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## The Products Liability Directive: A Mandatory Development Risks Defense

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# The Products Liability Directive: A Mandatory Development Risks Defense

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## **Abstract**

This Note argues that the optional inclusion of the development risks defense in Member State legislation undermines the Products Liability Directive by impeding harmonization of products liability laws in the Community. Part I sets forth the background and content of the Products Liability Directive. Part II discusses the implementation of the Products Liability Directive in Member State legislation. Part III argues that the optional nature of the development risks defense undermines the intent of the Directive. This Note concludes that the development risks defense should be mandatory in order to establish uniform products liability laws in the Member States.

## NOTE

### THE PRODUCTS LIABILITY DIRECTIVE: A MANDATORY DEVELOPMENT RISKS DEFENSE

#### INTRODUCTION

In 1976, the European Community (the "EC" or the "Community") recognized a need for a uniform products liability law to regulate trade and to ensure continual development of new production methods.<sup>1</sup> Subsequently, in 1985, the Council of Ministers of the European Communities (the "Council") promulgated the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products (the "Products Liability Directive" or the "Directive").<sup>2</sup> The Products Liability Directive makes certain defenses available to producers of goods.<sup>3</sup> One such defense, known as the development risks defense or the state of the art defense, provides that a producer shall not be liable if the producer shows that it did not possess the scientific or technical knowledge to discover the defect prior to circulation of the product.<sup>4</sup> The Products Liability Directive, however, permits a Member State to choose whether it wants to incorporate the development risks defense into its national legislation.<sup>5</sup>

This Note argues that the optional inclusion of the development risks defense in Member State legislation undermines the Products Liability Directive by impeding harmonization of products liability laws in the Community. Part I sets forth the background and content of the Products Liability Directive.

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1. See REPORT OF THE LEGAL AFFAIRS COMMITTEE, 1979-1980 EUR. PARL. DOC. (COM No. 71) 2, 12 (1979) [hereinafter LEGAL AFFAIRS REPORT].

2. O.J. L 210/29 (1985) [hereinafter Products Liability Directive].

3. *Id.* art. 7, O.J. L 210/29, at 31.

4. *Id.* art. 7(e), O.J. L 210/29, at 31.

5. *Id.* art. 15(1)(b), O.J. L 210/29, at 32. Article 15(1)(b) provides that [e]ach Member State may by way of derogation from Article 7(e) maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

*Id.*

Part II discusses the implementation of the Products Liability Directive in Member State legislation. Part III argues that the optional nature of the development risks defense undermines the intent of the Directive. This Note concludes that the development risks defense should be mandatory in order to establish uniform products liability laws in the Member States.

## I. THE PRODUCTS LIABILITY DIRECTIVE

### A. Background and Policy Considerations

Prior to the enactment of the Products Liability Directive, the only harmonization of international products liability laws consisted of a convention governing conflict of laws problems in products liability suits.<sup>6</sup> Consequently, the Commission of the European Communities (the "Commission") produced a preliminary internal draft for products liability in 1974 and a second draft in 1975. On September 9, 1976, the Commission started the formal legislative process by proposing a Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (the "Proposed Directive")<sup>7</sup> to promote free movement of goods within the Community.<sup>8</sup>

Several factors provided the impetus for this Commission

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6. Conférence de La Haye de Droit International Privé, Actes et Documents de la douzième session du 2 au 21 octobre 1972, Tome III, Responsabilité du Fait des Produits, Acte final 246-50 (1974); see Resse, *Further Comments on the Hague Convention on the Law Applicable to Products Liability*, 8 GA. J. INT'L & COMP. L. 311 (1978). The Hague Convention on the Law Applicable to Products Liability addressed the conflict of laws regarding products liability law. See *id.* at 311. The United States proposed the convention because it would lead to greater certainty, predictability, and uniformity in products liability law. See *id.* The United States also proposed that the plaintiff choose the forum. See *id.* at 312. The convention, however, did not include the U.S. view and cited strict requirements for choice of law in articles 4 to 7. See *id.* at 312-13.

7. Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, O.J. C 241/9 (1976) [hereinafter Proposed Directive].

8. See *id.*; Amendment of the Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products, O.J. C 271/3 (1979) [hereinafter Amended Proposal]. The Commission's amended proposal stated that the approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergences may distort competition in the common market; whereas rules of liability which vary in severity lead to differing costs

proposal and for a uniform products liability law. A producer that exports its product into another Member State subjects itself to the legislation of that Member State.<sup>9</sup> Thus, the Commission noted that a difference in products liability laws would restrain the free flow of goods from one Member State to another Member State with more stringent products liability legislation.<sup>10</sup>

The Commission also recognized several other problems if different products liability laws existed among the Member States. First, the Commission feared that disparate products liability laws would distort competition in the Community.<sup>11</sup> In addition, divergent products liability laws would lead to differences in producers' costs.<sup>12</sup> The Commission sought to solve these problems by introducing liability irrespective of fault, or strict liability.<sup>13</sup> By introducing liability irrespective of fault, the Commission proposed a manner in which to achieve adequate consumer protection.<sup>14</sup>

On July 13, 1978, the Economic and Social Committee of the European Communities (the "Economic and Social Committee" or the "Committee") expressed its support for the Proposed Directive.<sup>15</sup> The Economic and Social Committee

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for industry in the various Member States and in particular for producers in different Member States who are in competition with one another.

*Id.*; see LEGAL AFFAIRS REPORT, *supra* note 1, at 23; see Orban, *Products Liability: A Comparative Legal Restatement-Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 400 (1978).

9. LEGAL AFFAIRS REPORT, *supra* note 1, at 23.

10. Amended Proposal, *supra* note 8, at 4. The Commission stated that "the free movement of goods within the common market may be influenced by divergences in laws." *Id.*; see LEGAL AFFAIRS REPORT, *supra* note 1, at 23.

11. Proposed Directive, *supra* note 7, O.J. C 241/9, at 9.

12. *Id.*

13. *Id.*

14. *Id.*

15. Opinion on the Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, O.J. C 114/16 (1978). The Economic and Social Committee of the European Communities (the "Economic and Social Committee") is an ancillary institution that advises the European Community. See D. LASOK & J. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 235 (1987). The Economic and Social Committee, formulated under the terms of Articles 193 and 198 of the Treaty Establishing the European Economic Community (the "EEC Treaty"), consists of 188 members who represent producers, farmers, transport carriers, workers, dealers, craftsmen, professionals, and representatives of the general public. Treaty Establishing the European Economic Community, Mar. 25,

considered the need for more expedient remedies for persons injured by defective products and discussed ways that Member States would benefit from the implementation of such remedies.<sup>16</sup> The Committee also expressed a need for an apportionment of costs of the damages awarded by these remedies.<sup>17</sup> The Committee expressed concern that it would be unfair for consumers alone to bear potential price increases caused by damage costs, particularly if such expenses would have serious social and economic effects on consumers.<sup>18</sup> The Committee, moreover, suggested that the Proposed Directive would eliminate or reduce the number of defective products on the market without disturbing the marketing of safe products.<sup>19</sup> Finally, the Committee contended that the enactment of a directive would enable the Member States to follow developments in the field of products liability law on both a national and international level.<sup>20</sup>

When the proposal came to the European Parliament for review and its advisory opinion, the Legal Affairs Committee of the European Parliament (the "Legal Affairs Committee") considered the views expressed by the Economic and Social Committee and, in 1979, presented its endorsement of the Proposed Directive.<sup>21</sup> The Legal Affairs Committee emphasized the need for the implementation of strict liability to counter the difficulty, in certain instances, of procuring proof of fault without access to a producer's production documents.<sup>22</sup>

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1957, arts. 193 & 198, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty]; D. LASOK & J. BRIDGE, *supra*, at 235. The Council of Ministers appoints the members of the Economic and Social Committee after consultation with the Commission. EEC Treaty, *supra*, arts. 193 & 198; see D. LASOK & J. BRIDGE, *supra*, at 235-36. The opinions of the Economic and Social Committee are not binding, but may be more influential than the opinions of the European Parliament because Committee members are involved in activities likely to be affected by Community policies. D. LASOK & J. BRIDGE, *supra*, at 236.

16. Opinion on the Proposal for a Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, O.J. C 114/16 (1978).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See generally LEGAL AFFAIRS REPORT, *supra* note 1.

22. *Id.* at 24. Furthermore, commentators argued that

[l]iability irrespective of fault does not burden the producer to an unjustified extent. Normally he can divide the costs of damage passed on to him as a

In addition, the Legal Affairs Committee reiterated the need to enhance free movement of goods within the common market.<sup>23</sup> The Legal Affairs Committee pointed out that divergences between the laws of the various Member States caused purchasers to buy products in those countries where the consumers were best protected against damage and financial loss.<sup>24</sup> Similarly, the Legal Affairs Committee noted that manufacturers of end-products purchased semi-finished goods in those countries where the producer liability was the greatest.<sup>25</sup>

Finally, the Committee on the Environment, Public Health, and Consumer Protection of the European Parliament emphasized that consumers, as opposed to producers, would be less likely to learn of new technological changes and developments.<sup>26</sup> As a result, consumers would be unaware of the producer's identity or the reliability of new products.<sup>27</sup> Thus, without strict liability laws consumers would find it difficult to obtain compensation for defective products.<sup>28</sup>

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result of liability being made independent of fault among all users or consumers of products free of defects from the same range, or of his production as a whole, by including the expense incurred (payment of damages or payment of insurance premiums) in his general production costs and in his pricing of the goods. Thus, all consumers bear the costs of the damage to a reasonable extent.

