Legal Study – Exclusion Clauses in Standard under the EU Low Voltage Directive 73/22/EEC (Children and Disabled People using Electrical Appliances)

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Commissioned by the European Association for the Co-Ordination of Consumer Representation in Standardisation (ANEC)

October 2004

Contents

Disclaimer

We would like to bring to your attention that, in general, ANEC would prefer the use of “people with disabilities” rather than “infirm people” However, as the terminology “infirm people” is used in the original standard EN 60335 Part1 (the general exclusion clauses in standard), it is also used in this study for the sake of clarity.

Part I: The current Regime – Legal Status of Exclusion Clauses in Product Safety Standards under the Low Voltage Directive

This Part of the Study focuses on the legal status of exclusion clauses in the EN 60335 standard series whose references and titles have been publicized by the Commission as harmonised standards under the Council Directive 73/23/EEC (Low Voltage Directive).[1] It will approach this issue by outlining what an exclusion clause is and by giving an overview of the different varieties of exclusion clauses in the EN 60335 standard series (Chapter A). This description will be followed by a legal analysis of the exclusion clauses (Chapter B). Chapter C will sum up the results of Part I.

A. Exclusion clauses in the EN 60335 standard series

The EN 60335 standard series deals with the safety of electrical appliances for household and similar purposes, their rated voltage being not more than 250 V for single phase appliances and 480 V for other appliances. The general standard EN 60335-1 defines general requirements applicable to all products within the product family. Specific standards EN 60335-2 modify these general requirements for specific products.

I. The „general exclusion clause“ in standard EN 60335-1

§ 2 of the introduction to EN 60335-1 states that

> „This standard recognizes the internationally accepted level of protection against hazards such as electrical, mechanical, thermal, fire and radiation of appliances when operated as in normal use taking into account the manufacturer's instruction. It also covers abnormal situations that can be expected in practice.”

When defining its scope, EN 60335-1 states:

> „As far as is practicable, this standard deals with the common hazards presented by appliances that are encountered by all persons in and around the home. However, in general, it does not take into account
>
> - the use of appliances by young children or infirm persons without supervision
>
> - playing with the appliance by young children.”

The latter sentence is usually referred to as „exclusion clause“.

Exclusion clauses define specific situations that do not fall under „normal use“ of an appliance. The corresponding hazards are considered outside the responsibility of a manufacturer.

1 In its latest communication of April 2, 2004, the Commission has publicized reference and title of the EN 60335 part 1 standard as well as of 85 different part 2 standards, OJ C 103, 2.

The term „exclusion clause“ is somewhat misleading since it implies that the safety interests of children and infirm persons are not dealt with altogether. Such an understanding of the „exclusion clause“ would go too far:

- First, it has to be noted that the general exclusion clause only refers to the **use without supervision** of an appliance by young children or infirm persons and the **playing** with the appliance by young children. Hazards arising for young children or infirm persons under supervised use do fall within the scope of the standard.
- Then, hazards that arise for children or infirm persons as **bystanders** are not excluded either. EN 60335-1 generally covers hazards encountered by all persons in and around the home, whether they are users of the appliance or mere bystanders. This view is supported by Section 4 of EN 60335-1; as a general requirement, appliances shall be constructed so that in normal use they function safely so as to cause no danger to persons or surroundings, even in the event of carelessness that may occur in normal use.

The meaning of the general exclusion clause in EN 60335-1 is therefore limited to identifying **three specific situations** which fall outside of the scope of a standard: the use without supervision by young children, the use without supervision by infirm persons and the playing with the appliance by young children.

There is no clear definition of the terms „**young children**“ and „**infirm persons**“. In referring to these terms, the exclusion clause apparently intends to identify two groups of consumers which are particularly prone to hazards when using electrical household products. Given this rationale, the meaning of „young child” or „infirm person” can differ from product to product: a child too young to use an electric iron safely might be old enough for the safe use of an electric toothbrush.

Another term of the exclusion clause that gives room for interpretation is the term „**supervision**“. Does it signify a constant presence of a supervisor? Or does it suffice if e.g. a parent has instructed a child as to the use of a product? EN 60335-2-17 (Particular requirements for blankets, pads and similar flexible heating appliances) is more concrete in this respect. It states in note 101 that children are considered to be old enough to use an appliance without supervision when they have been adequately instructed by a parent or guardian and are deemed competent to use the appliance safely.

Although the rationale of this specific exclusion clause would make sense also in the context of EN 60335-1, it cannot be extended to it. The term „supervision“ implies the **constant presence of a supervisor** when a child or an infirm person uses the appliance. EN 60335-2-17 is an exception from this rule.

II. Exclusion clauses in specific EN 60335-2 standards

As far as exclusion clauses in specific EN 60335-2 standards are concerned, three groups of standards can be distinguished.

- Most of the specific part 2 standards refer to the part 1 standard and reiterate the general exclusion clause of EN 60335-1.
- Another - smaller - group of standards does not contain an exclusion clause. The products concerned are for commercial use (in light industry) only. Since this group of standards focuses on the common hazards encountered by persons employing these products, hazards to children and infirm persons are excluded by definition. Here, any specific exclusion clause would be superfluous.
- The third group contains standards with their proper exclusion clause. In the following are listed all specific exclusion clauses in EN 60335 part 2 standards under the LVD:

Part 2 Standard	Exclusion Clause
EN 60335-2-17 Blankets, pads and similar flexible heating appliances	„As far as is practicable, this standard deals with the common hazards presented by appliances that are encountered by all persons in and around the home. However, in general, it does not take into account - the use of appliances by young children or infirm persons without supervision; - playing with the appliance by young children. NOTE 101 Children are considered to be old enough to use an appliance without supervision when they have been adequately instructed by a parent or guardian and are deemed competent to use the appliance safely.“
EN 60335-2-84 Toilets	„As far as is practicable, this standard deals with the common hazards presented by appliances that are encountered by all persons in and around the home. However, in general, it does not take into account young children playing with the appliance.”
EN 60335-2-97 Drives for rolling shutters, awnings, blinds and similar equipment	„As far as is practicable, this standard deals with the common hazards presented by appliances that are encountered by all persons in and around the home. However, in general, it does not take into account playing with the appliance by young children but recognizes that children may be in the vicinity.”

Though rather small, the list of specific part 2 standards with their own exclusion clause is revealing.

- EN 60335-2-17 has a more liberal approach to the notion of „use without supervision“. It does not exclude the use of an electrical blanket, pad or similar flexible heating appliance by young children if they have been instructed prior to the use. In doing so, the standard takes a more realistic viewpoint than that of EN 60335-1. Apparently, there is no compelling reason why this approach should be confined to this specific group of products.

- EN 60335-2-84 concedes that in the case of toilets, an unsupervised use by young children or infirm people cannot be excluded from the scope of the standard. Given the very „private nature" of the use of a toilet, it would be unrealistic to require that it be used under supervision. Only in extreme cases, i.e. when young children or infirm persons are incapable of using a toilet on their own, the situation is different.
- As for EN 60335-2-97, the exclusion clause essentially corresponds to the general exclusion clause of EN 60335-1. Also, it explicitly formulates a general concept that underlies the EN 60335 standard series: hazards for bystanders have to be considered as well.

