SOME ASPECTS OF LIABILITY FOR DEFECTIVE PRODUCTS IN ENGLAND, FRANCE AND GREECE AFTER DIRECTIVE 85/374/EEC

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1. INTRODUCTION

In an economic age ruled by consumerism, the idea that the consumer needs protection against certain abusive practices of sellers, suppliers or manufacturers follows naturally. On account of the difference in economic strength, influence and knowledge between producer and consumer, the latter is perceived to be in a weaker position and thus many national jurisdictions afford additional legal protection to him in the event of a dispute. Furthermore, the Single Market can be described as consumer-oriented to an extent, since a large part of the European Community policies is directed towards goals that in many respects serve the individual. Increase in social awareness, improvement of working conditions, better standards of living, opening of the markets and, of course, a superior buying power, aim to ensure some of the fundamental interests of the individual within the framework of a new European legal order. Consequently, the interests of the consumer cease to be the exclusive preoccupation of national legal orders and become a concern for the Community as a whole.

The Maastricht Treaty has now elevated consumer protection to the status of a Union policy[1] but specific European-wide programmes envisaging rights for the consumers have been implemented since 1975.[2] For the Community, consumerism is defined in terms of a clash of interests between collective and individual forces of the market, with European unification offering further opportunity for malpractices across the failing barriers. In order to preserve the unity of this market and protect the individuals appropriately, the EC has not only to devise a common policy and to ensure its enforcement, but also to bring the Member States in line with it. The task is quite arduous as it is necessary to ensure that the Community measures are sufficiently adaptable to take effect within the diverse national systems of all the Member States, without compromising the legal protection offered by the Community rules or by the individual countries themselves.

1.2. One of the most important aspects of consumer protection is the problem of claiming compensation against a producer when the goods have been defective and have caused injury (or death) to a person or damage to property. The system concerned with the operation of the basic rules of liability of manufacturers, retailers, importers and installers for defects in the products they supply is called, for short, product liability.

Although every country has its own methods and ways of applying the theories of product liability, two brood areas exist where problems arising from defective or unsatisfactory goods can be dealt with: liability in contract and liability in delict. The former deals with the situations were the plaintiff consumer is bound to the manufacturer directly by some contractual relation, usually sale of goods. However, the problems arise mainly in assessing the liability of the producer were there is no direct link between him and the final consumer of the goods, usually because of the existence of a long chain of distributors, importers, suppliers,

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[1] Art. 3(s) EC, as inserted by Art. G(4) of the Treaty on European Union.

[2] For an overview, see Lasok & Bridge, The Law and Policy of the European Union, London (1994), 725 et seq.

resellers and retailers. These situations are dealt with by product liability in tort, and this is what the current presentation will focus on.
The variety of obligations imposed on the producer in different European countries has led to various levels of protection of the consumer throughout the Community. Therefore a Directive dealing with product liability was introduced, aiming at an approximation of laws on product liability and product safety. However this directive does not harmonise the consumer protection provisions and in most countries the former rules remain. This gives place in some countries to a multi-tiered configuration of product liability.

1.3. The first part of this paper will describe the liability system of the directive, and attempt an analysis of its advantages and disadvantages as well as an economic evaluation. The second part will be an expose of the product liability regimes in England, Greece and France. The preexisting systems will be considered first, along with an outline of the way that the directive has been implemented in the individual jurisdictions.

2. THE 1985 DIRECTIVE ON LIABILITY FOR DEFECTIVE PRODUCTS

2.1. Before 1985, the product liability laws in different Member States of the Community were quite dissimilar. In France, the system created by the courts in the 1960s effectively imposed strict liability, whereas German and Greek law -although theoretically utilising fault liability- were reversing the onus of proof by presuming fault of the defendant manufacturer and English law was based on negligence. This disparity could affect competition and create barriers to intra-Community trade by subsidising firms in some states and penalising others, as consumers in different European countries were not in the same position, and the producers did not have the same duties towards them.[3] To remedy the situation, various proposals for a Directive on Products liability were considered in the seventies and finally led to the adoption by the Community of Directive 85/374 in 1985.[4] Indeed, the preamble of the Directive states that "approximation of the laws of the Member States [...] is necessary because the existing divergencies may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer. [...] 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".