Orban, *supra* note 8, at 400-01.

23. LEGAL AFFAIRS REPORT, *supra* note 1, at 31-32; see Amended Proposal, *supra* note 8 (discussing Commission's views on common market).

24. LEGAL AFFAIRS REPORT, *supra* note 1, at 32.

25. *Id.*

26. *Id.* at 31. The Legal Affairs Committee endorsed the Commission's proposal for adequate consumer protection. *Id.*; see Amended Proposal, *supra* note 8, at 4. After consideration of the Commission's proposal, the Legal Affairs Committee justified the adoption of liability irrespective of fault. See LEGAL AFFAIRS REPORT, *supra* note 1, at 11; Amended Proposal, *supra* note 8, at 4. The European Parliament advised that a producer "is able, by careful organization and supervision of production to minimize the risk of damage or injury. He has the easiest access to information and evidence as to whether goods were defective when they were put on the market." *Id.*

27. LEGAL AFFAIRS REPORT, *supra* note 1, at 32.

28. *Id.* In its proposal to the European Parliament, the Commission stated that imposing liability

on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure which he incurs to cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects.

Amended Proposal, *supra* note 8, at 4.

The Council substantially amended the Commission's 1979 proposal, apparently taking into account the views of the European Parliament and the Economic and Social Committee.<sup>29</sup> After six years of deliberations, the Council of Ministers approved the final version of the Directive on July 25, 1985.<sup>30</sup>

### B. Directive's Content

The final version of the Directive represents a progression of change. The original text proposed by the Commission in 1976 was amended by the Commission.<sup>31</sup> The final Products Liability Directive was formulated and approved in 1985.<sup>32</sup>

#### 1. The Implementation of Strict Liability

Differences in national products liability provisions created the need for the imposition of strict liability.<sup>33</sup> Article 1 of the Directive therefore mandates the implementation of strict liability among the Member States.<sup>34</sup> The implementation of strict liability created a great change in products liability law throughout the Community. Prior to the promulgation of the Directive, only three Member States imposed producer liability without fault.<sup>35</sup> In all other Member States, liability arose from negligence. In some Member States, a consumer could recover damages only after proving that the producer caused the product to be defective.<sup>36</sup> Other Member States presumed fault on the part of the manufacturer, allowing the manufacturer an opportunity for rebuttal.<sup>37</sup>

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29. Compare Amended Proposal, *supra* note 8 with Products Liability Directive, *supra* note 2.

30. See Products Liability Directive, *supra* note 2, O.J. L 210/29, at 29.

31. See Proposed Directive, *supra* note 7; Amended Proposal, *supra* note 8.

32. See generally Products Liability Directive, *supra* note 2, O.J. L 210/29.

33. See LEGAL AFFAIRS REPORT, *supra* note 1, at 11.

34. See Products Liability Directive, *supra* note 2, art. 1, O.J. L 210/29, at 30. Article 1 states that "[t]he producer shall be liable for damage caused by a defect in his product." *Id.*

35. See LEGAL AFFAIRS REPORT, *supra*, note 1, at 12. The products liability laws in France, Belgium, and Luxembourg had always imposed strict liability on producers of defective products. *Id.*

36. *Id.* The product liability laws in Italy and Germany placed the burden of proof on the consumer until the products liability law was reversed in 1968. *Id.* Denmark, the Netherlands, the United Kingdom, Ireland, and, since 1968, Germany presumed fault but allowed exculpatory evidence to be admitted. *Id.*

37. *Id.* France, Belgium, and Luxembourg adopted a system of strict liability



According to the Legal Affairs Committee, strict liability was imposed to protect consumers.<sup>38</sup> The Legal Affairs Committee argued that the producer is in the best position to know whether goods are defective when placed on the market because producers have the easiest access to information.<sup>39</sup> Furthermore, the Committee noted that a producer can foresee high insurance premiums and can calculate the price of its products to offset the high costs.<sup>40</sup>

## 2. Options Set Forth in the Directive

The Directive allows Member States to take different positions on three issues as a result of compromises necessary to secure its adoption.<sup>41</sup> The optional provisions set forth in the Directive relate to the development risks defense, the setting of financial limits,<sup>42</sup> and the possible coverage of primary agri-

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excepting contrary evidence to repudiate the presumed fault. *Id.*; see Amended Proposal, *supra* note 8, at 5. The Commission stated that

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

*Id.*

38. *Id.* at 11. The second consideration of the Directive states that "liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production." Product Liability Directive, *supra* note 2, O.J. L 210/29, at 29. Some commentators have noted that strict liability promotes loss spreading, discourages the consumption of hazardous products, and encourages the production of safety products. See, e.g., Niles, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 VA. J. INT'L L. 729, 758 (1985).

39. LEGAL AFFAIRS REPORT, *supra* note 1, at 11.

40. *Id.*

41. Products Liability Directive, *supra* note 2, art. 15, O.J. L 210/29, at 32; see *supra* note 5 (containing text of article 15).

42. The final draft placed a threshold of 500 ECUs for property damages in order to avoid excessive litigation. Products Liability Directive, *supra* note 2, art. 9, O.J. L 210/29, at 31. The Products Liability Directive sets out fixed liability limits that cannot be reduced or increased by national laws. *Id.* art. 16, O.J. L 210/29, at 32; see *supra* note 40 (containing text of article 16).

The Proposed Directive noted that "the equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed." Proposed Directive, *supra* note 7, art. 7, O.J. C 241/9, at 12; see Orban, *supra* note 8, at 405 (discussing new European unit of account).

The Directive fails to define a limit on a producer's total liability. Article 16(1)

cultural products.<sup>43</sup> Commentators argue that the optional nature of certain provisions within the Directive promotes disharmony in the Community and undermines the intent of the Directive.<sup>44</sup> Others favor an optional development risks defense to maintain conformity with existing products liability laws in some Member States.<sup>45</sup>

### 3. Definition of "Products" and "Producer"

Article 2 of the Products Liability Directive defines "product" as anything moveable.<sup>46</sup> The Directive specifically excludes game and primary agricultural products, but it leaves open the possibility of their inclusion in individual Member States' legislation.<sup>47</sup>

For the purposes of the Products Liability Directive, the manufacturer is considered a producer if the manufacturer puts its trademark on a product.<sup>48</sup> Where the producer of a

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states that "[a]ny Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU." *Id.* art. 16(1), O.J. L 210/29, at 32.

43. *Id.* arts. 2, 7, 15, 16, O.J. L 210/29, at 30-32. Article 2 of the Directive exempts primary agricultural products and game from the scope of the Directive. *Id.* art. 2, O.J. L 210/29, at 30. However, article 15 of the Directive provides that the exemption for primary agricultural products can be withdrawn by individual Member States in their implementing legislation. *Id.* art. 15, O.J. L 210/29, at 32; *see supra* note 5 (containing text of article 15); *see also* Products Liability Directive, *supra* note 2, art. 7(e), O.J. L 210/29, at 31; *id.* art. 16, O.J. L 210/29, at 32.

44. *See, e.g.,* Thieffry, *EEC Directive 85/374 on Liability for Defective Products: Implementation and Practice*, in *EEC STRICT LIABILITY IN 1992: THE NEW PRODUCT LIABILITY RULES* 9, 48 (P. Thieffry & G. Whitehead eds. 1989).

45. *See infra* note 122 and accompanying text (discussing Luxembourg's failure to adopt development risks defense).

46. *See* Products Liability Directive, *supra* note 2, art. 2, O.J. L 210/29, at 30.

47. *Id.*, consideration 15 O.J. L 210/29, at 30. The fifteenth consideration of the Products Liability Directive states that

since the exclusion of primary agricultural products and game from the scope of this Directive may be felt, in certain Member States, in view of what is expected for the protection of consumers, to restrict unduly such protection, it should be possible for a Member State to extend liability to such products.

*Id.* The European Parliament advised that it would be too much of an imposition to make a producer liable for defects in agricultural, craft, or artistic products because such products are not manufactured industrially. *LEGAL AFFAIRS REPORT, supra* note 1, at 17. The classification of products is a discretionary function of the courts. Wautier, *European Community*, in *PRODUCTS LIABILITY, AN INTERNATIONAL MANUAL OF PRACTICE* ¶ 1.12, at 19 (W. Freedman ed. 1988).

48. Products Liability Directive, *supra* note 2, art. 3, O.J. L 210/29, at 30-31.

good cannot be identified, each supplier is identified as the manufacturer unless the supplier identifies the manufacturer within a reasonable time.<sup>49</sup> The same rule applies to the importer.<sup>50</sup>

#### 4. Defectiveness

Under the Directive, a product's defectiveness is determined under a "reasonable consumer" standard.<sup>51</sup> Defectiveness is determined by the absence of safeguards that the public at large expects, rather than by the product's fitness for use.<sup>52</sup>

When making a determination of defectiveness, various factors are considered, including the time at which the product was put into circulation, the intended use of the product in relation to its actual use, and the presentation of the product.<sup>53</sup>

49. *Id.* art. 3(3), O.J. L 210/29, at 31.

