

Product liability in the European Union

A report for the European Commission
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PRODUCT LIABILITY IN THE EUROPEAN UNION A REPORT FOR THE EUROPEAN COMMISSION

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EXECUTIVE SUMMARY

1. BACKGROUND

In December 2001, the European Commission appointed Lovells to carry out a major study of the product liability systems in the Member States of the European Union (the "Study"). This Study was foreshadowed by the Commission in its report on the responses to its 1999 Green Paper on Liability for Defective Products (the "Green Paper Report").

The Study set out to investigate the practical operation of the systems of law under which product liability claims may be brought in each Member State. These systems include the Product Liability Directive (the "Directive") and "national" systems of law such as those of contract and tort, which are permitted to operate alongside the Directive by virtue of its Article 13. The Study considered the extent to which there was a need further to harmonise product liability laws in the EU, or to make any amendments to the Directive. The results of the Study are set out in the accompanying Report.

2. CONDUCT OF THE STUDY

As background for the Study, reports were prepared by experts in each Member State describing the structure and operation of the product liability systems in their respective countries, including relevant aspects of practice and procedure in so far as they had an impact upon the operation of the product liability systems.

A survey was then conducted, between July 2002 and January 2003, into the practical operation and effects of those systems in each Member State. The survey was carried out by means of a combination of personal interviews (face to face or by telephone) and self-completion questionnaires. The potential participants in the Study were divided, for the purposes of the research, into four categories, namely:

- consumer representatives, which comprised consumer associations at both national and EU levels
- producers and suppliers of products (including manufacturers, importers, distributors and retailers) and trade associations
- insurers, reinsurers, insurance associations and insurance brokers
- lawyers (claimants' and defendants'), regulators and other government agencies and legal academics.

These categories are referred to here as "Consumer Representatives", "Producers", "Insurers" and "Legal", respectively.

During the course of the research, over 1,500 potential participants from all Member States were directly invited to contribute. In total, 349 participants in the four categories responded, including over 100 by way of personal interviews.

3. FINDINGS OF THE RESEARCH

3.1 The practical differences in product liability systems as between Member States

An important objective of the Study was to investigate the extent to which the potential liability of producers and suppliers, and the opportunities for consumers to recover compensation when injured by defective products, differed as between Member States.

It is noteworthy that the national liability systems of all Member States of the EU rest on a common basic framework. Specifically, those who produce or supply products that injure consumers may be liable to pay compensation under one or more of three systems:

- **The Directive.** In most respects, the Directive has been faithfully implemented in each Member State.
- **Contract.** In almost all Member States, the law of contract will come to the aid of a consumer who is injured by a product if the injury results from a breach by the seller of an agreement with the consumer. In some cases, rights of redress will be available against others further up the supply chain. However, the circumstances in which contractual remedies are available, and the types of damages recoverable, vary significantly from Member State to Member State. In some circumstances contractual remedies are of little benefit to consumers who wish to pursue product liability claims.
- **Tort.** Each Member State has a system of extra-contractual liability for the recovery of compensation by injured persons. In most cases, these principles apply where there is an element of fault on the part of the producer or supplier.

Against this background, participants in the Study were asked questions about the extent to which they considered that "product liability risks", in terms of claims being brought and their outcome,¹ differed as between the Member States. The vast majority of participants considered that there were differences, most saying that product liability risks differed "a little".

The main factors cited by participants for those differences were:

- the optional provisions in the Directive
- discrepancies in the implementation and interpretation of the Directive

¹ In the case of Consumer Representatives the corresponding questions were put in terms of the level of "consumer protection". The meaning of the terms "product liability risks" and "consumer protection" in the context of the Study were defined in the questionnaires. See Part 2, section 1.2 of the Report.

- the lack of harmonisation of national liability laws
- differing approaches to the assessment of damages
- differing procedural rules and levels of access to justice
- variations in consumer attitudes from Member State to Member State.

Many participants said that they considered that differences in procedural rules and access to justice were of more importance than differences in substantive law.

As to the practical effects of these differences, a few Producers indicated that they affect their businesses in some ways, but there is little evidence that they create significant barriers to trade or distortions to competition.

3.2 The impact of the Directive

Most participants thought that the Directive, since its adoption in 1985, had increased the prospects of product liability claims being brought, and of their success. Most participants also thought that the Directive had contributed to an increase in the level of safety of products in the EU.

Less than one quarter of Insurers said that the Directive has had an impact on the type of insurance policies offered in the EU, although more than one half said that it has had an impact on the basis upon which insurance is offered (for example, premiums or conditions for coverage), and on the way in which they deal with their insureds.

3.3 The experience of product liability claims in the EU

The Study also investigated the experience of product liability claims in the EU over recent years and, in particular, since the first report on the experience of the Directive was presented by the Commission in December 1995. That report concluded that there had been little practical experience of the Directive up to that time.

The research undertaken in the course of the Study suggests that there is now some practical experience of the Directive in almost all Member States, although the national courts are still by no means overwhelmed by product liability claims. It is also evident that the practical experience of the Directive, whilst significantly advanced since the 1995 report, is still developing.

There has, however, been a noticeable increase in product liability claims in the EU over the past 10 years. Most participants thought that claims in the EU had increased "a little", whilst about a quarter of those who expressed a view thought that they had increased "a great deal". Whilst the Directive was identified as a factor that has contributed to this increase, factors more frequently identified as important were increased consumer awareness of rights, increased consumer access to information, and media activity.

There is also evidence that product liability claims in the EU have become more successful in the past 10 years. Half of the participants who expressed a view on this question believed this to be so. The factor that was most commonly identified as contributing to the increase in success of product liability claims was greater access to legal assistance/advice. A significant number of participants also identified the Directive as contributing to the success of product liability claims.

Participants, and in particular Insurers, also reported that the incidence of out-of-court settlements had increased over the past 10 years. The factors that were most often cited as contributing to this increase included media activity and greater access to legal assistance/advice. The Directive was also frequently identified as a factor.

4. THE POSSIBILITY OF REFORM

4.1 The impetus for reform

In the Green Paper Report, it was noted that many of those who responded to the Green Paper considered that the Directive had "created a well-balanced and stable legal framework which takes into account the concerns of both the consumer and the producers". The Commission has made it clear that any reform of the Directive must be undertaken with a view to maintaining that balance.

The research undertaken in this Study reveals that there is no uniform call for major reform of the Directive from any particular category of persons affected by its operation and that the Directive was generally seen by most participants as providing a good balance between the interests of producers and those of consumers.

It is true that the prevailing view among Consumer Representatives was that the Directive did not strike an appropriate balance in that it did not adequately protect the interests of consumers. However, no single deficiency was cited by a majority of Consumer Representatives as the source of imbalance. Whilst this does not discount the validity of the views expressed by Consumer Representatives, it does make it difficult to conclude that the Directive is fundamentally flawed in any significant respect.

Indeed, many respondents have urged that there be no reform at this time. Some participants suggested that it would be better to await the outcome of developments in other areas, which might have an impact on the practical operation of product liability systems including the Directive. These include developments at an EU level in areas such as the regulation of product safety, access to justice, and consumer protection more generally.

To the extent that participants did identify areas in which the Directive was seen to be deficient, a number of themes emerged.

(a) Burden of proof

It is evident that questions relating to the burden of proof continue to be controversial, and are seen by many to be of real practical significance. There remains a perception on the part of some Consumer Representatives that consumers are unfairly disadvantaged by the burden of having to prove defect and/or causation in product liability claims. The concern mainly arises from perceived difficulties in proving claims due to a lack of legal or other resources needed to investigate them properly, or to an inability to gain access to essential information. Such problems are seen to be particularly acute in relation to technical products, or where the alleged injuries are of a complicated nature.

Producers and Insurers, on the other hand, are concerned that any relaxation of the rules relating to the burden of proof might have the effect of encouraging "spurious claims". Indeed, some Producers suggested that there should be a greater obligation on claimants to substantiate claims in the early stages of proceedings.

(b) The concept of "defect"

There is continuing uncertainty as to the precise meaning of the term "defect". This is reflected in different interpretations in some of the cases decided by the national courts. Some of the controversial questions include:

- Is there room for a "risk/benefit" analysis when considering the level of safety which a person is entitled to expect?
- Is the conduct of the producer a relevant factor? For example, is it relevant to consider the care (or lack of care) taken by a producer in the design, manufacture or marketing of the product?
- Where the safety of a product is closely regulated, and the producer complies with all relevant regulations, in what circumstances, if any, can the producer be held to a higher standard of safety for the purposes of liability under the Directive?
- Is it enough for an injured consumer simply to prove that the product failed, thereby causing injury, or does the consumer in addition have to prove the cause of the failure?

It might be expected that, as the experience of the Directive grows, there will emerge a body of national case law that may serve to provide guidance as to the interpretation of this fundamental concept. It might also be expected that some aspects of this will come to be resolved in due course by the European Court of Justice ("ECJ").

(c) The development risks defence

It is evident that the development risks defence in Article 7(e) remains controversial. Whilst examples of its having been successfully relied upon in any EU country are difficult to find, Insurers and Producers clearly continue to regard it as important. Although some participants, particularly Consumer Representatives, suggested it be abolished, some Producers and Insurers urged that it be retained.

The economic impact of the removal of the development risks defence is the subject of a separate study to be undertaken on behalf of the Commission in 2003. Having regard to the evidently limited practical scope of the defence, there would seem to be little need for reconsideration of this provision at this time.

(d) The minimum threshold

In some jurisdictions, the minimum threshold of €500 was seen as an unjustifiable source of problems for consumers, particularly in countries which provide low-cost tribunals for dealing with product liability claims, and in jurisdictions where the "threshold" is treated as a deductible from any damages awarded.

(e) A defence of regulatory compliance

A number of participants (from the pharmaceutical industry in particular) suggested that the Directive should provide a defence for producers in industries where the safety of a product is closely regulated, if products comply fully with applicable regulations. As EU product safety regulation continues to expand, it might be expected that this issue will assume even greater importance.

(f) Design defects and failure to warn

Some participants also questioned the applicability of no-fault liability systems in design defect and failure to warn cases, suggesting that a fault-based standard was better suited to such defects.

(g) The 10 year "long-stop"

A few Consumer Representatives and Legal participants pointed to the 10 year long-stop provision as a feature that leads to inadequate protection for consumers. In the Green Paper Report, it was noted that there was not sufficient empirical evidence as to the effect of this provision or what would be the impact of reform. Given that it is still less than 10 years since some Member States implemented the Directive, it is perhaps still too early for an informed assessment to be made.

4.2 The case for further harmonisation

(a) Existing harmonisation under the Directive

The Directive constitutes a measure designed to harmonise product liability laws in the EU at a particular level. It has introduced into all Member States (in some cases for the first time) a concept of no-fault liability of producers to persons injured by defective products. In so doing, the Directive ensures a common basis of liability upon which all persons in the EU can claim compensation if injured by a product that does not provide the level of safety that a person is entitled to expect.

The results of the Study suggest that the Directive has substantially achieved its objective. This is a significant achievement, given that some of its provisions were highly controversial at the time the Directive was first proposed. The broad acceptance of the Directive in the EU, as reflected in the results of the Study, is also remarkable.

(b) Article 13

Article 13 of the Directive ensures the coexistence of national systems of liability with the system established under the Directive. Given that national systems of liability differ as between Member States, full harmonisation of product liability laws cannot be achieved so long as Article 13 remains in place.

However, the responses received from participants suggested overall that there was no strong call for Article 13 to be removed with the effect that the provisions of the Directive would become the sole system of product liability, to the exclusion of tort laws, contract law, and any "special liability systems".

Whilst there appear to be no serious practical impediments to taking this step (leaving aside the question of legal base), as a political matter it is likely to be highly controversial, not least because it would have the effect of depriving consumers of alternative means of seeking redress. There are also concerns that any reforms associated with the removal of Article 13 might upset the balance of interests reflected in the Directive in its present form.

(c) Interpretation of the Directive by the national courts

There remains substantial scope for national courts to differ in their interpretation of the central provisions of the Directive. Recent cases that have considered the meaning of the term "defect", for example, demonstrate the extent to which differing interpretations can lead to very different outcomes in otherwise similar cases.

It may be that, over time, wider experience of the Directive may lead to greater consistency in its application by national courts and tribunals. However, if areas of controversy remain, they may fall to be considered by the ECJ, and it is desirable that they do. If not, the Commission

may need to intervene, perhaps by amending the Directive itself. Given the wide acceptance of the Directive, however, legislative change should be a measure of last resort.

(d) The broader context

The Directive cannot be viewed in isolation, but only as part of a broader system involving a wide variety of factors (such as safety and consumer protection laws, judicial practices and procedures, cultural and social factors), all of which affect the interests of both consumers and business operators. These other factors can have a greater influence than the substantive laws themselves on the practical functioning of product liability systems, including the Directive, and are constantly subject to change. For this reason, any consideration of possible reforms to the Directive has to be made with regard to their potential impact in the context of the broader system.

5. MAIN CONCLUSIONS

5.1 Principal findings

The differences in product liability risks as between the Member States

1. The prospects of product liability claims being brought, and their likely outcome, do differ as between the Member States. There is no single cause of these differences. They result from:
 - the optional provisions in the Product Liability Directive
 - discrepancies in implementation and interpretation of the Product Liability Directive
 - differences in the national liability systems that exist alongside the Product Liability Directive
 - differing approaches to the assessment of damages
 - differing procedural rules and levels of access to justice
 - variations in consumer attitudes from Member State to Member State.

The impact of the Directive on product liability risks

2. The Product Liability Directive has moderately increased the prospects of product liability claims being brought, and of their success.
3. The Product Liability Directive has contributed a little to increasing the level of safety of products marketed in the EU.

The effect of differences in product liability risks as between the Member States

4. There is little evidence that disparities as between Member States in the practical functioning of product liability regime create significant barriers to trade or distortions to competition in the EU. A few Producers indicated that their businesses are affected in some ways by such disparities.
5. There is some evidence that disparities as between Member States in the practical functioning of product liability regimes may affect the basis on which insurance coverage is offered in different Member States. There is no evidence however, that such disparities restrict the availability of insurance in any Member State. As to the Directive itself, some Producers and Insurers reported that insurance premiums increased somewhat as a result of the Directive.

The experience of product liability claims in the EU

6. There has been a noticeable increase in the number of product liability claims in the EU in the last 10 years.
7. Whilst the Product Liability Directive has contributed to the increase in product liability claims, more important factors have been increased consumer awareness of rights, increased consumer access to information, and media activity.
8. There is evidence that product liability claims in the EU have become more successful in the past 10 years. The Product Liability Directive has contributed to this increase. Other important factors have been greater access to legal assistance/advice and changes in judicial attitudes to claims.
9. There is evidence that claims by consumers are generally more likely to be successful if brought under the Product Liability Directive rather than under other national laws. This is more so in some Member States than in others.
10. In the last 10 years, the incidence of out-of-court settlements has increased somewhat. The main factors responsible for the increase appear to be media activity, greater access to legal assistance and the Directive.

The impetus for reform

11. The prevailing view of participants overall is that the Product Liability Directive strikes an appropriate balance between the respective needs of producers/suppliers and consumers. Most Consumer Representatives, however, said that it does not adequately protect the needs of consumers. Reasons cited for this included the lower threshold, burden of proof and the development risks defence, although no one factor was

identified by a majority of Consumer Representatives. A minority of Producers thought that the Directive did not adequately protect the needs of producers/suppliers. The most commonly cited reasons were the Directive's application to design defects and warnings, and the lack of a defence of regulatory compliance.

12. In general, there is not a great deal of support for the suggestion that Article 13 should be abolished so as to exclude national systems of liability such as contract law, tort law and "special liability" systems.

5.2 General observations

1. The evidence shows that there is no need for fundamental reform of the Directive at this time. Whilst some participants expressed concern about particular issues, no single issue emerged as being of sufficiently broad concern to warrant fundamental change.
2. The Directive itself is broadly accepted in all Member States, although some areas of controversy or uncertainty remain in relation to its practical application. The Commission will no doubt wish to continue to monitor developments in case law, and in the practical operation of product liability systems, in order to assess, on an ongoing basis, whether any intervention is required in the future.
3. The establishment of a central database of the decisions of Member States' courts and tribunals concerning the Directive would make an important contribution to achieving greater harmony in the application of the Directive in the EU. It would not only serve as a resource to national courts and tribunals in applying the terms of the Directive, but would also assist the Commission in monitoring and assessing the practical operation of the Directive on an ongoing basis.

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PART 1 - INTRODUCTION

1. BACKGROUND

The Product Liability Directive 85/374/EEC (the "Directive") was adopted in the European Union (the "EU") on 25 July 1985. The Member States were required to implement the Directive by 30 July 1988.

For a number of reasons, the time it took to implement the Directive varied considerably as between the Member States, and some of the current Member States joined the EU after the date specified for implementation. The first Member State to implement the Directive was *the United Kingdom*, which did so in March 1988. The last of the current Member States to implement the Directive was *France*, which introduced its implementing legislation in May 1998.

The first report on the operation of the Directive was presented by the European Commission (the "Commission") in 1995¹ based on an impact study carried out in 1994. At that time it was considered that experience was still too limited to make any proposals for amendment.

On 28 July 1999, the Commission presented a Green Paper on Liability for Defective Products (the "Green Paper"),² which initiated a further analysis of the implementation of the Directive, and in which there were outlined a number of "options" for reform. The Commission called for responses.

A number of the options discussed in the Green Paper provoked interest in various sectors, and over 100 responses were received by the Commission.³ After considering these responses, the Commission published a Report on the Application of Directive 85/374 on Liability for Defective Products (the "Green Paper Report"),⁴ which emphasised that:

*[The Directive] represents a compromise reconciling the interests at stake. The Member States' political determination...to have a balanced framework of liability governing relations between firms and consumers must not be underestimated. ...Accordingly, any proposal to revise the directive should take into account [that] balance....*⁵

¹ COM (95) 617, 13 December 1995.

² COM (1999) 396 final.

³ The largest percentage of responses to the Green Paper came from European organisations based in Brussels, and the bulk of the remaining responses came from persons or entities in Germany, France and the United Kingdom.

⁴ Com (2000) 893 final, 31 January 2001.

⁵ *Ibid*, p.12.

The Green Paper Report concluded that, among other things, there was insufficient data to enable the Commission to form an informed view on what (if any) reforms were required, and announced that two important studies should be commissioned:

1. a major study to investigate the operation and practical effects of product liability systems existing in the EU
2. a smaller study concerning the economic impact of the removal of the development risks defence.

In December 2001, Lovells was appointed by the Commission to carry out the first of these studies (herein referred to as the "Study"). It was recognised that this would be an ambitious study which would involve, first, a review of the product liability systems in each Member State, and second, an investigation into the practical effects of those systems, by way of a survey directed to those persons and entities affected by, or involved with, those systems.

This report (the "Report") details the methodology, results and conclusions of the Study.

2. THE SCOPE OF THE STUDY

The Study comprised a comprehensive review and analysis of the general experience of the operation of product liability systems in EU Member States, from the perspective of those most closely affected by those systems. The Study was not intended to repeat the exercise initiated by the Commission in the Green Paper. Rather, it analysed the extent and prevalence of product liability risks, the nature and extent of product liability claims, the extent to which existing regimes provide an appropriate balance between the relevant interests, and the possibility of reform.

The results of the Study should be considered in the light of the overall context from which they were gleaned. The operation of product liability systems in the EU is bound to be affected by a variety of factors such as product safety regulation, consumer protection measures and access to justice. Looking forward, more general initiatives relating to EU-wide law reform must be taken into account in considering the nature and viability of any future reform.

The Study has provided an overview of the practical application of the product liability laws in all Member States and should assist the Commission in assessing the practical effects of the Directive and the feasibility of further reform.

3. THE CONDUCT OF THE STUDY

3.1 The national reports

The first stage of the Study ("Stage 1"), which involved the preparation of reports describing the product liability systems in each Member State, was conducted with the assistance of expert product liability practitioners and/or academics in each country. These experts were:

Member State	Reporters	Firm/University
Austria	Professor Rudolf Welser; Professor Christian Rabl	Universität Wien
Belgium	Professor Bernard Dubuisson	Université catholique de Louvain
Denmark	Jens Rostock-Jensen	Kromann Reumert, Copenhagen
Finland	Marko Mononen	University of Helsinki
France	Professor Christian Larroumet	Lovells, Paris
Germany	Ina Brock; Dr Detlef Hass	Lovells, Munich
Greece	Professor Ioannis Karakostas	University of Athens
Ireland	Alex Schuster	Trinity College, Dublin
Italy	Professor Roberto Marengo	Lovells, Rome
Luxembourg	Jean Steffen; Alex Schmitt	Bonn Schmitt & Steichen, Luxembourg
The Netherlands	Klaas Bischopp	Lovells, Amsterdam
Portugal	Professor Luís Brito Correia	Universidade Católica Portuguesa
Spain	Professor Miguel Pasquau Liaño	University of Granada
Sweden	Rose-Marie Lundström	Mannheimer Swartling, Stockholm
The United Kingdom	Professor Geraint Howells	University of Sheffield

The reports produced in Stage 1 provided the background for the research carried out in the course of the second stage ("Stage 2"). Relevant information gathered during Stage 1 has been incorporated into the discussion and analysis of the research results in this Report.