2.2. The Directive was issued to accomplish throughout the Single Market a common basis to compensate consumers for death, personal injury or damage to personal property due to defects in industrially produced, moveable products. It introduced what is in many Member States an entirely new concept of liability in this regulatory area, a concept stated in Article 1 of the Directive:
'The producer shall be liable for damage caused by a defect in his product.'

In contrast to the approach under traditional fault liability, the product liability Directive concentrates on the objective characteristics of a given product and asks whether it is to be considered defective. The conduct of the manufacturer is not taken into consideration when assessing his responsibility; instead he is accountable in an objective way, i.e. he is strictly liable for any damage caused by his product.
2.2.1. A 'Producer' is the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part, or any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer. Also any persons who import into the Community a product for Sale, hire, leasing or any form of distribution in the course of their business.[5] When the producer cannot be identified, each supplier of the product is treated as its producer unless he informs the consumer, in reasonable time, who the real producer or the person who supplied him with the

[3] Pearson, Law for European Business Studies, London (1994), 274.

[4] Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products (85/374/EEC), OJ 1985, No. L210/29.

[5] Art. 3, Dir. 85/374.

product is. The same applies to an imported product, if the product does not indicate the identity of the importer, even if the name of the producer is indicated.[6]

2.2.2. The products concerning the Directive are "all moveables even though incorporated into another moveable or into an immovable"[7] with the exception of "primary agriculture products and game". This is a very wide definition. It clearly includes all finished goods as well as raw materials and components incorporated in a finished product. The product does not have to be a consumer product but it must have been industrially produced. Electricity is specifically included in the definition.

2.2.3. The plaintiff is required to prove defect and damage and the causal link between them.[8] 'Damage' according to Article 9 means either damage caused by death or by personal injuries or damage to, or destruction of, an item of property other than the defective product itself; provided that (a) the item of property is of a type ordinarily intended for private use or consumption, and (b) was used by the injured person mainly for his own private use or consumption. Compensation for non-material damage (pain and suffering, loss of reputation etc.) is expressly excluded from the Directive[9], leaving this to the national legislation.

2.2.4. The question of whether or not the product is defective will be decisive as to liability. The concept of defectiveness is tested by reference not to the product's functioning and performance but to the expectation of safety which should apply to it in the circumstances. The test set out in article 6(1) of the Directive is based on safety as measured objectively by a person's expectation: "a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances in account...". Three factors are specified in the Directive as amongst those which are to be taken into account in deciding whether a product is defective:
2.2.4.1. "the presentation of the product"; this could include consideration of marketing, product description, information and warnings. In this case, the expectation of safety of a product may be qualified by instructions, contraindication, and precautions issued to the consumer.
2.2.4.2. "the use to which it could reasonably be expected that the product would be put". It is not surprising that the use to which the product was in fact put when it caused the damage is taken into account, given that the general approach to consumer safety in the Directive is objective. A producer may often find that his product has been put to an unintended use, misused or abused.
2.2.4.3. the third factor is "the time when the product was put into circulation." A product should not be defective if it becomes dangerous only after extensive or reasonable life. If it may become less safe with time however, it must be accompanied by an adequate warning. Thus, use by a consumer after an expire date clearly marked on a product should excuse the manufacturer. The directive also provides expressly that "a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation".[10]

2.2.5. True to the preamble of the Directive which mentions that there should be "a fair apportionment of risk between the injured person and the producer so that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances", the producer can exculpate himself if he proves in accordance with Article 7:
"(a) that he did not put the product into circulation; or
(b) that in the circumstances it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect come into being afterwards; or (c) that the product was neither manufactured by him for safe or any form of distribution for economic purposes nor manufactured or Distributed by him in the course of his business; or

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[6] Ibid. The reason for this being to prevent the consumer from the inconvenience of attempting to pursue a claim against a foreign producer.

[7] Art. 2, Dir. 85/374.

[8] Art. 4, Dir. 85/374.

[9] Art. 9, Dir. 85/374.

[10] Art. 6(2), Dir. 85/374.

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
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 the defect to be discovered; or
(e) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product."

2.2.6. The liability of the producer arising from the directive cannot be excluded or limited by arrangement, since Article 12 of the Directive does not permit any contractual derogation. Also, the Directive does not affect any rights that the claimant may have according to a liability system other than the Directive (Article 13) and he can pursue these rights independently, without -of course- being able to claim compensation twice for the some defective product. This is not incompatible with basic principles of consumer protection, but it undermines the Directive as an effective Community instrument.[11]

2.2.7. The proof of causation rests on the plaintiff. The notion of strict liability in the Directive entails that the consumer must prove that the product caused the injury and also that, but for a defect in the product, that injury would not have arisen.