50. *Id.* The Directive further defines a producer as "any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business." *Id.* art. 3(2), O.J. L 210/29, at 31.

51. *Id.* art. 6(1)(b), O.J. L 210/29, at 31.

52. Products Liability Directive, *supra* note 2, at 29. The sixth consideration of the Products Liability Directive states that

to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances.

*Id.*

A product is defective if it differs from what is considered to be normal. Wautier, *European Attempts on Harmonizing Laws Related to Products Liability*, in PRODUCTS LIABILITY, A MANUAL OF PRACTICE ¶ 2.431, at 49 (H. Stucki & P. Altenburger eds. 1981). In addition, the Directive considers for purposes of defectiveness the presentation of the product as well as the time when the producer put the product into circulation. *Id.* ¶¶ 2.432-2.433, at 50; see Products Liability Directive, *supra* note 2, art. 6, O.J. L 210/29, at 31. The consumer's use of a product in a manner that does not conform with the product's purpose does not discharge the producer from liability under every circumstance. Wautier, *supra*, ¶ 2.433, at 50.

For example, a manufacturer of children's toys cannot be discharged from his liability by attaching a notice to the product warning children not to put the toys into their mouths because of the toxic nature of the paint. The producer has a duty not to use toxic paint for children's toys, even if there are no legal provisions or manufacturing standards prohibiting the use of such paint.

*Id.* at 51.

53. Products Liability Directive, *supra* note 2, art. 6, O.J. L 210/29, at 31. The definition of a product's defectiveness as defined by the Directive is an example of how the definitions within the Products Liability Directive have changed since it was first introduced. Compare Proposed Directive, *supra* note 7, art. 4, O.J. C 241/9, at 11

The Legal Affairs Committee advised that older products are not as safe as newer ones because of the higher risks associated with older products.<sup>54</sup> Furthermore, the Committee stated that a product should only be considered defective if the product was being used for its intended purpose.<sup>55</sup> Finally, the Legal Affairs Committee advised that the intended use of the product is a decision made by the consumer, not the producer.<sup>56</sup>

### 5. Joint and Several Liability and Contributory Negligence

The Products Liability Directive imposes severe penalties on producers for marketing defective products.<sup>57</sup> Article 5 of the Directive provides that producers may be jointly and severally liable for the same damages if liability exists, and a consumer may claim full compensation for injury from any one of the producers.<sup>58</sup>

The Legal Affairs Committee noted that the 1976 draft of the Products Liability Directive excluded contributory negligence claims from the scope of the Directive.<sup>59</sup> The Commis-

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with LEGAL AFFAIRS REPORT, *supra* note 1, at 8. Article 4 of the Proposed Directive states that "[a] product is defective when it does not provide for persons or property the safety which a person is entitled to expect." Proposed Directive, *supra* note 7, art. 4, O.J. C 241/9, at 11. The amended text as proposed by the European Parliament stated that

a product is defective when, being used for the purpose for which it is apparently intended, it does not provide for persons or property the safety which a person is entitled to expect, taking into account all the circumstances, including its presentation and the time at which it was put into circulation.

LEGAL AFFAIRS REPORT, *supra* note 1, at 8 (emphasis omitted).

54. LEGAL AFFAIRS REPORT, *supra* note 1, at 18.

55. *Id.*

56. *Id.*

57. Products Liability Directive, *supra* note 2, arts. 1 & 5, O.J. L 210/29, at 30 & 31. For example, the Directive's implementation of strict liability, as well as joint and several liability, places difficulties on producers of defective products. *Id.*

58. *Id.* art. 5, O.J. L 210/29, at 31. This provision frees a party from initiating costly and inefficient proceedings against all of the producers in separate trials. Orban, *supra* note 8, at 402. The laws of the individual Member States govern indemnification of the party who pays the damages in full by the other parties that are jointly and severally liable. *Id.*

59. LEGAL AFFAIRS REPORT, *supra* note 1, at 37. The Consumer Protection Committee explained the rationale behind the omission of contributory negligence:

It is difficult to see how comprehensive the draft directive is intended to be. Since a number of its provisions are already in force in some Member States, it seems reasonable for it to cover all possible aspects of the problem of

sion, however, proposed that contributory negligence should be taken into account.<sup>60</sup> As a result, article 8 of the final Directive provides that contributory negligence of an injured party may be invoked to reduce producer liability.<sup>61</sup> Because the Directive contains no clear standards addressing contributory negligence, the Committee on Economic and Monetary Affairs hypothesized that article 8 will cause decisions on contributory negligence claims to vary from one jurisdiction to another, resulting in different products liability laws among the Member States.<sup>62</sup> One commentator theorized that the Directive encourages injured persons to seek the defendant with the ability to pay the highest compensation as well as to "forum shop" for the jurisdiction in which plaintiffs receive the largest monetary recoveries.<sup>63</sup>

## 6. Defenses

The Products Liability Directive seeks to impose more stringent standards on producers, while granting those producers a number of defenses.<sup>64</sup> Article 7(e) defines the "state of the art" or development risks defense, which states that if a producer did not possess the scientific and technical knowl-

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consumer liability, and not to appear one-sided by omitting a safeguard which will be important to producers. The directive should however avoid treating slight inadvertency of the victim as contributory negligence; and in cases of personal injury probably only gross negligence or intentional conduct should be taken into account.

*Id.*

60. Amended Proposal, *supra* note 8, at 5. In addition to contributory negligence, the Commission added an optional inclusion of compensation for pain and suffering. *Id.*; LEGAL AFFAIRS REPORT, *supra* note 1, at 9.

61. Products Liability Directive, *supra* note 2, art. 8, O.J. L 210/29, at 31. Article 8(2) of the Products Liability Directive provides that "[t]he liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible." *Id.* art. 8(2), O.J. L 210/29, at 31.

62. See LEGAL AFFAIRS REPORT, *supra* note 1, at 26-27.

63. Simon, *Observations des Professionnels sur l'introduction en Droit Français de la Directive Européenne la Responsabilité du Fait des Produits Défectueux* (Professional Observations on the Introduction in French Law of the European Directive on the Responsibility of Defective Products), at 198 (copy on file at the Fordham International Law Journal office).

64. See Products Liability Directive, *supra* note 2, art. 7, O.J. L 210/29, at 31; see also *id.* art. 15, O.J. L 210/29, at 32 (discussing optional nature of development risks defense).

edge to learn of the defect at the time the product was placed into circulation, the producer will not be held liable for injuries and damages resulting from this defect.<sup>65</sup> Discovery of the defect in a product must have been absolutely impossible.<sup>66</sup> Article 15(b) of the Directive, however, allows Member States to exclude the development risks defense from their national legislation at their option.<sup>67</sup>

The Directive provides several other defenses. Pursuant to article 7(a), if the producer can prove that it did not put the product into circulation and did not manufacture the product for sale or distribution, the producer is relieved of liability.<sup>68</sup> Furthermore, article 7(b) provides that a producer is not liable for defects arising after the product enters circulation.<sup>69</sup> Article 7(c) exonerates a producer from liability if it neither manufactured the product for sale nor distributed the product in the course of its business.<sup>70</sup> Finally, article 7(d) of the Products Liability Directive excuses producers from liability if the defect is the result of manufacturing the product to comply with mandatory regulations issued by Member States.<sup>71</sup>

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65. *Id.* art. 7(e), O.J. L 210/29, at 31.

66. *Id.*

67. *Id.*; *see id.* art. 15(1)(b), O.J. L 210/29, at 32 (discussing optional nature of development risks defense); *supra* note 5 (containing text of article 15).

68. Products Liability Directive, *supra* note 2, art. 7(a), O.J. L 210/29, at 31.

69. *Id.* art. 7(b), O.J. L 210/29, at 31.

70. *Id.* art. 7(c), O.J. L 210/29, at 31.

71. *Id.* art. 7(d), O.J. L 210/29, at 31. Despite the language of article 7(d), if a product complies with the legislation of a Member State, it does not make the product free of all defects. Boger, *The Harmonization of European Products Liability Law*, 7 FORDHAM INT'L L.J. 1, 30-31 (1984). The Directive's definition of a defect overrides any definition set forth in Member State legislation. *Id.* at 31. The Directive allows the Member States to choose their own methods of implementing the Directive into their national legislation, but Member States must adhere to the Community's requirements regarding the substantive provisions of the Products Liability Directive. *Id.*

Other aspects of the Directive relate to limitation periods. The Products Liability Directive states that an injured party has three years to bring suit. Products Liability Directive, *supra* note 2, art. 10(1), O.J. L 210/29, at 31. The tenth consideration states that "a uniform period of limitation for the bringing of action for compensation is in the interests both of the injured person and of the producer." *Id.*, consideration 10, O.J. L 210/29, at 29. The Directive provides for a three-year limitation period because this period gives the victim the time to bring an action against the producer in another Member State. *Id.* art. 10(1), O.J. L 210/29, at 31; *see* Orban, *supra* note 8, at 406. In addition, an injured party has ten years to initiate proceedings from the date on which the producer first placed the product into circulation. Products Liability Directive, *supra* note 2, art. 11, O.J. L 210/29, at 32. The reason-

## II. MEMBER STATE IMPLEMENTATION OF THE DIRECTIVE

Member States have been slow to comply with the Products Liability Directive because of the controversial nature of article 7(e), the development risks defense.<sup>72</sup> Eventually, most Member States are likely to implement the development risks defense into their national legislation.<sup>73</sup> Luxembourg, however, has chosen not to adopt the development risks defense into its national legislation, and France and Belgium are likely to follow.<sup>74</sup>

### A. Member States Adopting the Development Risks Defense

The majority of Member States have chosen to implement the development risks defense into their national legislation.<sup>75</sup>

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ing for this type of limit was stated by Mr. Richard Burke at a conference on products liability:

Without such a term to his liabilities, the producer would be faced with increasing difficulties. The relevant records would be more and more difficult to trace, especially where a company had changed hands; it would be more and more difficult to distinguish defect from wear and tear; and the producer would have to insure in perpetuity.