3.2 The survey

The success of Stage 2 of the Study - namely the research into the practical operation and effects of product liability systems across the EU - was likewise due in no small part to the substantial assistance provided by product liability practitioners and academics (the "Researchers") in each Member State. These experts comprised:

Member State	Researchers	Firm/University
Austria	Thomas Mondl	Mondl & Partners, Vienna
Belgium	Debra Holland	Lovells, Brussels
Denmark	Jens Rostock-Jensen	Kromann Reumert, Copenhagen
Finland	Marko Mononen	University of Helsinki
France	Professor Christian Larroumet	Lovells, Paris
Germany	Ina Brock	Lovells, Munich
Greece	Dimitris Emvalomenos	Bahas Gramatidis & Partners, Athens
Ireland	Roddy Bourke	McCann Fitzgerald, Dublin
Italy	Professor Roberto Marengo	Lovells, Milan
Luxembourg	Jean Steffen; Alex Schmitt	Bonn Schmitt & Steichen, Luxembourg
The Netherlands	Klaas Bischopp	Lovells, Amsterdam
Portugal	Professor Luís Brito Correia	Universidade Católica Portuguesa
Spain	José Melendez Professor Miguel Pasquau Liaño	Albiñana y Suarez de Lezo, Madrid University of Granada
Sweden	Rose-Marie Lundström	Mannheimer Swartling, Stockholm
The United Kingdom	John Meltzer; Rod Freeman; Siobhan Thomson	Lovells, London

The Stage 2 research required that consideration be given not only to the different legal systems themselves, but also to the socioeconomic realities within which they operate. This was accomplished by surveying a broad range of participants across the EU, by means of a combination of personal interviews (face to face or by telephone) and self-completion questionnaires. Due to the differing perspectives of those involved in the product liability systems in the EU, and the need for a certain level of specificity in the enquiries, the potential participants in the Study were divided into four categories and a questionnaire was devised for each category. Participants were grouped into the following four categories:

- consumer representatives, which comprised consumer associations at both national and EU levels
- producers and suppliers of products (including manufacturers, importers, distributors and retailers) and trade associations
- insurers, reinsurers, insurance associations and insurance brokers
- lawyers (claimants' and defendants'), regulators and other government agencies and legal academics.

For the purposes of analysing the responses, these categories are described in this Report as "Consumer Representatives", "Producers", "Insurers" and "Legal" respectively.

It was recognised that, of all the groups affected by product liability systems, it would be the Insurers who would have the most comprehensive experience of the practical operation of product liability systems. Insurers have the best understanding of the number and types of product liability claims, the amounts of compensation paid to consumers and any trends in respect of such claims. Given that the policies written by most of the larger insurers (and many of the smaller ones) cover risks in various jurisdictions, insurers have a unique appreciation of cross-border and comparative issues. Indeed, it was a primary objective of the Commission, at the commencement of the Study, to attempt to secure a high level of contribution from the insurance industry. For a variety of reasons, this has proved to be a difficult task in previous studies, and as such it was one of the areas on which Lovells focused in undertaking the Stage 2 research.

(a) Devising the questionnaires

Given the number of potential participants, it was important to devise a method of ensuring the maximum level of contribution. Accordingly, questionnaires were developed that could readily be completed by participants in their own time, or could form the basis of personal interviews.

The questionnaires were devised by Lovells in collaboration with Professor Geraint Howells and the independent market research company MORI, to ensure a balanced, even-handed approach to all participants.

Each of the four types of questionnaires contained an identical set of "core" questions. Specific questions were added in each type of questionnaire to address areas of particular knowledge or experience relevant to the category of participant.

The substantive sections of the questionnaires sought to elicit information and views in respect of three distinct areas, namely:

- the extent and prevalence of "product liability risks" ⁶ in the EU

⁶ As defined in the questionnaires: see Part 2, section 1.2, *infra*.

- the nature and extent of product liability claims in the EU
- the extent to which existing regimes provide an appropriate balance between the relevant interests, and the possibility of reform.⁷

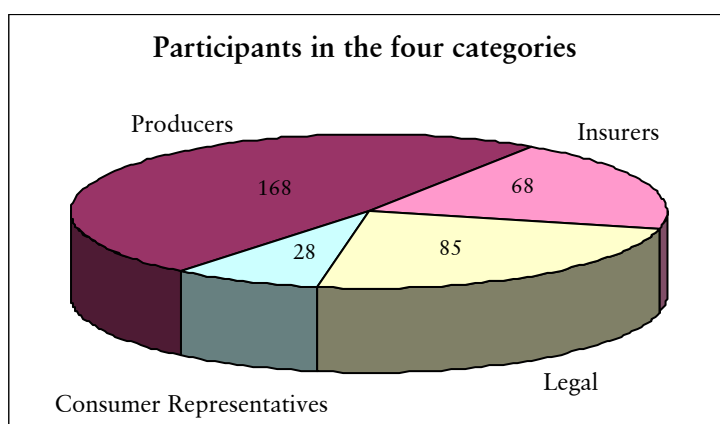
The questionnaires included a combination of "tick box" and open ended questions. Participants were invited to provide additional comments in relation to the specific information sought, and to provide any recommendations for reform of the Directive. In addition, participants were asked to provide a summary of their significant experiences, over the last 10 years, with respect to the operation of product liability systems in the EU.

(b) Responses to the survey

In the course of the research, over 1,500 potential respondents from the four categories across all Member States were directly invited to contribute. In addition, many trade associations and insurers associations were asked to communicate information about the study to their members, and provide them with an invitation to contribute.

In total, 349 responses were received, from participants in the four categories as follows:

Figure 1

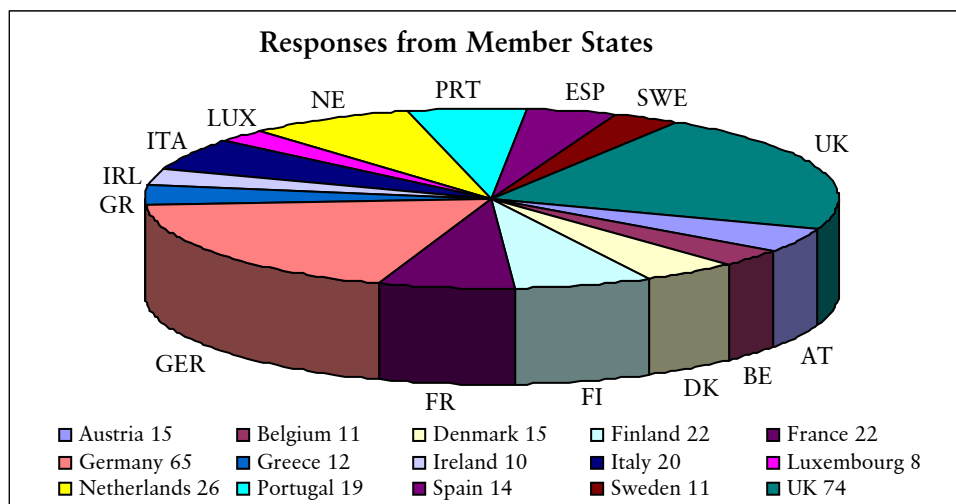


The responses from the EU Member States, by country, were as follows:⁸

⁷ The Study did not set out to gather information on raw "numbers of claims", or "amounts of damages" in product liability cases in the EU. Such data would in itself be of limited practical value, even if it could be reliably gathered.

⁸ There were also five responses received from participants outside the EU.

Figure 2



Over 100 of the responses resulted from personal interviews.

A list of the survey participants appears at Appendix 1.

(c) Analysis of the survey responses

The questionnaires were designed so that the responses could be grouped and compared statistically. This has enabled identification of particular trends, matters of general consensus, differences of opinion and areas of uncertainty. However, it was recognised from the outset that there would be limitations on the amount and type of information that could be obtained through the standardised questions in the questionnaires. It was for this reason that personal interviews were conducted and that the self-completion questionnaires specifically asked participants to express any views they held which were outside the confines of the specific questions posed. The additional information obtained in these ways has aided in the analysis of the statistical data.

In recognition of the limitations to which this kind of statistical data are inevitably subject, certain factors were taken into account when analysing the data gathered in the course of the Study.

1. In order to ensure that an adequate number of responses could be gathered to allow a meaningful statistical analysis, it was necessary, as in all broad surveys of this nature, to simplify the questions to some extent. This was also, of course, required in order to cater for the broad range of potential participants, spread across 15 different countries. Despite the practical need for such compromises, the Study has identified some clear trends and messages, and the responses to the questions were expanded and explained to a significant degree by those participants willing to provide the additional information requested.

2. The number of participants in each category varied significantly (see Figure 1). In analysing the data, particular care was taken to consider the results for each category (and especially Consumer Representatives, from whom the fewest responses were received), as well as the results overall, in order to ensure that specific views within each category were taken into account.
3. The number of responses received from individual Member States was not uniform (see Figure 2), but this was taken into account where necessary in the course of analysing the data. The differences in the numbers of responses were discussed with the Researchers in the Member States. Factors identified as influencing numbers included size of the market, cultural differences, differing experiences with product liability claims, and differing experiences with litigation generally.

Not all participants offered an answer to each question in the questionnaires. In some cases, participants answered by indicating that they did not know. For the purposes of this Report, it was more appropriate to analyse the statistical data (except where otherwise indicated) on the basis only of the answers of those who offered a view on the matters under investigation.⁹

⁹ Where relevant, the number of participants who said they did not know is also reported in the analysis.

PART 2 - RESULTS OF RESEARCH

1. COMPARISON OF PRODUCT LIABILITY SYSTEMS THROUGHOUT THE EU

1.1 Liability framework

The Directive in its present form provides a common, but not exclusive, basis for product liability claims in the EU. To that end, Article 13 of the Directive expressly preserves rights according to the rules of contractual or non-contractual liability, or according to certain "special liability systems" at a national level.

One of the notable features that emerges from an analysis of the liability systems that exist in all the Member States of the EU is the extent to which they rest on a common basic framework. Indeed, in each Member State consumers have available to them a right to claim compensation for product related injuries under three distinct liability systems:

- (a) The Directive. All Member States have, in most respects, faithfully implemented the terms of the Directive into national law (although some points of divergence have recently been dealt with by the European Court of Justice ("ECJ"), and some other discrepancies persist). Certainly, the Directive has ensured that every consumer in the EU has at least one common basis upon which to bring a claim – that of a claim against the producer based on the defectiveness of a product. To the extent that other systems are available, they serve simply to provide an alternative means for consumers to pursue a claim for compensation.
- (b) Contract. Each Member State also has systems that provide for the recovery of compensation by injured consumers through the law of contract. In this respect:
 - The fundamental laws of contractual liability are based on broadly similar principles, although some jurisdictions require fault while others do not.
 - Consumers' rights are mainly confined to claims against those with whom the consumer can be said to have entered into an agreement (subject to some exceptions in most Member States, and notably *France, Belgium, Austria* and *Luxembourg*). This is a significant restriction on a consumer's right to claim compensation in respect of a defective product, as it often restricts the consumer's right to bring a claim against the manufacturer.
 - The contractual relationship is often regulated, to some degree, by legislation. In particular, consumers are usually protected by a statutory prohibition on unfair clauses (or, more particularly, by a statutory provision that renders such clauses unenforceable), or by similar protection through national case law. Legislation also commonly provides for particular terms to be implied into consumer contracts for the purchase of products. Such terms might include that the product is fit for its purpose, or of satisfactory quality. This is an area that has also been the subject of

legislative activity at a Community level, for example, through the Consumer Guarantees Directive¹⁰ and the Unfair Terms in Consumer Contracts Directive.¹¹

- (c) Tort. Each Member State also has a developed system of extra-contractual liability for the recovery of compensation by injured persons, based on tortious principles. In most cases, liability under this system requires some element of fault on the part of the defendant.

An important object of the Study was to explore the practical experience of these systems, and in particular to find out the extent to which there exist significant differences in practice.¹²

1.2 Differences in product liability risks as between the Member States

Survey participants in Stage 2 of the Study were asked questions designed to establish whether product liability risks differed as between the Member States. They were also asked to explain the basis for their answers. Participants in the Producers, Insurers and Legal categories were asked:

To what extent, if at all, do you perceive that product liability risks differ as between the various Member States of the EU?

"Product liability risks" were expressly defined in the questionnaires to include the risk of litigation being brought by consumers against producers/suppliers in respect of a defective product, the likelihood of success of such litigation, and the level of compensation for damages a producer/supplier might be called upon to pay.

In the case of Consumer Representatives, the corresponding question was framed as follows:

To what extent, if at all, do you perceive that levels of consumer protection under product liability laws differ as between the various Member States of the EU?

"Consumer protection" was defined in the questionnaires to include opportunities to commence litigation against producers/suppliers in respect of a defective product, the likelihood of success of such litigation, and the level of damages from which a consumer may be able to benefit as a result.

For the purposes of this Report, the term "product liability risks" is used to refer to both "product liability risks" and "consumer protection", as defined in the questionnaires.¹³

¹⁰ 99/44/EC.

¹¹ 93/13/EC.

¹² See the more detailed discussion of these systems at Part 2, section 1.3(d).

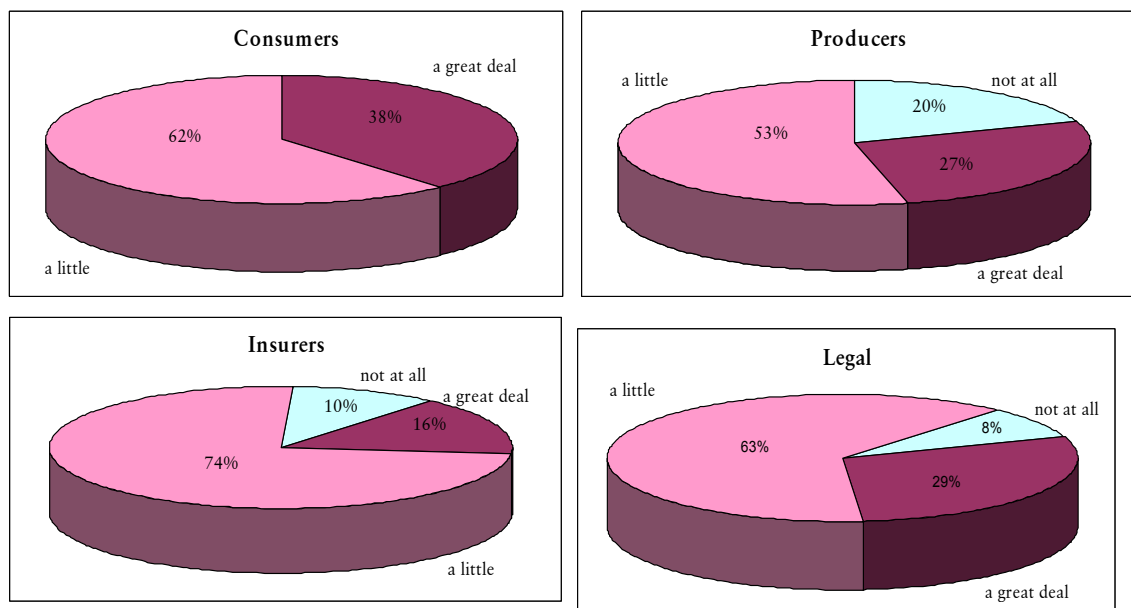
¹³ It is recognised that there is not necessarily an exact correlation as between the concept of "product liability risks" in the eyes of Producers and Insurers and the concept of "consumer protection under product liability laws" as seen by Consumer Representatives. Nevertheless, the concepts, as defined in the questionnaires, are important indicia of the practical effects of product liability laws - as seen from the varying perspectives of those affected by them - and they provide a useful basis for comparing the experiences of the respective groups.

The vast majority of participants overall who expressed a view on this question¹⁴ (see Figure 3), considered that there were differences in product liability risks as between Member States. Most of those participants said that the risks differed "a little", while a minority said they differed "a great deal".

Within the Insurers category, which might be expected to possess the greatest experience overall of product liability risks, most said that there were differences as between Member States. The majority of them said that product liability risks differed "a little", while the rest said that they differed "a great deal".

Within the Consumer Representatives category, about half said that they "did not know".¹⁵ Of those who expressed a view, all thought that levels of consumer protection differed as between the Member States. About one third of them thought levels of consumer protection differed "a great deal".

Figure 3: Extent to which product liability risks differ as between the various Member States



Where respondents indicated that there were differences in product liability risks as between Member States, a variety of factors were mentioned as giving rise to those differences, although no single factor emerged as being of significantly more importance than the others. The factors included:

- the optional provisions in the Directive

¹⁴ 22% of participants "did not know".

¹⁵ Many of the participants in this category did not have multi-jurisdictional experience.

- discrepancies in implementation and interpretation of the Directive
- the lack of harmonisation of national liability laws
- differing approaches to the assessment of damages
- differing procedural rules and levels of access to justice
- variations in consumer attitudes from Member State to Member State.

These factors are discussed in the sections that follow.

1.3 Sources of differences in product liability risks

(a) The optional provisions in the Directive

Some participants who thought that there were differences in the product liability risks as between Member States pointed to the availability of the three provisions in the Directive which are (or were) optional, namely:

- **Article 16(1) – cap on damages**

The option to include a cap on potential damages has been exercised in *Germany*, *Portugal* and *Spain* (and originally in *Greece*, although the cap was removed when the law was re-enacted in 1994). In the course of the Study, no one reported any case in which this provision has been at issue.

- **Article 7(e) – the development risks defence**

The most controversial of the optional provisions has been the so-called development risks defence. Only *Finland* and *Luxembourg* have exercised the option in Article 15(1)(b) to exclude this provision from the national laws implementing the Directive.

The scope of the defence is limited in *Spain* (in that it does not apply in respect of medicines, foodstuffs or food products intended for human consumption), and in *France* (where it does not apply to human body parts or products from the human body). Although the defence is included in legislation that implements the Directive in *Germany*, the effect of the federal Drug Act¹⁶ is that the development risks defence is not available in respect of products covered by the compensation scheme under that Act.

The United Kingdom was the first Member State to enact legislation to implement the Directive, and was quickly subject to criticism for failing to follow the precise terms of the development risks defence. The Commission challenged *the United Kingdom's* implementing legislation, arguing that it called for a subjective assessment, in that it placed the emphasis on the conduct of a reasonable producer, which departed from the terms of Article 7(e) of the Directive.

¹⁶ Article 84 ff. *Arzneimittelgesetz*.

Ultimately, the ECJ decided that it should not be assumed that *the United Kingdom's* legislation would be interpreted in a way that would be inconsistent with the Directive.¹⁷ The defence was considered at length by the English High Court in *A & Others v National Blood Authority*.¹⁸ In this case, the High Court, following the lead of the ECJ, looked directly to the language of the Directive (rather than the implementing law) when considering whether the defendant could take advantage of the defence.

- **Article 15(1)(a) – agricultural products**

The option to include agricultural products within the Directive has now been removed by Directive 99/34/EC, with the effect that the Directive now applies to agricultural products in all Member States.

(b) Discrepancies in the implementation of the Directive

Many participants referred to differences which arose not from the "optional" provisions in the implementing legislation, but from other differences in the way in which the Directive had been implemented, and interpreted by national courts, in the Member States.

Member States have, on the whole, faithfully implemented the Directive. The table at Appendix 2 identifies the key features of the implementation of the Directive in each Member State. The table at Appendix 3 sets out the areas in which particular Member States have, in their implementing legislation, departed significantly from the terms of the Directive. As can be seen from these tables, the main differences, to the extent that they exist, do not in most cases relate to the central features of the Directive.

That is not to say that the Directive has been implemented in all Member States without controversy. Certainly, the introduction of a system into the laws of Member States, under which a producer could be held liable to consumers without any element of fault, has been contentious in some countries.

Whereas in most Member States the controversy surrounding the Directive arose mainly out of concerns over the negative impact on business of introducing "strict liability", in the case of *France* the greatest concerns related to the fact that the Directive was perceived to provide a lower level of protection for consumers. Similar concerns arose in *Spain*, where the implementation of the Directive in 1994 expressly prevented consumers from taking advantage of the greater degree of protection previously available under the 1984 General Law for the Protection of Consumers and Users.¹⁹ The removal of this protection was recently confirmed by the ECJ in *Mariá Victoria González Sánchez v Medicina Asturiana SA*,²⁰ where the Court stated (as it had in decisions relating to *Greece* and *France*) that the Directive is a maximal

¹⁷ [1997] AER (EC) 481.