III. Practical impact of the exclusion clause

As a general consequence of the exclusion clause, a manufacturer can design and manufacture an appliance without having regard to certain hazards relating to young children and infirm persons. To give a concrete example: when it comes to protection against access to live parts, Section 8 of EN 60335-1 provides for a compliance check using test probes that represent adult limbs. The „child finger test probe" is not foreseen.[2]

However, it has to be noted that – in spite of the exclusion clause - certain part 2 standards go a different way. They do provide for compliance checks using the „child finger test probe".[3] In the same vein, other part 2 standards account for childlike behaviour despite the exclusion clause.[4] Here, the practical impact of the exclusion clause is somewhat countered through the back door. Whenever this is the case, the exclusion clause is diluted and has less practical relevance.

B. Legal status of the exclusion clause and the presumption of conformity

I. Legal regime

1. Legal status of a harmonised standard; presumption of conformity

The EN 60335 standard series is formulated by CENELEC, a private standardisation organisation under Belgian law. The only legal obligations deriving from a European standard concern the members of the standard body that issued the standard. E.g., Art. 5 of CEN/CENELEC Guide 1 (Status of European Standards) obliges CENELEC members to

2 For a discussion of the impact of exclusion clauses in the context of risk problems with high surface temperature see the study by *Arild*, Risk problems with high surface temperature on consumer products, Report Nr. 2 / 2001 of the National Institute for Consumer Research (Norway), p. 63.

3 E.g. EN 60335-2-25 (microwave ovens), Section 8.1.1.

4 E.g. EN 60335-2-6 (cooking ranges, cooking tables, ovens and similar appliances for household use), Section 11 – maximum temperatures at the front; Section 20 – stability, testing of the door under a load of 22,5 kg which represents a small child sitting on it.

give a European standard the status of a national standard and to withdraw any conflicting national standard within agreed periods.

Regarding manufacturers, a CENELEC standard is a mere „suggestion" how to produce „state of the art". It is not a binding rule of law or even a contractual obligation.

A different question is whether a private standard is made mandatory by law. Although some European countries adhere to this idea,[5] this is not the approach chosen by the European legislator. There is no public obligation on a manufacturer to produce an appliance according to a harmonised standard.

However, this does not mean that EN 60335 standard series has no legal relevance at all. In the context of directive 73/23/EEC, European law attaches legal relevance to harmonised standards such as the EN 60335 standard series. With the so-called reference to standards model,[6] Art. 2 and Annex I of directive 73/23/EEC define **legally binding essential safety objectives** for electrical equipment but rely for the formulation of the specific safety requirements on the provisions of harmonised standards. By this, harmonised standards are not promoted to legally binding rules, but according to Art. 5 of directive 73/23/EEC a compliance with harmonised standards results in a **presumption of conformity** with the general safety objectives of the directive. Member states have to ensure that electrical equipment which complies with the safety provisions of harmonised standards shall be regarded by their competent administrative authorities as complying with the provisions of Art. 2 of directive 73/23/EEC.[7] So although a manufacturer is not obliged to produce an appliance according to a harmonised standard, directive 73/23/EEC sets a strong incentive for him to do so. If a manufacturer chooses not to produce an appliance according to an existing harmonised standard, he bears the burden to demonstrate that his product nevertheless fulfils the essential safety requirements of the LVD. He can do so by obtaining a report from a notified body according to Art. 8 No. 2 of the LVD, but due to the costs of such a report this is not a likely option. So one could say that harmonised standards such as EN 60335 do not have the status of legally binding rules, but they have a de facto force that is comparable to such rules.

EN 60335 is not – as such – subject to legal review. The results of the standard making process by private standard institutions is independent and not subject to legal „second guessing". However, since the LVD presumes that products manufactured according to harmonised standards meet the essential and legally binding safety requirements, it is apparent that EN 60335 has to be **within the boundaries of the essential safety**

5 For examples cf. *Schepel/Falke*, Legal aspects of standardisation in the Members States of the EC and EFTA, Vol. 1, p. 184.

6 First introduced by directive 73/23/EEC and later followed by the New Approach to technical harmonisation and standards in Council Resolution of 7 May 1985, OJ C 136, p. 9.

7 E.g., Italian law provided that the thermostatic device with which water heaters had to be fitted were not to allow the temperature to exceed 100°C, while standard EN 60335-2-21 provided for temperatures up to 130°C. Therefore, the ECJ found that Italy had breached its obligations under Community law by not recognizing the presumption of compliance of the LVD, Case C-100/00.

requirements of directive 73/23/EEC in order to benefit from the presumption of conformity in Art. 5.

2. The essential safety requirements of directive 73/23/EEC

a) The relevant safety concept of directive 73/23/EEC

aa) Art. 2 and Annex I of directive 73/23/EEC

The essential safety requirements are laid down in Art. 2 and Annex I of directive 73/23/EEC. Apparently, these essential safety requirements do not contain any exclusion clause. Annex I mentions several times in general terms **the protection of persons**, e.g. against harm which might be caused by electrical contact direct or indirect (No. 2 lit. a). No distinction is made about the age or group of persons using the appliance.

However, Part 1 d) of Annex I refers to hazards that arise when the equipment is **used in applications for which it was made**.

The legal issue lies in the interpretation of this phrase. Are electrical household products made for the use of children and infirm persons without supervision?

If yes, exclusion clauses would not meet the essential safety requirements of directive 73/23/EEC. If not, exclusion clauses would only formulate more concretely a general safety concept already inherent in directive 73/23/EEC.

Part 1 d) of AnnexI seems to follow what is referred to in product safety law as the **intended use concept**. Essentially, this concept addresses all hazards that arise during the use for which a product is originally designed for. From the consumer standpoint, this concept is rather strict: it gives the manufacturer a pole position to define the circumstances of use and thus the relevant hazards to be taken into account. It can be found in other new approach type directives as well.[8]

Other directives are more consumer oriented in this respect. The toy directive 88/378/EEC[9] and directive 2001/95/EC on general product safety[10] go beyond the manufacturer's definition also taking into account hazards that arise when a product is used in a way for which it is not intended, but that are nevertheless foreseeable. This **foreseeable use concept** also takes into account that products are sometimes used for purposes other than for which they are made. This becomes clear in the case of toys. Their intended use is to be played with, but it is foreseeable that children put toys into their mouths. In this case, it would go too far to even speak of misuse of the product because this use is inevitable due to childlike behaviour.

It should be noted that directive 73/23/EEC at least partially goes beyond the concept of intended use. In certain instances, it leaves room also for hazards that arise under a

8 E.g. in Art. 2 No. 1 of the machinery directive 98/37/EC, OJ L 207, p. 1.
9 OJ L 187, p. 1.
10 OJ L 11, p. 4.

foreseeable use of a product. Annex I No. 2 d) demands that the insulation must be „suitable for foreseeable conditions"; Annex I No. 3 c) requires that the electrical equipment shall not endanger persons, domestic animals and property „in foreseeable conditions of overload".

But these two instances are rather an exception of the general rule than the formulation of another coherent safety concept of foreseeable use.

