “lack of safety” in more detail than the Directive defines “defect”. Factors to be considered in determining whether a lack of safety exists differ from those of the Directive insofar as they expressly include: (1) the use to which the product “may foreseeably be put” (and not merely uses that are “reasonably expected”); (2) how the product “has been marketed;” and (3) consideration of the instructions for use.

(2) Component Part Liability

Like Article 2 of the EU Directive, SPLA § 2 defines “product” to include a component part so that the producer of the finished product and the component’s producer are both subject to liability for a lack of safety in the component part. However, the SPLA does not contain an exclusion of liability comparable to Article 7(f)

³³ The Directive was implemented by Act 22/1994 of July 6, 1994.

³⁴ The Swedish Product Liability Act (SPLA) was enacted on January 23, 1992, prior to Sweden’s application for membership in the EU. Thereafter, and before it entered into force, several amendments were made by legislation dated December 3, 1992. The SPLA then entered into force January 1, 1993. However, several provisions of the amendments did not enter into force until January 1, 1994, simultaneously with the EEA convention becoming effective in Sweden.

of the Directive. This difference may be very significant because it means that, at least on its face, the SPLA does not exclude component part liability on the ground that the instructions given by the manufacturer gave rise to the lack of safety.

(3) One-Month Period for Identifying Supplier

SPLA provides for a one-month period in which a supplier may, after an action has been commenced against him, preclude liability by informing the claimant of the identity of another person who manufactured the product, marketed it as his own, or supplied it to him. This contrasts with the Directive's "reasonable time" formulation, under which the Member States have provided periods of varying length.³⁵

(4) Right of Indemnity

Unlike the Directive, SPLA § 11 provides an express right of recourse against a person liable under the SPLA's provisions.³⁶ If a person has paid damages pursuant to the Consumer Purchases Act of 1990 or the Consumer Services Act of 1985, he may recover from the person liable under the SPLA the amount so paid.

(15) United Kingdom

Consumer Protection Act 1987 ("CPA")³⁷

The CPA applies generally in the entire United Kingdom.³⁸ Unlike the other Member States' implementing legislation, the CPA bears little resemblance to the provisions of the Directive. Thus, many of the CPA's provisions are more detailed and explicit than those found in the other laws. As elsewhere in the European Union, strict liability for products did not generally exist under prior United Kingdom law, and the CPA represents an important new development.

g) Options

(1) Pursuant to CPA § 2(4), unprocessed primary agricultural products are not subject to strict liability.

³⁵ Compare Italy's Presidential Decree of May 24, 1988, Article 4 (three months); with Denmark's Law Concerning Product Liability 4(5) (reasonable time).

³⁶ The Directive indicates in Article 8 that it is not intended to displace the national laws of the Member States pertaining to recourse and indemnity.

³⁷ The Consumer Protection Act 1987 (CPA) entered into force on March 1, 1988.

³⁸ The product liability provisions of the CPA do not apply in Northern Ireland, where a special law, The Consumer Protection Act [Northern Ireland] entered into force on March 1, 1988 applies. The products liability provisions of the Northern Ireland legislation are substantially similar to those of the CPA.

(2) The development risk defense is permitted under CPA § 4(1)(e). However, the defense under the CPA may differ from the requirements of the Directive. It permits a producer to defend against liability on the ground that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control. Unlike the Directive, the CPA relies on a “reasonable person” standard and permits the development risk defense if a fictitious reasonably prudent producer of that kind of product would not have known of the defect. This negligence standard might allow the defense even in a case in which available knowledge indicated the existence of the defect, so long as the producer was reasonable in not having that knowledge.

The EU Commission claims that CPA § 4(1)(e) violates EU law and has commenced proceedings against the United Kingdom on this point. While the CPA permits the development risk defense if a “reasonable” producer would not have detected the defect, the Directive permits the defense only if the state of scientific and technical knowledge “was not such as to enable the existence of the defect to be discovered.” It appears that the “reasonableness” test of the CPA is more a negligence standard than it is the strict liability standard of the Directive, which permits it only if at the time no producer could have known.

(3) The CPA does not impose a maximum limit of liability.

b) Special Features

(1) Definition of Defect

In addition to the terms required by the Directive, CPA § 3 provides explicitly that the term “safety” shall “include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.” “Defect” thus expressly includes not only property damage, personal injury and wrongful death, but harm to component parts. However, liability for harm to component parts is then excluded under CPA § 5(3).

(2) Circumstances

Similarly, the CPA goes into detail in describing the first of the named “circumstances” to be considered in determining whether a

defect exists,³⁹ which in the Directive was referred to simply as the “presentation” of the product.