¹⁸ [2001] 3 All ER 289.

¹⁹ Law 26/1984, 19 July 1984.

²⁰ Case C-183/00 [2002].

harmonisation Directive, intended to prevent Member States from departing from its terms by imposing higher obligations on producers and suppliers or creating higher levels of protection for consumers.

So far as the substantive differences in the way in which the Directive has been implemented are concerned, some of these have come to be considered and criticised by the ECJ, for example, in *Commission v United Kingdom*,²¹ which concerned the development risks defence in Article 7(e) and, more recently, in *Commission v France*²² and *Commission v Greece*,²³ in which both States were chastised for failing to implement the lower threshold of €500 for property damage. *France* was further criticised for (a) providing that suppliers would be liable to the same extent as producers, and (b) making certain of the producer's defences contingent upon his taking appropriate steps to prevent harmful consequences should a defect be discovered within a period of 10 years.

(c) Differing interpretations of the Directive by national courts

Some participants suggested that differences in product liability risks arose through differing interpretations by national courts of the laws implementing the Directive.

Previous assessments of the impact of the Directive concluded that there were few examples of its consideration by national courts. It is clear that the national courts are now considering the Directive more frequently and it is certainly possible to identify decisions in which the courts have taken inconsistent approaches to the Directive. For example, courts in *the Netherlands* and *the United Kingdom* have applied the development risks defence differently in similar circumstances involving contamination of blood products. In the Dutch case, suppliers of blood products who were, at the time of supply, unable to screen for a harmful virus (HIV), were entitled to rely on the defence. In contrast, the English court said the defence was not available to blood product suppliers who were unable to screen for another harmful virus (in that case, Hepatitis C).

Similarly, there are discrepancies in the way the courts have approached the concept of defect (see for example the decision of the Tribunal de grande instance of Aix en Provence in *France* on 2 October 2001 and the decision of the High Court of Justice in *the United Kingdom* in *Richardson v LRC Products Ltd.*²⁴ Each of these cases took a different approach to whether the claimant had to prove the cause of the product failure.²⁵

It can be seen, therefore, that national courts in Member States will adopt differing interpretations of some of the central concepts in the Directive. However, only time will tell whether this will become an issue that the Commission will need to address. It may be, for

²¹ *Supra* note 17.

²² Case C-52/00 [2002].

²³ Case C-154/00 [2002].

²⁴ [2000] Lloyd's Rep. Med. 280.

²⁵ These cases are discussed in more detail in Part 3, section 2.2, *infra*.

example, that the ECJ will itself clarify matters, at least in respect of some issues. Indeed, there is a growing body of decisions of the ECJ on the provisions of the Directive. The ECJ has already considered the development risks defence (Article 7(e)),²⁶ the question of whether non-commercial medical service providers can be liable under the Directive (Articles 7(a) and (c) and Article 9),²⁷ and Article 13.²⁸ Such decisions should result in greater consistency in the approach taken by national courts.

(d) Lack of harmonisation of national liability laws

Many participants (predominantly Producers and Legal) cited the fact that national systems of liability existed alongside the laws implementing the Directive as a source of the different levels of product liability risks as between Member States.

The existence of these national systems is preserved by Article 13 of the Directive. The effect of Article 13 is that consumers will generally have a choice as to the cause of action upon which to bring their claim (or, in some jurisdictions, the courts will have a choice as to the basis upon which to award consumers compensation). For example, if a product is marketed without adequate instructions as to its safe use, and a consumer in the EU is injured as a result, that consumer will generally have the option of claiming either under national tort law, based on the fault or neglect of the product supplier, or alternatively under the laws implementing the Directive on the basis that the product was defective. In some cases, the consumer may also have contractual rights against the supplier. The different national systems of liability that exist alongside the laws implementing the Directive are discussed in more detail below.

- **Systems of contractual liability**

The laws providing for liability in contract in each Member State are based on similar principles, although they are by no means identical.

In almost all Member States, the law of contract will come to the aid of a consumer who is injured by a product if the injury results from a breach by the seller of an agreement with the consumer. Indeed, in Member States such as *France* or *Luxembourg*, where an injury results from such a breach, a claimant can generally only seek redress under the law of contract.

In the Scandinavian Member States, however, contract law has very limited scope in product liability cases. In *Denmark*, *Finland* and *Sweden*, damages for personal injuries are generally not recoverable under contract law. In *Denmark*, compensation for damage to property other than to the product itself, or to a product in which it is incorporated, is usually not recoverable, and in *Finland* and *Sweden*, such compensation is recoverable only in limited circumstances.

²⁶ *Commission v United Kingdom*, *supra* note 17.

²⁷ *Henning Vedfeld and Aarhus Amtskommune*, Case C-203/99 [2001].

²⁸ *Mariá Victoria Gonzáles Sánchez v Medicina Asturiana SA*, *supra* note 20; *Commission v France*, *supra* note 22 and *Commission v Greece*, *supra* note 23.

Privity of contract

The basic premise of all contractual systems is that the rights and responsibilities of parties to a contract are governed by the terms of that contract, and that, generally, third parties do not enjoy any benefits under that contract. This privity of contract principle has, however, been modified in ways that affect product liability claims in almost all Member States.

In *Austria*, for example, the principle has been almost entirely abrogated as far as product liability is concerned in order to overcome what were perceived to be shortcomings in the tort law which often left consumers without a remedy. To that end, the contract between the producer and the initial purchaser is deemed to have a "protective effect" for the benefit of other persons who acquire the product through a chain of contracts, such that the end consumer can seek redress directly from the producer notwithstanding the absence of a contractual relationship between them (although a mere bystander usually cannot benefit from this "protective effect").

Other jurisdictions have modified the privity of contract rule in respect of specific contractual obligations. For example in *France*, and similarly in *Luxembourg*, the Civil Code incorporates a "latent defects warranty", as well as a general safety duty ("*obligation de sécurité*"), into contracts for the sale of goods, the benefit of which passes to successive purchasers of the product. The effect of this is that a consumer may claim under these provisions against the ultimate seller, as well as the producer and any other person in the chain of sellers. The Cour de cassation in *France* has further held that the general safety duty on professional sellers (including manufacturers) benefits not only those lower down the contractual chain, but all third parties including mere bystanders.²⁹

The law in *Spain* also extends to consumers, in specific circumstances, a right to pursue a claim in contract against a manufacturer of a product notwithstanding the lack of a direct contractual relationship between them.

In *Finland*, the Consumer Protection Act contains detailed provisions which allow a consumer to bring a claim against upstream suppliers of a defective product under contract-like principles.

In *Portugal*, express warranties provided by the manufacturer, and which accompany the goods, may form the basis of a claim against the manufacturer by a person who purchases the goods from a downstream supplier. In such a case, the supplier is considered to be acting as the agent of the manufacturer.

²⁹ Cass. civ. 1ère, 17 January 1995. The only real defence available in a claim based on the safety duty is that of *force majeure*; nothing in the nature of a development risks defence is available. The Cour de cassation has thereby effectively established a no-fault regime based loosely on contract principles, which achieves results similar to the Directive. See further C Larroumet, "*La responsabilité du fait des produits défectueux*", JCP(E) 1998.1204.

In *Ireland*, there is an interesting exception to the privity of contract principle, where statute provides that if a third party is injured when using a defective motor car with the consent of the purchaser, he or she may maintain an action against the seller for breach of an implied condition in the contract for sale as if he or she were the purchaser of the car. Legislation in *Ireland* also provides a specific right for subsequent purchasers or donees to bring a claim against a manufacturer³⁰ for breach of any guarantee provided voluntarily by the manufacturer, even if there is no privity of contract between the buyer and the seller. This right extends to all persons who acquire title to the goods during the life of the guarantee.

The question of fault

In some Member States, such as *the United Kingdom* and *Ireland*, liability in contract is "strict" in the sense that there is no requirement that the breach be attributable to the fault of the defendant. In most others, fault or an element of "bad faith" is generally required to give rise to liability, at least for personal injury or for damage to property other than the product itself. For example, in most of the civil law jurisdictions in the EU, the seller will be liable only where he knew, or should have known, that the product was not in conformity with the contract. The extent of knowledge expected of a seller does vary from one Member State to another. For example, courts in *France* and *Luxembourg* usually expect a professional seller to be aware of all defects, while a seller in *Austria* or *Germany* is not necessarily under a general obligation to examine, and thus be aware of any defects in, the products he sells.

The difficulties which claimants may have in proving fault have been redressed to varying degrees in several Member States. In *Portugal* and *Austria*, for example, there is a presumption of fault in the event of the non-fulfilment of a contractual obligation, in which case the burden of proof shifts to the defendant to prove the absence of fault.

Damages in contract

In all Member States, there is a basic right to recover damages suffered by reason of a breach of contract. As noted above, what is recoverable in contract is relatively limited in *Denmark*, *Finland* and *Sweden*, but in other countries a consumer can generally recover damages for personal injury or harm to property other than the product itself. In *Belgium* and *France*, however, consequential damages are not recoverable unless the claimant proves knowledge, intention or fault on the part of the supplier. In countries such as *Spain* and *Austria* the categories of recoverable damages depend on the degree to which the defendant is culpable.

National laws also differ when it comes to non-material damage such as compensation for pain and suffering. While non-material damage in personal injury cases is generally recoverable under contract law in countries such as *France*, *Belgium*, *Luxembourg*, *the United Kingdom*, *Germany*³¹ or *Austria*, it is not recoverable in *Greece*, *Italy*, or *the Netherlands*.

³⁰ Or an importer if the manufacturer is not within the jurisdiction.

³¹ As of 1 August 2002; see Article 253(2) of the German Civil Code.

Additional protection for consumers in contract law

Another basic premise of contract law is the principle that parties will be bound by the express terms of their agreement with each other. However, all Member States have introduced provisions to protect consumers from unfair contract terms. In particular, Member States have introduced provisions to:

- render unenforceable contract terms which are unreasonable or unconscionable
- include in contracts for the sale of products to consumers mandatory obligations to supply products that are of satisfactory quality and fit for their purpose, and which correspond with descriptions or samples given prior to the contracts.

Some of those legislative provisions have their origins in EU measures such as the Consumer Guarantees Directive³² and the Unfair Terms in Consumer Contracts Directive.³³

- **Systems of liability in tort**

The overall impression from an analysis of the tort liability systems in each Member State is that almost all of them provide a mechanism by which consumers, who can prove that they were injured as a result of the neglect of the producer, may be able to recover most or all of their material damages and, in most cases, recover non-material damages as well. One important exception is in *Austria*, where tort law has very rarely resulted in the liability of a producer owing to difficulties for consumers in meeting the high burden of proof required to fix a producer with liability.

As with contract law, there are important differences between the tort laws of the different Member States, such as those relating to the requirement of fault and the burden of proof.

The requirement of fault in tort

In most Member States, tort law requires that the defendant be at fault, or in breach of some general duty to the claimant. In some jurisdictions, this element is described in terms of "unlawfulness" or "culpability". In others, it is understood in terms of a breach of a "duty of care". Some Member States, however, have traditional tort systems under which in some cases proof of fault is not a necessary element (and in that sense they may be described as "strict liability" systems). This is seen, for example, in the Civil Codes of *France*, *Belgium* and *Luxembourg*, which incorporate a regime based on a concept of custody, under which a person is irrebuttably presumed to be liable upon proof that a product which he had in his possession was defective and caused injury to the claimant. There are only limited defences available to such a claim (for example *force majeure*). The regime has, however, generally been applied only to certain types of products such as those that are likely to explode.

³² *Supra* note 10.

³³ *Supra* note 11.

The burden of proof in tort

In each Member State, the general rule is that the claimant bears the onus of proving the essential elements of the case in order to recover compensation. However, in a number of Member States, there is in some circumstances a reversal of the onus of proving the necessary element of fault.

In *Germany*, the Supreme Court has established a distinctive concept of “producer liability” under tort law.³⁴ The concept is based on a shift in the burden of proof for negligence. Where the claimant can prove that he was injured by a defective product, it will be presumed (albeit rebuttably) that the producer infringed his objective duty of care, and that in doing so he was at fault. This rule applies to manufacturing defects,³⁵ design defects³⁶ and “instruction defects” (for example, where the producer has given inadequate warnings).³⁷ The producer can exonerate himself from manufacturing defects by raising the so called “odd-unit” defence (unless he is under a special “quality-check duty”³⁸). In respect of design and instruction defects the producer can raise a “development risks” defence, unless he failed to monitor the product with the necessary reasonable care after the time of supply.³⁹

In a number of Member States, national courts have been prepared to infer the existence of fault from the fact that the product is defective. Examples of this practice have been reported in cases in *the Netherlands*⁴⁰ and *Ireland*.⁴¹ In such cases, there is effectively a reversal of the burden of proof, with a requirement for the defendant to adduce evidence to convince the court that it was not at fault, notwithstanding the defective condition of the product. This is also seen in *Denmark*.

Similarly, the Supreme Court in *Spain* has established in many judgments that the claimant has only to prove the damage and the causal link between the defendant's activity and the damage; fault is presumed unless the defendant can prove a high level of due diligence. In many cases the defendant will only be exonerated if he can prove the intervention of a fortuitous event or *force majeure*, or the exclusive fault of the claimant or a third party.

In *Italy*, in the case of injury caused by “hazardous” products, the burden rests on the defendant to prove that all suitable measures had been taken to prevent the damage if the defendant wishes to avoid liability.

³⁴ Beginning with the “Chicken-Pest” case in 1968, BGHZ 51, 91.

³⁵ *Ibid.*

³⁶ BGHZ 67, 359.

³⁷ BGHZ 116, 60 (children’s tea).

³⁸ BGHZ 104, 323 (lemonade bottle).

³⁹ BGHZ 80, 199 (apple scab).

⁴⁰ Supreme Court, 2 February 1973, NJ 1973, 315 (leaking hot water bottle); Supreme Court, 6 December 1996, NJ 1997, 219 (polluted herbicide).

⁴¹ *Fleming v Henry Deny & Sons*, Supreme Court, unreported, 29 July 1955 (black pudding containing lump of steel); *Mills v Coca-Cola Bottling*, Circuit Court, unreported, 8 May 1984 (woodlice in soft drink).

- **Other liability systems**

In addition to preserving the traditional liability systems based on contract and tort, Article 13 also preserves any "special liability system existing at the moment when [the] Directive [was] notified".

The ECJ has confirmed that this means schemes limited to a specific product sector (see *María Victoria González Sánchez v Medicina Asturiana SA*,⁴² which impugned a general Spanish regime geared to consumer protection, in so far as it dealt with product liability).

The most important example of such a special liability system is found in *Germany*, where there is a special scheme for pharmaceutical products under the federal Drug Act.⁴³ The Drug Act contains special provisions for causation and excludes the development risks defence. Another special liability system in *Germany* is incorporated in the Genetic Engineering Act, which contains special provisions for liability arising from genetically manipulated organisms.⁴⁴

(e) Differences in the assessment of damages

Many participants pointed to varying approaches to the assessment of damages as a source of differences in product liability risks as between Member States.

As already noted in the context of contractual claims, the principles by which damages are assessed do differ greatly as between Member States. First, there are differences in the heads of damages recoverable under the various liability systems in the Member States. For example, in some countries, such as *Greece* and *the Netherlands*, non-material damages are not recoverable under the Directive, whereas they are recoverable under national systems of product liability.

There are also differences in the manner in which damages under the various heads are assessed. For example, in jurisdictions such as *the Netherlands* and *Finland*, the damages a defendant is liable to pay may be reduced to take into account the relative financial circumstances of the parties.

Whilst all Member States recognise the concept of "contributory negligence" as a factor which can reduce the amount of compensation recoverable by an injured claimant, the availability of this defence to claims, other than under the Directive, is much more restricted in some Member States (for example, in *Sweden*) than in others.

The method of assessment of damages and the amount of any eventual award are also influenced by a range of socioeconomic factors, including the extent to which medical expenses are met by

⁴² *Supra* note 20.

⁴³ *Supra* note 16.

⁴⁴ Articles 32 - 37 *Gentechnikgesetz*. Note that there is some question as to whether this Act amounts (in whole or in part) to a "special liability system" for the purposes of Article 13, as it was introduced after the Directive was notified but before the right to exclude agricultural products was removed.

state funding, the extent to which lost income is covered by social security systems, the taxation system, the cost of living and cultural issues.

(f) Differences in procedural rules/access to justice

Not surprisingly, many participants thought that levels of product liability risks differed as between the Member States at least in part because of differences in procedural rules governing product liability claims. This includes features such as the availability of class (or similar) actions, the rules of evidence and the availability of pretrial discovery of documents. For example, while pretrial discovery is commonly available in *the United Kingdom* and *Ireland*, its availability is generally more restricted in other Member States.

Likewise, some participants thought that an important factor giving rise to differences in product liability risks was the varying levels of access to justice. Relevant factors include the level of legal costs, the availability of legal aid and the availability of contingency fee arrangements. Steps have been taken in recent years to improve access to justice in several of the Member States (see Part 3 of this Report).

The length of time taken by courts to deal with proceedings was also cited by some participants as a source of differences in product liability risks.

The areas where significant differences in procedural rules/access to justice can most readily be seen include group actions, the availability of low-cost tribunals and the funding of claims.

- **Group actions**

The availability of procedures for bringing actions on behalf of groups of persons varies considerably from one Member State to another. Class actions similar to those commonly available in the US are generally not available, except in *Spain* and *Sweden*. Representative actions on the other hand, are available in one form or another in many Member States including *Italy*, *Portugal*, *Luxembourg*, *Greece*, *the Netherlands*, *France* and *Austria*. In *the United Kingdom*, there are relatively new procedures for the consolidation of claims for the purposes of group actions.

- **Courts/tribunals**

In all jurisdictions, product liability claims may be dealt with by national courts. However, in *Finland*, there is an effective regime for the hearing of product liability disputes in the form of the Consumer Complaints Board. This is a jurisdiction which is able to offer consumers an accessible and inexpensive forum in which to bring product liability claims, and there is a history of consumers in *Finland* taking advantage of it. Decisions of the Tribunal are not binding, but they are usually followed by the parties to whom they are directed.

A similar regime also exists in *Sweden*, in the form of the National Board for Consumer Complaints, which has dealt with approximately 40 product liability claims since its inception in 1979.

- **Funding of product liability claims**

Most Member States provide some form of legal aid to assist with the funding of product liability claims. However, the basis upon which it is available can vary significantly from Member State to Member State.⁴⁵

The rules relating to the recoverability of legal expenses in the event of a successful claim also vary significantly. In *the United Kingdom, Ireland, Portugal, Sweden, Germany, Italy, Denmark* and *Austria* the successful party will expect to recover at least a significant proportion of its legal expenses from the unsuccessful party. This is not the case, however, in *Belgium*, and rarely so in *Luxembourg*.

For more details of some of the differences as between Member States with respect to procedural rules and access to justice, see the table at Appendix 4.

(g) **Differences in attitudes of consumers**

A number of participants suggested that differences in product liability risks arose from the differing attitudes of consumers in the various Member States. In particular, some participants thought that consumers were more "claims conscious" in some Member States than in others, and therefore were more likely to bring a claim on the basis of having been injured by a defective product.

Where participants offered a view on which Member States were marked by a higher level of "claims consciousness" than others, there was not a great deal of consistency between the answers. However, there was a clear perception that there is a higher level of litigiousness in *the United Kingdom* and *Ireland*. *France, Germany* and *Italy* were also singled out by a number of participants as countries in which the level of claims consciousness was higher than in other Member States.

⁴⁵ Note that a directive has been adopted recently that deals with legal aid for cross-border disputes: COM (2002), 13 final, 18 January 2002.

Conclusion 1

The prospects of product liability claims being brought, and their likely outcome, do differ as between the Member States. There is no single cause of these differences. They result from:

- the optional provisions in the Product Liability Directive
- discrepancies in implementation and interpretation of the Product Liability Directive
- differences in the national liability systems that exist alongside the Product Liability Directive
- differing approaches to the assessment of damages
- differing procedural rules and levels of access to justice
- variations in consumer attitudes from Member State to Member State.

2. IMPACT OF THE DIRECTIVE ON PRODUCT LIABILITY RISKS

2.1 Whether the Directive has contributed to an increase in product liability risks generally

Participants in the Producers, Insurers and Legal categories were asked to express their views on whether the level of product liability risks⁴⁶ has changed as a result of the Directive. (In the case of Consumer Representatives, the question was whether the level of consumer protection has changed as a result of the Directive.)