Speech by Richard Burke, London Conference on Product Liability 6 (Feb. 28, 1980) (copy on file at the *Fordham International Law Journal* office) [hereinafter Burke Speech].

72. See Thieffry, *supra* note 44, at 28.

73. See EEC STRICT LIABILITY IN 1992: THE NEW PRODUCT LIABILITY RULES 207 (P. Thieffry & G. Whitehead eds. 1989).

74. See *infra* note 117 and accompanying text (discussing Luxembourg law); *infra* notes 130-37 and accompanying text (discussing likelihood that Belgium will not adopt development risks defense); *infra* notes 138-50 and accompanying text (discussing likelihood that France will not adopt development risks defense).

75. See *supra* note 73 and accompanying text (discussing countries likely to implement development risks defense). Greece and Italy were among the first Member States to implement the development risks defense into their national legislation. Greece changed its products liability law to conform with the Directive by adopting a ministerial decision. No. A.P.B. 7535/1077 (Mar. 31, 1988) (Greece); see *Doing Business in Europe*, Common Mkt. Rep. (CCH) ¶ 43-851. Prior to the enactment of the Greek law, a consumer had to prove fault on the part of the producer to recover for defective products under section 914 of the Greek Civil Code on Torts. See Letter from Peter Dracopoulos, Attorney at the law offices of Karatzas & Perakis in Athens, Greece (Jan. 11, 1990) (copy on file at the *Fordham International Law Journal* office).

Italy was the third Member State to implement the Directive into its national legislation. See Thieffry, *supra* note 44, at 35. On May 24, 1988, the Italian legislature passed a Presidential Decree adopting the development risks defense in concurrence with the Products Liability Directive. D.P.R. 24 magio 1988, n. 224 (Italy); see *Doing Business in Europe*, Common Mkt. Rep. (CCH) ¶ 53-500. Other Member States that have adopted the development risks defense are Portugal, Denmark, and Germany.

Currently, only three Member States are likely to exclude the defense from their products liability laws.<sup>76</sup> Although not every Member State has actually changed its national legislation to comply with the Directive, most have at least drafted products liability legislation in compliance with the Directive.<sup>77</sup>

### 1. Ireland

Although Ireland has been extremely slow in its implementation of the Directive, the Confederation of Irish Industry (the "CII") stated that Ireland intends to adopt the development risks defense into its national legislation.<sup>78</sup> The Irish Minister for Industry and Commerce argues that the absence of a development risks defense would create major problems for producers.<sup>79</sup> Such problems include high insurance costs and stifling of innovation created by producers' fear of liability in developing new products.<sup>80</sup>

In light of these arguments, it appears that Ireland will include the development risks defense in its product liability legislation upon implementation of the Directive.<sup>81</sup>

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*See* Decreto-Lei No. 383/89, art. 5(e) (Nov. 6, 1989) (Port.); Product Liability Act, No. 371, art. 7.1.4, at 3 (June 7, 1989) (Den.); Lousanoff & Moessler, *German Products Liability Law and the Impact of the EC Council Directive*, 22 INT'L LAW. 669 (1988).

76. *See infra* notes 121-50 and accompanying text (discussing products liability laws in Luxembourg, Belgium, and France).

77. *See infra* notes 82-92 and accompanying text (discussing products liability draft legislation in Spain); *infra* notes 139-50 (discussing draft legislation in France).

78. Confederation of Irish Industry (the "CII") Newsletter, *Wider Responsibilities Under Product Liability Directive*, Jan. 12, 1988, at 2, col. 1. The CII is a privately-funded lobbyist group representing industry in trade, economics, finance, taxation, and planning and development. Telephone interview with Joan Barry, CII Information Officer (Sept. 11, 1990). Albert Reynolds, the Irish Minister for Industry and Commerce, noted that Ireland must comply with the Directive in order to maintain a cost competitive market. Speech by Albert Reynolds, Minister for Industry and Commerce, at 6 (Oct. 30, 1987) (copy on file at the *Fordham International Law Journal* office) [hereinafter Reynolds Speech]. Minister Reynolds argued that

every producer wants to avoid having claims taken against him. The best way of doing so is to ensure that proper quality control systems are in operation. . . . I cannot accept that a dramatic increase in claims should automatically follow or that there should be a significant increase in insurance premiums.

*Id.*

79. Reynolds Speech, *supra* note 78, at 4.

80. *Id.* Innovation will be stifled by the lack of new products entering the market. *Id.* The absence of new products will arise from the producer's fear that something unforeseen will go wrong. *Id.*

81. *See* CII Newsletter, Nov. 29, 1988, at 4, col. 2.



## 2. Spain

To date, Spain has not implemented the development risks defense into its products liability legislation. Before the Products Liability Directive, Spain based producer liability on fault, with the producer bearing the burden of proof.<sup>82</sup> The reform of Spanish law pursuant to the terms of the Products Liability Directive is currently under discussion. As of yet, Spain has only draft legislation regarding strict products liability.<sup>83</sup>

Several factors account for Spain's delay in adopting the Products Liability Directive. Spain did not become a member of the EC until January 1, 1986.<sup>84</sup> As a result, the Spanish government must change a large part of Spain's existing legislation to comply with EC laws.<sup>85</sup> In implementing these changes, the Spanish government has given products liability reform a low priority.<sup>86</sup>

Two pieces of draft legislation, however, include the development risks defense.<sup>87</sup> The first draft was almost identical to the Products Liability Directive, with the exception of the inclusion of special strict liability provisions for manufacturers of pharmaceuticals.<sup>88</sup> The second draft more closely reflects the Spanish products liability law as it may be formulated.<sup>89</sup>

82. See Carlo, *Product Liability Law after the European Directive in Spain* (Sept. 22-23, 1988) (copy on file at the *Fordham International Law Journal* office). Prior to the promulgation of the Directive, Spain had a special products liability system, distinct from the general system as provided by the Spanish Civil Code. See *id.*

83. *Id.* at 3.

84. See Treaty of Accession, O.J. L 302/1 (1985) (Spain).

85. See *id.*

86. Carlo, *supra* note 82, at 3.

87. *Id.*; see *Propuesta de Anteproyecto de Ley de Responsabilidad Civil por Daños Causados por Productos Defectuosos* (Proposed Project of the Law of Civil Responsibility for Damages Caused by Defective Products), art. 6(e), at 4 (prepared by Professor don Angel Rojo Fernandez), reproduced in Carlo, *supra* note 82, at app. A (Jan. 26, 1988); *Draft of Spanish Products Liability Law*, art. 29(e), at 123 (prepared by Professor R. Bercovitz), reproduced in Carlo, *supra* note 82, at app. B.

88. Carlo, *supra* note 82, at 3. The draft proposed by Professor Rojo differs somewhat from the Products Liability Directive. *Id.* The Spanish draft includes 1) certain agricultural products; 2) the extension of the legal concept of producer to the producers of agricultural products or raw materials; and 3) the establishment of a system of strict liability for the manufacturers of pharmaceuticals similar to that established in Germany. *Id.*

89. *Id.* Professor Bercovitz is responsible for the second draft of the Spanish products liability law. *Id.* Article 29(e) of the second draft includes the development

The second draft, unlike the Directive, extends responsibility for loss and damages to faulty services as well as defective products.<sup>90</sup> In addition, the second draft includes the concept of damages for pain and suffering and removes the lower threshold of 500 ECUs established by the Products Liability Directive.<sup>91</sup>

Despite the delay in the Spanish Parliament, it seems likely that Spain will adopt the development risks defense in compliance with the Directive.<sup>92</sup>

### 3. The Netherlands

The Tweede Kamer der Staten-Generaal (the "Dutch Parliament") implemented the development risks defense into its national legislation on September 13, 1990.<sup>93</sup> Prior to the promulgation of the Directive, the products liability law in the Netherlands presumed fault on the part of the producer.<sup>94</sup> When the Directive was under debate in the Dutch Parliament, a member of the Partij Van De Arbeid (the "PVDA"), the labor party in the Netherlands, drafted an amendment opposing the

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risks defense as outlined in article 7(e) of the Directive. Draft of Spanish Product Liability Law, art. 29(e), at 123, reproduced in Carlo, *supra* note 82, at app. B.

90. Carlo, *supra* note 82, at 4.

91. *Id.* at 4; see Product Liability Directive, *supra* note 2, art. 9(b), O.J. L 210/29, at 31. Article 9(b) states that damage means

damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:

- (i) is of a type ordinarily intended for private use or consumption, and
- (ii) was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage.