2.2.8. Nevertheless, the Directive does not completely harmonise the laws of the different Member States, in that it permits specific derogations where Member States are free to opt out or not from certain terms of the Directive.[12] The allowable variations are:[13]
2.2.8.1. a maximum liability limit for death and personal injury claims of at least 70 million ECUS, but individual Member States may choose whether to include this or not (Art. 16 of the Directive).
2.2.8.2. a minimum threshold for damages for personal injury and damage to property of 500 ECUs (Art. 9).
2.2.8.3. although agricultural products and game do not fall into the definition of a 'product' for the Directive, Art. 15.1(a) permits Member States to impose strict liability for these if they so wish.
2.2.8.4. article 15.1(b) of the Directive permits the Member States to derogate from the Directive by excluding the 'development risks' defence, contained in Article 7(e),whereby a manufacturer can claim that the state of scientific and technical knowledge was not such as to enable the defect to be discovered when the product was put into circulation (known also as the 'state of the art' defence).

2.2.9. The proceedings for the recovery of damages according to the Directive, have a limitation period of three years, beginning from the date on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.[14]
A prescription period of 10 years is introduced under Article 11, starting from the date on which the product which caused the damage has been put into circulation.

2.2.10. Finally, under Article 21, the Commission undertakes to monitor the Directive's application in practice, and to report every five years to the Council of Ministers submitting, as appropriate, proposals for its amendment. This reexamination, especially of the effects of derogations and procedural rules, is particularly important in order to establish whether the Directive has effectively improved the protection of consumers, and contributed to the unity of the Single Market.[15]

2.3. It is important to realise that Directive 85/374 does not replace, but instead supplements, the prevailing systems of consumer protection in the laws of Member States. A consumer who has no claim under fault liability unless he proves that the producer was at fault, will have a prima facie claim under the

[11] Lasok & Bridge, op. cit., 736.

[12] In addition, of course, to the fact that all Directives allow Member States a certain measure of discretion as to the exact form and method of their implementation. See Art. 189 EC.

[13] Merkin, A Guide to the Consumer Protection Act 1987, London (1987), 6-7. Also, Pearson, op. cit., 274.

[14] Art. 10, Dir. 85/374.

[15] Lasok & Bridge, op. cit., 737.

Directive irrespective of fault: this is what we mean by saying that liability under the directive is strict. It is however certainly not an absolute liability: the consumer still has to prove the damage and the causation and there are several defences that the manufacturer can bring.

3. CRITIQUE AND ECONOMIC ANALYSIS OF THE DIRECTIVE

3.1. At first sight, the regime of strict liability for defective products appears to represent a development in favour of consumers at the expense of producers. In fact, the system is intended to address at least some of the problems which arose under the contract and fault liability theories when applied to the area of consumer protection. But although the range of potential defendants has been extended, this may not necessarily lead to an increase in the findings of liability itself.

3.1.1. First, although the responsibility of the manufacturer does not depend on fault as such, proof of causation still rests on the claimant and the directive in no way alters other existing national rules on the burden of proof.

3.1.2. In some situations, the producer can avoid liability by seemingly only having to prove that he complied with the general duty of care to which he might have been expected to conform in manufacturing and supplying a product, and therefore that the defect probably did not exist at that time. In fault liability, the question is whether the producer's conduct was reasonable. The question of what constitutes reasonable conduct can only be answered in the context of the state of actual and constructive knowledge of the defendant of the relevant time which in turn involves consideration of the discoverability of the problem. The same concepts of knowledge and discoverability therefore arise under both fault and strict liability.

3.1.3. Furthermore, the availability of the development risks defence is highly problematic. To what extent does the Directive annul all its efforts t provide effective consumer protection by introducing the development risk defence?