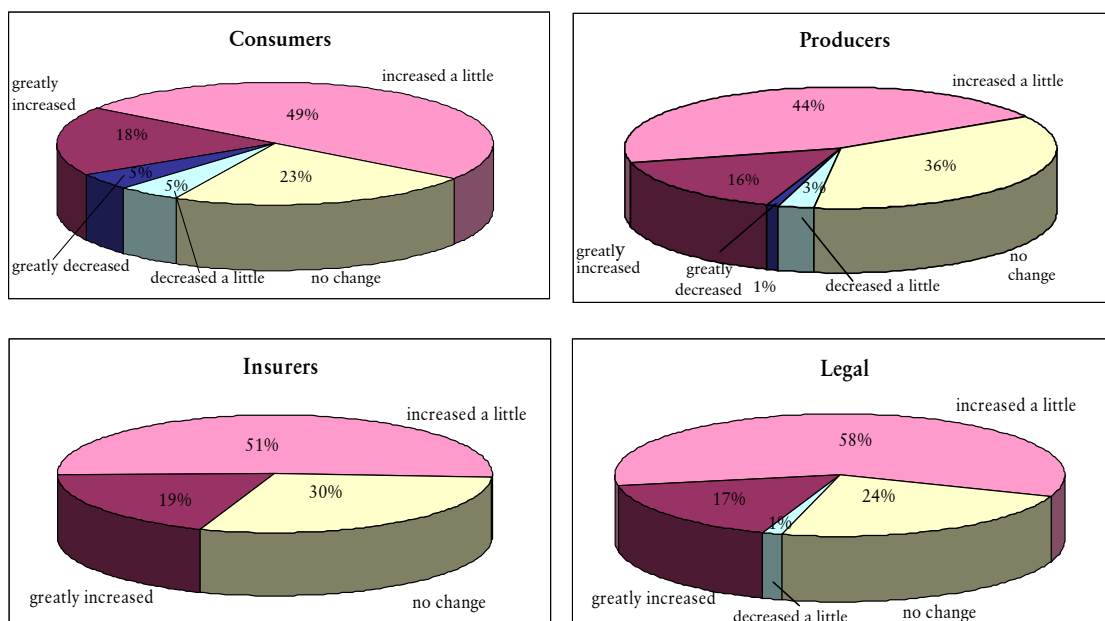
Most participants who expressed a view on this question⁴⁷ thought that the Directive had resulted in an increase in the levels of product liability risks (see Figure 4). Whilst most thought that the levels had increased "a little", some thought that the levels had increased "a great deal".

A little over one quarter of those who expressed a view on this question thought that there had been no such change as a result of the Directive. This included 34% of Producers but only 19% of Consumer Representatives.

Among the Consumer Representatives who expressed a view,⁴⁸ most thought that the Directive had contributed to an increased level of consumer protection. Of these, one quarter thought it had contributed "a great deal".

⁴⁶ As defined in the questionnaires - see above in Part 2, section 1.2.

⁴⁷ 14% said that they did not know.

Figure 4: Extent to which product liability risks have changed as a result of the Directive**Conclusion 2**

The Product Liability Directive has moderately increased the prospects of product liability claims being brought, and of their success.

2.2 Whether the Directive has contributed to an increase in product safety

Levels of product liability risks are partly dependent upon the level of safety of products in the market. For this reason, participants were also asked whether they considered that the Directive had contributed to increasing the level of safety of products marketed in the EU.

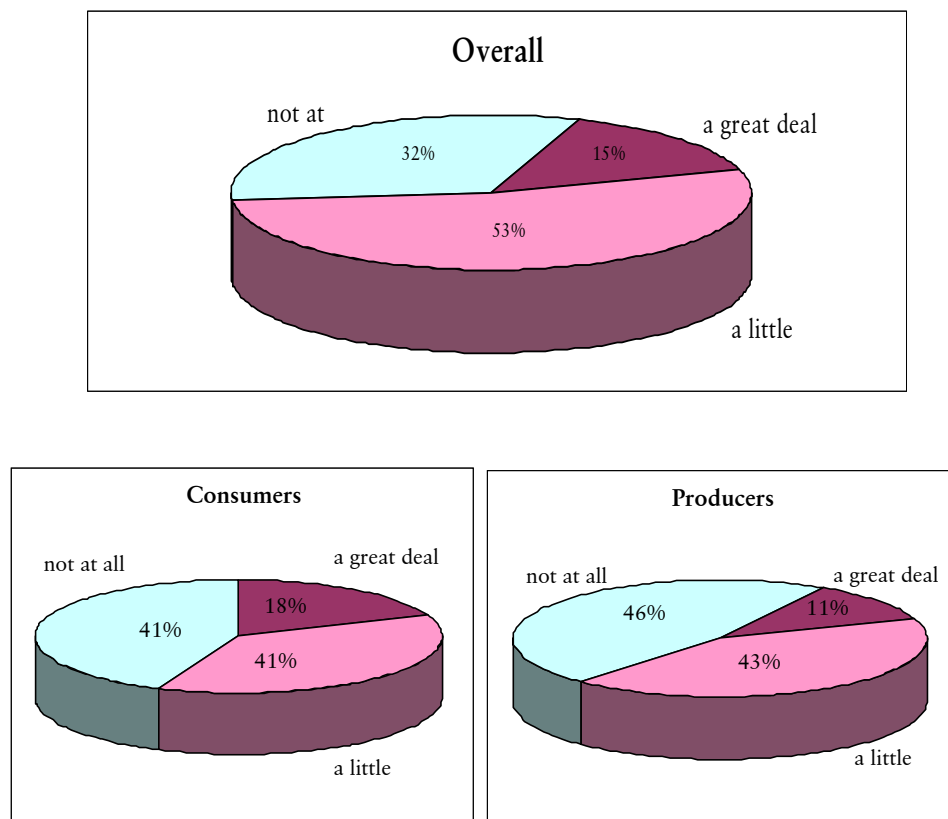
In response to that question, most of those who expressed a view⁴⁹ considered that the Directive had contributed to an increase in the level of safety of products in the EU (see Figure 5). Of these, a few thought it had contributed "a great deal", whilst most thought it had contributed "a little". Approximately one third of those who expressed a view thought that the Directive had *not* contributed to the level of safety of products marketed in the EU.

⁴⁸ 15% said that they did not know.

⁴⁹ 22% said that they did not know.

With respect to this question, it is perhaps the views of Consumer Representatives and Producers that are most relevant. Of those Consumer Representatives who did express a view,⁵⁰ well over half thought that the Directive had contributed to increasing the level of safety of products to some degree, whilst the remainder thought that it had made no such contribution. The views of Producers reflected a similar pattern.

Figure 5: Extent to which the Directive has contributed to increasing the level of safety of products in the EU



Conclusion 3

The Product Liability Directive has contributed a little to increasing the level of safety of products marketed in the EU.

⁵⁰ More than a third of Consumer Representatives said they did not know.

3. EFFECT OF DISPARITIES IN PRODUCT LIABILITY RISKS AS BETWEEN MEMBER STATES

3.1 Whether disparities in product liability risks as between Member States give rise to trade barriers

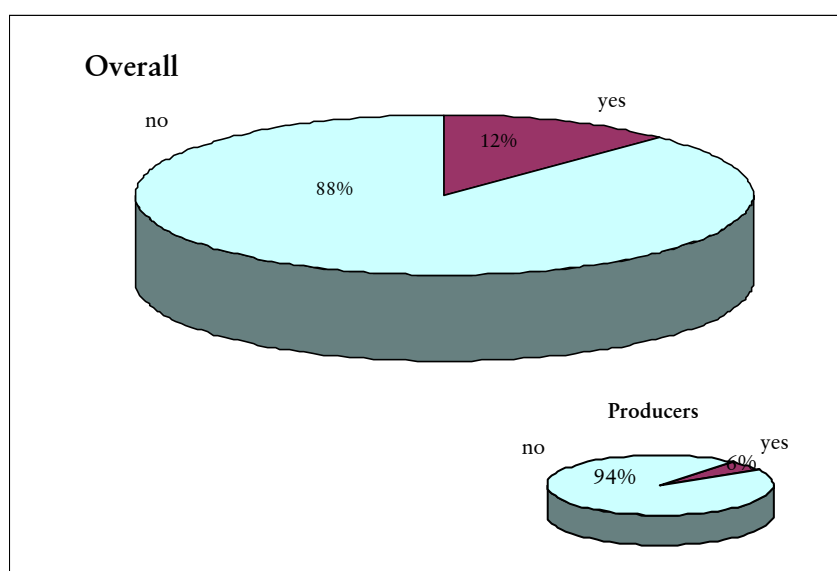
One of the purposes of the Directive was to remove divergences that may distort competition and affect the movement of goods within the Community.

It was important to determine whether any differences in the levels of product liability risks had given rise to barriers to trade within the internal market. Accordingly, Producers, Insurers and Legal participants were asked:

*Does any disparity in product liability risks between Member States discourage the marketing in one Member State of products from another?*⁵¹

One quarter of the participants said that they did not know.⁵² Of those who did offer a view (see Figure 6), only a small number (and only 6% of Producers) said that they thought the disparities discouraged the marketing in one Member State of products from another Member State. There was no general indication that any barriers to trade or distortions to competition created by these disparities were of particular significance to Producers.

Figure 6: Do any disparities in product liability risks as between Member States discourage the marketing of products?



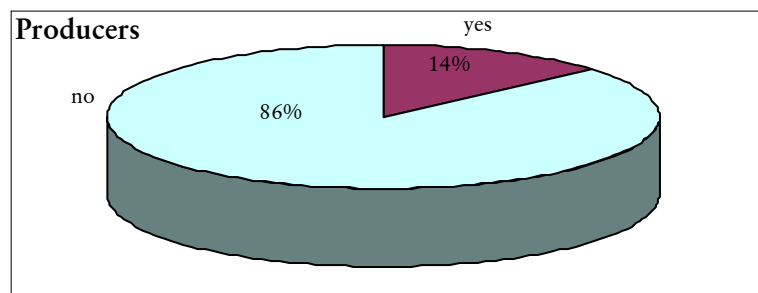
⁵¹ Consumer Representatives were not asked this question.

⁵² This included 45% of Insurers, 32% of Legal and 14% of Producers.

Producers were separately asked to indicate whether the perceived differences in product liability risks as between the Member States affected the way in which they conducted their businesses.

Of those who offered a view,⁵³ a large majority said that there was no effect (see Figure 7). In *Germany*, two trade associations in the Producers category indicated that the differing risks are an issue for their member companies, and that the relative risks are assessed when considering the terms and conditions of sale of their products. In *Ireland*, one Producer indicated that the level of documentation and instructions will vary, while another Producer said that the level of after-sales support and warranty costs will vary, depending on the particular Member State.

Figure 7: Do disparities in product liability risks as between Member States affect the way producers conduct their business in the EU?



Conclusion 4

There is little evidence that disparities as between Member States in the practical functioning of product liability regime create significant barriers to trade or distortions to competition in the EU. A few Producers indicated that their businesses are affected in some ways by such disparities.

3.2 Whether disparities in product liability risks as between Member States affect the availability and nature of insurance policies

In a similar vein, Insurers and Producers were asked a series of questions about the availability of product liability insurance.

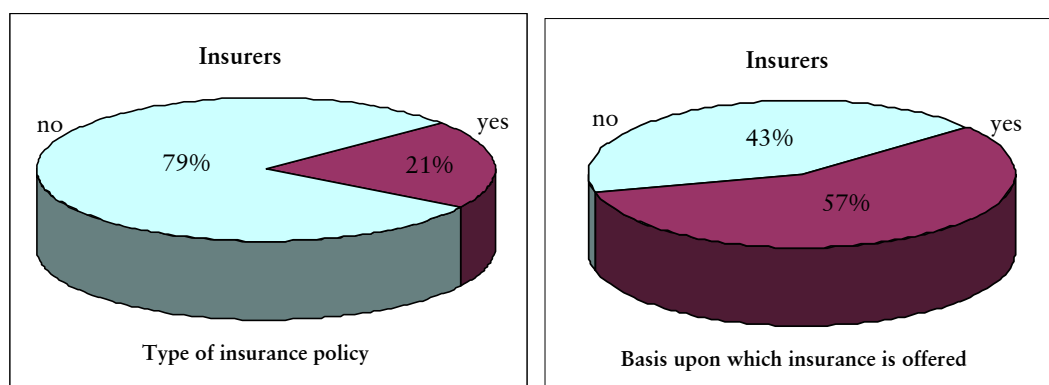
So far as Insurers were concerned, the majority of those who offered a view⁵⁴ said that the differences in product liability risks did not affect the types of insurance offered in each Member

⁵³ 11% said that they did not know.

⁵⁴ Two said that they did not know.

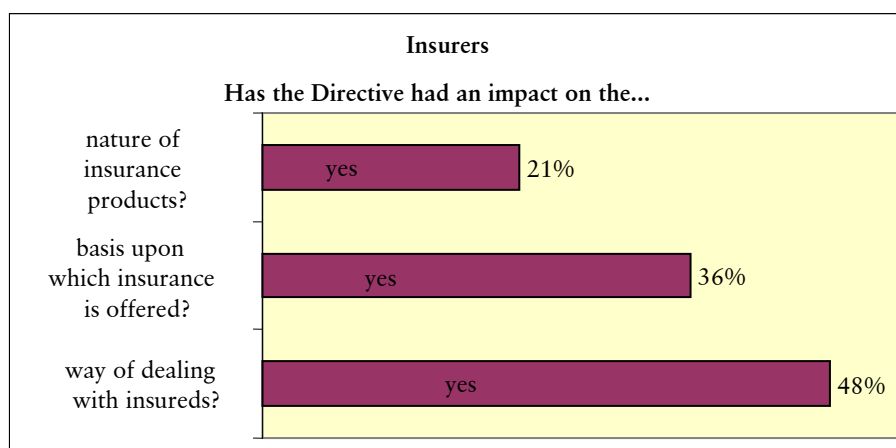
State, although more than half said that the differences affected the basis upon which such insurance is offered, such as the premiums or conditions for coverage (see Figure 8).

Figure 8: Do disparities in product liability risks between Member States affect the type of insurance policies available in the EU, or the basis upon which they are offered?



Of those Insurers who commented on the impact of the Directive itself on the availability of product liability insurance,⁵⁵ a little less than half said that the Directive had changed the way in which they dealt with their insureds, for example by more closely supervising their risk management strategies, or insisting on quality checks. A smaller proportion said that it had affected the nature of insurance policies offered in each Member State, or the basis upon which policies were offered (see Figure 9).

Figure 9: Impact of the Directive on insurance in the EU



Producers were also asked about the availability of insurance. A large majority of Producers who provided an answer said that the differences in product liability risks did not affect either the nature of product liability insurance or the basis on which it was provided.

⁵⁵ 11% said that they did not know.

It is interesting to note that only 8% of Producers who expressed a view said that they had sought additional product liability insurance coverage due to the implementation of the Directive. About 40% said that insurance premiums had increased as a result of the implementation of the Directive (most of them saying that premiums had increased "a little").

Conclusion 5

There is some evidence that disparities as between Member States in the practical functioning of product liability regimes may affect the basis on which insurance coverage is offered in different Member States. There is no evidence, however, that such disparities restrict the availability of insurance in any Member State. As to the Directive itself, some Producers and Insurers reported that insurance premiums had increased somewhat as a result of the Directive.

4. THE EXPERIENCE OF PRODUCT LIABILITY CLAIMS IN THE EU

One of the important objectives of the Study was to investigate the experience of actual product liability claims in the EU over recent years and, in particular, since the first report on the Directive was presented by the Commission in December 1995. As a result of the impact study upon which that report was based, it was concluded that there was little practical experience of the Directive up to that time.

It was evident from the outset of this Study that national courts in Member States had not by any means been overwhelmed by product liability claims. It was also evident that the practical experience of the operation of the Directive, whilst significantly advanced since the 1995 report, was still developing. In this Study, Lovells set out to investigate the extent to which, if at all, experience had changed since the previous research was undertaken.

Against that background, the investigation in Stage 2 of the Study included an inquiry into the trends in product liability claims generally, the extent to which the Directive's provisions were invoked by claimants, and the extent of, and reasons for, out-of-court settlements of claims. The inquiry extended to people's perceptions as to the relative advantages and disadvantages to consumers of bringing claims under the Directive rather than under national systems such as contract or tort.

4.1 Extent of increase in product liability claims

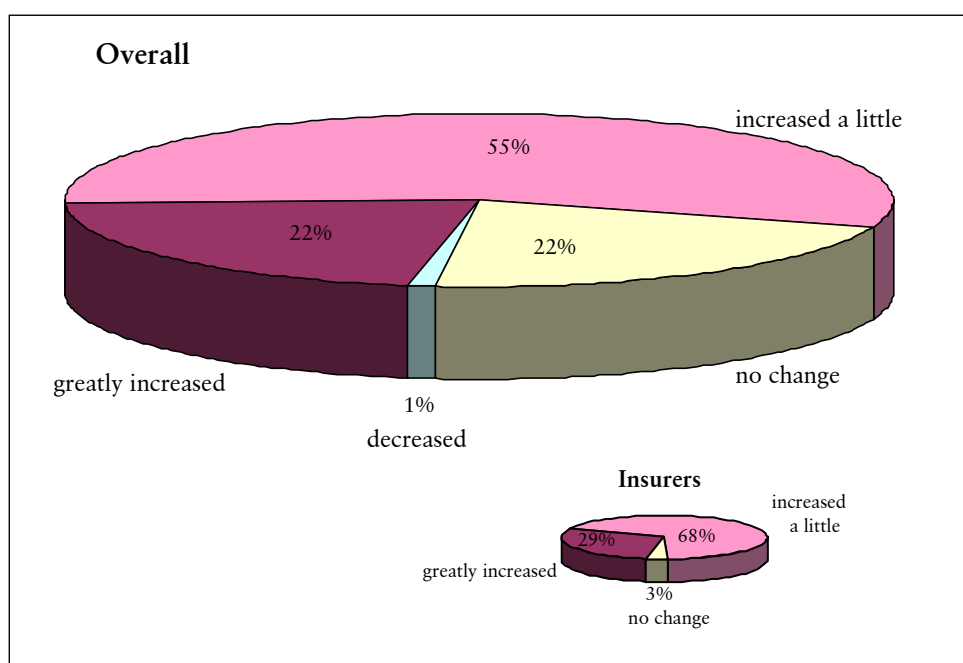
All participants were asked the following question:

To what extent, if at all, has the number of product liability claims brought by consumers against producers/suppliers increased in the last 10 years?

Of those who expressed a view,⁵⁶ a significant majority said that the number of product liability claims had increased over that period. A little over a quarter of those said that the number of claims had increased "a great deal", whilst the rest thought they had increased "a little" (see Figure 10).

Insurers can be expected to have the best understanding of the level of claims. Of those Insurers who expressed a view,⁵⁷ the overwhelming majority thought that the number of claims had increased over the last 10 years. Of these, most thought that the number of claims had increased "a little", but a significant proportion thought they had increased "a great deal". No Insurers thought that the number of claims had decreased.

Figure 10: Extent to which the number of product liability claims has changed in the last 10 years



Conclusion 6

There has been a noticeable increase in the number of product liability claims in the EU in the last 10 years.

⁵⁶ 12% said that they did not know.

⁵⁷ 5% said that they did not know.

4.2 Reasons for increase in product liability claims

Participants were asked a series of questions to identify reasons why the number of product liability claims might have increased. To that end, a number of possible factors were suggested, and participants were asked to indicate whether they considered each of these was a "major factor", a "minor factor", or "not a factor". Participants were also invited to suggest other factors giving rise to any increase in product liability claims.

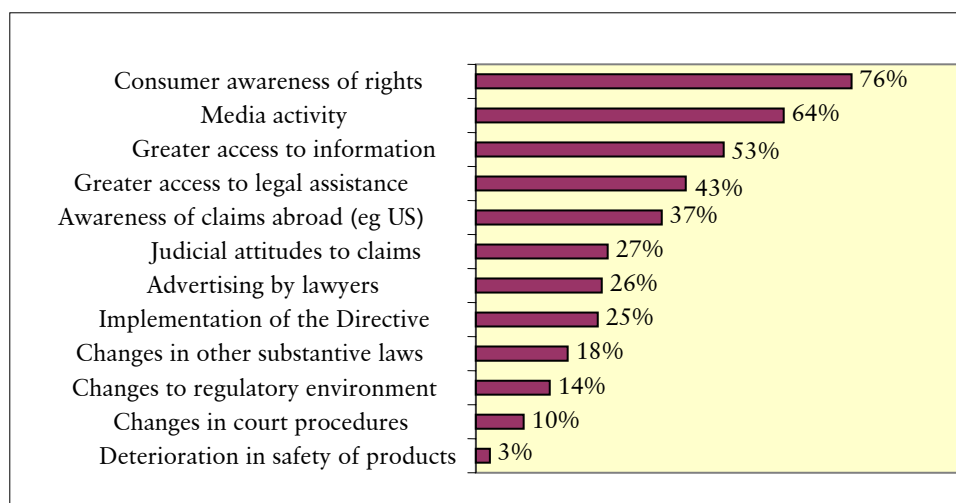
The suggested factors were:

- implementation of the Product Liability Directive
- changes in other substantive laws
- increased consumer awareness of rights
- greater access to legal assistance/advice
- changes in court procedures
- changes in regulatory environment
- advertising by lawyers
- increased consumer access to information
- media activity
- deterioration in the general level of safety of products
- awareness of claims in other jurisdictions (for example the US)
- changes in judicial attitudes to claims.