*Id.*

92. Spain will probably include the development risks defense into its national consumer protection law, but the inclusion of the defense is still under debate. Carlo, *supra* note 82, at 5. Spain's slow implementation of the Directive arises from a conflict existing between the Ministry of Justice, which favors the defense as beneficial to the producer, and the Ministry of Health and Consumer Affairs, which opposes the defense. *Id.*; see *supra* note 87 and accompanying text (discussing Spanish draft law on products liability adopting development risks defense).

93. See Aanpassing van het Burgerlijk Wetboek aan de richtlijn van de Raad van de Europese Gemeenschappen inzake de aansprakelijkheid voor produkten met gebreken (Products Liability Law), No. 487, art. 1407a(e), at 1 (Sept. 13, 1990) (Neth.). Article 1407a(e) incorporates article 7(e) of the Directive into the Dutch Civil Code *verbatim*. See *id.*

94. See LEGAL AFFAIRS REPORT, *supra* note 1, at 32.

development risks defense.<sup>95</sup> In response to this amendment, the Christen Democratisch Appel (the "CDA"), the conservative party prevailing in Holland, actively supported the development risks defense.<sup>96</sup>

The CDA argued that because producers are often ignorant of risks created, to hold a producer liable for circumstances it is unaware of would be unfair.<sup>97</sup> The CDA further argued that exclusion of the development risks defense would create problems in the calculation of liability insurance.<sup>98</sup> The CDA stated that because producers are often unaware of the defects in products, they lack the ability to calculate liability risks and as a result, they are unable to calculate insurance premiums properly.<sup>99</sup>

Furthermore, the CDA argued that because the majority of Member States plan to adopt the development risks defense, exclusion of the defense would exacerbate the problem of forum shopping.<sup>100</sup> The CDA noted that multi-national corporations that sell goods in France, Luxembourg, and Belgium would be sued in the Member States where the greatest recovery is likely to be obtained.<sup>101</sup>

#### B. *The United Kingdom: A Controversial Implementation*

The United Kingdom complied with the Directive in the form of the Consumer Protection Act,<sup>102</sup> which received Royal

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95. Tweede Kamer der Staten Generaal and the Amendement Van Het Lid Swildens-Rozendaal (Proposal to Amendment art. 1407a) (May 17, 1989) (Neth.) [hereinafter Proposal to Dutch Amendment]. Swildens-Rozendaal, a member of the PVDA, drafted the amendment. The amendment states that "[i]n the interests of good consumer protection there will be no exception made for development risks liability." *Id.* (translated into English by John Barney). The PVDA favors consumer protection. *Id.*

96. Adaption of the Civil Code to the Directive of the Council of the European Communities concerning liability for defective products, LTS 1580/86/Dutch/ LC, 1985-1986 Sess., art. 1407a(e) (Second Chamber of the States-General) (Neth.).

97. See Proposal to Dutch Amendment, *supra* note 95 (discussing CDA's view of development risks defense).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The CDA further argued that exclusion of the development risks defense would hinder innovation. *Id.* Producers will fear placing new products on the market. *Id.* In turn, this practice will prove to be detrimental to the Dutch economy and to its place in the international market. *Id.*

102. Consumer Protection Act, 1987, ch. 43 (U.K.).

Assent on May 15, 1987.<sup>103</sup> The Consumer Protection Act adopted the development risks defense in article 4(1)(e), which provides that a producer exonerates itself from liability if it proves that it did not possess the scientific and technical knowledge that a reasonable producer would possess to discover a defect.<sup>104</sup> The Consumer Protection Act thus deviates from the original defense as set forth in article 7(e) of the Products Liability Directive.<sup>105</sup>

The development risks defense set forth in the Consumer

103. *Id.*

104. *Id.* art. 4(1)(e), at 3. In furtherance of consumer protection, the United Kingdom proposed an amendment to eliminate the development risks defense with respect to the pharmaceutical industry. 487 PARL. DEB., H.L. (5th ser.) 856 (1987). This proposal stemmed from the German thalidomide tragedy, which caused an uproar over an improperly tested tranquilizer that was sold over the counter. *Id.* The Parliament expressed concern over pharmaceutical products that have a devastating effect on human life. *Id.*

The thalidomide tragedy caused West Germany to remove the development risks defense for manufacturers of drugs. *Id.* The drug thalidomide (marketed under the trademark Counteragen) supposedly represented a new product having unexpected troubles. Veed-Cannon, *A Practical Perspective on Products Liability in the European Communities*, 1982/1 LEGAL ISSUES OF EUROPEAN INTEGRATION 37, 73. The market advertised the drug as a safe tranquilizer but it had not been properly tested. *Id.* Mr. Richard Burke, in a London Conference on Products Liability, stated that "it is unacceptable that consumers should be treated as guinea pigs and bear the risk, without remedy, of defects being discovered during use." Burke Speech, *supra* note 71, at 9.

Opponents of the amendment to eliminate the defense argued that to exclude development risks for pharmaceutical products would not hinder tragic incidents. 487 PARL. DEB., H.L. (5th ser.) 862 (1987). Mistakes are made in the testing of any product. *Id.* Furthermore, pharmaceutical products are tested more thoroughly as a result of the thalidomide tragedy. *Id.* at 858. Lord Poritt of the House of Lords argued that the "proposers of this amendment are suggesting a specific exclusion of the pharmaceutical profession from the possibility of using a defense that anybody else can use—the development risks defence—then I suggest to your lordships that is illogical, unfair, and highly discriminating and very much against the benefit of the community." *Id.* at 859. Thus far, Germany is the only Member State to exclude the development risks defense for pharmaceutical products. See Zekoll, *German Products Liability Act*, 37 AM. J. COMP. L. 809, 810 n.6 (1989).

105. Consumer Protection Act, 1987, ch. 43, art. 4(1)(e), at 3 (U.K.). Article 4(1)(e) of the Consumer Protection Act changed the wording of the development risks defense set forth in the Directive. Article 4(1)(e) provides a defense if

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.

*Id.* Article 7(e) of the Products Liability Directive states that

[t]he producer shall not be liable as a result of this Directive if he proves that the state of scientific and technical knowledge at the time when he put the

Protection Act imposes a reasonableness standard less restrictive than the standard outlined in article 7(e) of the Directive.<sup>106</sup> One House of Lords member noted that the version of the defense as stated in article 4(1)(e) is a watered down version of the Directive.<sup>107</sup> Commentators argue that the content of the U.K. legislation alters the Directive by introducing industry standards, thereby reducing the existing law to a variant

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product into circulation was not such as to enable the existence of the defect to be discovered.

Products Liability Directive, *supra* note 2, art. 7(e), O.J. L 210/29, at 31. Because the United Kingdom is the only Member State to change the wording in the development risks defense, the Commission has initiated proceedings against the United Kingdom, charging that the United Kingdom insufficiently implemented the Directive. Letter from Monique Goyens, Legal Advisor to the Bureau Europeen des Unions de Consommateurs (BEUC) (Oct. 11, 1989) (copy on file at the *Fordham International Law Journal* office).

106. 487 PARL. DEB., H.L. (5th ser.) 849 (1987); *see* Consumer Protection Act, 1987, ch. 43, art. 4(1)(e), at 3 (U.K.). Some legislators in the House of Lords prefer strict compliance with the Directive. 487 PARL. DEB., H.L. (5th ser.) 850 (1987). Lord Morton of the House of Lords inquired hypothetically what would happen if someone were the only producer of a product. *Id.* He asked:

[W]here does [the sole producer of a product] go to find a producer? . . . Is he the only person who is expected to have discovered the defect? It is easy for the sole producer to say, 'I did not expect this. I might not be expected to know this.' Surely it is better to keep the directive, which is in words which can be understood.

*Id.*

Because the Consumer Protection Act does not strictly comply with the Products Liability Directive, the Commission may bring an Article 169 action against the United Kingdom. *See* EEC Treaty, *supra* note 15, art. 169. Article 169 states that [i]f the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

*Id.*

The Commission has also initiated proceedings against Belgium, France, Ireland, and the Netherlands. BUS. INS. NOV. 5, 1990, at 33. These proceedings will be brought before the Court of Justice of the European Communities (the "Court" or the "Court of Justice") in 1991. *Id.* Spain may still be included in the suit. *Id.* Commissioners initially questioned the products liability legislation in Germany, Italy, Denmark, and Luxembourg. *Id.* After an investigation, however, the Commission took no legal action against these Member States. *Id.*

107. 487 PARL. DEB., H.L. (5th ser.) 849 (1987). The development risks defense is intended to encourage producers to develop new products and new production methods for the benefit of the consumer. *Id.* at 853. If the defense is watered down too much, producers will not try as hard to develop new products for the consumer's benefit. *Id.*

of negligence.<sup>108</sup> These commentators argue that the Directive allows for clarification of ambiguities by each Member State, but disallows alteration of its objective.<sup>109</sup> Furthermore, they argue that the U.K. legislation imposes a reasonableness test that conflicts with the Directive's objective of consumer protection through strict products liability.<sup>110</sup>

The Confederation of British Industry (the "CBI"),<sup>111</sup> on the other hand, believes that article 4(1)(e) represents a preferable interpretation of the meaning of article 7(e).<sup>112</sup> The CBI argues that the Directive's wording was unworkable in the context of U.K. legislation.<sup>113</sup> In support of this proposition, the CBI argued that the wording of article 7(e) was imprecise and contrary to the original intention of the Directive.<sup>114</sup> Thus, the CBI argued that the wording of article 4(1)(e) more realistically interprets the intentions of the Directive.<sup>115</sup>

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108. *Id.* at 851; see N.G. Dehn, Attorney at the National Consumer Council, Commentary on the Consumer Protection Act, 4 (copy on file at the *Fordham International Law Journal* office).

