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REPORT ON THE OPERATION OF DIRECTIVE 83/189/EEC  
LAYING DOWN A PROCEDURE FOR THE PROVISION OF INFORMATION  
IN THE FIELD OF TECHNICAL STANDARDS AND REGULATIONS  
1984 - 1987

(presented by the Commission)

REPORT BY THE COMMISSION ON THE OPERATION OF DIRECTIVE  
83/189/CEE

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## SUMMARY OF THE REPORT

The adoption by the Council of Ministers of Directive 83/189 on 28 March 1983 constituted an important step towards preventing the creation of new technical barriers to trade within the Community.

As well as instituting a mechanism for the collective scrutiny of draft technical legislation at national level, it set up an institutional and procedural framework to facilitate and accelerate standardization at European level.

The usefulness and significance of this Instrument was recognized by both the European Parliament and the Council in their positive response to the Commission proposal to extend the scope of the Directive to all industrial and agricultural products, which was adopted by the Council on 22 March 1988 (1).

Four years after the entry into force of the Directive, and immediately before its extension to all product sectors, the Commission has undertaken a review of its operation in order to assess how effectively it has been applied and what can be done in order to improve its effectiveness, given its important contribution to the completion of the internal market within the next five years.

The report follows the structure of Directive 83/189 itself, and deals first with the information procedure for standards and then with that for technical regulations.

### 1. Information procedure for standards

The information procedure for standards, which is managed for the Community and the EFTA countries by CEN/CENELEC, gives rise to the regular distribution to national standards organizations of an impressive volume of information on national standards activity in the form of both a complete updating register. Although some national standards organizations ensure that this information is widely distributed, in some cases by electronic means, this is not always the case. This may be one of the reasons for the relatively low incidence of requests by national standards organizations to be associated with standardization work going on in another Member State, although the number of such requests is increasing.

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(1) Council Directive 83/182/EEC of 22 March 1988 amending Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations.  
O.J.E.C. L/81 of 26.3.1988 p. 75.

The inflow of information, even though of variable quality as far as the amount of information provided on individual standards projects is concerned, is recognized both by the Commission services and CEN/CENELEC to be a valuable tool in the programming of European harmonization of standards.

The Commission doubts, however, whether surveillance of the large volume of national standards activity by CEN/CENELEC has been sufficiently developed.

The machinery set up under Article 6 of the Directive whereby the Commission, after consultation of the Standing Committee, may make standardization requests to CEN/CENELEC is being increasingly used; no fewer than 90 requests, involving 115 different standards, have been made since 1985. Most of these requests derive from the Commission's own legislative programme, however, and not from notifications under the information procedure.

The European standards organizations themselves have already been active in evaluating the effectiveness of the information procedure. An enquiry conducted in 1986 led to the adoption of a number of decisions concerning the extent of information to be provided and the distribution of the registers, although it was generally agreed that the structure of the procedure basically met the needs of interested parties.

On the basis of its own analysis, the Commission believes that the procedure must be strengthened further if it is to change the extent to which standardization activities are still overwhelmingly concentrated on the adoption of specific national standards and the taking-over in differing ways at national level of international or European standards. About 70% of the 1987 notifications on new work concerned specific national projects. A comparison shows that these appear to outnumber European projects by about nine to one (1).

The Commission is now taking action to ensure that information relating to national standards is more transparent and can be used more effectively:

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(1) Some caution should nevertheless be exercised in appraising the extent of specific national work. It seems that participants do not regularly notify relations with international or European work and also a European standardization project generally covers a of application than a national one.

(a) More complete notifications :

a number of standards bodies have still not implemented the improvements decided upon in 1986, and additional refinement of data is needed in order to achieve cross-referencing and greater transparency; the notification form and handbook will therefore be revised.

(b) More effective distribution of information :

there is reason to believe that information on new standards activity is not reaching the industries most directly concerned by it, and the Commission will in 1988 be contributing to a study by CEN/CENELEC on how to improve the dissemination of such information, using electronic means if necessary.