The justification of the development risks defence is the encouragement a research into new products. A producer confronted with absolute liability for unforeseeable defects will obviously not risk marketing any new products because of the cost of potential liability and the danger of damage to reputation in the event of successful proceedings against him; this is to the ultimate detriment of the consumer.[16]

This approach presupposes that insurance will not be available for development risk liability. Research seems to indicate that premiums will no be increased significantly by a regime of strict liability as long as the development risk defence is available, but that there will be a substantial rise if absolute liability is introduced. It becomes a matter of strategy thereafter given the availability of insurance- whether it is advisable to allow the development risks losses to fall upon the individuals or whether it is more desirable to require all consumers to contribute to the costs of insurance when making their purchases. Even if a development risks defence is included, however, this will not mean that the manufacturer will be able to avoid development risk liability altogether. An exporter to other Member States of the Community where the derogation has been put into effect, may always face absolute liability and there is always the possibility that the defence is not successful, even after expensive litigation.[17]

3.2 From an economic perspective the introduction of a common product liability regime in Europe encompasses two main purposes, a fair apportionment of risks and the enhancement of market unity.

3.2.1 The risk-distribution argument (as recognised in the preamble of the Directive, supra 2.1.) is founded on the aim to spread loss equitably throughout society rather than to allow it to fall on individuals through an expensive and unwieldy fault-based product liability. In principle, strict liability is one of the least expensive forms of risk-spreading, since producers can insure against third-party risks of a lower cost than consumers can insure against first-party ones. Besides, the existence of liability insurance is not going to become a disincentive for the producer to increase safety and standards, given the dangers of adverse publicity and premium-rating.[18]

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[16] Merkin, op. cit., 35.

[17] Ibid., 36.

[18] Lee, Risk/Utility and Product Liability, (1988/ 1) Trading Law, 2, Merkin, op. cit., 4.

3.2.2. As for market unity, manufacturers in Member States subject to strict product liability will be of a competitive disadvantage when exporting o other Member States with a lesser degree of consumer protection. Their products will be more expensive, because of domestic liability insurance premiums being incorporated in the production prices or as a result of the costs of higher safety standards. That is why failure to implement strict liability can be seen as a form of indirect protectionism.[19]

3.2.3. Nonetheless, the validity of the economic arguments in favour of harmonisation of product liability is far from uncontested. It is not fully certain what effect the Directive does have upon producer prices, and it has been argued that the difference would be insignificant.[20]

In addition, the targeted improvement of the levels of competition is unlikely to be achieved, as the Directive does not also harmonise the legal remedies available to the consumer in the various States. The derogations allowed on top of this, certainly do not do much to prevent the fragmentation of the market. Most importantly, Dir. 85/374 preserves existing principles of contractual or delictual liability already in force in Member State and preserves the existing national laws on contribution by joint tortfeasors.[21]

3.3. The debate concerning the value and efficacy of product liability is still underway.[22] In the United States for example, doubts about strict liability regulations have led the courts to initiate a 'return to negligence' by curtailing the use of the consumer-expectation test in favour of the risk-utility approach, especially in cases of defects in design.[23] There, the idea is gaining ground that the interests of producers and consumers are not served by a system relying so heavily on civil litigation. At the same time manufacturers are finding it increasingly difficult to obtain adequate third-party insurance cover whilst it is feared that excessive damage awards are discouraging innovation.

4 PRODUCT LIABILITY IN ENGLAND

4.1. Previous law.[24] A consumer who was injured or whose property was damaged by a product which he had bought could bring an action against the retailer for damages for breach of contract. Under the Sales of Goods Act an implied term was included in the contract to the effect that the goods will be fit for the purpose intended. However, because of the doctrine of privity of contract no action for damages could be brought by a third party even when it was foreseeable that a defective product would cause him harm, e.g. a member of the purchaser's family. In the landmark case Donoghue v. Stevenson[25] the House of lords acknowledged the possibility of tort brought by the ultimate consumer against the producer, but as the difficulty of proving negligence remained, the situation of the consumer remained relatively unfavoured.

4.2. The Consumer Protection Act 1987.[26] The implementing act came into force on 1 March 1988. Its wording often complex and the layout does not follow that of the Directive. In fact, there are some significant differences between the two. The essence of the present law is that the producer of a defective

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[19] Merkin, op. cit., 35

[20] E.g. Whittaker, The EEC Directive on Product Liability, (1985) 5 Yearbook of European Law, 233. Markesinis & Deakin, Tort Law, Oxford (1994), 535-536.