109. 487 PARL. DEB., H.L. (5th ser.) 850 (1987); see Letter from Tony Venables, Director of the BEUC (Sept. 3, 1987) (discussing ramifications of changing exact wording of Product Liability Directive) (copy on file at the *Fordham International Law Journal* office).

110. Dehn, *supra* note 108, at 4; see Nedwick, *The Development Risk Defence of the Consumer Protection Act 1987*, 47 CAMBRIDGE L.J. 455, 459 (1988).

111. The Confederation of British Industry (the "CBI") is an independent, non-party political organization that voices industrial concerns to the government. CONFEDERATION OF BRITISH INDUSTRY, INFORMATIONAL PAMPHLET 1 (Mar. 1989) (copy on file at the *Fordham International Law Journal* office).

112. CONFEDERATION OF BRITISH INDUSTRY, POSITION PAPER ON THE DEVELOPMENT RISKS DEFENSE 10 (Apr. 1987) [hereinafter CBI REPORT]. In support of the United Kingdom's deviation from the Directive, the House of Lords proposed that Community directives are often drafted for the benefit of a number of Member States. 487 PARL. DEB., H.L. (5th ser.) 852 (1987). Article 189 of the EEC Treaty provides that the result the Directive seeks to achieve is binding, but the method of implementation is optional within each Member State. See EEC Treaty, *supra* note 15, art. 189.

113. CBI REPORT, *supra* note 112, at 10. The House of Lords permitted the wording of article 4(1)(e) because the policies outlined in the Directive were not consistent with the policies familiar to the U.K. courts and practitioners. 487 PARL. DEB., H.L. (5th ser.) 851-52 (1987).

114. CBI REPORT, *supra* note 112, at 10. The CBI interpreted article 7(e) to exonerate producers only if no individual anywhere in the world could have discovered the defect. *Id.*

115. *Id.* at 11.

### *C. Member States Rejecting the Development Risks Defense*

At present, only one Member State has failed to adopt the defense.<sup>116</sup> Luxembourg has expressly excluded the development risks defense from its national legislation.<sup>117</sup> France and Belgium are likely to follow.<sup>118</sup> Prior to the promulgation of the Directive, the products liability laws in these Member States included strict liability but did not provide for a development risks defense.<sup>119</sup> Because their products liability laws already complied with the Directive, these Member States are reluctant to modify their products liability laws to include the defense.<sup>120</sup>

#### 1. Luxembourg

Luxembourg adopted legislation to comply with the Directive on April 21, 1989.<sup>121</sup> The Judicial Commission, the judicial committee of Luxembourg's parliament, rejected the development risks defense because it feared that the defense would erode consumer protection and because it found no

116. See *Projet de Loi relatif à la responsabilité civile du fait des produits défectueux* (Proposed law concerning the civil liability of manufacturers of defective products), Chambre des Députés No. 3287 (Mar. 1, 1989) (Lux.); see also *RAPPORT GÉNÉRAL DU GROUPE DE TRAVAIL SUR L'INTÉGRATION EN DROIT FRANÇAIS DE LA DIRECTIVE, POSITION PAPER ON THE PRODUCTS LIABILITY DIRECTIVE* (June 9, 1987) [hereinafter *WORKING GROUP REPORT*]; *FÉDÉRATION DES ENTREPRISES DE BELGIQUE, POSITION PAPER ON THE PRODUCTS LIABILITY DIRECTIVE* (Apr. 9, 1986) [hereinafter *BELGIAN POSITION PAPER*].

117. *Loi du 21 avril 1989 relative à la responsabilité civile du fait des produits défectueux* (Law of Apr. 21, 1989 concerning the civil liability of manufacturers of defective products), *DOCUMENT PARLEMENT 3287, SESSION ORDONNANCE 1988-1989* (Lux.).

118. See *CONSEIL NATIONAL DU PATRONAT FRANÇAIS, POSITION PAPER ON DEVELOPMENT RISKS DEFENSE 6* (Oct. 18, 1988) [hereinafter *CNPF POSITION PAPER*] (discussing likelihood that France will exclude development risks defense); *BELGIAN POSITION PAPER, supra* note 116 (discussing likelihood that Belgium will exclude development risks defense).

119. *LEGAL AFFAIRS REPORT, supra* note 1, at 32.

120. See, e.g., *Projet de Loi relatif à la responsabilité civile du fait des produits défectueux* (Proposed law concerning civil liability of manufacturers of defective products), Chambre des Députés, No. 3287, at 5 (Oct. 11, 1988); *id.* at 4 (Mar. 1, 1989).

121. *Loi du 21 avril 1989 relative à la responsabilité civile du fait des produits défectueux* (Law of Apr. 21, 1989 concerning the civil liability of manufacturers of defective products), *DOCUMENT PARLEMENT 3287, SESSION ORDONNANCE 1988-1989* (Lux.).

precedent in Luxembourg's general law.<sup>122</sup> The development risks defense is unknown in Luxembourg's legal process and jurisprudence.<sup>123</sup> The Judicial Commission, therefore, opposed any modification of Luxembourg's strict liability provision.<sup>124</sup>

The Luxembourg Chamber of Commerce (the "Chamber"), a private group that advises the Luxembourg Parliament, however, favored the defense and argued that by excluding the defense, Luxembourg would isolate itself from the rest of the Member States, resulting in a trade disadvantage *vis-à-vis* other states.<sup>125</sup> The Chamber believed that producers must assume part, but not all, of the responsibility to private consumers injured by defective products.<sup>126</sup> The Chamber also maintained that exclusion of the defense would inhibit innovation.<sup>127</sup> Finally, the Chamber argued that rejection of the defense would penalize industries that develop new products.<sup>128</sup> In spite of these arguments, which were presented during legislative debates, the Luxembourg parliament rejected the development risks defense in its national legislation.<sup>129</sup>

## 2. Belgium

As of 1990, Belgium has not complied with the Product Liability Directive,<sup>130</sup> and it seems unlikely that the Belgian

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122. *Projet de Loi relatif à la responsabilité civile du fait des produits défectueux* (Proposed law concerning the civil liability of manufacturers of defective products) *Chambre des Députés*, No. 3287, at 4 (Mar. 1, 1989) (Lux.).

123. *Id.* at 5 (Oct. 11, 1988).

124. *Id.* at 5 (Mar. 1, 1989).

125. *Id.* The Chamber of Commerce represents trade enterprises, but is considered more than a lobbying group because it gives advice to the government. Telephone Interview with Mr. Cloos, Legal Advisor at the Federation of Luxembourg Industries in Brussels (Feb. 19, 1990).

126. *Projet de Loi relatif à la responsabilité civile du fait des produits défectueux* (Proposed law concerning the civil liability of manufacturers of defective products), *Chambre des Députés*, No. 3287, at 10 (Mar. 1, 1989) (Lux.).

127. *Id.*

128. *Id.* at 9.

129. *Loi du 21 avril 1989 relative à la responsabilité civile du fait des produits défectueux* (Law of Apr. 21, 1989 concerning the civil liability of manufacturers of defective products), *DOCUMENT PARLEMENT* 3287, *SESSION ORDONNANCE* 1988-1989 (Lux.).

130. See generally *BELGIAN POSITION PAPER*, *supra* note 116.



legislature will adopt the development risks defense.<sup>131</sup> The proponents of the development risks defense in Belgium have argued that exclusion of the defense would increase a producer's liability and would lead to an incalculable increase in insurance premiums for manufacturers.<sup>132</sup> The current economic situation in Belgium, they argue, is particularly unfavorable to increased producer liability.<sup>133</sup> Furthermore, development risks defense proponents argue that innovation would be hindered because producers would subject themselves to increased liability when placing a new product on the market.<sup>134</sup> This increased liability would prevent manufacturers from developing new products or would cause a considerable increase in the price of products.<sup>135</sup>

The Council of Consumers in Brussels has argued that if the Belgian legislature decides not to adopt the development risks defense, it should at least impose a duty of vigilance and notice on producers.<sup>136</sup> Additionally, other groups have proposed that the Belgian legislature should look to article 4(1)(e) of the U.K. Consumer Protection Act for guidance.<sup>137</sup>

### 3. France

The development risks defense in France is the subject of much debate due to the direct conflict existing between the Directive and current French law, which provides for strict liability, but does not provide for a development risks defense.<sup>138</sup> As a result, only draft legislation has been proposed.<sup>139</sup>

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131. *Id.* at 5 (discussing reluctance of Belgium to adopt development risks defense).

132. *Id.* (discussing insurance premium increase); see WORKING GROUP REPORT, *supra* note 116, at 37.

133. BELGIAN POSITION PAPER, *supra* note 116, at 5.

134. *Id.*

135. *Id.*

136. WORKING GROUP REPORT, *supra* note 116, at 35.

137. *Id.* at 39; see Consumer Protection Act, 1987, ch. 43, art. 4(1)(e), at 3 (U.K.).