BB) IMPACT OF DIRECTIVE 2001/95/EC ON GENERAL PRODUCT SAFETY

Although it does not contain a general concept of foreseeable use, it could be argued that directive 73/23/EEC has to be understood in light of the directive 2001/95/EC on general product safety.

The directive 2001/95/EC on general product safety adheres to the foreseeable use concept. In Art. 2 (b), it defines a safe product as

> „product which, under normal or reasonably foreseeable conditions of use (…) does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account (…) in particular:
>
> (…)
>
> (iv) the categories of consumers at risk when using the product, in particular children and the elderly."

The interplay between directive 2001/95/EC on general product safety and specific legislation such as directive 73/23/EEC is referred to Art. 1 No. 2 al. 2 (a). According to the principle that special legislation takes precedence over general legislation, it states that the safety concept of Art. 2(b) shall not apply to those products as far as the risks or categories of risks covered by the specific legislation are concerned.

Here, it becomes evident that directive 2001/95/EC does not want to install its own safety concept when other specific Community legislation such as directive 73/23/EEC is already in place. As regards the risks covered by directive 73/23/EEC, the intended use concept applies.

CC) IMPACT OF THE PRECAUTIONARY PRINCIPLE

In 2000, the European Commission issued a Communication on the so called precautionary principle[11] to help decision-makers who are faced with the dilemma of balancing the freedom and rights of individuals, industry and organisations with the need to reduce the risk of adverse effects to the environment, human, animal or plant health. Although the precautionary principle has been welcomed as a starting point for a modern European approach to risk management, it cannot be invoked as a legal principle to turn the safety concept of the LVD into a more consumer oriented concept such as that of the GPSD. For one part, the Communication of the Commission is only a help for decision makers and not a

11 COM(2000) 1.

legally binding rule. For the other part, the precautionary principle only comes into play in a situation of uncertainty[12] (e.g. if there is no clear scientific evidence if a certain substance is harmful to human health). The question whether or not foreseeable use should be taken into account when defining the safety requirements for electrical household appliances does not pose itself in a situation of uncertainty; it is purely a question of public policy. Therefore, a decisive factor which triggers recourse to the precautionary principle is lacking.

To conclude, it must be said that directive 73/23/EEC has its proper safety concept. It formulates the general safety requirements for the products within its scope in a final manner; other community legislation such as the GPSD cannot add on to this safety concept.

b) Exclusion clauses and the safety concept of directive 73/23/EEC

When directive 73/23/EEC refers to „hazards that arise when the equipment is used in applications for which it was made", one observation is obvious: out of the scope of directive 73/23/EEC is any form of misuse.

Therefore, exclusion clauses are in line with this safety concept as far as they do not take into account **playing** with the appliance by young children. Playing with the appliance constitutes a misuse of the appliance; corresponding hazards are outside the scope of directive 73/23/EEC.[13]

As far as the exclusion of any **unsupervised use** by young children or infirm persons is concerned, the situation is different. Here, it is questionable whether these types of use are outside the „intended use" of a product. An answer depends on how and by whom the intended use of a product is defined.

The intended use of a product has a **subjective** as well as an **objective quality**. The subjective quality is inferred by the manufacturer's will. The definition of the intended use of a product depends foremost on its discretion. The manufacturer is best able to define the applications for which its product is made. The manufacturer will do so in the product manual in most cases.

However, though the manufacturer sets the framework, it would go too far to solely rely on his declaration when it comes to define the intended use of a product. Other objective sources have to be taken into account as well.

When it comes to defining the persons who can make an intended use of the product, legal restrictions as to the use of a product also define and limit the intended use of a product. When the person who uses a product needs a licence (e.g. driver's licence), it is apparent that a manufacturer cannot widen the intended use of the product at its discretion. Aside from

12 COM(2000) 17.

13 The situation is different for appliances intended for playing such as amusement machinery. EN 60335-2-82 takes account of this fact and therefore does not contain an exclusion clause. The relevant part of the standard reads: „As far as is practicable, this standard deals with the common hazards presented by appliances that are encountered by users and maintenance persons."

legal rules, conventions and consumer practice also have a certain role to play when it comes to circumscribe the intended use of a product. Put differently: a manufacturer has to face consumers as it meets them. The manufacturer cannot narrow down the intended use of its product at its own liking and disregard other forms of use that are commonly practiced by consumers.[14]

In the case of household products, there is no legal licence requirement for the use of such products. As recent market surveys show, most of these products are used in practice by all members of a household, whether young or old, whether healthy or infirm. Given the long history of use in European households, electrical household products are not regarded as highly dangerous or „not suitable for children". The objective threshold as to who may make an intended use of these products has lowered over the course of time. Today, the capability of a person to use such a product is the limit. E.g., any person capable of operating a toaster for its original purpose makes an intended use of it. Only persons not capable of doing so at all cannot make an intended use of the product. The threshold will differ from product to product and from user to user. However, it goes too far to generally exclude young children and infirm persons without supervision from using electrical household products for their intended purpose. Here, exclusion clauses confuse two legal concepts: the notion of intended use and the notion of proper use. It may be correct that young children or infirm people run a higher risks than „other people" when they use electrical household products without supervision. But they still make an intended use of the product. To give an example: a five year old child may be less aware of the inherent electrical dangers of a toaster when using it than other people. But the child is perfectly able to use a toaster for its intended purpose, i.e. to toast bread. In the same vein, it would run against the spirit of the LVD to exclude other „high risk groups" from the intended use such as „illiterates" who cannot read a product manual or people with disabilities. Although some disabilities may be so grave as to exclude the ability to use a product for its intended purpose altogether, it would run against everyday reality to categorize all people with disabilities as incapable of using a product without supervision. Rather, it has to be judged on a case by case basis as well as a user by user basis who is and who is not capable of using a product for its intended purpose. Here, EN 60335 has to rethink its exclusive approach and take into account social reality, especially the way some people with disabilities are able to lead a self-determined life on their own without supervision of others. To illustrate this point, one might think of a blind person who is capable of using a toaster for its intended purpose, but incapable of using an iron.

As conclusion, it can be summarized that the exclusion clauses in EN 60335 part 1 and EN 60335 part 2 standards are for the most part not in line with the essential safety requirements of the LVD.

14 In the same vein (concerning the German definition of „bestimmungsgemäße Verwendung": *Scheel*, in: Landmann/Rohmer, Gewerbeordnung Vol. II, § 3 GSG No. 131.

- The exclusion of young children playing with the appliance is covered by the LVD.
- The general exclusion of young children and infirm persons using the appliance without supervision is outside the safety requirement of the LVD. Any person capable of using an electrical household product for its purpose makes an intended use of the product.

II. Consequences

In order to evaluate the consequences of the discrepancy between the requirements of the LVD and the exclusion clauses in EN 60335 standards, one has to take into account that – as mentioned above (B. I. a) – the EN 60335 standard emanates from a private standardisation body. Three aspects are of interest:

The consequences for the standard itself, the consequences for the standard as a presumption of conformity in the framework of the LVD and the consequences for products manufactured according to the standard.