Figure 11 shows the overall response, with the chosen "major factors" listed in descending order of frequency of selection.⁵⁸

⁵⁸ It is recognised that all these factors may operate interdependently. For example, the implementation of the Directive may have contributed to an increased consumer awareness of rights. Similarly, media activity would be expected to play a role in providing consumers with access to information.

Figure 11: "Major factors" which have contributed to an increase in product liability claims



The most commonly selected factor was "increased consumer awareness of rights". Almost all participants who expressed a view selected this as a factor, 76% of them identifying it as a major factor, as shown in Figure 11.⁵⁹ One participant from *Denmark* observed that the increase in claims was "a result of a general change in society, where increased awareness of your rights and a more critical approach to products and professionals is a trend". All Consumer Representatives who commented thought it was a factor, most saying that it was a major factor.

The next most-selected factor was "media activity", which was chosen by 91% of participants who expressed a view, with 63% of those identifying it as a major factor.⁶⁰ All Consumer Representatives who commented on this thought that it was a factor and 69% identified it as a major factor.

"Increased consumer access to information" was also a popular choice, with 91% of all participants who expressed a view identifying it as a factor. 53% of those said that it was a major factor. Again, amongst the Consumer Representatives who commented on this, all who expressed a view thought that it was a factor, with 85% saying that it was a major factor. No Consumer Representative said that it was not a factor.

Interestingly, "advertising by lawyers" was selected by only one out of 28 Consumer Representatives as a factor, whereas 55% of Insurers and 61% of Producers who expressed a view thought that this was a factor. Seven of the Consumer Representatives who expressed a view thought that advertising by lawyers was "not a factor". (It would be expected that the answer to this question would be directly affected by the different rules and practices in the Member States in relation to advertising by lawyers. It was identified frequently as a factor in a

⁵⁹ 2% said that it was not a factor.

⁶⁰ 9% said that "media activity" was not a factor.

few countries, namely *France, Ireland* and *the United Kingdom*. Most participants in *Spain, Portugal, Greece* and *Finland*, however, thought that it was not a factor.)

A large majority (82%) of participants who expressed a view said that implementation of the Directive was a factor influencing the increase in claims. 25% ranked it as a "major factor".⁶¹ Amongst the Consumer Representatives who commented on this, 42% said that it was a major factor. Three quarters of Producers said that it was a factor (18% ranking it as a "major factor"), while 85% of Insurers said that it was a factor (27% saying it was a "major factor").

Some participants suggested other factors as contributing to the increase in claims. These included:

- the availability of legal aid insurance
- the fact that settlements were easier to achieve
- "ambulance chasing" and "contingency fee arrangements"
- withdrawal of state benefits assistance
- activities of regulators
- "scientific breakthroughs"
- activities of consumer organisations
- industry advertising
- "blame culture".

Conclusion 7

Whilst the Product Liability Directive has contributed to the increase in product liability claims, more important factors have been increased consumer awareness of rights, increased consumer access to information, and media activity.

5. SUCCESS OF PRODUCT LIABILITY CLAIMS

Participants were asked whether, in the last 10 years, product liability claims brought by consumers against producers/suppliers had become more successful.

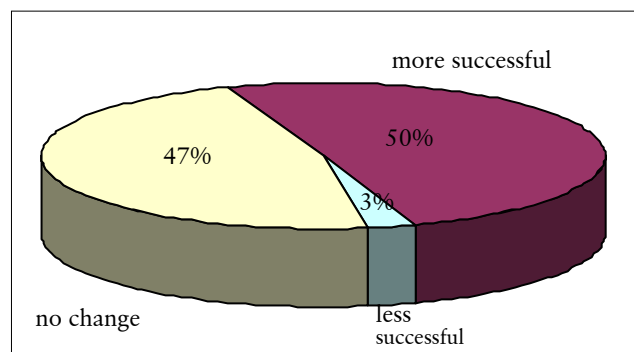
⁶¹ 18% of participants who expressed a view, including 26% of Producers, said that it was not a factor. Only one Consumer Representative said that it was not a factor. 15% of Insurers who expressed a view said that it was not a factor.

Of those participants who expressed a view,⁶² half thought that claims had become more successful, whilst most of the rest thought that there had been no change (see Figure 12). Only a small number said that product liability claims had become less successful over the last 10 years.

No Insurers suggested that claims had become less successful. Of those Insurers who expressed a view on this question, most thought that product liability claims had become more successful over the last 10 years.

The view that claims have become more successful was more strongly held by participants in *Austria, Belgium, Denmark, France, the Netherlands, Spain, Portugal* and *the United Kingdom* than by those in *Finland, Germany, Greece, Ireland* and *Italy*.

Figure 12: Have product liability claims become more successful in the past 10 years?



Where participants indicated that product liability claims had become more successful, they were asked to rate each of a series of factors possibly relevant to that increase as a "major factor", a "minor factor", or "not a factor". Participants were also invited to suggest other factors giving rise to the increase in product liability claims.

The factors that were suggested in the questionnaires were:

- implementation of the Directive
- changes in other substantive laws
- greater access to legal assistance/advice
- changes in court procedures
- changes in regulatory environment
- changes in judicial attitudes to claims.

⁶² 17% said that they did not know.

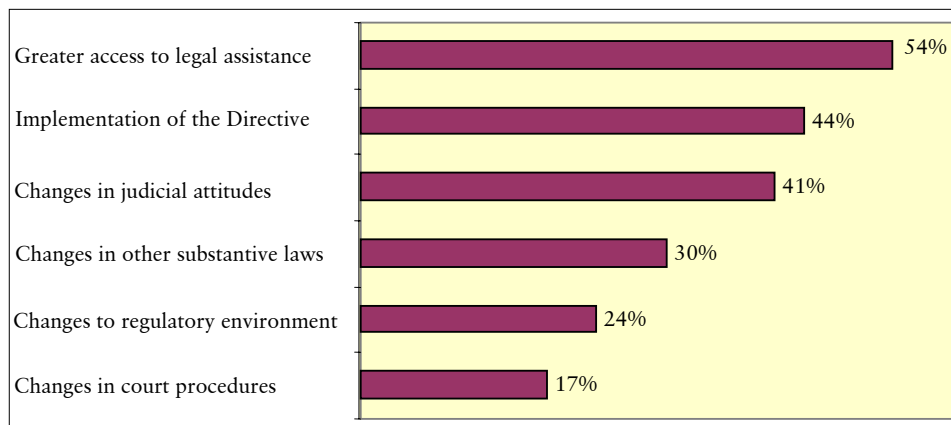
Of those participants who expressed a view on whether the implementation of the Directive was a factor, a large majority said that it was (nearly half saying that it was a "major factor"). All Consumer Representatives who expressed a view said that it was a factor, with 71% of them saying that it was a "major factor".

Nearly half of Insurers who expressed a view said that the Directive was a "major factor" leading to claims becoming more successful, and a similar number rated it as a "minor factor".⁶³ Among Producers who expressed a view, a small number said that the Directive was not a factor, with the rest split almost evenly as to whether it was a "major" or "minor" factor.

The most frequently identified "major factor" amongst participants overall was "greater access to legal assistance/advice" (54%). A further 28% said that this was a "minor factor". Access to legal assistance/advice was most frequently reported as a factor in *Austria, Greece, Italy* and *the United Kingdom*, and less frequently in *Denmark, Finland* and *Spain*.

Another frequently identified factor was "changes in judicial attitudes to claims". 41% of those who identified it as a factor ranked it as a "major factor", whilst 45% ranked it as a "minor factor".

Figure 13: "Major factors" contributing to the success of product liability claims



Other factors suggested by participants as contributing to claims becoming more successful included:

- increased awareness of business obligations
- increase in out-of-court settlements
- threat of media activity
- awareness of US litigation

⁶³ Four Insurers said that it was not a factor.

- commercial considerations for producers
- increased consumer access to information.

Conclusion 8

There is evidence that product liability claims in the EU have become more successful in the past 10 years. The Product Liability Directive has contributed to this increase. Other important factors have been greater access to legal assistance/advice and changes in judicial attitudes to claims.

6. LEGAL BASES FOR PRODUCT LIABILITY CLAIMS

6.1 Legal bases on which product liability claims are brought

Participants were asked about the legal bases typically relied upon in product liability claims. In particular, they were asked to estimate the proportion of claims brought on the basis of the Directive alone, on the basis of other national laws alone, or on the basis of a combination of the Directive and national laws.

Whilst a good number of participants were prepared to provide estimates in response to the question, many did not have sufficient experience of product liability to do so. There was also a lack of consistency in the answers of those who did comment. Caution should be taken in interpreting the answers. Nevertheless, some trends can be observed.

In *Austria*, there was a strong perception that the Directive was being relied upon in most product liability claims, and many thought that it was, in the majority of cases, the sole basis for product liability claims. Some participants from *Finland* (though by no means all) had a similar perception.

The converse experience was reported in *France*, where the general perception was that the Directive was rarely relied upon as the basis for product liability claims. This is not surprising given the relatively recent implementation of the Directive in France, and the view in that country that consumers are usually more likely to succeed under other national laws. A similar perception was reported in *Germany*, where most product liability claims are brought on the basis of tort. This is again not particularly surprising, given the fact that, until recently, damages for pain and suffering were not available to consumers under the Directive in that country. Most participants in *Germany* who expressed a view on this question considered that the Directive was very rarely relied upon as the sole basis for product liability claims. The reported experience in *Portugal* was similar, with most participants considering that laws other than those under the Directive were more commonly relied upon as the sole basis for product liability claims.

There was a less consistent pattern in the responses from *the United Kingdom*, although they indicated that the Directive was rarely relied upon as the sole basis for claims.

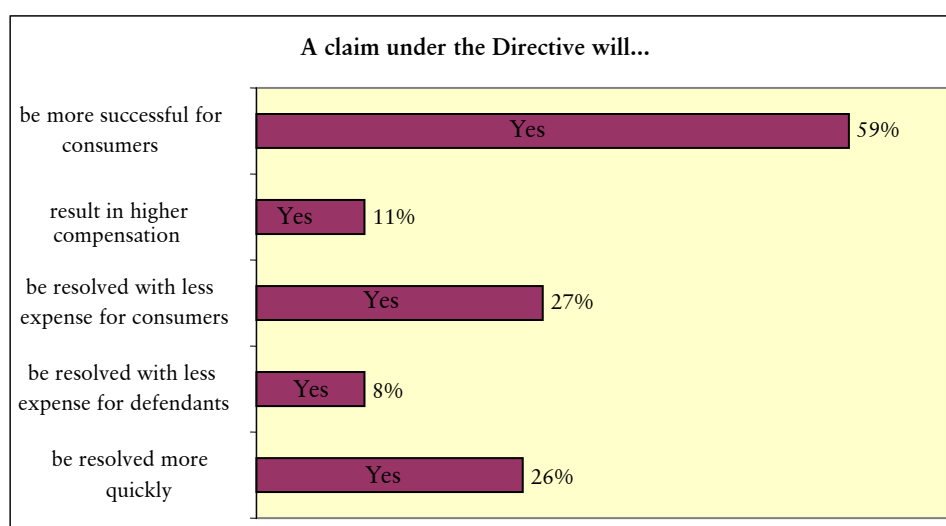
6.2 Perceived advantages of bringing claims under the Directive

Participants were asked to indicate whether they thought that consumers would obtain certain benefits if they brought their claims on the basis of the Directive rather than under other national laws. Potential benefits for consumers that were specifically identified on the questionnaires were increased success rates, higher compensation, less expense and a speedier resolution.

Overall, of those participants who expressed a view, 59% thought that claims under the Directive were more likely to succeed (see Figure 14). This was particularly apparent in the responses received from *Austria, Finland, the Netherlands, Sweden* and *the United Kingdom*. Notably, whilst three quarters of Insurers who expressed a view thought that claims were more likely to succeed if brought under the Directive, less than half of Consumer Representatives who expressed a view considered that to be so.

Of the participants overall who expressed a view, 27% thought that claims under the Directive were likely to be resolved with less expense for the consumer,⁶⁴ and 26% thought that they were likely to be resolved more quickly. Only 11% thought that claims were likely to result in higher compensation under the Directive.

Figure 14: Potential benefits to consumers of claims brought under the Directive



It is recognised that the answers to these questions will have depended in part upon the particular characteristics of the national systems of product liability operative alongside the Directive, and the extent to which they differ from that established under the Directive. For

⁶⁴ 8% also thought that they were likely to be resolved with less expense for the defendant.

example, in *Germany*, at least until 1 August 2002, a consumer could not recover damages for "pain and suffering" pursuant to the laws implementing the Directive. In *France*, where the national system of fault liability includes liability for development risks, a consumer may be disadvantaged if the claim is brought under the Directive, where the development risks defence (Article 7(e)) might be available to the producer.⁶⁵

On the other hand, in countries where liability under alternative national systems requires proof of fault, claims may succeed under the Directive in circumstances where they would fail under the other national systems. One recent example is the case of *Abouzaid v Mothercare*⁶⁶ in *the United Kingdom*, in which the consumer could not prove negligence on the part of the defendant (and therefore would fail in a claim under national tort laws), but nevertheless recovered damages under the law implementing the Directive.

Conclusion 9

There is evidence that claims by consumers are generally more likely to be successful if brought under the Product Liability Directive rather than under other national laws. This is more often the case in some Member States than in others.

7. INCIDENCE OF OUT-OF-COURT SETTLEMENTS

Participants were asked for their views on:

...the extent to which, if at all, the incidence of out-of-court settlement of product liability claims has changed in the last 10 years.

Of the participants overall who expressed a view on this,⁶⁷ more than half thought that settlements had increased (see Figure 15). Only one participant thought they had decreased.

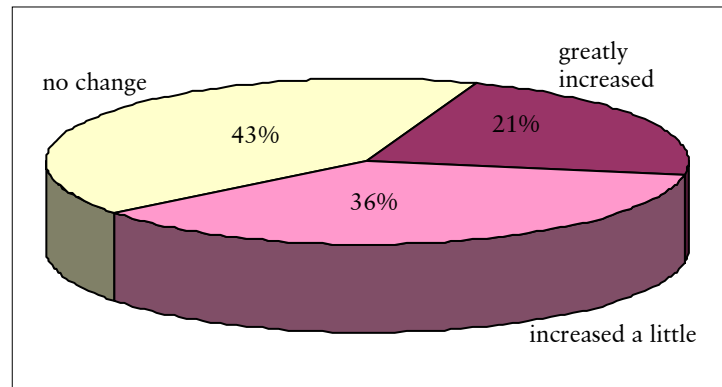
Insurers were expected to be able to provide the most reliable comment on general trends in out-of-court settlements. Three quarters of them thought that the incidence of settlements had increased and, of these, one third thought it had increased "greatly".

⁶⁵ Although note that there is a debate as to whether the national system that was developed to provide for strict liability prior to France's belated implementation of the Directive actually survives the implementing legislation.

⁶⁶ *The Times*, 20 February 2000.

⁶⁷ 27% said that they did not know.

Figure 15: Change of incidence of out-of-court settlements in the last 10 years



Participants were also asked to estimate what percentage of product liability claims in the EU were settled out of court. It appears that most are. The majority of participants overall who expressed a view thought that it was "more than 75%". This estimate was strongly reflected in the responses of Insurers.

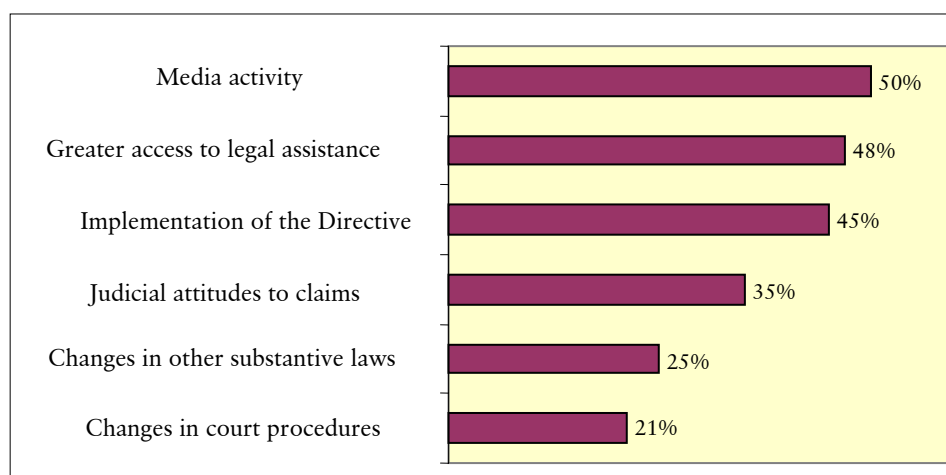
Where participants thought that the incidence of out-of-court settlements of product liability claims had increased, they were asked to rate each of a series of factors possibly relevant to that increase as a "major factor", a "minor factor", or "not a factor". Participants were also invited to suggest alternative factors giving rise to the increase.

The factors that were suggested to participants in this series of questions were:

- implementation of the Product Liability Directive
- changes in other substantive laws
- greater access to legal assistance/advice
- changes in court procedures
- media activity
- changes in judicial attitudes to claims.

Most participants thought that the Directive was a factor that had contributed to an increase in the incidence of out-of-court settlements (see Figure 16). Of those who expressed a view, 45% rated it as a "major factor". 86% of Insurers who expressed a view rated it as a factor, with a little over half considering it to be a "major factor".

Other factors suggested by participants as contributing to an increase in out-of-court settlements were corporate reputation concerns (cited mainly by Insurers and Producers) and the cost of litigation.

Figure 16: "Major factors" contributing to the increase in out-of-court settlements**Conclusion 10**

In the last 10 years, the incidence of out-of-court settlements has increased somewhat. The main factors responsible for the increase appear to be media activity, greater access to legal assistance and the Directive.

8. THE IMPETUS FOR REFORM**8.1 The balance struck by the Directive**

In the Green Paper Report, the Commission noted that many respondents considered that the Directive had "created a well-balanced and stable legal framework which takes into account the concerns of both the consumer and the producers".⁶⁸ It was recognised in that report that this balance must be maintained in any reform of the Directive.

To investigate the extent to which the balance identified in the Green Paper report still existed in practice, participants were asked whether they believed that the Directive struck an appropriate balance between:

- protecting the needs of consumers (including adequate protection from unsafe products, means of obtaining compensation and access to products at a reasonable price)

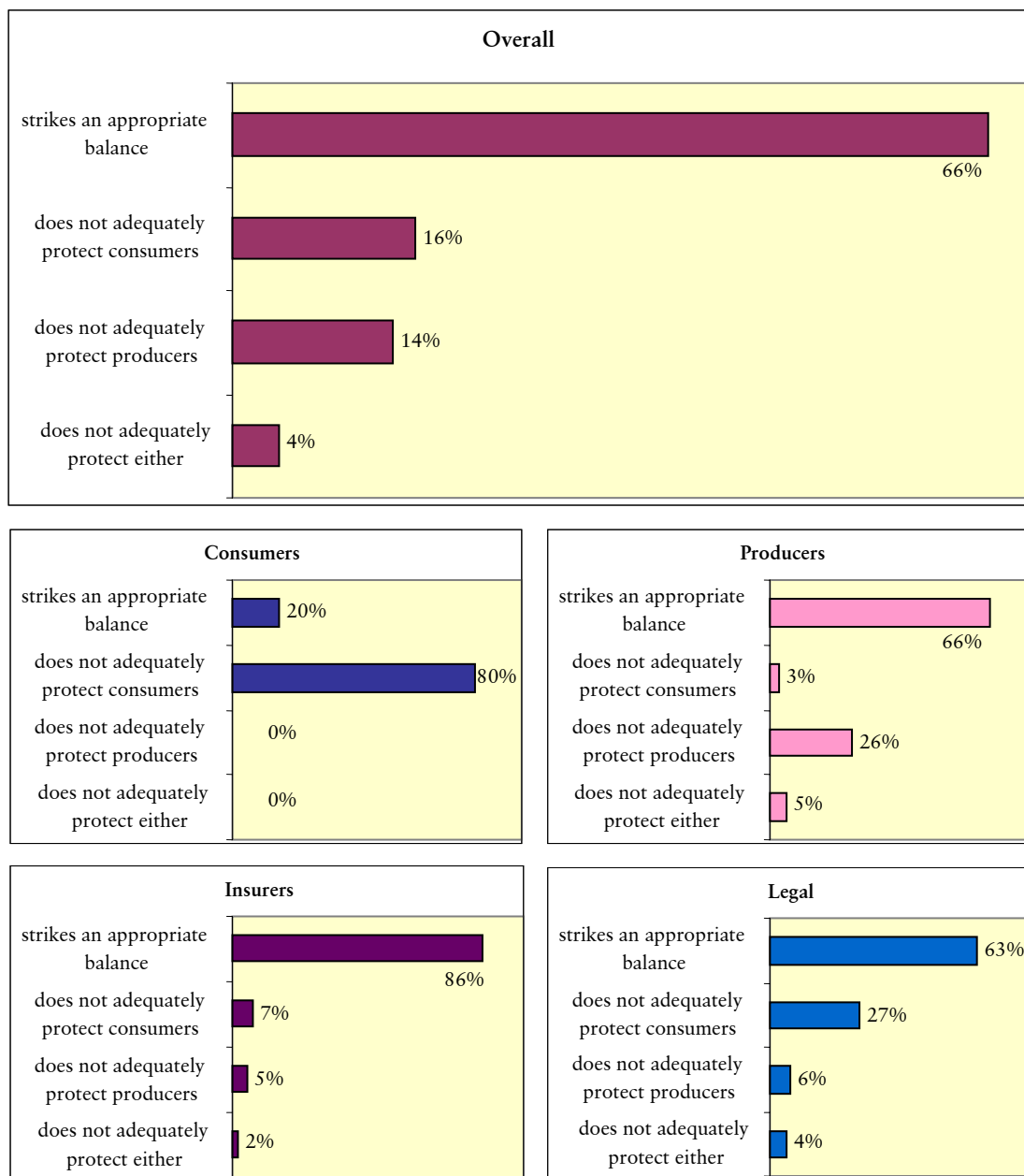
⁶⁸ *Supra* note 4 at p8.