138. CNPF POSITION PAPER, *supra* note 118, at 6; LEGAL AFFAIRS REPORT, *supra* note 1, at 32.

139. See Speech by Henri Temple, Professor at the University of Montpellier (Sept. 21, 1988) (copy on file at the *Fordham International Law Journal* office). A first draft was produced in March 1988 and a new one was developed in August 1988, omitting development risks as a defense for producers. *Id.* In most respects, the second draft is almost identical to the Products Liability Directive. *Id.* The draft legislation in sections 1387-16 adds, however, that the producer is liable even if it cannot recall a dangerous product from circulation. *Id.* at 2-3. In addition, the draft

French jurisprudence dictates, as a general rule, that a producer is responsible for unknown defects even if the producer proves that the defect was not discoverable at the time the product was put into circulation.<sup>140</sup>

The French Working Group (the "Working Group"), a group of French academics in charge of preparing a draft products liability law, wished to preserve French law and jurisprudence.<sup>141</sup> The Working Group nevertheless argued that adoption of the development risks defense could be considered in conjunction with standards that encourage producers to increase internal quality controls and to enforce safety standards.<sup>142</sup>

Some French commentators argue that incorporating the development risks defense into national legislation will result in producers limiting their liability by conducting less research on product safety.<sup>143</sup> Furthermore, these commentators argue that the fear of liability will cause producers to band together, adopting a code of silence regarding defective products and

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French legislation does not provide any limitation on liability such as the lower threshold of ECU 500 provided in the Directive. *Id.* at 3; see Products Liability Directive, *supra* note 2, art. 9(b), O.J. L 210/29, at 31.

140. See LEGAL AFFAIRS REPORT, *supra* note 1, at 32. Prior to the promulgation of the Directive, producers were strictly liable for defective products. *Id.*; see WORKING GROUP REPORT, *supra* note 116, at 7. The producer, however, is not liable when a defect does not cause damage. *Id.* Exceptions to this general rule include defective labels on medication. *Id.*

141. See generally WORKING GROUP REPORT, *supra* note 116. The Working Group, headed by Professor Ghestin, was a private group of academics charged by the French government with preparing draft legislation on products liability. Telephone Interview with Joëlle Simon, Judicial Director of the Conseil National du Patronat Français (Feb. 19, 1990). The Working Group, however, considered that the producer should, in certain instances, be able to invoke the development risks defense to exonerate itself. WORKING GROUP REPORT, *supra* note 116, at 7. For instance, the Working Group proposed that a producer should not be liable when damages are not imputed to a defect in the product, but to a danger such as the mislabeling of medication. *Id.* Therefore, the Working Group recommended that French law be modified in this respect. *Id.*

142. WORKING GROUP REPORT, *supra* note 116, at 34. The Working Group argues that producers can determine the scope of their own liability by not assuming the risks of development. *Id.* Furthermore, they argue that theoretically, producers could also arbitrarily decide to keep any scientific or technological information secret. *Id.*

143. Rothman & Finon, *Responsabilité du fait des Produits: Vers le Développement D'un Régime Défectueux*, 124 FICHES JURIDIQUE 6 (1988) (Institute for Consumer Affairs, France, Pub. No. 610).

thereby undermining consumer protection.<sup>144</sup> In addition, commentators note that producers may not disclose scientific and technological information that would hinder application of the defense in products liability suits.<sup>145</sup> This failure to share scientific and technological information might discourage innovation. Moreover, some commentators fear that producers will systematically invoke the defense, thereby prolonging legal proceedings and discouraging victims from seeking a remedy.<sup>146</sup>

Conversely, the Conseil National du Patronat Français (the "Conseil National"), a lobbying group concerned with promoting the interests of industrial and economic organizations, favors a mandatory development risks defense.<sup>147</sup> The Conseil National theorizes that the optional nature of the development risks defense will create competitive distortions among the producers of the Community, thereby undermining the Directive's objective of products liability law harmonization.<sup>148</sup> This group argues that if the development risks defense remains optional, the variations in the Member States' laws will hinder the achievement of a common market and encourage forum shopping by consumers injured by defective products.<sup>149</sup>

The Products Liability Directive and, in particular, the development risks defense have created controversy in France. Based on some of the concerns expressed by the Working Group, the French government is likely to reject the development risks defense in its national legislation.<sup>150</sup>

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144. *Id.*

145. *Id.*

146. *Id.*

147. See generally Simon, *supra* note 63. The Conseil National du Patronat Français (the "Conseil National") is the main organization in France that lobbies in the French parliament in favor of the industrial, commercial, banking, and economic sectors. Telephone interview with Joëlle Simon, Judicial Director of the Conseil National (Feb. 19, 1990). Most other Member States have individual lobbying groups for the industrial sector alone, whereas the Conseil National has over 300 firms as its members. *Id.*

148. Simon, *supra* note 63, at 198.

149. *Id.*

150. See *supra* notes 138-50 and accompanying text (discussing likelihood that France will exclude development risks defense).

### III. THE DEVELOPMENT RISKS DEFENSE SHOULD BE MANDATORY WITHIN THE DIRECTIVE

#### A. The Need for Harmonization

The EEC Treaty provides that the European Economic Community shall issue directives as a means of approximating legislation in the European common market.<sup>151</sup> The pursuit of a European common market, permitting the free flow of goods and equal competitive opportunities among Member States, suggests the need for harmonization of Member State products liability laws.<sup>152</sup> Furthermore, a uniform system of liability for defective products facilitates equal and adequate consumer protection.<sup>153</sup>

Generally speaking, compliance by all Member States with EC directives promotes harmonization.<sup>154</sup> The Products Liability Directive, however, promotes disharmony in the Community by permitting Member States to disregard certain of its

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151. EEC Treaty, *supra* note 15, art. 100. Article 100 of the EEC Treaty provides that

[t]he Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market.

*Id.* The EEC Treaty further provides that "[i]t shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States to promote throughout the Community a harmonious development of economic activities." *Id.* art. 2.

152. See LEGAL AFFAIRS REPORT, *supra* note 1, at 29.

153. *Id.* at 31. In addition, adoption of uniform products liability laws among Member States minimizes competitive distortions. *Id.*

154. See generally Robinson, *Could the Product Liability Directive be Directly Effective in Ireland Without Implementing Legislation?* (copy on file at the Fordham International Law Journal office) (discussing importance of implementing directives within prescribed time). The Court of Justice has illustrated this point in numerous cases emphasizing the importance of harmonization in connection with the promotion of a common market. See *Franz Grad v. Finanzamt Traunstein*, Case 9/70, 1970 E.C.R. 825 (discussing directive applying common system of turnover tax issued to harmonize national legislation and to eliminate distortions in connection with promotion of common transport policy). The Court in *Grad* stated that the efforts to harmonize Community legislation cannot be obtained through harmonization measures adopted by individual Member States at different dates. *Id.* at 834-35; see *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, 1982 E.C.R. 53, Common Mkt. Rep. (CCH) ¶ 8789 (deciding that Member State that fails to adopt implementing measures required by directive within prescribed time may not plead its own failure to perform obligations of directive).

provisions.<sup>155</sup> Exclusion of the Directive's provisions from national legislation is inconsistent with the goal of the Directive and is likely to hinder the free flow of goods.<sup>156</sup>

The Directive's failure to mandate a development risks defense will prove detrimental to the Community. For example, the Conseil National contends that if France fails to implement the development risks defense, it will adversely influence the French economy while giving other countries a competitive advantage.<sup>157</sup> France, by excluding the defense, will cause its producers to avoid experimentation with new products for fear of liability.<sup>158</sup> This fear will enable producers in other Member States to implement technological advances, thereby gaining a competitive advantage in certain products and methods of production.<sup>159</sup>

The Chamber of Commerce in Luxembourg expressed

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155. BRITISH DEPARTMENT OF TRADE AND INDUSTRY, IMPLEMENTATION OF EC DIRECTIVE ON PRODUCT LIABILITY 5 (Nov. 1985) [hereinafter DTI POSITION PAPER]; see Products Liability Directive, *supra* note 2, art. 15, O.J. L 210/29, at 32. Commentators have argued that the optional nature of certain articles within the Directive leaves key issues, such as limitations on liability, to the discretion of the Member States. See, e.g., Zekoll, *supra* note 104, at 815. Furthermore, commentators argue that this variation will cause Member States to depend on local laws that provide a wide range of varying solutions. *Id.* at 816. Moreover, the vague wording of some of the Directive's provisions will create conflicting interpretations in the various Member States, thereby creating disharmony. *Id.*

Mr. Patrick Thieffry argues that the options set forth in the Directive will be detrimental to the unification of products liability laws throughout the Community. Thieffry, *supra* note 44, at 48. Mr. Thieffry argues that

[e]ven when all Member States have finally incorporated the Directive in their national laws, their provisions will remain somewhat different, because of the options opened to the Member States . . . . If the law of the Federal Republic of Germany is applicable, for example, the overall liability of a producer for identical items with the same defect shall be limited to 160 million Ecu. Furthermore, primary agricultural products and game will apparently be subject to the Directive's system in France and in Luxembourg and—as far as it is possible to expect at the time of this paper—not in other Member States.