(3) Damages Recoverable

CPA § 5(1) provides that “damage” means “death or personal injury or any loss of or damage to any property (including land).” For emotional damages accompanying death or personal injury, such as pain and suffering or survival actions, one must look to the internal laws of the United Kingdom. Many of these laws, particularly those pertaining to wrongful death, are expressly referenced in CPA § 6.

With regards to property damage claims, CPA § 5(2) excludes liability for damage to the product itself but also extends this exclusion to “loss” of the product and to “loss of or damage to the whole or any part of any product” supplied with the product in question, for example, where the defect is in a component that damages other parts of the product.

CPA § 5(3) requires further that the property be “of a description of property ordinarily intended for private use, occupation or consumption,” and “intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.” Property damage is further subject to a threshold of £ 275 (US \$460) under CPA § 5(4). In this regard, it should be noted that the English courts interpret the Directive as having a threshold of 500 ECU, which is equivalent to US \$565 as opposed to a deductible. Currently, this is a contentious matter between the Commission and the UK.

CPA § 5(5) through § 5 (8) have no counterpart in the Directive, and as CPA § 5(8) makes clear, they do not apply in Scotland. CPA § 5(5) fixes in time the point at which property damage occurs at “the earliest time at which a person with an interest in the property had knowledge of the material facts about the loss or damage.” CPA § 5(6) defines such “material facts” as facts that would lead a “reasonable person with an interest in the property” to sue the defendant. Further, CPA § 5(7) imputes to the person suffering property damage knowledge of “facts observable and ascertainable” by himself or by him with the help of expert advice.

D. IMPACT ON LITIGATION

³⁹ The manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product.”

The question arises whether the Directive and related Directives will threaten the industries with increased liability as well as higher litigation and insurance costs, and therefore make it more difficult to maintain profits.

The fact that both the Directive and US law impose strict liability is one of the only similarities between the two situations. The dissimilarities between the two regimes indicate that fears of a similar products liability crisis in Europe are exaggerated. The following factors lessen the likelihood that the Directive will extinguish the competitiveness of companies operating in the EU and these cultural and legal differences provide some basis for drawing the conclusion that the impact will be less in Europe than it has been in the United States. These differences include:

(1) Contingent Fees

Contingent fees are prohibited for lawyers practicing in the EU. The lack of a contingent fee system eliminates a major financial incentive for EU lawyers to seek out promising cases,⁴⁰ thereby effectively barring injured parties from judicial redress in all but the clearest cases. And even in the 'clearest cases,' plaintiffs must have the financial resources to commence litigation.

(2) Legal and Court Costs

Moreover, if a plaintiff loses his case, it is very conceivable that he will have to pay the defendant's legal and court costs. Accordingly, indigent Europeans will almost never initiate product liability proceedings unless their probability of success is extremely high.

The absence of the contingency fee arrangement coupled with the potential payment of legal fees to the opposition also imposes a large financial risk on the European plaintiff.

(3) Pretrial Discovery

Pretrial discovery in Europe is limited to a far greater degree than it is in the United States. Thus, it is exceedingly difficult to obtain the necessary technical data upon which a successful case must rest.

(4) Juries

The use of juries in civil trials is virtually unknown in Europe, a significant procedural difference between EU and US litigation that augments these factors to the further detriment of plaintiffs. European cases are decided by judges, and not juries.⁴¹ When jurors hear an instruction in 'consumer expectation' terminology, they will ask themselves what they personally expect. And jury members think that products should

⁴⁰ Not only is there no contingent fee system, but lawyers in many European countries are prohibited from advertising, and there is in general an overriding predisposition among Europeans against litigation, in contrast to the high level of litigation consciousness among the American population.

⁴¹ With the exception of arrangements such as in Germany, where lay-members (Schöffen) sit with judges on some fact-finding panels.

not hurt people: Products should be ‘idiot-proof’. Juries are sympathetic to injured persons, and they are known to let their sympathies cloud their judgment more than judges. According to studies and experience, it is rare for juries to find for the defendant in a product liability case. And one must not forget that well over 90 percent of all cases settle, with the defendants always paying money, often substantial sums, to plaintiffs.

(5) Smaller Recoveries

Successful plaintiffs in European products liability actions face smaller recoveries, and therefore their incentive to sue decreases.

(6) Award for Pain and Suffering / Punitive Damages

Depending on the country, plaintiff’s ability to receive any award for pain and suffering could be limited or nonexistent. The potential for relatively large pain and suffering awards, however, is thought by many to encourage litigation. Further, almost none of the EU countries allow punitive damage awards.

(7) Option of Limiting Total Liability

The Directive provides Member States with the option of limiting the total liability a producer could incur, which greatly undermines plaintiff’s chances for large awards, particularly in mass tort cases, where European plaintiffs are already denied access to US-style class-action suits.