- protecting the needs of producers/suppliers (including maintaining incentives to develop and supply products, avoiding barriers to trade and ensuring availability of insurance at a reasonable price).

66% of those participants overall who expressed a view⁶⁹ thought that the Directive did strike an appropriate balance (see Figure 17). However, only 20% of the Consumer Representatives who expressed a view said that it struck an appropriate balance, 80% saying that it did not adequately protect the needs of consumers. These Consumer Representatives cited a number of factors to illustrate why the Directive did not strike an appropriate balance. The most frequently cited factors were the lower threshold (particularly in *Finland* and *Austria*), the burden of proof, and the development risks defence. Other factors cited were the lack of mandatory insurance, the existence of the 10-year "long-stop" period, and the lack of class action procedures. No single factor was cited by the majority of Consumer Representatives.

About a quarter of the Producers who expressed a view said that the Directive did not adequately protect the needs of producers/suppliers. The factors cited most frequently were the application of the Directive to defects relating to product design or warnings, and its failure to provide a defence of regulatory compliance in highly regulated industries.

⁶⁹ 12% said that they did not know.

Figure 17: Extent to which the Directive strikes an appropriate balance

Participants were also asked to what extent they thought that the product liability system as a whole (defined as the combination of the Directive, national laws and procedural rules) struck an appropriate balance between protecting the needs of consumers and those of producers/suppliers. A similar pattern of responses emerged amongst each of the four categories of participants.

Conclusion 11

The prevailing view of participants overall is that the Product Liability Directive strikes an appropriate balance between the respective needs of producers/suppliers and consumers. Most Consumer Representatives, however, said that it does not adequately protect the needs of consumers. Reasons cited for this included the lower threshold, burden of proof and the development risks defence, although no one factor was identified by a majority of Consumer Representatives. A minority of Producers thought that the Directive did not adequately protect the needs of producers/suppliers. The most commonly cited reasons were the Directive's application to design defects and warnings, and the lack of a defence of regulatory compliance.

8.2 Whether the Directive should become the sole system of liability for defective products

In the Green Paper Report, the Commission pointed to perceived or potential problems that might be created by reason of the coexistence of national systems of liability (which are preserved by Article 13) with the system created by the Directive. It is evident that the coexistence of national systems is at least a potential source of disruption to the internal market. The Commission specifically asked Lovells to investigate the possibility of amending the Directive so that it became the sole and exclusive system of liability in product liability claims. Accordingly, participants in the Study were asked to express their views on the implications of reforming the Directive to exclude national systems of liability (in effect, by abolishing Article 13).

Specifically, participants were asked whether the respective needs of producers/suppliers and consumers would be better protected if the Directive were revised so as to ensure that it was the "common and sole system of liability" for defective products across the EU.

Many participants recognised that there would be advantages to producers/suppliers in simplifying the systems of liability, and that this could be achieved partly by the removal of the option of claiming under national systems as well as under the Directive. Some participants (albeit a minority) also indicated that consumers themselves might benefit from a simplification of the system of liability in this way. On the other hand, perhaps unsurprisingly, many participants (including most Consumer Representatives) thought that abolishing Article 13 would not be to the advantage of consumers, as it would deprive them of a right to choose the most advantageous course of action on which to base their claim.

A smaller number of participants said that there would be no change in the extent of protection of the respective needs of producers/suppliers and consumers. This is consistent with the view expressed by many participants that the impact of liability laws themselves has less influence on

the ultimate practical effect of product liability systems than do factors such as access to justice, litigation culture, awareness of rights and consumer access to information. This is also consistent with another view expressed by many participants that the Directive generally provides as good a basis for bringing a product liability claim as do the national systems available in most Member States.

A few participants quite properly remarked that a view on whether the abolition of Article 13 would benefit either producers/suppliers or consumers, or both, would be different depending on whether, and to what extent, other features of the Directive affecting the respective rights of those groups were amended at the same time.

Conclusion 12

In general, there is not a great deal of support for the suggestion that Article 13 should be abolished so as to exclude national systems of liability, such as contract law, tort law and "special liability systems".

8.3 Other proposals for reform

All participants were asked whether they had any specific recommendations for reform. Over half of them responded in some way to that question.

No clear, consistent proposal for reform emerged from among the various suggestions proposed by participants. In fact, a significant number of participants said either that they had no recommendations for reform, or (in many cases) that it was their definite view that no reform should be undertaken at the present time. The view that no reform was needed was less commonly expressed by Consumer Representatives.

This result is consistent with the other information obtained in the Study which suggests that, in general, participants feel that the product liability systems in the EU for the most part strike an appropriate balance between the respective needs of producers/suppliers and consumers. It is also consistent with the conclusion that the more significant factors affecting such product liability systems are procedural, cultural and access to justice factors rather than the substantive laws themselves.

PART 3 - REFORM?

1. INTRODUCTION

In the Green Paper, the Commission pointed to a number of possible areas in which the Directive might be reformed. Some of the options raised were controversial, and the Green Paper prompted some detailed and strong responses from various interested groups.

The objectives of this Study did not include repeating the important work of the Green Paper. Rather, the Study investigated the practical experience of the product liability systems, and offered participants an open invitation to identify areas of concern, and to suggest possible reforms. It so happened, however, that many of the views expressed by participants in the Study reflected the responses to the Green Paper.

2. IS THERE A NEED FOR REFORM?

2.1 The broad acceptance of the Directive

It is clear that the Directive has had more impact in some Member States than in others. In Member States where existing national systems have been seen to be more beneficial for consumers than the system under the Directive (for example in *Germany* or *France*), little use has been made of the Directive and arguably it has had little impact. However, the research undertaken in the course of the Study has suggested that there is at least some experience of the Directive being used in almost all Member States.⁷⁰ Moreover, the Directive can be seen to offer, at least to the extent that it is uniformly implemented and interpreted, a common level of protection for consumers, and a common basis for liability of producers of defective products. The research also showed that the predominant (although not universal) view is that the Directive, and the product liability systems of which it is a part, generally strike an appropriate balance between the interests of producers/suppliers and those of consumers, and that there is no uniform call for major reform of the Directive from any particular category of persons affected by its terms. Indeed, it was developments in more general areas, such as access to justice, procedural reforms and perceived changes in the "claims culture" that were seen by many (and in particular Producers and Insurers), as presenting a risk of upsetting the prevailing balance.

It is a matter of some significance that, whilst most Consumer Representatives and a small minority of other participants suggested that the Directive did not strike an appropriate balance, no single deficiency was cited by a majority of these participants. This does not, of course, discount the validity of the views expressed, but it does make it difficult to conclude that the Directive is fundamentally flawed in any significant respect.

⁷⁰ Luxembourg is the only Member State in which there were reported to be no cases decided under the Directive.

This broad acceptance of the main provisions of the Directive is a remarkable achievement, given the nature of the reforms introduced by it, and the controversy that has surrounded the history of its adoption and implementation.

As noted above (see Part 2), the research undertaken in the course of the Study has revealed no clear and consistent call from within the EU for significant reform of the Directive. Indeed, many participants have urged that there be no reform at this time. In particular, a number of them suggested that it would be better to await the outcome of developments in other areas, which might have an impact on the practical operation of product liability systems, including the Directive. These include developments at an EU level in areas such as product safety regulation, access to justice, and consumer protection more generally.

That is not to say, of course, that all participants expressed complete satisfaction with the entire Directive.

2.2 Some particular areas of concern

Whilst there was no uniform message, a number of issues of concern did emerge from the responses.

(a) Burden of proof

It is evident that questions relating to the burden of proof continue to be controversial, and are seen by many to be of real practical significance. There remains a perception on the part of some Consumer Representatives that consumers are unfairly disadvantaged by the burden of having to prove defect and/or causation in product liability claims. The main concern in this regard as expressed by Consumer Representatives arises from perceived difficulties in proving claims due to a lack of legal or other resources needed to investigate them properly, or to an inability to gain access to essential information. Such problems are seen to be particularly acute in relation to technical products, or where the alleged injuries are of a complicated nature.

Producers and Insurers, on the other hand, have a real concern that any relaxation of the rules relating to the burden of proof would encourage "spurious claims". Indeed, some Producers suggested that there should be a greater obligation on claimants to substantiate claims in the early stages of proceedings. There is also a view that to change the burden of proof would upset the existing balance in the Directive. As observed by one organisation which represents small business in Europe:

Part of the balance of the Directive is also established by the fact that the victim, on one side, must prove damage, defect and causal relationship whereas the producer, on the other side, has the burden of proof for the existence of facts that might exempt him from liability.

(b) The concept of "defect"

The concept of "defect" is central to the application of the Directive. The important distinction between traditional fault-based principles of liability in most jurisdictions and the principle of liability under the Directive is that the former focuses on the conduct of the defendant, whereas the latter focuses on the characteristics of the product, and specifically whether the product contained a "defect" that caused the injury.

The Directive prescribes an "expectations" test for defect - that is, a product is said to be defective if it does not provide the safety that a person is entitled to expect. The subjective nature of the "expectations" test means that this principle is incapable of precise definition (just as concepts of "negligence" and "fault" have always escaped precise definition under national liability systems).

This leads to very practical questions about matters such as whether it is appropriate for a court to undertake a risk/benefit analysis when assessing what a person is entitled to expect, and the extent to which the actual conduct of a producer (such as the degree of care taken, or not taken) is ever relevant in this context. These questions have arisen in reported cases but have yet to be finally resolved by the courts in any Member State. For example, in *the United Kingdom*, in *A and Others v National Blood Authority*,⁷¹ the English High Court said that the conduct of the defendant is not a factor to be taken into account when considering whether a product is defective. However, in the subsequent case of *Sam Bogle and others v McDonald's Restaurants Ltd*,⁷² the English High Court cited, as a relevant consideration, the steps taken by McDonalds to train its staff in relation to the safe service of hot drinks to customers.

Uncertainty also surrounds the question of what is required to prove "defect". In some cases, courts seem to have decided that it is sufficient that the claimant merely prove that the product failed and that such failure resulted in injury. In a case decided by the Tribunal de grande instance of Aix en Provence in *France*,⁷³ the claimant was injured when a glass window in a fireplace exploded in circumstances where the precise cause was unknown. The Tribunal said that the intervention of the product at the time of the harm was sufficient and that the claimant did not have to prove the precise cause of the accident to prove that the product was defective. In a similar case in *Belgium* involving an exploding soft drink bottle the claimant was not required, under the Directive, to prove "the exact nature of the defect, in particular as regards all its technical aspects".⁷⁴

This is in contrast to the approach of the courts of *the United Kingdom* in *Richardson v LRC Products Ltd*⁷⁵ (which involved a condom that broke during use) and *Foster v Biosil*⁷⁶ (which

⁷¹ *Supra* note 18.

⁷² 25 March 2002.

⁷³ 2 October 2001, Dalloz 2001, IR p. 3092.

⁷⁴ Civ. Namur, 21 November 1996, J.L.M.B., 1997, p104.

⁷⁵ *Supra* note 24.

⁷⁶ Central London County Court, 18 April 2000.

involved a silicone breast implant that ruptured *in situ*). In both of these cases, the product failed, but the cause of the failure was unknown. Unlike the decisions in *France* and *Belgium*, the *United Kingdom* court in each case decided that, under the Directive, the claimant bore the onus of proving the nature of the defect alleged, and not merely that the product had failed. As the claimants were not able to prove what had caused the failure, the claims were unsuccessful.⁷⁷ There have been similar decisions in *Portugal*.⁷⁸

In light of these unresolved questions concerning the concept of "defect", it might be suggested that the concept could be more precisely defined in the Directive itself, so as to clarify the issues that remain controversial.

Some would argue, however, that it is better not to attempt to define the concept with too much precision, not least because this could restrict the ability of judges to deal with matters on a case-by-case basis. It might be expected however that, as experience of use of the Directive in litigation grows, there will emerge a body of case law that will provide a guide to the interpretation of this fundamental concept. It might also be expected that some aspects of the concept of "defect" will come to be clarified in due course by the ECJ.

(c) The development risks defence

The inclusion of this defence in the Directive has always been a source of controversy. For many, this provision represents a significant step away from the notion of "strict liability" (that is, liability without proof of fault) that is central to the Directive. Conversely, for others it is a crucial safeguard to preserve incentives to innovate, and to control insurance costs.

Member States, by Article 15(1)(b), have had the option to exclude the defence in their implementing legislation, but only *Finland* and *Luxembourg* have chosen to do so. Although the ECJ has provided some explanation of the scope of the defence (see *Commission v United Kingdom*⁷⁹), its precise scope remains uncertain.

The research undertaken in this Study highlighted the fact that this defence continues to be a source of controversy. Some Consumer Representatives, in particular, referred to the availability of this defence when expressing the view that the Directive does not adequately protect the needs of consumers, or when suggesting possible areas for reform. Nevertheless, there is a growing view, particularly amongst lawyers and academics, that the defence is read so narrowly as to be of little practical value to producers in its present formulation.

⁷⁷ One argument in favour of this view is that defences such as the development risks defence (Article 7(e)), and the "mandatory regulation" defence (Article 7(d)) cannot be considered by the court unless the court first identifies the nature of the defect alleged to have caused the injury. This argument was one of the factors taken into account in *Foster v Biosil*, *ibid*.

⁷⁸ See for example, High Court of Coimbra, 8 April 1997, BMJ 466, 596; Col. Jur 1997, 2, 38 (car catching fire).

⁷⁹ *Supra* note 17.

Indeed, there appears to have been only one reported example of where the defence has been used successfully, namely the *Sanquin Foundation* case in *the Netherlands*.⁸⁰ In this case, suppliers of blood contaminated with HIV were able to rely on the defence in circumstances where there was not a reliable screening test available to them at the time of supply. It is interesting to note, however, that a court of *the United Kingdom* decided in a subsequent case that the defence was not available in similar circumstances.⁸¹ In fact, this *United Kingdom* decision was one of at least six reported cases in the EU in which defendants have failed in their attempts to rely on the defence.

Notwithstanding the limited practical significance of the development risks defence (at least thus far), Producers and Insurers still see the defence as an important element of the no-fault liability regime. There seems little justification at present for any reconsideration of this defence, particularly as it has historically been regarded as a significant factor in achieving the Directive's balance between the interests of consumers and producers.⁸²

(d) The minimum threshold

Article 9(b) of the Directive establishes a "lower threshold" of €500 for property damage claims under the Directive. A number of participants recommended that reform of this provision be considered.

This provision is subject to different interpretations in the Member States. In most Member States, including *Austria*, *Denmark*, *Finland*, *Germany*, and *Italy*, the threshold is treated as a "deductible", in that the amount of damages awarded to a successful claimant (for property damage) is reduced by the specified amount. In some other Member States, such as *the Netherlands* and *the United Kingdom*, the threshold is treated as a minimum amount, such that, provided the claim exceeds that minimum, the full amount of damages is recoverable. In *Spain*, the amount is expressed in the implementing legislation to be a deductible, but in practice the courts treat it as a threshold, such that the amount has never actually been deducted from any award.

The lower threshold is clearly an issue in *Finland* in particular, where a number of participants suggested that it should be abolished. This would appear to be prompted by the fact that it is economically viable to bring relatively low-value product liability claims in *Finland*, through the Consumer Complaint Board. The availability of an inexpensive and readily accessible tribunal means that the minimum threshold has a real impact on consumers, particularly as it is treated as a deductible in that country.

Even in some Member States where there are no such low-cost tribunals for product liability claims (for example, *Austria* and *Germany*), there were still calls for the minimum threshold to

⁸⁰ District Court of Amsterdam, 3 February 1999.

⁸¹ *A & Others v National Blood Authority*, *supra* note 18.

⁸² As noted by way of background to this Report (see Part 1), a separate study has been commissioned into the economic impact of the removal of the development risks defence.

be abolished, or at least for it to be treated as a mere threshold rather than a deductible. This would ensure that consumers who wished to bring their claims under the Directive, rather than under national liability laws, would not be penalised for doing so by having their damages reduced by the amount of the deductible.

(e) A defence of regulatory compliance

Some participants, and in particular representatives of the pharmaceutical industry, argued strongly for the introduction of a defence of regulatory compliance, which would apply to a product whose safety was closely regulated, provided that the product complied fully with the applicable regulations.⁸³ The argument in support of this defence is that it is not for the national civil courts to second guess or undermine regulations that deal comprehensively with the safety of particular products. In the words of one Legal participant from *the United Kingdom*:

If the legislature has established that the regulatory authority is the guardian of the interest of the consumer, it is not for the courts to second guess that.

As EC product safety regulation continues to expand, it might be expected that this issue will assume even greater importance.

(f) Novel products, design defects and failure to warn

Some participants, mainly in the Producers category, suggested that the "strict liability" standard under the Directive was inappropriate for dealing with liability arising through design defects or injuries attributed to "informational defects" such as a failure to warn.

Others indicated that the same was true for innovative or novel products, and a few suggested that, as is the approach reflected in the US Third Restatement of Torts, a negligence standard was better suited to risks of this nature than was a "strict liability" standard.

(g) The 10-year "long-stop"

No claim may be brought under the Directive unless proceedings are instituted within 10 years from the date on which the producer put the defective product into circulation (Article 11).

Some Consumer Representatives and Legal participants suggested that this period was too short, or at least too short for some products, such as those that may cause injuries with a long latency period. Some participants also suggested that the 10-year long-stop should run from the date of supply to the particular consumer, rather than from the date on which the producer put the product into circulation.

⁸³ This view was also supported by an association representing small manufacturing businesses in Europe.

Notwithstanding these responses, it remains the case, as was stated in the Green Paper Report, that:

*There is no information on practical cases in relation to the effect of the ten-years time-limit, nor concrete data on the financial impact on industry and the insurance sector if the time-limit was extended.*⁸⁴

(h) Liability of intermediate suppliers

Two participants in *Denmark* referred specifically to the issue raised by the recent judgment of the ECJ in *Commission v France*,⁸⁵ and in particular to the issue of whether strict liability could be extended to intermediate suppliers who were not covered by the Directive.

These participants recommended that the Directive be amended to provide for (or permit) the extension of such liability. This is currently the subject of a resolution by the European Council that:

*there is a need to assess whether [the Directive] should be modified in such a way as to allow for national rules on liability of suppliers based on the same ground as the liability system in the Directive concerning liability of producers.*⁸⁶

If this resolution were given effect, this would mark a step away from the objective of harmonisation of product liability laws under the Directive.

2.3 The extent of harmonisation under the Directive

The Directive constitutes a measure designed to harmonise product liability laws in the EU at a particular level. It has introduced into all Member States (in some cases for the first time) a concept of no-fault liability of producers to persons injured by defective products. In so doing, the Directive ensures a common basis of liability upon which all persons in the EU can claim compensation if injured by a product that does not provide the level of safety that a person is entitled to expect.