1. Consequences for the standard

As stated above, the EN 60335 standard series is not subject to legal review. It cannot be challenged directly by interested groups such as consumers or manufacturers. It would therefore not be possible for a consumer organisation to go to court and request the removal or the alteration of a standard. The same is true for the European Commission. It cannot interfere with the internal procedures of a private standardisation institution. This view is also taken in an agreement among the European Commission and EFTA on the one side and CEN, CENELEC and ETSI on the other side.[15] In this agreement, the European Commission and EFTA expect the European Standards Organisations to, inter alia, take the public interest into account, in particular, safety and health, the protection of workers, consumers and environment.

However, the organisation who issues a standard usually provides for an **internal procedure** to remove a standard that has proven to be unsatisfactory. According to Rule 11.2.8 of CEN/CENELEC internal regulations, European Standards shall be periodically reviewed by the responsible Technical Committee. As a result of the review, it is up to the standard body to decide if the standard shall be confirmed, amended, revised as a new edition with a new date or withdrawn. The main responsibility for the content and a possible alteration/withdrawal of a standard therefore lies within CENELEC itself.

2. Consequences for the presumption of conformity

The EN 60335 standard series forms part of the market regime that the LVD has installed for the products within its scope. The philosophy behind the „reference to standards model" of

15 General Guidelines for the Co-operation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association of 28 March 2003.

the LVD is to rely on the technical expertise of standardisation institutions and not to second guess any definition of what is technical state-of-the-art. The LVD does not provide for a system of substantive ex-ante control of harmonised standards with respect to their conformity to essential safety requirements.[16]

The question is whether the LVD provides for a remedy if later on it is shown that a harmonised standard is outside the essential safety requirements of the directive. Art. 9 of the LVD contains a so-called **safeguard procedure**. It allows Member States to take products off the market, prohibit them from being put on the market, or restrict their free circulation if they do not meet the essential safety requirements of the LVD despite certified conformity. This deviation can be based – among other reasons – on the fact that a harmonised standard does not satisfy the essential safety requirements of a product directive.

With this safeguard procedure, a Member State can rebut the presumption of conformity for a product manufactured according to a harmonised standard on a case-by-case basis. The aim of this procedure is twofold: for one part, it gives Member States the power to quickly respond to product safety emergencies (product safety aspect). For the other part, the Commission gets notice of the problem and can try to find a European wide solution to the problem (internal market effect) by issuing a recommendation or opinion as to the marketability of a product. The safeguard procedure is product oriented, not standard oriented. Even if a product turns out to be unsafe due to a shortcoming in a harmonised standard, the safeguard procedure has consequences only for the product which can be withdrawn from the market, not for the standard or the presumption of conformity which remains in place.

Another procedure which could end the presumption of conformity is not foreseen in the LVD.

Here, the LVD differs from other directives which are passed according to the scheme set up in Council Resolution of 7 May 1985 on a „New Approach".[17] These directives contain a **procedure to control harmonised standards**. According to point VI of the sample directive, Member States or the Commission can bring a harmonised standard to the attention of a standing committee. To invoke this procedure, it is not necessary that a dangerous product safety situation has already emerged. At the end of the procedure, the Commission can withdraw the publication of a standard's reference in the OJ and thus terminate the presumption of conformity.[18] This procedure can be found in all New Approach type directives, but it is not part of the LVD which was passed before the New Approach.

16 Cf. the European Commission's Guide to the implementation of directives based on the New Approach and the Global Approach, p. 30.

17 OJ C 136, p. 1.

18 For an example see the Commission Decision 98/1900/EC of 22 January 1998, OJ L 23 p. 34; it concerned a standard under the machinery directive.

C. Summary

I.

The first main finding of Part I is this: the exclusion clauses in EN 60335 part 1 and EN 60335 part 2 standards are for the most part not in line with the essential safety requirements of the LVD.

The only aspect of the exclusion clause which is in line with the LVD is the exclusion of young children playing with the appliance. However, the general exclusion of young children and infirm persons using the appliance without supervision falls short of the safety requirement of the LVD. According to the concept of the LVD, any person capable of using an electrical household product for its intended purpose is within the safety concept of the directive. It goes to far too generally exclude young children and infirm persons, even without supervision, from this concept.

II.

The second main finding of Part I is somewhat disillusionary. There is no effective legal consequence as to the described shortcoming of the EN 60335 standard series.

Although the exclusion clauses do not meet the essential safety requirements of the LVD, this does not have direct legal consequences for the EN 60335 standard series. CENELEC has the sole power to alter or withdraw the standard.

The Commission cannot even – unlike in the case of New Approach type directives – withdraw the presumption of conformity which follows from adherence to the standard by withdrawing the publication of the reference of the standard in the OJ. Publication of the reference is for information purposes only and has no effect as to the presumption of conformity.

To change this situation, it would be advisable to adapt the LVD to the New Approach and to provide for a corresponding procedure to control harmonised standards.

Part II: The future legal regime – or what might be the consequences in case the exclusion clause will be eliminated

If the exclusion clause will be removed in one way or the other, the point arises whether and to what extent manufacturers might try to maintain their policy, that is to say the existing standard and safety and to shift the burden of the responsibility to consumers by narrowing down the potential use of the product through instruction of use. So in the very essence and somewhat overstated, the point would be whether manufacturers might simply point to a label or a respective instruction making blatantly clear that the product has not been designed to be used by children.

Such "**not to be used by children and the infirm**" instructions are not at the discretion of the manufacturer. Legally speaking, the question is whether the manufacturer may escape his liability by simply *instructing* the consumer accordingly. In the very end, such an understanding would allow the manufacturer to largely ignore the potential addressee when **designing** the product, and could focus the project design on the average male consumer. The sole protection of children would be that they are kept away from electrical appliances, i.e. that the parents put their children under supervision. So there is obviously a link between the design of the product and the instruction for use, just like in the low voltage directive.

However, neither the low voltage directive, nor the new approach directives or the general product safety directive deals with the liability of the manufacturer towards the injured party, here the children and the infirm. This is left to the directive 85/374/EC on product liability and the directive 99/44/EC on consumer sales. The former provides the injured party with the right to claim damages if the product is defective. The latter entitles the consumer with a set of rights and remedies in case the product is not in conformity with the quality requirements a consumer might be entitled to expect. However, at least under EC law a consumer would not have a right to claim damages, as the directive 99/44/EC explicitly exempts compensation claims from the set of consumer devices.

A. The relationship between product safety and product liability

Whilst both sets of directives, – on the hand the low voltage, new approach and the general product safety directive and – on the other the product liability and the consumer sales directive – deal with the same issue – the safety of products, they have a different focus. The former set of directives are meant to open up markets, more specifically to grant European manufacturers free access to the Internal Market provided the products comply with the technical standards elaborated by CENELEC under the current regime of the low voltage directive. In the consumer eyes, the Member States and their competent authorities are the guardian of the market. They have to adopt appropriate measures either to take unsafe products from the market if the presumption of conformity fails or to put pressure on the EC

to revise the technical standard[19] or at the very end to revise the low voltage directive itself. Under EC law the Member States' and their authorities' regulatory means to protect particularly vulnerable consumers, such as children and the infirm, are strictly speaking limited, at least as long as the technical device comes under the regime of the low voltage directive.