(8) Health Insurance

In many EU countries, health insurance coverage of all citizens is mandatory, and injured workers often receive government-regulated health compensation. The availability of state-funded health services reduces the incentive to litigate, especially where the recovery cannot be augmented by pain and suffering damages. Therefore, many injured Europeans are unlikely to file suit since they are assured of adequate compensation for their medical expenses without the hassle and potential monetary risks of litigation.

While those differences lessen the possibility of law suits, European plaintiffs may have an easier time proving that a product is defective than the US plaintiffs. The Directive does favor plaintiffs in its explication of what constitutes a seller. Furthermore, it seems to encourage suits, thereby threatening defendants who are responsible for a product defect, but otherwise would not have been sued. A further problem with the Directive is that previously existing methods of recovery still remain available to plaintiffs.⁴² In some countries, these other theories of liability could prove more costly to corporate defendants. On the other hand, these advantages are mitigated by time limits and liability caps, and the defenses afforded by the Directive are more generous.

III. PRODUCT SAFETY DIRECTIVE

⁴² Germany, for example, refused to approve the Directive unless it permitted alternative recovery under previously existing law.

In 1990, the European Council of Ministers approved a Directive concerning product safety (the “Product Safety Directive”). It is particularly significant because it imposes a general duty of safety.⁴³ This Directive provides that products should present only those risks reduced to such a level considered as acceptable and consistent with a high standard of protection for the safety and health of persons. The Product Safety Directive requires a permanent monitoring of marketed products to ensure that no unacceptable risks occur in the use of those products, and places a duty on the Member States to ensure that surveillance occurs. The Product Safety Directive is not limited to consumer products. These goals are accomplished through the enactment of comprehensive legislation to test, recall, and ban the distribution of unsafe products.

Several provisions are worthy of mention to illustrate the far reaching consequences of this Directive. The definition of “product” includes any manufactured product, including any component part or used product (Article 2). Importantly, a “safe product” is defined as a product which “does not present . . . an unacceptable risk for the safety and health of persons either directly or indirectly . . . through its effect on other products.” “Unacceptable risk” is defined in accordance with its intended use according to normal circumstances, or any other “reasonable foreseeable use.” Risk assessment is defined in Article 5 as referring to the state-of-the-art and the state of scientific and technical knowledge.

Articles 3 and 4 delineate the need for more precise warning labels and include the requirement that relevant warnings can be perceived “at all stages of use, consumption and disposal and if necessary, throughout the foreseeable use time of a product.” In other words, warnings must be communicated to users throughout the useful life of a product.

These provisions together with the required permanent monitoring of product use described in Articles 6 and 7, clearly indicate the intent that all persons be informed of any risks in the use of a product throughout the useful life of that product and its disposal.

The potential impact of this Directive cannot be understated. In contrast, in the US two distinct types of the duty to warn have evolved: a duty to warn when a product is sold and a duty to warn thereafter, if and when a danger is discovered. In general manufacturers have been judged by a reasonableness standard and only a few cases have required manufacturers to make more than a reasonable effort to warn about newly discovered dangers, resulting in a product recall or replacement.

The European Product Safety Directive, in imposing constant-monitoring duties on manufacturers and countries, charges European companies with more than a general standard of reasonableness. Once the Product Safety Directive is adopted by all Member States, it will be clearly supplementary to the applicability of the Strict Liability Directive and the effort to harmonize technical standards. Its impact will be substantial and will result in increasingly severe safety standards being placed on products with labeling requirements and monitoring requirements that go far beyond anything currently required by US products liability laws.

Depending on the extent to which risk assessment or cost benefit analysis is brought into and made a part of the decision-making, the implications of this Directive for producers and the impact on their potential liability is significant.

IV. HARMONIZATION OF TECHNICAL STANDARDS

The Machinery Directive is a good example of the general harmonization of technical standards in the European Union.⁴⁴ In addition to establishing a high level of consumer and worker machine safety, it had the goal of eliminating barriers to trade arising from the differing safety standards of the Member States. It creates uniform design and safety requirements for machinery. It is consistent with the consumer protection purpose of the Strict Product Liability Directive.

The Machinery Directive requires manufacturers, or their authorized EU representatives, to certify that their products comply with Community standards in accordance with specified procedures. The precise certification procedures to be followed depend upon the type of product involved.

Manufacturers must take measures “to eliminate any risk of accident throughout the foreseeable lifetime of the machinery . . .” Manufacturers are also required to inform users of machinery “of the residual risk due to any shortcomings of the protection measures adopted . . .” and that the machinery be designed “to prevent abnormal use if such use would engender a risk.”