The Directive is intended to harmonise product liability law within the scope of its operation. That is, it is a "maximal harmonisation" measure that prevents Member States from departing from its terms through the imposition of higher obligations on producers and suppliers or the creation of higher levels of protection for consumers.⁸⁷

⁸⁴ *Supra* note 4 at 21.

⁸⁵ *Supra* note 22.

⁸⁶ 2003/C 26/02.

⁸⁷ This was confirmed by the ECJ in *María Victoria González Sánchez v Medicina Asturiana SA*, *supra* note 20; *Commission v France*, *supra* note 22 and *Commission v Greece*, *supra* note 23.

The results of the Study suggest that the Directive has substantially achieved its objective. This is a significant achievement, given that some of its provisions were highly controversial at the time the Directive was first proposed. The broad acceptance of the Directive in the EU, as reflected in the results of the Study, is also remarkable.

The Directive did not, of course (and nor was it intended to), bring about complete harmonisation of product liability systems. Indeed, the Directive expressly preserves, through Article 13, certain systems that existed in Member States prior to the implementation of the Directive. These comprise the national systems of liability under the laws of contract and fault-based liability, and "special liability systems" that existed prior to the Directive. The Directive also envisages "progressive harmonisation"⁸⁸ in that it remains open to the Commission to seek a higher degree of harmonisation through the Directive over time.

2.4 Further harmonisation through the Directive

It has been some 17 years since the Directive was adopted, and 15 years since it was first implemented by a Member State.

In May 1994, an impact report was provided to the Commission concerning the state of implementation of the Directive up to that time.⁸⁹ That report surveyed the practical effects of the Directive. One of the main conclusions of that report was that:

*Experience with the Directive is so far limited and is likely to develop slowly. There is no evidence indicating that any general change in the policy of the legislation is currently called for.*⁹⁰

It is nearly nine years since that report was published. Whilst evidence of practical experience of the Directive remains limited, it is now possible to identify some clear trends, and draw a number of general conclusions concerning the operation of the Directive.

The main objectives of the Study were to investigate the practical effects of the Directive in its context alongside other national liability laws, to seek the experience and opinions of those affected by product liability systems, and to assess the need for, and feasibility of, reform of the Directive. As the Study has confirmed, the practical impact of a liability law such as that created by the Directive is affected by a range of external factors, including access to justice, changes in societal attitudes, developments in procedural rules, and, indeed, changes in other liability and regulatory laws.

⁸⁸ See *Commission v France*, *supra* note 22.

⁸⁹ McKenna & Co, "Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on liability for defective products".

⁹⁰ *Ibid* at 45.

The Study has also confirmed that there are differences in product liability risks as between Member States. In so far as these discrepancies are rooted in the provisions of the Directive itself, they arise from four sources as follows:

- the "optional" provisions
- differences in implementation
- differences in interpretation
- the preservation of national systems by Article 13.

Each of these is a potential source of "incomplete harmonisation".

(a) The "optional" provisions

The inclusion in the Directive of the two remaining "optional" provisions (see Part 2, section 1.3) is self-evidently a potential source of disharmony.

There appears to be little evidence that the cap on damages has, at least to date, been of any practical consequence. Certainly, no participant cited it as an important source of divergence in product liability risks.

The option to exclude the development risks defence has been exercised by two Member States, *Luxembourg* and *Finland*. In the other Member States, the defence has, at least to date, been of almost no practical benefit to producers in litigation. Nevertheless, the existence of the option remains at least a theoretical source of disharmony.

(b) Implementation of the Directive

As discussed in Part 2 of this Report, the Directive has not been implemented consistently throughout the EU. A number of important areas of divergence in particular Member States have been challenged in actions by the Commission against *the United Kingdom*,⁹¹ *Greece*⁹² and *France*,⁹³ and the scope of its implementation in *Spain* was also considered in *María Victoria González Sánchez v Medicina Asturiana SA*.⁹⁴ The strong judgments of the ECJ in these cases have served the dual purpose of requiring the rectification of national implementing legislation inconsistent with the Directive (in the cases of *Greece* and *France*) and of assisting in a greater understanding of the scope and meaning of the terms of the Directive generally.

In the case brought against *the United Kingdom*, the Commission challenged the implementation of the development risks defence on the basis that it was not identical to the Directive. The ECJ recognised that this was a potential source of divergence from the

⁹¹ *Commission v United Kingdom*, *supra* note 17.

⁹² *Commission v Greece*, *supra* note 23.

⁹³ *Commission v France*, *supra* note 22.

⁹⁴ *Supra* note 20.

Directive, but said that a decision could not be made until practical experience showed that courts in *the United Kingdom* actually interpreted the provision in a manner that was inconsistent with the Directive.

In *A and Others v National Blood Authority*,⁹⁵ the High Court in *the United Kingdom*, in the light of the judgment of the ECJ, interpreted the development risks defence by reference to the Directive itself, notwithstanding the differences in the national implementing legislation. In this case, the High Court took the somewhat novel approach (for an English court) of overlooking the implementing legislation and assessing the questions of liability by reference to the terms of the Directive itself. The High Court said:

*Although the UK Government has not amended Section 4(1)(e) of the [UK implementing legislation] so as to bring it in line with the wording of the directive, there is thus binding authority of the Court of Justice that it must be so construed. Hence...the major discussions in this case, and all the areas of most live dispute have concentrated entirely upon the wording of arts 6 and 7(e) of the directive, and not upon the equivalent sections of the [UK implementing legislation], to which I shall make little or no further reference.*⁹⁶

This may be an indication that in the future courts will, at least in *the United Kingdom*, resolve apparent discrepancies between implementing provisions and the Directive in favour of the Directive.

(c) Interpretation of the Directive's provisions

The third source of "incomplete harmonisation" derives from differences in the ways in which the terms of the Directive are interpreted and applied by national courts in Member States.

Reference has been made above (see Part 3, section 2.2) to conflicting judgments on the concept of defect, what is required to prove the existence of a defect, and the circumstances in which the development risks defence might apply. These cases illustrate the possible scope for differing interpretations of key provisions of the Directive which can produce very different outcomes in otherwise similar cases. It is evident that this will continue to be a potential obstacle to harmonisation under the Directive.

At present, many decisions of national courts are not readily available to the national courts of other Member States. If they were, this would help to ensure a greater consistency in approach to the interpretation of the Directive. Whilst it is recognised that national courts of one Member State are not always influenced by the decisions of the national courts of other Member States (or even of their own), it might be expected that, if those decisions were available, they would prove a valuable resource, and provide useful guidance. This in itself

⁹⁵ *Supra* note 18.

⁹⁶ *Ibid* at 308-309.

would contribute to the objective of harmonisation. Indeed, in the most extensive judicial consideration of the Directive to date, in *the United Kingdom* case of *A and others v National Blood Authority*,⁹⁷ the judge drew heavily upon the decisions of courts and academic writings emanating from other Member States when interpreting the terms of the Directive.

With this in mind, an important practical measure that could be taken would be to establish a central database of decisions of courts and tribunals in cases concerning the Directive. In addition to providing a resource for national courts, this would also enable the Commission readily to monitor the practical operation of the Directive across the EU on an ongoing basis.

(d) The co-existence of national liability systems (Article 13)

Given that national systems of liability differ as between Member States, full harmonisation of product liability laws cannot be achieved so long as other national systems of liability continue to apply, as ensured by Article 13 of the Directive.

If it were considered appropriate, further harmonisation could be achieved by abolishing Article 13, thereby excluding other systems of liability in circumstances where the Directive applies. This would render the Directive the sole basis for determining the liability of producers to consumers injured by defective products.

If Article 13 were to be abolished, it would be important to define clearly the circumstances under which the Directive applied exclusively.⁹⁸ This, in itself, could be a source of uncertainty, legal controversy and litigation.

2.5 Further harmonisation outside the Directive

There are several developments in Europe intended to bring about a greater uniformity of laws. These could ultimately have an impact on the extent of harmonisation in the field of product liability in two ways. First, these developments could affect the bases upon which product liability claims are brought under traditional national liability systems (so long as Article 13 of the Directive applies). Second, they could have an impact on the way courts decide those matters arising under the Directive that fall to be determined by reference to national laws, such as causation and damages.

The Commission has specifically requested that these developments be considered with reference to the question of whether further harmonisation could be achieved.

In the past 20 years some notable steps have been taken towards the idea of a more harmonised private law in Europe (and worldwide). There have been a number of initiatives in this area.

⁹⁷ *Ibid.*

⁹⁸ There is another point to consider, which is whether the EU institutions would have a proper legal base under the Treaty of Rome to exclude the operation of national systems of law (such as tort or contract) in the context of the Directive.

These initiatives range from drafting non-binding principles (so called "soft law"), which could be used to provide comparative information on the different legal systems throughout the EU, to laying the ground for the establishment of a binding common private law code. Four initiatives that appear to be of particular relevance to product liability are:

(a) Lando Commission

An early initiative to draft principles of European private law was that of the Commission on European Contract Law (the "Lando Commission"). The most important piece of work of the Lando Commission is the European Principles of Contract Law (PECL). In 1995, after nearly 13 years of work, PECL Parts I and II were completed and finally, in 1999, a revised version was published. These together cover the core rules of contract law. In the area of product liability, the most relevant parts are those that deal with performance, breach and damages and other remedies. In May 2002, the Lando Commission published PECL Part III. Product liability related matters in a wider sense are dealt with here, for example the liability of joint debtors and limitation periods.

(b) Study Group on a European Civil Code

In 1999 the Study Group on a European Civil Code was founded with a view to building on the work of the Lando Commission. The Group's aim is to produce a comprehensive set of principles of European private law. The Group focuses on specific types of contracts (for example sales, services and guarantees) as well as the most important parts of the law of extra-contractual obligations. The Group published draft Principles of European Tort Law in June 2002, which set out a basic tort rule and then dealt with damages, accountability (intention, negligence and strict liability), causation, specific defendants and multiple tortfeasors, defences and remedies.

The Study Group on a European Civil Code sees product liability as a question of "accountability" in tort law. Product liability is incorporated in the Principles of European Tort Law simply by stating in Article 3: 206 that "with adjusted wording, the text will adopt the provisions of the EU Directive".

(c) Tilburg Group

Another initiative is that of the European Group on Tort Law (the "Tilburg Group"), which was established in 1993.⁹⁹ The Tilburg Group works with the European Centre of Tort and Insurance Law ("ECTIL"), which was founded in Vienna in 1999, and whose main purpose is to "create a secure international basis for the drafting of the Principles [of European Tort Law] and to undertake further research projects in the field of tort law".¹⁰⁰

⁹⁹ A list with all the Members of the Group can be found at <http://cvil.udg.es/tort/members.htm>.

¹⁰⁰ <http://www.ectil.org>.

The Tilburg Group (together with ECTIL) presents their principles in a series of books on comparative tort law. These books deal, for example, with causation, wrongfulness, damages, strict liability and personal injury, as well as with tort-related issues such as insurance law.¹⁰¹

The Tilburg Group would like to see product liability embedded in a more general concept of "professional liability", which would principally be a strict liability system. The rationale behind this broader concept lies in the allocation of risk for carrying out a "hazardous activity" in the course of business. The basic principles of the Product Liability Directive are seen to serve as a good model for such a "professional liability" concept, including an objective "public expectations test" as well as a defence for "development risks".¹⁰²

(d) Commission's Communication on European Contract Law

The most visible outcome, so far, of the discussion on harmonising private law in the EU has been the Commission's Communication on European Contract Law which was published in July 2001.¹⁰³ One of the options for future Community initiatives identified in the Communication is to promote the development of common contract law principles leading to greater convergence of national laws.

The Commission intends that this initiative should also cover "the aspects of tort law linked to contracts and to its other features relevant to the internal market...in so far as they are already part of existing community law."¹⁰⁴

What these initiatives have in common is a desire to establish principles comprising the core of European private law, which are intended to facilitate the understanding not only of the common ground of the legal systems throughout the EU, but also of their differences. The principles could, in future, have a role similar to the US Restatements which contribute to the harmonisation of the law of the individual States of America. Like the Restatements, the principles drafted by the Lando Commission and the Study Group on a European Civil Code are supplemented with comments and notes. Whilst these principles are not binding, they are intended to serve eventually as a basis for a (binding) European code of private law.¹⁰⁵

The responses to the Commission's Communication on European Contract Law show how divided are the opinions among the Community institutions, individual Member States, business representatives and members of the legal profession in respect of the prospect of a European

¹⁰¹ A list of all publications can be found at <http://www.ectil.org/publications>.

¹⁰² U Magnus, *Die Produkthaftung im Kontext eines Europäischen Zivilgesetzbuchs*, *Zeitschrift für Europarechtliche Studien (ZEuS)* 2002, 131, 138.

¹⁰³ 2001/C 255.

¹⁰⁴ *Ibid* at para. 13.

¹⁰⁵ See for example O Lando, *Optional or Mandatory Europeanisation of Contract Law*, *European Review of Private Law* 1: 59-69, 2000. The two Groups are more cautious as to the 'precise form' of a binding code in their 'Joint Response' to the Communication on contract law at paras. 95, 96.

civil code.¹⁰⁶ It is evident that any initiative for a comprehensive codification of European private law could be achieved only after significant practical hurdles have been cleared, and only with substantial political compromise.

Aside from these initiatives, there are other developments towards a common European liability law. For instance, there are various initiatives which seek to promote the understanding of the common roots of the European legal systems.¹⁰⁷ There are also examples of national courts drawing on the experience of other legal systems in applying national liability laws.

An example of this is the recent decision in *the United Kingdom in Fairchild v Glenhaven Funeral Services*.¹⁰⁸ The House of Lords there held that the traditional "but for" test for causation did not apply in the particular circumstances of the case. In considering whether English courts should depart from the traditional principle of causation, the Court said that if:

*...a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most of the jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world...there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.*¹⁰⁹

2.6 Product liability laws (including the Directive) as part of a wider scheme

Neither the Directive nor product liability laws generally can be viewed in isolation. They are part of an overall scheme involving a wide variety of safety and consumer protection laws, judicial practices and procedures, cultural and social factors (such as consumer attitudes to bringing claims) and the dynamics of an integrated marketplace. It is important to recognise the influence that these factors have on the practical impact of the Directive, and other product liability laws, and their relevance to any harmonisation of product liability systems in the EU. Further, it is these factors which, this Study has revealed, have a greater influence on the number of product liability claims and their outcome than do differences in the liability laws themselves.

¹⁰⁶ The reactions to the Communication on European Contract Law can be viewed at http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html.

¹⁰⁷ One example of these is the Common Core ("Trento") Project, which analyses the legal systems in European countries in order to identify the common principles of private law (specifically in the areas of contracts, tort and property). Similarly, the "European Casebook" project seeks to explain common European principles and doctrines in the context of leading cases.

¹⁰⁸ [2002] All ER 305.

¹⁰⁹ *Ibid* at 334, *per* Lord Bingham.

(a) Cultural and social factors

In discussions with participants, the view was commonly expressed that cultural and social factors played an important part in the practical functioning of product liability systems. It was noted by many participants, for example, that the attitude of consumers to bringing claims was affected by a variety of matters, which differed as between the Member States, including:

- social security regimes
- the levels of support and encouragement provided by consumer groups
- the influence of the media
- judicial attitudes
- social attitudes as to the allocation of responsibilities.

Several participants observed that some of these matters were susceptible to change, and as such, consumer attitudes to bringing claims did not remain static.

(b) Procedural/access to justice factors

The ability of consumers to bring claims, and indeed their attitude to doing so, will also be affected by access to justice considerations such as:

- the availability of funding for claims
- procedures to facilitate claims, for example class actions
- rules of evidence, documentary disclosure, etc.

These factors are also subject to change. For example, some Member States have reformed their civil procedure rules in recent years, notably *the United Kingdom, the Netherlands and Spain*, with the result that class actions or other group proceedings have been made available in these States. Such proceedings have also been made available in *Portugal*, and recently in *Sweden*.

(c) Damages

The determination of which heads of damage are recoverable, and how such damages are to be quantified, falls to be decided according to principles of national law, regardless of whether a product liability claim is brought under the Directive¹¹⁰ or under national product liability systems.

It would be naïve to suppose that complete harmonisation of damages awards could ever be achieved, or that such a measure would greatly contribute to removing real differences as

¹¹⁰ See Article 9.

between the practical effects of product liability systems in different Member States. In any event, the damages that are recovered by consumers are a function of a range of factors including the availability of public health care and other social security benefits, the cost of living and taxation structures, as well as cultural and other social factors.

(d) Safety and consumer protection laws

There are a number of existing or proposed EU legislative initiatives which do or are likely to affect the overall context within which product liability laws operate.

The Directive might be said to be primarily a "remedial" measure in the sense that it seeks to compensate for injuries suffered by consumers. Another remedial measure is the Directive on Consumer Guarantees¹¹¹ which gives buyers certain rights with respect to consumer products which do not conform to a contract of purchase and sale.

There are numerous measures which might be said to be fundamentally "preventative" in the sense that they seek to prevent injuries occurring in the first place by regulating the manufacture and distribution of products in the EU. Examples of such measures include the recently revised General Product Safety Directive¹¹² and the plethora of sector-specific directives which regulate such items as (amongst others) pharmaceuticals, medical devices, cosmetics, toys, food, machinery and electronics. To the extent that such measures ensure the safety of products on the market, they will reduce the need for consumers in the EU to seek redress under product liability laws.

There are also assorted measures designed to regulate or affect the relationship between professional sellers and consumers, such as the Directive on Unfair Terms in Consumer Contracts.¹¹³ A Green Paper on EU Consumer Protection and a proposal for a Council Regulation on Sales Promotions, both published in October 2001, envisage further harmonisation of business-to-consumer transactions.¹¹⁴ The Green Paper on EU Consumer Protection was followed up by a Communication published in June 2002. This proposed an action plan for consultation with a view to developing a framework directive, which the Commission had suggested should be based on a general clause of fair commercial practices and a consumer detriment test. It is conceivable that, if these proposals are implemented, they could provide a basis for product-related claims.¹¹⁵

¹¹¹ *Supra* note 10.

¹¹² Directive 2001/95/EC, which revises Directive 92/59/EEC and which is due to be implemented in all Member States by 15 January 2004.

¹¹³ *Supra* note 11.

¹¹⁴ COM (2001) 531 final and COM (2001) 546 final, respectively.

¹¹⁵ As has been the case with similar laws in the United States and Australia.

2.7 Feasibility of further harmonisation

The Directive does not fully harmonise product liability laws throughout the EU such that, in any Member State, consumers and producers/suppliers could expect the same outcomes in similar circumstances. Indeed, at the time the Directive was adopted, it was intended to provide for only limited harmonisation, whilst at the same time "[opening] the way towards greater harmonisation".¹¹⁶ For the reasons discussed in this Report, total harmonisation in the broadest sense is an unrealistic goal.

In principle, it would be possible to achieve further harmonisation in a number of ways. The obvious place to start in order to achieve significantly greater harmonisation would be to abolish Article 13 so that the Directive became the sole and exclusive basis for product liability claims in the EU. Whilst there appear to be no serious practical impediments to taking this step (leaving aside the question of legal base), as a political matter it is likely to be highly controversial, not least because it would have the effect of depriving consumers of alternative means of seeking redress. There are concerns that any reforms associated with the removal of Article 13 might upset the balance of interests reflected in the Directive in its present form.

Further harmonisation might also be achieved by removing the options to derogate from the Directive or by clarifying potential points of uncertainty in the terms of the Directive itself. It is unclear at this stage to what extent such steps either are necessary or would achieve further harmonisation as a practical matter. However, it may be that as experience of use of the Directive grows, such discrepancies as exist in the operation of the Directive as between Member States may assume greater practical significance, in which case some intervention by the Commission may be warranted.

Finally, the Directive cannot be viewed in isolation but as part of a broader system, involving a wide variety of factors (such as safety and consumer protection laws, judicial practices and procedures, cultural and social factors), all of which affect the interests of both consumers and business operators. These other factors can have a greater influence than the substantive laws themselves on the practical functioning of product liability systems, including the Directive, and are constantly subject to change. For this reason, any consideration of possible reform of the Directive should be made with regard to its potential impact in the context of the broader system.

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¹¹⁶ Preamble to the Directive.