The protection gap, shall at least in theory be filled by the product liability directive 85/374/EC. The Commission has long defended the idea that safety for consumers can be guaranteed by combining the low voltage directive, respectively the new approach-type directives[20] with the product liability directive. Such a concept presupposes that the product liability directive might put pressure on the manufacturer to produce safe electrical devices only, be it for the average consumer be it for the particularly vulnerable consumer. The manufacturer is supposed to avoid liability claims by raising the protection standards. If he fails to do so, he might be held liable. Whether the concept is right or wrong might be set aside. In essence, it is built on the idea that an injured party, here a child or an infirm might claim compensation in case he or she has been injured by an unsafe electrical device.

Just as under the low voltage directive, the key question is when and under what conditions a product may be regarded as unsafe. Is it already unsafe because it has been **designed** for adults only without taking into account children or the infirm as possible users, or is it unsafe because the manufacturer has not provided the potential addressees with adequate instructions for use. It seems strange to assume that the concept of safety can be divided into a public law part – addressed to the Member States and a private law part – addressed to the manufacturers. So, in theory, the above-mentioned understanding of safety in the low voltage directive should be literally transferred to the directive on product liability. Practice, however, is different. Whilst the concepts are certainly interlinked, as they stand side by side, each is matching a different challenge – here public policy and there private compensation.

An easy example might explain what is meant. It is one thing for a public authority to find out whether electrical devices have to be withdrawn from the market because they are – illegally – based on the exclusion clause, and it is another for a judge to decide over a case, in which an unsafe device has injured a child or an infirm. Ex ante and ex post facto assessments start from different premises. Therefore, it is necessary to investigate the concept of safety under the directive on product liability separately and in addition to the one under the low voltage directive (see under B). It is only in the light of these findings that the question might be raised to what extent the manufacturer may exclude or limit his liability in the instruction for use or any other form of presentation (see under C).

19 Legally it is rather complicated whether and to what extent the European Commission has power to push CENELEC into action or to request the elaboration of a particular standards.

20 The new approach to standards and technical regulation, adopted in 1985 has led to a whole set of directives, in between the toys directive.

B. The duties of the manufacturer regarding special consumer groups such as children and the infirm

At the very beginning an important disclaimer has to be made: whilst the EC directive on product liability has been adopted some twenty years ago, it has produced little case-law before European courts.[21] The major reason being that the product liability directive stands side by side to national tort law regime. Most old Member States' courts have integrated the protective device of the product liability directive into their national tort law regime, with Austria as one notable exception. The new Member States have adapted their national legal systems long before 2004 to the requirements of the product liability regime. That is why it might well be that in the near future the sheer number of references to Luxembourg might rise. This is not to say that the product liability had no impact on national tort law regimes, however, the impact can be felt indirectly only.

That is why the available set of EC documents and EC judgments remains scarce. There is only one commentary focusing on directive 85/374/EEC alone.[22] A fuller picture would require to have a deep look into the national legal systems. This will be done with regard to Germany and Austria, from where particularly interesting case-law with regard to injured children and the instructions for use might be reported. In case the European Court of Justice has to deal with more references from Member States' courts, it goes without saying that the national case-law would be taken into consideration if not as a source of law, than as a means to illuminating the different notions and terms defined in the product liability directive.

I. The concept of safety under the product liability directive

The concept of safety is laid down in Article 6 para (1) which runs as follows:

> „A product is defective when it does not provide the safety which a person is entitled to expect"

Here the European Community realised for the first time the concept „legitimate expectations" with the adoption in 1985 of the directive 85/374/EC.[23] It is a concept which strikes a balance between the manufacturer's and the consumer's interest. Manufacturers would like to define the concept of safety themselves, translated into the language of technical standards and safety – by referring to the „intended use" – consumers on the other hand would like to bind manufacturers to a concept of „foreseeable misuse".[24] The directive on product liability ranks in between the two poles, it relies on 'reasonable' use, which is neither "intended use" nor "foreseeable misuse". Such a reading is confirmed by reference to recital 6 which reads

21 See *Micklitz*, in: Reich/Micklitz, Europäisches Verbraucherrecht, 4. Auflage 2004, § 27.

22 This is *Taschner/Frietsch*, Produkthaftungsgesetz und EG-Produkthaftungsrichtlinie, 2. Auflage 1990.

23 *Micklitz*, Social Justice in European Private Law, Yearbook of European Law 1999/2000, pp. 167-204.

24 In German: *Joerges/Falke/Micklitz/Brüggemeier*, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, ZERP Schriftenreihe, Band 2, 1988, Englische Fassung: European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards, European University Institute Working Papers in Law, 5 Bände, No. 1991/10-91/14.

„Whereas 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 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."

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. Whilst the manufacturer maintains the power to design the product and to define its use, it has to take into consideration the foreseeable use – not the misuse – of the consumer. This is exactly the message of „legitimate expectations". The consumer's expectations are decisive, however, only as long as they are legitimate. The very same concept of legitimate expectations has been implanted into the product safety directive.[25] The general product safety and the product liability directive rely so far on the identical concept.

To say it bluntly, the concept of safety in the product liability directive reaches beyond the low voltage directive. It puts stronger emphasis on the manufacturer's responsibility to take into consideration „how" and „by whom" the product is used. This exactly is „foreseeable" use. Whilst the concept does not directly imply an answer to the question of whether the manufacturer has to design the product in a way to protect children and the infirm or whether it may simply point to a „not be used by children and the infirm" policy, it certainly enhances the pressure on the manufacturer to increase the level of protection.

Therefore, the answer to be found with regard to the protection of children and the infirm can be built on the concept of legitimate expectations. Again no case-law exists, although *Veedfald*[26] confirms that the European Court of Justice is willing to grant the consumer the protection he is entitled to expect, which he may reasonably expect or legitimately expect. In essence, this means that constructive safety comes first and that there is no means to replace a safe design by safe instructions. Instructions for use, if any, are to be understood as additional measures.

II. The addressees of protection – who is the injured party?

The Directive does neither define nor provide for direct guidance in getting to grips with who shall be protected by the directive. Contrary to most consumer law directives, the product liability directive does not refer directly to the notion of the consumer. Art. 4 instead refers to the injured party and Art. 6 to „a person". That is why the father of the directive, Hans Claudius Taschner always rejected the idea that the product liability directive is a piece of consumer law. For him the focus was broader, any injured party that claimed to be damaged could come under the protective device of the directive. So children and the infirm are certainly protected, but the directive does not devote particular attention to them. For the first time, recital 13 of the proposal for a new directive concerning unfair business-to-consumer

25 See Part I.
26 Case C-203/99, *Veedfald*, 2001 (ECR) I-03569

commercial practices in the Internal Market provides for particular protection of children.[27] It indicates that the Commission might attribute more attention to the different needs of protection.

Indirectly, however, there is a relationship to consumer protection. It is bound to define the type of property that might be damaged by an unsafe product. Whilst Art. 9 is certainly meant to exclude industrial property, it does so by giving shape to consumer products:

> (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU provided the item of property:
>
> (i) is of a type ordinarily intended for private use or consumption, and
>
> (ii) was used by the injured party mainly for his own private purpose.

The legislator starts from a two fold premise, firstly there are products intended for private use and those that are not and secondly there are products of dual use which could be used either for private consumption and/or for industrial and commercial purposes. These products of dual use clearly come under the scope of the directive, as long as the injured party proves that he or she has used the product „mainly" for private consumption.