(c) A complete picture of standardization in Europe :

the Commission has concluded negotiations with CEN/CENELEC in order to set up an integrated information system containing published as well as draft standards in Europe, to come into effect in 1989.

(d) Greater use of the procedure for the purposes of European standardization :

the large number of notified draft standards has made it difficult for CEN/CENELEC with their limited resources to analyse them systematically and initiate new activities at European level; the Commission has taken steps to assist the organizations by further strengthening of their resources in order to improve surveillance of the information procedure.

Clearly, the full cooperation of national standards organizations, and particularly the few which are responsible for most standardization at national level within the Community, will be necessary in order to implement the improvements in question.

## 2. Information procedure for technical regulations

Directive 83/189/EEC imposes on Member States the obligation to communicate to the Commission all draft technical regulations, but also requires that the Commission and the other Member States react to such notifications within a very short time-limit (3 months). These time constraints, combined with the steadily growing number of notifications (now 200 a year), the interest in translations of notified texts and the requirement for immediate distribution to all Member States of all communications under the procedure, have necessitated a complex system for management of the procedure which has not yet overcome all the logistical problems involved.



The Commission considers that everything possible should be done both by itself and by the Member States to ensure that the notified drafts can be examined as quickly as possible under conditions guaranteeing that they are properly understood. It has already made every effort to provide translations into as many languages as possible of all the messages exchanged under the procedure. As far as the national drafts notified are concerned, the Commission, despite the fact that it has no legal obligation to do so, has provided the Member States with translations even where it did not need them itself. It has also taken the initiative of studying the feasibility and cost of having notified texts translated rapidly into all official Community languages by outside agencies.

The Commission has also thought of several practical measures to give the parties three full months to examine notified texts. These measures, discussed in detail by the Standing Committee on Standards and Technical Regulations, could include a month's extension in the period allowed for examination of the notified drafts and a month's extension to the standstill period when a detailed opinion is delivered. It has also been suggested that an agreement should be sought with all the Member States on limiting to exceptional cases the principle of the confidentiality of notifications (Article 8, para 4).

Since Directive 83/189/EEC has just been amended (see note 1, page 6) and the results of the current study on the translation problem are still awaited, the Commission considers it preferable for the time being not to propose these changes, but may well come back to them when the time seems ripe.

As far as Member States' compliance with the obligation to notify is concerned, the Commission considers that performance is still very uneven, and that some Member States at least are not living up to their commitments under the Directive. Although the total number of notifications has increased steadily each year, to exactly 200 in 1987, there are a number of points of concern if one considers the distribution of notifications between Member States and between sectors. For instance :

- two Member States alone account for 57 per cent of notifications to date;
- some Member States have notified very few regulations in the past four years;
- some Member States have notified no measures in respect of sectors where most others have notified a significant number;

- no notifications of regional measures have been received.

The Commission proposes that a number of steps be taken to remedy this situation :

- (I) until now the Commission has not systematically monitored compliance with the obligation to notify; it intends to conclude contracts with bodies which, in each Member State, will be responsible, under Commission supervision, for the material operations of obtaining and scrutinizing official national publications in order to detect technical regulations published in them after which the Commission will make the necessary analyses and take appropriate action;
- (II) as an additional measure, and in order to facilitate the monitoring of Member States' reactions to comments and detailed opinions, the Commission, after consulting the Standing Committee for Standards and Technical Regulations, has formally requested the Member States under Article 8.3 of the Directive to send it systematically from 1 July 1988, all the definitive texts of notified technical regulations;
- (III) the Commission also intends to bring infringement proceedings against Member States which fail to notify draft technical regulations.

In addition, in all information and publication campaigns concerning the "New Approach", the Commission will draw attention to its view that technical regulations not notified to the Commission are not enforceable.