[21] This increases the possibility of potential plaintiffs actively seeking the most advantageous jurisdiction to conduct litigation ('forum shopping'); cf. Atree, 'Jurisdiction, Enforcement of Judgement and Conflicts of Laws', in Kelly & Atree (eds.), European Product Liability Law (1992), 147.

[22] See discussion in Markesinis & Deakin, op. cit., 564.

[23] Cf. Whitehead & Scott, 'A Comparison of Product Liability Law in the US and the EC', (1991) European Business Law Review, 171.

[24] For a detailed analysis, Markesinis & Deakin, op. cit., 523 et seq.

[25] [1932] AC 562.

[26] See Pearson, op. cit., 268 et seq.; Clark, 'The Consumer Protection Act 1987', (1987) Modern Law Review, 614. Howells, 'The Consumer Protection Act 1987', (1987) 159.

product is liable for damage caused by that product, unless he can rely on one of the defences. Thus, the system focuses on the condition of the product instead of the conduct of its producer.[27]

4.2.1. The terms 'producer', 'product' and 'defect' are defined by the Act as well as the type of damage for which the producer may have to pay compensation. The title of the Act can be misleading however, as it will protect not only a 'consumer' but anyone who suffers injury or damage as a result of a defective product. The plaintiff must show (a) damage, (b) defect in the product, and (c) a causal link between the two.

4.2.2. In section 1(2) of the Act, a 'producer' of a product is defined as:

(a) the person who manufactured it;

(b) in case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it;

(c) in the case of a product that has not been manufactured, won or abstracted, but whose essential characteristics are attributable to an industrial or some other process (for example, in relation to agricultural produce), the person who carried out that process.

4.2.3. A 'product' is 'any goods or electricity'. (s. 1(2) of the Act). The ‘goods’ include substances (natural or artificial, solid, liquid or gaseous form), growing crops, things comprised in land by virtue of being attached to it, ships, aircraft and vehicles, component parts and raw materials incorporated into finished products.[28] Game and agricultural products are excluded from the definition.

4.2.4. Under section 3(1) there is a defective product “if the safety of the product is not such as persons generally are entitled to expect”. The definition is not confined to or which are dangerous to health, but includes risk to property and products damage and inconvenience. The notion of 'defect' in the Act leaves many questions unanswered.[29] A difficulty is that it fails to provide a readily ascertainable objective standard against which a manufacturer can ensure the safety of his product, and, in that respect, does not move too for ahead from the previous position under the law of tort.

4.2.5. The defences are found in section 4 of the Act. One is that the defect is attributable to compliance with any statutory requirement or EC obligation. Also, “that the person proceeded against did not at any time supply the product to another” which covers cases of mistaken identity, where the wrong manufacturer or supplier is sued or where the goods are stolen from the manufacturer or distributor. The third defence exculpates the manufacturer for goods supplied for non-profit reasons, e.g. gifts, charity, etc. Another defence can be mode from the fact that the defect did not exist in the product at the relevant time. The most important one is the 'development risks' defence, which has been incorporated into the Act in England, whereby "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 producer in question might be expected to have discovered the defect if it had existed in his products while they were under his control". The nature of the defence and its implementation in the UK[30] has provoked controversy; and the Commission has accused the UK of allowing too broad a scope for the defence.[31]

5. PRODUCT LIABILITY IN GREECE (AND GERMANY)

5.1. Greek product liability law is to be found in law No. 1961 of 1991, concerning consumer protection and other provisions. Delictual liability of the producer in respect of defective goods is only a -part of this Act, which also regulates advertising, standard business terms, the conclusion of contracts outside business premises, servicing after the sale and consumer organisations. less than four months after its publication, the

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[27] See Griffiths et al., 'Developments in English Product Liability Law: A Comparison with the American System', (1988) Tulane Law Review, 353; also Schnopfhagen, 'Produkthaftung in England', (1993) Zeitschrift fur Rechtsvergleichung, 62.

[28] Consumer Protection Act 1987, s. 45 (1).

[29] Stapleton, 'Three Problems with the new Product Liability' in Cane & Stapleton (eds.), Essays for P. Atiyah.

[30] See Howells, 'Europe's Solution to the Product Liability Phenomenon', (1991) Anglo-American Law Review, 205.

[31] See the argumentation in Merkin, op. cit., 35; for the view that the UK has indeed properly implemented the Directive, Newdick, 'The Development Risk Defence of the Consumer Protection Act 1987', (1988) Cambridge Law Journal, 455; id., 'Risk, Uncertainty and 'Knowledge' in the Development Risk Defence', (1 99 1) Anglo-American Law Review, 127.