In the context here at issue, one might easily imagine circumstances under which a product is designed mainly to be used by adults only, although it cannot be excluded that children or the infirm use electrical devices as well. Again, the directive is of little help on defining the safety standards of so-called products of dual use.

As the directive draws no distinction between the different potential addressees, it seems tempting to refer to the ECJ which developed the concept of the average consumer who is deemed to be reasonably well informed, reasonably observant and circumspect.[28] In various newer cases, the ECJ confirmed its legal practice referring to the aspect of an average consumer.[29] Any reference to the average consumer rule can certainly not merely be rejected by pointing to the origins of the case-law which may be found in marketing practices law. The ECJ has developed a normative concept which is prima facie applicable regardless of the particular context in which it might be applied. The question, however, is to what extent such a normative concept is compatible with the concept of safety.

III. The product design and the protection of children and the infirm

When it comes down to discuss the design of the product and the level of protection the consumer is entitled to expect, a whole set of questions arise that have to be carefully investigated:

27 Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), 25.5.2004, Institutional File, 2003/0134 (COD).

28 Case C-210/96, *Gut Springheide* (1998) ECR I-4657, 4691.

29 Case C-303/97, *Sektkellerei Kessler* (1999) ECR I-117; Case C-220/98, *Lifting* (2000) ECR I-117.

- Who is the child? The level of constructive safety – i.e. safety by an appropriate design – has to be linked to the life-time of the child. A baby needs more protection than an adolescent.
- Who is the infirm? There is a broad range of possible users to be taken into consideration, maybe suffering from quite different forms of handicaps.
- What is the role of parents? The level of constructive safety has to be put in relation to the role and function parents have to play in supervising their children. Only babies and little children have to be supervised.
- What is the role of a guardian of an infirm if there is a need for a guardian?
- What about costs? The „fool proof" products are more expensive that products where the level of protection by design is replaced or supplemented by instruction for use.
- What about different safety cultures in Europe? There are Member States, like Germany, where consumers expect protection by design, there are other Member States who put more emphasis on the guardian role of the parents.[30]

Young children are not able to buy the products themselves, they either have no money or they are not given what they would like to have. This might change when children are getting older. Children today dispose of a substantial amount of money. Therefore, children have become an important economic factor on the market. Children, whether young or old, have no particular expectations with regard to the safety of products. This is the task of their parents who represent the children's expectations. Parents might like to have „fool proof" products, regardless of the price, that is to say they expect safety from the cheapest product.[31] This releases them from looking after their children or from instructing them properly. It is only when children are getting older that the parents might start to educate their children on how to handle products that might cause risks to their health and safety.

The parents' expectations have to be contrasted with the manufacturers expectations, and maybe even with social expectations enshrined in a particular safety culture. Manufacturers are well aware of the parents' expectations. They want to sell their products. That is why they may be tempted to fully take the parents' expectations into consideration– as long as these expectations do not end up in overpriced products which are no longer saleable. In legal terms, the right to safety clashes with the right to trade freely in the Internal Market. Ideally, safety should not be measured against economic considerations. That is why the manufacturers may usually not be heard in product liability claims that a protection by design would have been too costly. If it were different, manufacturers could in theory offer different levels of safe products. The inherent logic – the safer the more expensive – contrasts harshly with the understanding of justice in western type democracies. Even if the standard of safety cannot legitimately be divided, economic considerations cannot completely be set aside. The

30 Case 188/84, *Commission/France* (1986) ECR 419.
31 MünchKommBGB-*Wagner*, 4. Auflage 2004, § 3 ProdHaftG Rn. 13.

break-even-point is certainly that each producer must have a fair chance to sell his product on the market.

Similar issues arise with regard to the infirm. Disabled people are not at all a homogenous group of consumers. They may suffer from all sorts of mental and/or physical diseases to a varying degree. They may only need some assistance in how to use a particular electrical device, they may be dependent on the help and support of a guardian. It seems difficult to group disabled people under whatever „categories". Social security instruments are of limited help here, as they classified disabled people according to the seriousness of their disease. They do not consider the degree to which disabled people or able or unable to use electrical appliances. However, one thing is for sure. Disabled people may rely more and more on electrical devices to facilitate their life.

Last but not least, social considerations come into play. Do we want a world in which products are „fool proof" and where parents are „no longer" responsible for looking after their children? Whilst each Member State would certainly reject such an argument in the overstated form, there is ample evidence that the Member States differ in the way in which they look at safety issues. *Viscusi*[32] has found some twenty years ago that there is a relationship between rising safety standards and lowering supervision. These findings have not provoked unanimous answers. An ever larger European Community might have to live with these social and cultural differences. The ECJ, again in the context of marketing practices, has excepted social and cultural differences within Art. 28 of the Treaty.[33]

The product liability directive does not contain clear-cut answers to all these questions. If any, the answer may be derived out of the concept of safety. That is why in the very essence only relatively broad guidance is possible on the degree to which consumers, i.e. children or the infirm, might legitimately expect a safe design. The concept of legitimate expectations obliges the manufacturer to clearly protect babies and young children by an adequate design. Parents must rely on constructive safety. Products which come under this category will normally be produced for children only. In this case, electrical devices are of little or no importance. Similar conclusions might be drawn with regard to severely disabled people.

There are particular problems with products of dual use for children ranging from 3 to 5 years of age, as they come into contact with electrical devices that are not designed for their purposes. The toaster has already been mentioned. But what about electrical devices that parents are buying and that children might use, such as a motor saw or any other device used in the garden. This is where parents have to bear their responsibility for the safety of their child. Manufacturers cannot be blamed for irresponsible behaviour of parents. Parents have to play their part. Therefore, products of dual use are typically the ones for which where constructive safety alone cannot exclude risks for children and the infirm and with which

32 *Viscusi*, Regulating Consumer Product Safety, 1984.
33 Case C-220/98 (2000) ECR I-117 at 30.

additional precautionary measures are needed. The point is to determine, however, where to strike the balance and what sort of precautionary measures are needed.

IV. The instruction for use and the protection of the children and the infirm

The Directive provides some guidance on possible instructions for use, again without differentiating between the addressees:

> „Article 6 para. (1)
>
> A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including":
>
> (a) the presentation of the product,
>
> (b) the use to which it could reasonably be expected that the product would be put,
>
> (c) …

The presentation of the product contains all activities of the manufacturer to make his product known to the public.[34] The producer's activities might cover advertising measures, characterizations of the product and/or instructions for use. The presentation already starts by the design of the product itself. The producer should advise the user of the product properties. He has to bring the user's attention to specific properties of the product which could be dangerous by using it without instructions.

Characterisations and commercials in particular have a special effect on the potential user concerning his expectations to the product and its properties. If the manufacturer so produces specific safety expectations, its product might become unsafe, simply by using advertising strategies. If children and infirm people are the addressees of advertising measurers, the risk for the manufacturer to be tied to his advertising might even increase. Advertising provides information about the product in order to make it appealing. Most information will point out the product's advantages. Expectations which are caused because of advertising must be fulfilled, i.e. a mountain bike is presented by rough use in off road areas. The expectations of the audience that the bike is well suited to off road use cannot be restricted by the instructions for use later.[35] The proposed directive on unfair marketing practices is particularly meant to protect children against unfair or misleading advertising, however, safety related commercials are excluded from the scope of application. Therefore the envisaged directive is of little help in that respect.