As far as the content of national technical regulations notified under the information procedure is concerned, the Commission draws attention to the relatively high incidence of technical regulations on which it has felt it necessary to deliver a detailed opinion (approximately one quarter of all notifications). Member States, too, are increasingly active in opposing legislation proposed by other Member States; in 1987, more detailed opinions were delivered by Member States (53) than by the Commission (49). While this greater involvement of Member States in the procedure is to be welcomed, the Commission is concerned that so many notifications appear to give rise to serious difficulties for Intra-Community trade.

The Commission has included in this report a detailed legal analysis of the kinds of conflict with the principles of Community law which occur most frequently in draft national technical regulations.

It concludes that such potential infringements still occur frequently, even after four years, in the draft legislation of all Member States (the number of detailed opinions for each Member State being broadly in proportion to its number of notifications).

The Commission therefore intends as a matter of priority to pursue a limited number of infringement cases which address the principal issues referred to in its legal analysis, in the hope that further EEC Jurisprudence will be developed in this area.

Finally, the Commission recalls that the Council and the European Parliament should regularly review the operation of this Directive in the light of an annual report from the Commission which, at the request of the European Parliament, has been written into the amended Directive adopted by the Council on 22 March 1988.

## Chapter I - INTRODUCTION

1. Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations introduces for the first time at Community level the obligation for Member States to notify the Commission of draft regulations and standards that fall within its scope. Pursuant to Article 1 (7), its scope extends to industrially manufactured products other than medicinal products within the meaning of Directive 65/65/EEC, cosmetic products within the meaning of Directive 76/768/EEC, agricultural products within the meaning of Article 38 (1) of the Treaty, and food. Apart from agricultural products, these exceptions did not appear in the Commission's initial proposal<sup>(1)</sup> but were added by the Council.
2. The Directive is based on three guiding principles which govern its working:
  - (a) The need for an instrument giving information on the framing of technical provisions before they are adopted so as to prevent the creation of fresh barriers to the free movement of goods; this preventive instrument is intended to extend or in some cases forestall the action taken by the Commission pursuant to Article 169 of the EEC Treaty against infringements by the Member States.
  - (b) The desire to ensure complete transparency of national plans by a compulsory procedure and to promote effective cooperation between the Commission and the Member States so as to reduce or eliminate disparities in national standards and regulations, thus helping towards the attainment of a Community-wide industrial market. The Directive also provides a framework for the development of European standardization, in particular through systematic and careful scrutiny of the data exchanged.

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(1) OJEC C 253 of 1 October 1980, p.2.

- (c) The establishment, under the auspices of the Commission, of a continuous dialogue between national and Community interests, culminating in a Standing Committee; the Directive facilitates this by making the Commission and the Member States responsible for the proper working of the system.
3. Directive 83/189/EEC lays down an information procedure for a single purpose: to avoid barriers to trade. It is thus designed as an instrument of Community policy, calling for joint action by the Commission and the Member States. The adoption of the Single Act and the priorities in the White Paper have enhanced the importance of its role in helping to complete the single market.
  4. It was because of this objective of the single market that the Commission, after four years' experience with the procedure, decided to enlarge the instrument and early in 1987 proposed that its scope be extended to all products<sup>(1)</sup>. This proposal was adopted by the Council on 22 March 1988 in cooperation with the Parliament and after the opinion of the Economic and Social Committee had been obtained<sup>(2)</sup>.
  5. The time has now come, just as the scope of the Directive is being extended and in accordance with Article 11 of the Directive itself, to review its operation over the first four years. The findings will provide useful information for future action with a view to the completion of the internal market by 1992.

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(1) See Doc. COM(87)52 final of 13 February 1987 - OJEC C 71 of 19 March 1987, p.12.

(2) Directive 88/122/EEC - OJEC (L81 of 26.03.1988).