V. CONCLUSION

There are many well-known techniques for limiting liability in the products liability area. Every manufacturer and product seller should consider the use of many of these techniques. The goal of any prevention program is to minimize the occurrence of accidents and claims and, if they occur, to have available people and documents which can be used in court to prove that the manufacturer or seller acted reasonably and that a defect did not exist in the product at the time of sale.

Detailed attention must be given by persons who want to introduce products into the European market in light of the standardization efforts and the Directive on product safety. Substantial work and sophisticated risk analysis will have to be accomplished to insure compliance with these regulations. The warning and labeling requirements, together with the requirement for permanent monitoring, are posing hazards to the effective marketing of products within the European Union. In addition, they create liability issues for manufacturers, not only

⁴⁴ The free circulation of goods within Europe requires that the technical standards used to design and construct those products be uniform if differing technical standards are not to continue as a barrier to the free flow of goods. Often referred to as the ‘new approach’, a process to create standards is based upon consensus rather than unanimity. After being developed by Committees (CEN/CENELEC) and approved by the EC, the national standardization bodies must adopt the standards and withdraw any standards which are not consistent with the approved standards. All products manufactured in conformity with these standards presumptively comply with all regulations.

from the products sold in Europe, but also from the impact that information might have on claims pending in other countries.

**OVERVIEW OF THE IMPLEMENTATION OF THE EU PRODUCTS LIABILITY DIRECTIVE AND OF
THE THREE OPTIONS IN THE EU MEMBER STATES**

Member State	Agricultural Products	Development Risk Defense	Max. Limit
Austria	-	+	-
Belgium	-	+	-
Denmark	-	+	-
Finland	+	-	-
France	+	+	-
Germany	-	+	+
Greece	-	+	+
Ireland	-	+	-
Italy	-	+	-
Luxembourg	+	-	-
Netherlands	-	+	-
Portugal	-	+	+
Spain	-	+	+
Sweden	+	+	-
United Kingdom	-	+	-

PREVENTIVE MEASURES

- Issue a company policy pertaining to product safety, quality and reliability under the signature of the chief executive officer
- Designate an executive, representing top-level management, to coordinate and have authority for products liability prevention activities
- Establish a committee responsible for products liability prevention
- Keep product liability prevention committee informed of loss trends, warranty claims, product incidents, and claims and litigation
- Conduct audits of the effectiveness of the program by independent, qualified personnel at appropriate intervals
- Establish procedures within the engineering department to evaluate the potential for personal injury and property damage during reasonably foreseeable use and misuse of proposed new products or modified existing products
- Ensure that statutes and regulations are thoroughly understood by design engineers and are used as minimum requirements in the design of the product. These regulations and standards must be exceeded where appropriate
- Have final design specifications for all new products and revisions to existing products reviewed by qualified personnel
- Submit new products for further approval and certification by nationally recognized testing agencies, or conduct in-house tests
- Inform suppliers, whenever practical, of the final use of their materials or components and request their suggestions regarding changes or improvements
- Insist that critical components in the product be coded for production, place and date for easy traceability
- Arrange for coding of identical components when provided by two or more suppliers
- Establish procedures so that all changes in production methods and techniques are reviewed from a product safety standpoint prior to implementation
- Arrange for audits of quality control procedures and record keeping
- Ensure that clear, complete, conspicuous and durable instructions and warning labels are provided when a product contains inherent hazards which cannot be eliminated through design changes or adequately protected by guards
- Ensure that capacity ratings are permanently displayed in a conspicuous place on those products where such data contributes to user safety, or is required by law

- Require review of all operating and maintenance manuals by legal and engineering personnel for adequacy and accuracy. Consider the field-testing of manuals and labels to ensure that the user understands them
- Have all advertising literature, brochures, labels and instruction reviewed by marketing, engineering and legal departments
- Have legal counsel draft and review product warranties, guarantees, disclaimers, sales contracts and purchase orders
- Ensure that the packaging and shipping procedures are adequate to minimize the possibility of product damage or alteration during shipment
- Conduct training programs for engineering, service and marketing personnel, distributors and wholesalers regarding their product liability prevention responsibilities
- Make sure that products with removable guards or safety devices are not sold without them unless a written statement is obtained from the customer that such devices are not desired. Consult a lawyer to determine if an indemnification is appropriate, or if such customer request should not be agreed to
- Establish a policy regarding the sale or disposal of factory seconds, damaged or returned products
- Establish a procedure for the investigation of all product-related incidents, whether received from a customer, field service representative, distributor or dealer
- Develop and test a product recall plan which can be placed in effect on short notice
- Establish a formal document management policy governing, in part, the creation and retention of documents essential for the defense of litigation