*Id.*

156. LEGAL AFFAIRS REPORT, *supra* note 1, at 29. The European Parliament advised that "if Member States are allowed to lay down [certain] implementing provisions, this would undoubtedly lead to divergence in the application and consequent cost to producers of the principle of products liability. The proposal is, therefore, not fully in line with the intended objective of bringing about equal competitive opportunities in the Community." *Id.*

157. Simon, *supra* note 63, at 202.

158. *Id.*

159. *Id.*

similar concerns.<sup>160</sup> By excluding the defense, Luxembourg is isolating itself from the rest of the Community and will be at a disadvantage with respect to its partners and competitors.<sup>161</sup> To avoid potential liability, investors will avoid contributing money to new technologies, thereby stifling innovation.<sup>162</sup>

Furthermore, the United Kingdom's implementation of the development risks defense significantly undermines the objective of the Directive.<sup>163</sup> Because the United Kingdom has adopted its own standard for producer liability, the United Kingdom's implementation of the Directive will not achieve the goal of harmonization.<sup>164</sup> Article 4(1)(e) of the Consumer Protection Act imposes a reasonableness standard, reducing the development risks defense to a negligence test.<sup>165</sup> Additionally, this standard creates the likelihood that a future body of case law will develop in the United Kingdom that fails to conform with the Directive.<sup>166</sup> Such a development would further undermine the underlying interests of the Products Liability Directive.<sup>167</sup>

The goal of the Products Liability Directive is consistent with the Treaty's intentions to harmonize the Community market.<sup>168</sup> Exclusion of the development risks defense in Belgium, France, Luxembourg, and the United Kingdom undermines the intentions of the EEC Treaty and promotes disharmony in the Community.

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160. See *Projet de Loi relatif à la responsabilité civile du fait des produits défectueux* (Proposed law concerning civil liability of manufacturers of defective products), *Chambre de Députés*, No. 3287, at 7 (Mar. 1, 1989) (Lux.).

161. *Id.*

162. *Id.* at 10.

163. See Dehn, *supra* note 108, at 5 (discussing United Kingdom's controversial implementation of Products Liability Directive).

164. *Id.*

165. Consumer Protection Act, 1987, ch. 43, art. 4(1)(e), at 3 (U.K.); see Nedwick, *supra* note 110, at 459.

166. See Dehn, *supra* note 108, at 5.

167. *Id.*

168. See EEC Treaty, *supra* note 15, art. 2. Article 2 provides that

[i]t shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

*Id.*

B. *The Development Risks Defense is Favorable to the European Community*

A mandatory development risks defense would harmonize the products liability laws in the Community, thereby creating a free flowing market devoid of competitive distortions.<sup>169</sup> A uniform products liability law eliminates the possibility of a producer being subjected to a variety of products liability laws.<sup>170</sup> Producers will not have to fear exporting goods to Member States with more stringent products liability laws.<sup>171</sup> The resulting free flow of goods will enable the market to run more smoothly.<sup>172</sup>

Some opponents argue that the development risks defense will enable producers to exercise complete control over their industry.<sup>173</sup> By arbitrarily not disclosing certain scientific and technical knowledge, an entire industry can choose to ignore improvements in their products, thereby stifling beneficial innovation.<sup>174</sup>

Innovation, however, can also be stifled by not adopting the development risks defense.<sup>175</sup> For example, producers will avoid creating new products that will be only marginally profitable because they are not widely utilized or in high demand, and will innovate in only the most profitable markets.<sup>176</sup> Furthermore, there is little evidence that innovation has been stifled in those Member States that have implemented the defense.<sup>177</sup>

Proponents of the development risks defense argue that rejecting the defense will cause insurance rates to rise.<sup>178</sup> They

169. LEGAL AFFAIRS REPORT, *supra* note 1, at 31-32.

170. *Id.* at 23.

171. *Id.*

172. *Id.* Otherwise, manufacturers will be reluctant to sell innovative products in countries where the legal environment is hostile. CBI REPORT, *supra* note 112, at 3. This is a significant problem in the medical field where products liability claims are most prevalent. *Id.* at 4.

173. Burke Speech, *supra* note 71, at 10.

174. Schmitz, *EEC Council Directive Liability for Defective Products: A Consumer Viewpoint*, Bureau Européen Des Unions De Consommateurs, (BEUC) doc. 39/86, at 4 (Feb. 27, 1986).

175. CBI REPORT, *supra* note 112, at 3.

176. *Id.*

177. *Id.*

178. CBI REPORT, *supra* note 112, at 5. Certain industries, particularly in the areas of pharmaceuticals and aircraft, complained that to exclude development risks

fear that the cost of insurance will be so high that only producers in economically strong companies will be able to insure themselves.<sup>179</sup> Moreover, producers who are unaware of defects in products lack the ability to calculate liability risks, resulting in the inability to calculate insurance premiums.<sup>180</sup> Opponents of the defense, however, argue that insurance premiums do not differ significantly between countries that cover risks of development and those that do not.<sup>181</sup> Furthermore, industrialists need not worry because consumers appear willing to pay more to cover producers' insurance costs.<sup>182</sup>

In addition, exclusion of the defense will aggravate the problem of forum shopping.<sup>183</sup> Multi-national corporations that sell goods throughout the EC will be sued in the Member

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would prove to be more burdensome to their industries than others. Burke Speech, *supra* note 71, at 10. This is true because side effects of pharmaceuticals or cosmetics are often, in spite of intensive testing, technically or scientifically not capable of being detected. See Lousanoff & Moessle, *supra* note 75, at 674. Because the unique liability problems in these industries have been in existence for so long, however, legal solutions already have been developed to resolve them. See Burke Speech, *supra* note 71, at 10.

179. CBI REPORT, *supra* note 112, at 5.

180. See Proposal to Dutch Amendment, *supra* note 95; see also *supra* note 95 and accompanying text (discussing insurance premiums).

181. Rothman & Finon, *supra* note 143, at 6. Insurers propose that any increase in insurance costs subsequent to the Directive's implementation would be minimal. *Id.* The American Chamber of Commerce in Europe (the "EUROMED") agreed that insurance coverage for development risks is not likely to appreciate. AMERICAN CHAMBER IN ITALY, ITALIAN-AMERICAN BUSINESS (Nov. 1980) (copy on file at the *Fordham International Law Journal* office). EUROMED, however, submitted that premiums would be significantly higher with respect to pharmaceuticals that are inherently and unavoidably unsafe. *Id.* at 56.

182. CBI REPORT, *supra* note 112, at 4. The Association of Insurance Managers in Industry and Commerce (the "AIRMIC"), which represents those responsible for buying insurance on behalf of their companies, urged the inclusion of a development risks defense in the Directive. *Id.* at 5. AIRMIC advised that

[w]hile manufacturers and suppliers are prepared to accept responsibility for their products, they cannot realistically fund these liabilities without insurance protection. . . . If, as we know is the case, the insurance industry is not able to provide the cover that we need at present, one must question their ability to provide cover under a strict liability regime, let alone one without a development risks defence.

*Id.*

183. See Proposal to Dutch Amendment, *supra* note 95; see also *supra* note 95 and accompanying text (discussing problems of forum shopping resulting from optional development risks defense).



States most likely to award the greatest recovery.<sup>184</sup>

Originally, the European Parliament argued for the elimination of the development risks defense to protect consumers.<sup>185</sup> The Commission, however, in its explanatory memorandum on the amended proposal, argued that exclusion of the defense would require consumers to bear the risk of the unknown.<sup>186</sup> Furthermore, the *Union des Industries de la Communauté Européenne*, a group that lobbies on behalf of consumer interests, stated that when products are placed on the market, manufacturers are obliged by the law in all Member States to take all necessary measures to protect the consumer once they realize that their products are defective.<sup>187</sup> Moreover, the development risks defense allows consumers to be compensated more readily because cases will be tried in court with more expediency.<sup>188</sup>

### CONCLUSION

The Council of Ministers set specific goals when it implemented the Products Liability Directive. The goal of the Products Liability Directive is to protect consumers in the EC while advancing toward the European economic union of 1992. The adoption of a mandatory development risks defense would promote both the goals of the Directive and the goal of European economic union, while allowing producers to innovate and improve their products. The optional development risks defense in article 15 of the Products Liability Directive, however, undermines these goals. The defense should be

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184. Proposal to Dutch Amendment, *supra* note 96 (discussing problems associated with exclusion of development risks defense).

185. UNION DES INDUSTRIES DE LA COMMUNAUTÉ EUROPÉENNE (UNICE), POSITION PAPER ON THE AMENDED PROPOSAL FOR A DIRECTIVE ON PRODUCTS LIABILITY 3 (Jan. 16, 1980) [hereinafter UNICE POSITION PAPER].

186. Amended Proposal, *supra* note 8, at 4; see UNICE POSITION PAPER, *supra* note 185, at 3. The BEUC, a lobbying group for European consumers, argued that European judges do not have much experience in products liability cases. Schmitz, *supra* note 174, at 4. More than ninety-five percent of European products liability cases settle out of court. *Id.* By encouraging out of court settlements, the BEUC argues that the development risks defense will be beneficial to manufacturers because it leads to favorable results. *Id.*

187. UNICE POSITION PAPER, *supra* note 185, at 3.

188. Schmitz, *supra* note 174, at 4.

mandatory in order to promote innovation and to create a common market with minimal competitive distortions.

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