Act was amended by law No. 2000 of 1991. Surprisingly, the new amended provisions are, to some extent, in conflict with Dir. 85/374.

5.1.1. Previous law. The previous applicable law is Greek Civil Code Art. 914, which provides (like in the German Civil Code Art. 823 BGB) that whoever unlawfully and culpably causes damage to another must compensate the injured party for the damage so caused. Under previous Greek law, producers could be held liable for negligently manufacturing a defective product containing a defect. A duty of care arises at the research and development stage and continues throughout the design and production processes. Furthermore, the producer could be liable for negligent failure to provide adequate warning or instructions for use, including, for example, warning of dangers arising from product misuse or of side effects of normal use.[32] Exactly like in Germany, the Greek courts reversed the burden of proof in favour of the claimant and thus the plaintiff had only to demonstrate the existence of the defect, the damage and the causal relationship between them. It was not necessary for him to show that the manufacturer was at fault. By analogous application of the provision relating to liability due to the collapse of an edifice, courts had held that the burden then shifts to the manufacturer to prove that neither he nor his agents were responsible for the existence of the defect.[33]

5.1.2. The law after the Directive.[34] The original Act implementing the Directive became effective on 3 September 1991 and the amendments on 24 December 1991. The new law is mandatory (Art. 3), without prejudice to any legal provisions which may be more favourable to the consumers (Art. 50). It is important to note that it applies equally to enterprises owned by the State or local authorities. A general duty to supply the market with safe products is introduced with Article 4 and there is a presumption that products are safe if they comply with mandatory requirements. There is ample room for state intervention by means of comprehensive measures where consumer health and safety are endangered (Art. 6). Past experience shows that such measures are indeed taken in cases of dangerous pharmaceutical products, toys, food products etc. Liability in respect of damage caused by defective products is strict and the relevant provisions are in line with those of the Directive, subject to the derogations referred to below. The concept of 'producer' however, as set out in Art. 8, is narrower than in the Directive, due to provisions channelling liability in respect of packaged goods and goods in bulk to particular persons (Art.[35] *7).*

5.1.2.1. Moral damage and pain and suffering are compensated (Art. 8 in conjunction with Civ. Code art. 932). Recoverable damages under Arts. 928-930 Civ. Code in the case of death include maintenance and hospital fees/funeral expenses and in case of personal injury, hospital fees, damage sustained and consequential loss. Compensation in respect of death/personal injury is payable irrespective of and in addition to any other lump sum indemnity or pension fund payments received under social security schemes or private insurance policies of the victim or of other beneficiaries of such awards.[36] The threshold for property damage to be borne by the injured party is drachmae 50,000.

5.1.2.2. The amendments introduced by Act no. 2000/1991 provide for administrative sanctions against suppliers acting in breach of the law, which include substantial fines and the closing of the business for up to one year (art. 48a).

5.1.2.3. Associations of consumers are classified as either "Consumer Clubs" or "Consumer Unions", the latter being endowed with locus standi in respect of collective actions (or class actions) and the institution of criminal proceedings against producers.

5.1.2.4. Previous product liability law may still be relevant where compensation in excess of the limit (or less than the threshold) is sought or where the injured party wishes to take advantage of the longer prescription limit of the Civil Code. Such law would also be applicable in situations lying outside the scope of the new acts (e.g. damage to the product itself). The law of Contract and the statutes regulating the sale of goods are applicable to actions between producers and/or consumers who are parties to such contracts.[37]

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[32] Tsouroulis & Rediadis, Product Liability in Greece [working paper], Piraeus (1993), 6.

[33] Ibid.; also Pantelidou 'Die Entwicklung der Produzentenhaftung im griechischen Recht', (1990) Recht der Internationalen Wirtschaft, 540.

[34] For an overview Rokas, Die Umsetzung der Produkthaftungsrichtlinie der EG, (1989) Versicherungsrecht, 437.

[35] Tsouroulis & Rediadis, op. cit., 2.

[36] Ibid., 3.

[37] Ibid., 4.