Whilst it goes without saying that Member States courts are very sensitive in assessing safety related advertising that invites in particular children to take high risks into account, Art. 6 cannot be understood so as to oblige the manufacturer to give warnings of potential risks in commercials.[36] The producer may conceal possible disadvantages in its advertising, at least

34 *Taschner*, Produkthaftungsgesetz, Art. 6 Rn. 13; *Howells*, Comparative Product Liability, 1993, p. 37.
35 *Müller*, Produkthaftung im Schatten der ZPO-Reform, VersR 2004, 1073.
36 *Taschner*, Produkthaftung, Art. 6 Rn. 14.

as long as there is no general duty to disclose information on potential risks of a product. One may wonder to what extent the general product safety directive sets standards which have to be respected even in advertising matters.

However, the notion of „presentation" does not cover advertising alone, it equally encompasses the duty of the manufacturer to characterize the possible use of the product and its inherent dangers. The instructions for use have to refer to all possible risks known to the manufacturer. The manufacturer is liable for any omission of warnings resulting from possible risks, in case the product has been properly used. The presentation of the product and the instruction itself depends on the target group. Instructions for use addressed to specialised staff are to be less detailed and extensive as it is assumed that they have more experience, contrary to children and infirm people who may require more detailed information.[37]

Paragraph (b) of Art. 6 devotes particular attention to the consumer's expectations concerning the use of a product. The manufacturer has to give instructions according to potential risks that could result from using a product and that can *reasonably* be expected to happen.[38] The concept of safety makes it abundantly clear that the manufacturer alone responsible for defining the use of the product. Otherwise, its potential liability could be narrowed down simply by giving very restrictive instructions, such as „to be used by adults only", or „not to be used by children under five", or „to be used by children only under supervision". The key word is „reasonable". This includes the obligation of the manufacturer to take all circumstances which could normally happen into consideration. Mostly there is a use which is not on purpose but could be expected anyway i.e. children will take toys not only to play but also to chew. The European legislator is aware of this and points to the use which could fairly be assumed. In drafting its instructions, the manufacturer has to take into account all kinds of potential use of a product except the use which is contrary to the initial purpose of the product. In such case, we would talk about misuse. The distinction between misuse and use, which could be fairly assumed, depends on the social acceptance of the product.[39] But nevertheless, the instruction for use has to refer to all possible dangers known to the manufacturer. Potential risks known by the manufacturer have to be disclosed, especially when it is obvious that a danger can be discovered by an average consumer. Therefore the required information refers to the definition of an average consumer by the ECJ or an average child or an average disabled person as it is suggested to exist with regard to define the potential addressee.

37 *Schiemann*, in: Erman, Bürgerliches Gesetzbuch, § 3 ProdHaftG, Rn. 4.
38 *Taschner*, Produkthaftung, Art. 6 Rn. 15.
39 *Taschner*, Art. 6 Rn. 17.

C. Are manufacturers allowed to exclude their liability in case the users do not respect the instruction for use

Instructions for use have a twofold sense. On the one hand, they shall provide the consumer with the necessary information on how to use the product safely. On the other hand, instructions for use allow the manufacturer, in case he is sued in court, to refer to the instructions and to reject his liability claiming that the product has not be used according to the instructions. So strictly speaking, the manufacturer will not exclude its liability in the proper sense, that means he will not literally write down in its instructions, that it is not liable for any use beyond and outside the instructions.

The situation, however, is different with regard to the exclusion clause as defined under EN 60335-1. This technical standard eliminates some potential risks from the product design and the instructions for use. If the exclusion clause is withdrawn, the manufacturer might feel invited to introduce a similar wording in the presentation of the product and the instructions for use. It has remained hidden for so long to consumers and all potential users, – that there was and there is no obligation for the manufacturer to take the needs of the particularly vulnerable groups into account –, would suddenly become know to the public. For the purpose of the ongoing analysis it is assumed that the manufacturers simply copy the text from the EN standards into their instructions for use. The message put on the product or integrated into the instructions could then be as follows:[40]

> „The xyz product has been produced in conformity with EN 60335-1 dealing with the common hazards presented by appliances that are encountered by all persons in and around the home. However, in general, it does not take into account the use of appliances by young children or infirm persons without supervision playing with the appliance by young children."

Whatever the form of the message might be, its potential legal effect cannot be denied. Therefore, the question arises in the light of the foregoing analysis whether such a term is legally admissible. There are no particular rules in the directive dealing with the inter-relationship of instructions for use, and the exclusion of liability. However, there are two articles which indirectly touch upon the issue: the waiver under Art. 7 and the general exclusion in Art. 12. Outside and beyond the product liability directive, reference might be made to lit a) of the indicative list of the directive on unfair contract terms. In that article, all exclusions clauses are prohibited which exclude the liability for bodily injury. Its applicability presupposes, however, that there is a contractual relationship between the consumer and the producer, what might be the case if the producer is at the same time the seller and that the exclusion clause is contained in a standard contract term.

I. The Article 7 defence

> Article 7
>
> The producer shall not be liable as a result of this Directive if he proves:

40 The proposed new EN 60335-1 contains such a broad exclusion clause.

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;

Art. 7 d) is only dealing with mandatory statutory provisions. It would mean that a particular national regulation exists in which the message enshrined in EN 60335-1 is reiterated. It is plain that no such provisions in national law exist. Usually, instructions for use are subject to agreements from different parties or made available by the producer to the final seller. Mandatory regulations issued by public authorities serve for standardisation, simplification of the manufacturing process and rationalisation. They are the exception to the rule. A technical standard is legally nothing more than a recommendation of what to do, it is not binding.[41] Therefore the Art. 7 defence does not apply.

II. Limits to exclusion clauses under Art. 12

Art. 12

The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

The Directive does not permit any contractual agreement deviating from its provisions regarding the liability. The manufacturer cannot limit or even exclude its liability by way of concluding a contract. The same applies in case of trying to conclude a contract or finding some quasi contractual rules.[42] There were practical attempts to design a contract by referring to the instructions for use or to the instruction leaflet. The producer requests the consumers to agree with these conditions if they use the product. In theory, the freedom of contract allows the producer to fix a provision in order to exclude or narrow down his liability. But in case public interests are concerned, the freedom of contract is restricted and that is exactly what the product liability directive has been designed for. The same reasoning lies behind lit a) of the indicative list of directive 93/13/EC, however, bound to the existence of standard contract terms. In so far Art. 12 is broader, though bound to its scope of liability.

There is a certain tension between Art. 6 and Art. 12, because each and every instruction of use affects the liability of the manufacturer. The line between what is admissible and what is not admissible must be drawn with regard to the character of the instructions. If they are specifically designed to the product concerned, the instructions cannot be regarded as excluding liability. The point then is whether the interplay of a safe design as complemented by instructions fully meets the concept of safety, i.e. the legitimate expectations of the consumers. However, if there is no such link, if the instructions are general and broad in nature, they must be understood as exclusions clauses.

A literal transfer of the exclusion clause in EN 600-335-1 in the suggested way, would clearly violate Art. 12.