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APPENDIX 2 - IMPLEMENTATION OF THE PRODUCT LIABILITY DIRECTIVE IN THE 15 MEMBER STATES

MEMBER STATE	IMPLEMENTED DATE	DEVELOPMENT RISKS DEFENCE	CAP ON DAMAGES	INITIAL INCLUSION OF PRIMARY AGRICULTURAL PRODUCTS	IMPLEMENTATION OF COMPULSORY AGRICULTURAL AMENDMENT	MINIMUM A "THRESHOLD" OR "DEDUCTIBLE"	"REASONABLE TIME" FOR IDENTIFICATION OF PRODUCER DEFINED	SPECIFIC PRODUCTS INCLUDED OR EXCLUDED	RECOVERY OF NON-MATERIAL DAMAGES
Austria	01.07.88	yes	no	no	01.01.00	deductible	no	includes "energy"	yes
Belgium	01.04.91	yes	no	no	12.12.00	deductible	no	n/a	yes
Denmark	10.06.89	yes	no	no	04.12.00	deductible	no (suppliers primarily liable)	n/a	yes
Finland	01.09.91	no	no	yes	n/a	threshold	no	excludes buildings on land owned by someone else	yes
France	22.05.98	yes except for body parts/products, but conditional upon producer taking appropriate steps to prevent harmful consequences	no	yes	n/a	no minimum	no (suppliers primarily liable)	n/a	yes

MEMBER STATE	IMPLEMENTED DATE	DEVELOPMENT RISKS DEFENCE	CAP ON DAMAGES	INITIAL INCLUSION OF PRIMARY AGRICULTURAL PRODUCTS	IMPLEMENTATION OF COMPULSORY AGRICULTURAL AMENDMENT	MINIMUM A "THRESHOLD" OR "DEDUCTIBLE"	"REASONABLE TIME" FOR IDENTIFICATION OF PRODUCER DEFINED	SPECIFIC PRODUCTS INCLUDED OR EXCLUDED	RECOVERY OF NON-MATERIAL DAMAGES
Germany	01.01.90	yes	yes	no	01.12.00	deductible	yes (1 month)	excludes drugs	no
Greece	16.11.94	yes	no	yes	n/a	no minimum	no	includes natural forces	no
Ireland	16.12.91	yes	no	no	04.12.00	deductible	no	n/a	probably
Italy	24.05.88	yes	no	no	02.02.01	deductible	yes (3 months, may be extended)	n/a	no, unless defendant's action also constitutes a crime
Luxembourg	02.05.89	no	no	yes	n/a	deductible	no	n/a	yes
Netherlands	01.11.90	yes	no	no	29.11.00	threshold	no	n/a	no
Portugal	11.11.89	yes	yes	no	24.04.00	deductible	yes (3 months)	n/a	yes
Spain	08.07.94	yes except re drugs, foodstuffs and food products intended for human consumption	yes	no	30.12.00	deductible (in theory, but has not been deducted in any case except one, so in practice a threshold)	yes (3 months)	includes gas	yes

Appendix 2

MEMBER STATE	IMPLEMENTED DATE	DEVELOPMENT RISKS DEFENCE	CAP ON DAMAGES	INITIAL INCLUSION OF PRIMARY AGRICULTURAL PRODUCTS	IMPLEMENTATION OF COMPULSORY AGRICULTURAL AMENDMENT	MINIMUM A "THRESHOLD" OR "DEDUCTIBLE"	"REASONABLE TIME" FOR IDENTIFICATION OF PRODUCER DEFINED	SPECIFIC PRODUCTS INCLUDED OR EXCLUDED	RECOVERY OF NON- MATERIAL DAMAGES
Sweden	01.01.93	yes	no	yes	n/a	deductible	yes (1 month)	n/a	yes
UK	01.03.88	yes	no	no	04.12.00	threshold	no	n/a	yes

APPENDIX 3 - SUBSTANTIAL DIVERGENCES FROM THE PRODUCT LIABILITY DIRECTIVE IN MEMBER STATES' IMPLEMENTING LEGISLATION

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
Article 1 The producer shall be liable for damage caused by a defect in his product.	
Article 2 For the purpose of this Directive "product" means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. "Primary agricultural products" means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. "Product" includes electricity. <i>NB: Article 2 was amended by Directive 99/34/EC of 10 May 1999 with a view to including agricultural products within the scope of Directive 85/34/EEC (the new measures to be applied by Member States as from 4 December 2000) and now reads:</i> Article 2 For the purpose of this Directive, "product" means all movables even if incorporated into another movable or into an immovable. "Product" includes electricity.	Belgium - restricts definition of product to all "tangible" movables. Ireland - product includes electricity "where damage is caused as a result of a failure in the process of generation of electricity". Spain - specifically includes "gas" as a product. Directive 99/34/EC has not been implemented and primary agricultural products and game are still excluded. United Kingdom - refers to "industrial" rather than "initial" processing.

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>Article 3</p> <ol style="list-style-type: none"> 1. "Producer" means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer. 2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer. 3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated. 	<p>Denmark - defines "manufacturer" rather than "producer"; "manufacturer" includes a person who manufactures or gathers natural products; re Article 3(3), the injured party is free to hold either the manufacturer or the distributor or both liable.</p> <p>France - re Article 3(3), the seller, the lessor and any other supplier acting in his professional capacity shall be liable for the product's defect in the same way as the producer.</p> <p>Italy - re Article 3(1), specifically defines producer of agricultural products and game as the farmer, stock-farmer, fisher and hunter; re Article 3(3), liability of suppliers only arises where (a) the injured person has made a written request specifying the damage-causing product, the place and time of purchase and offering an opportunity to view the product, and (b) the producer fails to identify the name and domicile of the producer within three months of the request (which period may be extended in certain circumstances).</p> <p>Portugal - re Article 3(3), injured person must request in writing and supplier must provide, also in writing and within three months, the identity of the manufacturer or importer or of some preceding supplier.</p> <p>Spain - defines "manufacturer" rather than producer; re Article 3(3), supplier must provide information within three months; also supplier primarily liable where he has supplied the product with full knowledge of the existence of the defect, though he may claim over against the manufacturer or importer.</p> <p>Sweden - does not refer to "producers", but defines liable persons as "whoever has manufactured, produced or collected together the product".</p>

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
	United Kingdom - re Article 3(3), the injured person's request must also be made within a "reasonable period", and at a time when it is not reasonably practicable for him to identify all of the producers, importers or own branders who may be liable.
Article 4 The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.	Greece - omitted Portugal - omitted
Article 5 Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.	Denmark - lists factors to be taken into account in apportioning joint liability, specifically the cause of the defect, the individual manufacturer's opportunity and possibility of controlling the product, and existing liability insurance policies. Portugal - lists factors to be taken into account in apportioning joint liability, in particular the risk created by each person liable, the gravity of any culpability with which he has acted, and his contribution to the injury; in case of doubt liability is to be apportioned equally.
Article 6 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: <ul style="list-style-type: none"> (a) the presentation of the product; 	Belgium - re Article 6(1)(c), defines "put into circulation". Denmark - re Article 6(1)(a), refers to "marketing" rather than "presentation"; re Article 6(b), refers to expected use rather than "reasonably" expected use. Italy - re Article 6(1)(a), adds specific circumstances to be taken into account, for example, in addition to the presentation of the product, the way in which the product was put into circulation and its "manifest features, directions and warnings provided"; also adds a section specifically aimed at manufacturing

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>(b) the use to which it could reasonably be expected that the product would be put;</p> <p>(c) the time when the product was put into circulation.</p> <p>2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.</p>	<p>defects which provides that a product is defective if it does not provide the safety normally offered by the other products in the same line; re Article 6(1)(c), defines "put into circulation".</p> <p>Sweden - re Article 6(1), defines products "lacking in safety" (rather than "defective" products) viz. not as safe as can reasonably be expected, with safety to be judged by reference to, <i>inter alia</i>, how the product could be foreseen to be used, how it has been marketed, in the light of the operating instructions, and when the product was put into circulation; Article 6(2) is omitted.</p> <p>United Kingdom - re Article 6(1), a product is defective if "the safety of the product is not such as persons generally are entitled to expect"; re Article 6(1)(a), in place of "presentation of the product" appears "the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product"; re Article 6(1)(c), refers to "supply" rather than "put into circulation", and "supply" is broadly defined.</p>
<p>Article 7</p> <p>The producer shall not be liable as a result of this Directive if he proves:</p> <p>(a) that he did not put the product into circulation; or</p>	<p>Belgium - re Articles 7(a), (b) and (e), defines "put into circulation".</p> <p>France - re Article 7(e) - defence does not apply to claim in respect of human body parts or products and is subject to the producer having taken appropriate steps to prevent any harmful consequences.</p> <p>Italy - re Articles 7(a), (b) and (e), defines "put into circulation".</p>

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>(b) that, having regard to 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 came into being afterwards; or</p> <p>(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or</p> <p>(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or</p> <p>(e) 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</p> <p>(f) 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.</p>	<p>Spain - re Article 7(e), defence does not apply to claim in respect of medicines, foodstuffs or food products intended for human consumption.</p> <p>Sweden - Article 7(c) is omitted; Article 7(f) is also omitted, and where injury is due to an unsafe component, both the component and the final product are considered to have caused the injury.</p> <p>United Kingdom - re Articles 7(a), (b) and (e), refers to "supply" rather than "put into circulation", and "supply" is broadly defined; re Article 7(e), provides that the producer shall not be liable if he proves "that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control".</p>
<p>Article 8</p> <p>1. Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.</p>	<p>Belgium - re Article 8(2), does not include the proviso "having regard to all the circumstances".</p> <p>Denmark - re Article 8(1), this is said to be omitted (already an established rule under Danish law).</p> <p>Italy - re Article 8(1), this is omitted (said to be already established under Italian legal principles, but may in fact not be as some precedents consider act of third party to be <i>force majeure</i>).</p>

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>2. The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.</p>	<p>Spain - re Article 8(1), adds that where manufacturer has paid a claim, he may claim over against the third party the amount corresponding to the third party's contribution to the damage.</p>
<p>Article 9</p> <p>For the purpose of Article 1, "damage" means:</p> <p>(a) damage caused by death or personal injuries;</p> <p>(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:</p> <p>(i) is of a type ordinarily intended for private use or consumption, and</p> <p>(ii) was used by the injured person mainly for his own private use or consumption.</p> <p>This Article shall be without prejudice to national provisions relating to non-material damage.</p>	<p>Austria - re Article 9(b), damage to property is not restricted to property intended for private use or consumption.</p> <p>France - re Article 9(b), has not implemented the €500 threshold.</p> <p>Greece - re Article 9(b), has not implemented the €500 threshold.</p> <p>Ireland - re Article 9(a), "personal injury" includes any disease and any impairment of a person's physical or mental condition.</p> <p>Italy - the provision relating to non-material damage has not been implemented.</p> <p>Luxembourg - damage is defined as "any damage", excluding only damage caused to the product itself or to non-private-use products and damage resulting from nuclear accidents which is covered by international agreements in force.</p>
<p>Article 10</p> <p>1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably</p>	<p>Italy - adds a section concerning worsening of damage which provides that the limitation period shall not begin to run until the injured person became or should have become aware of damage serious enough to justify bringing a claim.</p>

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>have become aware, of the damage, the defect and the identity of the producer.</p> <p>2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by the Directive.</p>	
<p>Article 11</p> <p>Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.</p>	<p>Belgium - defines "put into circulation".</p> <p>Italy - defines "put into circulation"; circumstances in which the long-stop period can be extended include where an application for credit acceptance has been filed in bankruptcy proceedings or the person liable has acknowledged the injured party's right to bring a claim.</p> <p>United Kingdom - refers to "supply" rather than "put into circulation", and "supply" is broadly defined.</p>
<p>Article 12</p> <p>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.</p>	
<p>Article 13</p> <p>This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.</p>	<p>Belgium - no reference to any "special liability system".</p> <p>Ireland - no reference to any "special liability system".</p>

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>Article 14</p> <p>This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.</p>	<p>Belgium - refers specifically to a particular law concerning liability related to nuclear energy, rather than to international conventions generally.</p> <p>Ireland - omitted.</p>
<p>Article 15</p> <p>1. Each Member State may:</p> <p>(a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive "product" also means primary agricultural products and game <i>[NB according to Directive 99/34/EC all Member States should have included primary agricultural products and game as of 4 December 2000]</i>;</p> <p>(b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in its legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.</p> <p>[Sections 2 and 3 omitted for present purposes.]</p>	

DIRECTIVE 85/374/EEC	SUBSTANTIAL DIVERGENCES IN IMPLEMENTING LEGISLATION
<p>Article 16</p> <p>1. Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU.</p> <p>[Section 2 omitted for present purposes.]</p>	
<p>Article 17</p> <p>This Directive shall not apply to products put into circulation before the date on which the provisions referred to in Article 19 enter into force.</p>	<p>Belgium - defines "put into circulation".</p> <p>Ireland - refers to "products put into circulation in any Member State".</p> <p>Italy - defines "put into circulation".</p> <p>United Kingdom - refers to "supply" rather than "put into circulation", and "supply" is broadly defined.</p>
<p>Article 18</p> <p>[Omitted for present purposes.]</p>	
<p>Article 19</p> <p>1. Member States shall bring into force, not later than three years from the date of notification of this Directive [30 July 1985], the laws, regulations and administrative provisions necessary to comply with this Directive....</p> <p>2. [Omitted for present purposes.]</p>	

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Article 20 [Omitted for present purposes.]	
Article 21 [Omitted for present purposes.]	
Article 22 [Omitted for present purposes.]	

APPENDIX 4 - DIFFERENCES IN PROCEDURAL RULES/ACCESS TO JUSTICE

MEMBER STATE	MULTI-PARTY CLAIMS	RECOVERY OF COSTS	RIGHTS OF APPEAL	PROGRESS OF CLAIMS		EXTENT OF DOCUMENT DISCOVERY OBLIGATIONS
				FIRST INSTANCE	APPEALS	
Austria	no class actions; representative actions available; consolidation available for related claims	costs recoverable in relation to amount by which each party has succeeded / failed	automatic from first instance unless <€2,000 in which case leave required; appeals to Supreme Court strictly limited	up to 1 year including appeals if simple; up to 3 years including appeals if complex	up to 1 year including all instances if simple; up to 3 years including all instances if complex	no pretrial discovery; available from other party by court order if sufficiently described
Belgium	no class actions; representative actions available but not for damages; consolidation available for related claims	loser pays winner's court costs including experts' and witness expenses, but each party pays own legal fees regardless of outcome	automatic unless magistrate's judgment for up to €1,240 or first instance or commercial court judgment for up to €1,860, which cannot be appealed	up to 5 years in Brussels, considerably less in other regions	up to 5 years in Brussels, considerably less in other regions	none
Denmark	no class or representative actions; test cases may occur; consolidation available for related claims	loser pays winner's costs, though seldom all of them	automatic after first instance, leave required thereafter; judgments of <€1,345 cannot be appealed	1 - 3 years	less than at first instance	available if necessary, from parties and non-parties

MEMBER STATE	MULTI-PARTY CLAIMS	RECOVERY OF COSTS	RIGHTS OF APPEAL	PROGRESS OF CLAIMS		EXTENT OF DOCUMENT DISCOVERY OBLIGATIONS
				FIRST INSTANCE	APPEALS	
Finland	not available	loser pays winner's costs; in case of partial success parties cover their own costs	automatic from District Court; leave required from Appeal Court (granted in <10% of cases)	6 - 12 months	12 - 18 months at Court of Appeal; 18 months at Supreme Court	court can order party to produce documents
France	no class actions; representative actions available, for damages or other remedies, if approved by public authorities	at court's discretion; winner usually recovers court costs but more rarely lawyers' fees	automatic from first instance unless <€3,800 in which case no right of appeal	minimum 6 months to 1 year at first instance in Paris; longer in other regions	minimum 1.5 years at Paris Court of Appeal; minimum 2 years at Appeal Courts in other regions; 2 - 5 years at Cour de cassation	court can order disclosure of relevant documents from party or non-party; available before trial but rarely used
Germany	no class actions; consolidation available for related claims; in case of "serial damages", one lawyer may represent several claimants	loser pays winner's costs, with lawyers' fees recoverable only up to statutory maximum based on value of claim; costs apportioned in case of partial success; claimant pays if pursued claim without good reason	automatic from first instance if >€600; leave required in all other cases	1 - 2.5 years	1.5 - 2.5 years at second instance; c. 2 years at Federal Supreme Court	no formal rights or procedures; court can order a party or non-party to produce documents; non-party may decline if unreasonable

MEMBER STATE	MULTI-PARTY CLAIMS	RECOVERY OF COSTS	RIGHTS OF APPEAL	PROGRESS OF CLAIMS		EXTENT OF DOCUMENT DISCOVERY OBLIGATIONS
				FIRST INSTANCE	APPEALS	
Greece	no class actions; representative actions available; consolidation available for related claims	loser pays winner's costs; where partial victory costs apportioned accordingly; claimant pays if pursued claim without good reason	automatic except county court decisions below a set amount, which are not appealable	c. 1 year in county court; c. 2 years in Court of First Instance	c. 1 year	not available pretrial
Ireland	no class actions; representative actions available; consolidation available for related claims	loser pays "party and party" costs as partial indemnity to winner, including legal fees	automatic in the vast majority of cases	c. 4 months in District Court; c. 6 months in Circuit Court; min. 4 - 5 years in High Court	District Court to Circuit Court - c. 1 year; Circuit Court to High Court - over 1 year; High Court to Supreme Court - min. 1 year.	available from other party by court order if sufficiently described; non-party discovery available subject to providing for non-party's costs
Italy	no class actions; representative actions available but not for damages; consolidation available for related claims	generally loser pays all winner's costs including legal fees; judge may set off costs for "good reasons", including abuse of process by the winner	automatic from lower courts	c. 3 - 4 years	c. 2 years each	no pretrial discovery; court may order disclosure from parties or non-parties but not if this would cause them serious damage

MEMBER STATE	MULTI-PARTY CLAIMS	RECOVERY OF COSTS	RIGHTS OF APPEAL	PROGRESS OF CLAIMS		EXTENT OF DOCUMENT DISCOVERY OBLIGATIONS
				FIRST INSTANCE	APPEALS	
Luxembourg	no class actions; representative actions available in theory	generally loser pays winner's costs and expenses and each party pays own counsel's fees; court has discretion to award all or part of legal fees	no appeal if <€750; otherwise appeals as of right	c. 15 months, or more if complex medical issues	c. 12 months (or more if complex medical issues) at appeal level; 8 - 12 months at Supreme Court	pretrial discovery available at court's discretion; available from non-parties if useful; penalty may be imposed for failure to produce documents
Netherlands	no class actions; consolidation available for related claims; representative actions available but not for damages; group may give one person power of attorney to file claim on their behalf; test cases possible	generally loser pays winner's costs, under a scheme based on the value of the claim	as of right to Court of Appeal unless <€1,750	1 - 2 years	1 - 1.5 years at appeal level; c.2 years at Supreme Court	no pretrial discovery; court can order disclosure, including, in certain circumstances, from non-parties; if a party fails to produce documents, court may draw adverse inference
Portugal	no class actions; representative actions available for preventive measures or damages; consolidation available for related claims	generally loser pays winner's court costs (including expert fees) and each party pays own counsel's fees	no appeal for amounts up to €3,740.98; appeal as of right to High Court for amounts up to €14,963.94; appeal to Supreme Court for amounts above that	minimum 21 months for simple declarative procedure; otherwise up to several years	c. 8 months each for simple procedure; otherwise 1 year each	pretrial discovery available only in criminal proceedings

MEMBER STATE	MULTI-PARTY CLAIMS	RECOVERY OF COSTS	RIGHTS OF APPEAL	PROGRESS OF CLAIMS		EXTENT OF DOCUMENT DISCOVERY OBLIGATIONS
				FIRST INSTANCE	APPEALS	
Spain	class actions available; representative actions available	loser pays all winner's costs, but at court's discretion and only up to the value of 1/3 of the claim; in case of partial success, each party pays own costs and half the common costs; proportional awards unusual; costs may be awarded against a party who has litigated vexatiously	automatic from first instance; appeal to Supreme Court only where >€150,253 or where lower court decisions are contradictory and there is <i>cassation</i> interest	from 9 months to 1 year	1 - 2 years at second instance; 2 - 3 years at Supreme Court	available by court order from parties or non-parties; available pretrial where "a reasoned fear exists that, owing to persons or the state of affairs", the proof will not be able to be produced at trial

MEMBER STATE	MULTI-PARTY CLAIMS	RECOVERY OF COSTS	RIGHTS OF APPEAL	PROGRESS OF CLAIMS		EXTENT OF DOCUMENT DISCOVERY OBLIGATIONS
				FIRST INSTANCE	APPEALS	
Sweden	class actions available; consolidation available for related claims; test cases fairly common	generally loser pays winner's costs; costs apportioned in event of partial success; costs include compensation for time and effort expended by a party in the litigation; reimbursement of winner's costs relatively limited in Simplified Civil Cases	leave required in most cases	minimum 1 year	minimum 1 year each	no pretrial discovery; during court proceedings may request discovery including from non-party
United Kingdom	consolidation available for related claims	generally loser pays winner's costs though credit may be given for particular issues won by overall loser	leave almost always required	c. 3 years	c. 1 year each	each party must disclose documents on which that party relies or which support the other party's case; preaction disclosure available by court order if could save costs or encourage settlement; non-party disclosure available if necessary to dispose fairly of claim or to save costs