5.1.3. Derogations.
5.1.3.1. The maximum limit of liability in respect of death or personal injury is fixed at drachmae 7,203,840,000 (much lawer than the ECU 70 million provided for by the Directive).
5.1.3.2. The development risks (state of-the-art) defence is not dealt with expressly. The provision closest to that is Art. 10(e), which is wider than the defence envisaged in the Directive. The article introduces subjective rather than objective criteria, thus defeating to some extent, the purpose of the introduction of strict liability in Art. 7.[38]
5.1.3.3. Primary agricultural products and game that have not undergone initial processing are not products for the purposes of the Act.

5.2.1. Previous German law. On the subject of the previous German law, in a claim for damage caused by a defective product, the courts have held, based on the German Civil Code Art. 823 1 BGB as stated previously, that there is a presumption of negligence which it is up to the manufacturer to rebut. The first product liability case, in which the German Supreme Court decided the reversal of the burden of proof from the plaintiff to the defendant was the 'fowl pest case'.[39] The owner of a chicken farm sued the manufacturer of a fowl pest virus vaccine which had killed thousands of his chickens.[40] Although the Court did not introduce a regime of strict liability, the reversal of the onus of proof has had the some effect, more or less.
5.2.2. German law after the Directive. The Produkthaftungsgesetz[41] implements Dir. 85/374; it came into force on 1 January 1990 and is almost identical to the directive. The development risks defence is included, with the exception of medical preparations. The duty to observe development risks for specific products (as developed by case law) remains unaffected. The manufacturer may nevertheless be answerable under general tort law if the development risk became known after the product was introduced onto the market and if he failed to avoid the occurrence of the damage by means of subsequent warning notification.

6. THE SITUATION IN FRANCE

6.1. French law presents a rather unique case amongst the product liability systems in Europe, as (at the time of writing of this paper) Dir. 85/374 has not been implemented yet.[42] As a consequence, only the law of obligations according to the Code Civil is applicable so far.
The complexity of the system as well as uncertainties in the rules have been subject of criticism. For some, the Directive was a welcome opportunity to harmonise and simplify the existing law in France relating to product liability. The French Government presented on 23.V.1990, draft legislation to Parliament for the implementation of the Directive into French law. The Assemblee Nationale adopted it on 1.VI.1992, but the Senate reacted the proposal. The draft bill, for the third time, is under parliamentary discussion. Three reasons can be cited for this apparent reluctance to implement the Community Directive: firstly, France (or of least, the courts) has been at the forefront of innovation in respect of product liability and the urgency of protecting the consumer with new legislation is not pressing. Besides, because of the well-established existing system problems of compatibility arise, as the regime of the Directive is not exclusive but supplementary. The major point of contention focuses on the development risks defence however, and whether France should use the allowed derogation or not.

6.2. Based on the Code Civil, two types of actions can be brought, the one, based on Articles 1382 and 1383 of the Code Civil, more frequently used than the other, of Article 1384(1).

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[38] See Ibid., 3-4.

[39] BGHZ 51, 91; cf. Pearson, op. cit., 273-274.

[40] For an English translation of the whole case see Youngs, Sourcebook on German Law, London (1994), 365.

[41] For the German Implementation in English, Zekell, 'The German Products Liability Act', (1989) American Journal of Comparative Law, 809; Veltins, 'The New Law of Product Liability in the FRG', (1990) Transnational Lawyer, 83.

[42] Deprimoz, 'Plongée dans les Zones d'Ombres de la Directive Communautaire sur la Responsabilité des Produits Defectueux, (1 987) Revue Generale des Assurances Terrestres, 36 1.

6.2.1. The general tort action based on Article 1382 and 1383 requires that the plaintiff proves a fault or negligent act or omission on the part of the producer or one of its distributors.
The Cour de Cassation had originally adopted rigid requirements of proof that the consumer had to show.[43] This strict position was later modified. French Courts realised that the proof of such fault quite often constitutes for the victim an almost insurmountable obstacle, and today the mere proof of a defect in the product is sufficient to establish the fault of the manufacturer. The victim is no longer bound to show a breach of the producer's duty of care in the manufacturing process.[44] The fault is no longer focused on the defendant's behaviour but on the product itself, which is more objective and makes it easier for the injured party to achieve proof of fault. 6.2.2. The Code Civil contains specific provisions on no-fault liability. One of them is Article 1384, which has been imaginatively employed by the Cour de Cassation in consumer protection by applying the solution elaborated in the case of damages caused by animals to situations of damages by defective goods. This innovation developed a strict liability regime in respect of injury caused by products which a person (usually the owner of the product) has in his custody ("garde").[45] The plaintiff only has to show a causal relationship between the damage suffered and the product. The manufacturer may exonerate himself proving that the damage was due to an external cause, such as a mistake committed by the plaintiff.