41 *Taschner*, Art. 7 Rn. 22.
42 *Taschner*, Art. 12 Rn. 1.

D. The admissibility of excluding the liability in instruction for use - a survey of the law in selected Member States

The case-law with respect to similar issues is quite limited as has already been demonstrated by the Commission in the Communication 2000 (893 final)[43] on the applicability of directive 85/374/EEC. However, one thing is for sure. If particular vulnerable consumers are injured by defective products, the courts are willing to grant compensation ex post facto. These findings can easily be confirmed by reference to a study undertaken for the European Commission on the liability for defective services in the field of tourism, home and leisure activities, medial malpractices and public goods.[44]

I. Germany

According to § 14 ProdHaftG (GER), it is prohibited to limit or exclude product liability.[45] There have been many attempts to construct on detour an individual contract in order to exclude liability, i.e. the way of concluding a contract by the instruction for use. It was suggested that the consumer would accept the stipulations containing an exclusion of liability by using the product. But these attempts have been unsuccessful. The courts ruled against the manufacturer and any attempt to limit its liability.[46]

The interesting cases address circumstances where there is an instruction for use containing a correct warning of the potential danger but where the user becomes injured nevertheless. In one case, a producer of ready-mixed concrete delivered the concrete to a do-it-yourself owner of a one-family house.[47] The consumer was going to process the material. He came in contact with the concrete and received an injury on his knees because of the alkaline effect. The house owner claimed compensation but did not succeed. The delivery sheet contained a warning pointing to the alkaline effect. „Skin and eyes are to be protected by processing the concrete. In case of contact, spring-clean with water. In case of affecting the eyes contact the doctor immediately." The warning on the delivery sheet was well visible and did not get lost between other instructions for use. The court ruled that the warning was correct. It contained details on the potential danger and proposals for action in case of getting in contact with the ready-mixed concrete. The consumer processed with the concrete without paying attention to the warning. Therefore it is his fault being injured by using the material.

43 31.01.2001, COM (2000), 893 final.

44 *Magnus/Micklitz*, Comparative analysis of national liability systems for remedying damage caused by defective consumer services. A study commissioned by the European Commission 2004; http://europa.eu.int/comm/consumers/cons_safe/serv_safe/liability/index_en.htm.

45 *Taschner*, Art. 14 Rn.

46 See references in MünchKommBGB-*Wagner*, § 14 Produkthaftungsgesetz, Rn. 1.

47 OLG Celle, 29.01.2003, Az. 9 U 176/02.

On the other hand the manufacturer was held liable because the instructions for use did not contain a detailed warning of a potential danger known to the manufacturer. In „Kindertee I"[48] the court ruled against the manufacturer. When putting the product on the market, the manufacturer did not warn at all about the possibility of getting caries, later the instructions contained a warning which was regarded to be insufficient as it did not contain all details regarding the kind of danger. In „Kindertee II" [49] the court ruled against the manufacturer because no warning was included about using the tea in combination with baby bottles. In „Papierreißwolf"[50] a two-year-old child put his fingers in the opening of a paper shredder and became severely injured. The instructions for use did not include a warning about the danger of reaching the opening with hands. As the danger of cutting off the fingers was not as obvious as it is the case in using a slicer or circular saw, the user could not easily identify the danger. Therefore a warning especially with regard to little children had to be supplied.

II. Austria

According to § 5 PHG „a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product". The instructions for use are part of the presentation just like in Art. 6 of the Directive. The instructions for use have to provide detailed information about the correct handling and warnings about potential danger that might occur when using the product. The duty of compensation cannot be excluded or limited according to § 9 PHG. Therefore, the instructions for use cannot contain any declaration of an agreement which would exclude or limit the liability of the consumer when he uses the product.

If the instructions for use contain all known information about possible dangers and the safe handling, the manufacturer will not be held liable in case of misuse or negligent and inappropriate handling. So the only way for a manufacturer to exclude its liability is to develop complete and detailed instructions for use including visible warnings concerning the possible dangers. The required information refers to the use which the manufacturer fairly could assume. The expected use is related to social adequate behaviour. For instance it could be expected that a user of a pencil chews on the backside. So in case that would be unhealthy an instruction for use had to warn from chewing. The instructions for use have to take into consideration any possible kind of use as long as it is not only a theoretic possibility but an obvious kind of use.

The Austrian Supreme Court had to deal with a similar issue already decided in German courts. The case concerned delivery of ready-mixed concrete. The Court held that the duty of instruction remains with the manufacturer even if he could readily assume that the consumer knows the danger.[51] However, during the delivery the manufacturer had to recognise that the

48 BGH, NJW 1992, 560.
49 BGH, NJW 1994, 932.
50 BGH, NJW 1999, 2815.
51 OGH, 06.10.2000, Az. 1 Ob 62/00.

consumer did not know about the danger of ready-mixed concrete. He stepped bare footed in it without using rubber shoes. The consumer became injured and claimed compensation. He argued that the instruction did not warn about that the concrete could harm the skin. The manufacturer pretended that there was no need for instruction of use as the possible dangers of ready-mixed concrete to the skin are commonly known. In the first instance the court ruled in favour of the manufacturer. He was said not to be obligated to warn about the danger. The consumer succeeded on appeal. The product was held to be defective due to the incomplete instruction for use.

If the manufacturer provides detailed instructions for use warning on all known and unknown potential danger he is not liable in case the user is injured. So the manufacturer could exclude his liability by a complete instruction for use which contains all information it can be reasonably assumed to be known by the manufacturer.

III. Summary

German and Austrian courts demonstrate the same attitude. The policy is to require complete and comprehensive instructions for use. The user may even rely on information about every day knowledge. The common approach on ready-mixed concrete undermines such an understanding.

The German case law on instructions for use, here at issue, requires a harder look. The series of Kindertee decisions demonstrates that there is a relationship between the need for full instruction and the publicly available knowledge of risks. However, such a relationship does not release the manufacturer from providing full information, even on well-known facts. If he does so, and if the risk is broadly known, he may escape liability. This is the overall message from the Kindertee story.

E. Results

- The directive 85/374/EEC starts from a concept of safety which reaches beyond the low voltage directive.
- The concepts of safety in directive 85/374/EC on product liability and on product safety are identical.
- The directive 85/374/EEC protects the legitimate expectations of consumers, whoever they are. There is a clear priority for guaranteeing the safety of consumers by a safe design. Instructions for use cannot be nothing more than a supplementary measure. They cannot replace an unsafe design per se.
- The total exclusion of the interests of children and the infirm in EN 60335-1 is not in line with the concept of safety in the directive 85/374/EEC on product liability. This is not to say that products must be ‘fool proof’. The manufacturers are allowed within limits to rely on instructions for use, and with regard to children on parents supervising their children.

- If the exclusion clause in EN 60335-1 is removed manufacturers might try to integrate the exclusion clause in a reworded version into the presentation and/or the instruction for use.
- Such a broadly termed disclaimer would clearly violate Art. 12 which prohibits to exclude or to limit the manufacturer's liability within the scope of the product liability directive.
- Whether such a disclaimer is integrated in the instructions for use or part of the presentation or subject to a contractual arrangements does not play a role.