6.3. The contents of the draft Act. Although the solutions imposed by the strict liability under the Directive correspond closely to those resulting from the existing Civil Code rules, the incorporation of the directive into French law has necessitated the insertion of an entirely new title into the Code Civil (De la Responsabilite du Fait du Defaut de Securite des Produits). The development risks defence is included.
However, the draft Act contains several new points which have the effect of further extending the scope of strict liability in the field of product safety, especially as regards to the defences available for the producer. For example, whereas the Directive provides that the producer can be exculpated if he shows that "it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation",[46] according to the draft Act, the manufacturer must prove that the defect did not actually, and not merely probably, exist at the time he put it into circulation.
Thus the draft Act should simplify and unify the multiplicity of theories of product liability. According to it, a uniform product liability system would provide greater legal certainty for producers and sellers by reducing the theories under which they might be liable and safeguard the interests of consumers by reinforcing the principle of no fault product liability.

7. CONCLUSIONS

7.1. Directive 85/374 was due to have been implemented by 25 July 1988. In fact only Germany and England met that deadline. The product liability Directive specifies that it only intended to achieve an approximation of the laws of Member States and not to harmonise their consumer protection systems. The individual countries are allowed to opt-out of three provisions: the inclusion of primary agricultural products and game as a product, the development risks defence, and an upper limit on total liability. In addition to this, the contractual and delictual rules of compensation in the Member States continue to exist. Provisions relating to sale of goods and guarantees remain as they stand under national law (except in France). Special liability systems like the West German pharmaceutical regime are also preserved. The end result of this is that one must be constantly alert to domestic rules which may afford better protection than Dir. 85/374.[47] For example, in France a contractual action for 'vice caché' (hidden defect) or an 'action directe' against a manufacturer may be the preferred option. In England it may be advisable to forego the proof of the product being defective in favour of an action for breach of the implied condition of merchantable quality. And the

[43] E.g. Cass. Civ. 7.III.1966.

[44] Cass. Civ. 18.VI.1972.

[45] Cass. 13.II.1930.

[46] Art. 7(b), Dir. 85/374.

[47] With more details, Howells, 'Implications of the Implementation and non-implementation of the EC Products Liability Directive', (1990) 41 Northern Ireland Legal Quarterly, 22.

German domestic protection has developed to the extent of offering sometimes a better deal for the consumes (e.g. the reversal of the burden of proof or the obligation to monitor products). Evidently, a claim may have advantages and chance of success under one or the other system. Arguably, this may serve the consumer's interests better, since he can plead several liabilities.
On the other hand, the directive surely fails to resolve the problem of the different levels of protection to the consumer. It is, however, possible that by the year 2000 these options will be removed. Every five years the Commission has to submit a report to the Council on the application of the Directive, together with appropriate proposals. The Council can then decide whether to repeal these provisions.

7.2. The versions of the Directive in different languages are also incompatible. In England, any claim higher than the minimum 500 ECU threshold will be compensated in full. In the German version, however, this amount will be deducted from any larger claim.

7.3. As for as the individual national implementing bills go, the (proposed) French is the one which follows more closely the Directive's spirit. Not only will the directive be implemented, but also the former system will be unified and general consumer protection widened. In Germany the implementation of the directive is faithful, but does not attempt to unify its domestic system. In Greece and in England, the implementing legislation has narrowed down the scope of the directive with consequent reduction of the protection for the consumer.[48] Again, the problem of different levels of protection remains, since all national legislations differ from each other.

7.4. Adding the questionable economic results that the Directive has brought about to the apparent continuation of the piecemeal regime for product liability in the EC one would be "foolish to underestimate the extent to which an erosion of consumer confidence in the safety of imported goods will jeopardise the realisation of market integration."[49]

[48] For an in-depth comparative approach, Smith, 'The EC Directive on Product Liability: A Comparative Study of its implementation in the UK, France and West Germany', (1992) Legal Issues in European Integration, 101.

[49] Weatherill, Cases and Materials on EC Law, London (1994), 469.