## Chapter II - THE INFORMATION PROCEDURE FOR STANDARDS

### 1. DESCRIPTION OF THE OPERATION OF THE INFORMATION PROCEDURE

6. In 1984 the Commission contracted out the technical operation of the information procedure for standards to the European standards bodies CEN and CENELEC<sup>(1)</sup>. The EFTA countries have been associated with the procedure from the outset and contribute to the operating costs through a similar contract between the EFTA Secretariat and CEN/CENELEC.
7. CEN and CENELEC have set up a joint central unit which collects, manages and distributes the necessary information. It collects the information from and distributes it to the members of CEN and CENELEC, which are the national standards institutions of the EEC countries (see list 1 in the Annex to the Directive) and the EFTA countries. The unit also draws up an annual report on the operation and management of the procedure. Together with the quarterly verifications, this report forms the basis for a detailed audit and examination by the Commission of the results of the information procedure. Any ideas it may give for improving the procedure, especially at technical level, are studied by a joint working party consisting of CEN and CENELEC and are then examined by the Standing Committee for Directive 83/189/EEC.
8. The information system for standards became operational in January 1985. The members of CEN and CENELEC have been sending data to the central unit in accordance with Directive 83/189/EEC. This consists in particular of annual standards programmes and their quarterly updates (see Article 2 of the Directive) any new draft standards open to public inspection (see Article 4 of the Directive) and any national standard adopted. In addition, the CEN/CENELEC central unit receives data on developments in international standardization, including information on the participation of CEN/CENELEC members in those activities. The data are sent to the central unit either on magnetic tape or on notification sheets.

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(1) European Committee for Standardization and European Committee for Electro-technical Standardization.

9. The central unit enters the collected information in a computerized database. As a result, information on the updated standards programmes and on draft national standards open to public inspection is permanently available.
10. The information collected and managed is currently disseminated in two periodic registers published periodically.

The first, called the Standardization Programme, is divided into 13 sectors and 290 subsectors and contains all standardization work in progress and planned at national, European and international levels. In addition to the national reference, this register gives the stage reached (intention or draft for public inspection), the title, and a brief description of the subject. The register is currently distributed as a full version in the first quarter of the year and as an updated version six months later. It is produced in the working languages of CEN and CENELEC<sup>(1)</sup>, with the exception of the international part which, to reduce translation costs, is published only in English. This first register represents the equivalent of about 1 300 pages of original text per month.

The second register gives information on draft national standards open to public inspection. It is produced monthly and in principle only in English. It contains, by sector and subsector, all new draft standards at the public inspection stage (see Article 4 of the Directive). This register, which for each draft contains the same type of information as the first register, provides information rapidly and in a classified form for all potential users. In volume it represents about 150 pages of original text a month.

11. The two registers are sent to the members of CEN and CENELEC, to the Commission, and to the EFTA Secretariat. The members of CEN/CENELEC distribute them to interested parties by their own methods, depending on the resources available.

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(1) English, French and German.

12. The members of CEN/CENELEC send the central unit the full text of draft national standards at the public inspection stage (see Article 4 of Directive 83/189/EEC). A copy of the drafts may, on request, be made available to the user departments of the Commission and EFTA. Each member of CEN/CENELEC may, on receiving information through the second register and a copy of the notification sheets, request the author (if necessary by a standing order for certain fields) to send the full text of the draft open to public inspection.

## 2. EXPLOITATION OF INFORMATION FROM THE PROCEDURE

### a) Use of information at national level

13. The Commission has noted that the extent to which information from the procedure is used varies both within the Community and within EFTA.
14. Although the procedure is generally regarded as a useful tool for promoting industrial activities on the European market, the practical measures taken nationally to make it effective are very uneven.
15. In some Member States the national standards institutions have set up a coordinating unit to circulate information directly to national technical committees, trade associations and industry. In others, however, a survey conducted in 1986 showed that no regular distribution had been organized. The information was generally made available on request or was accessible only on the premises of the standards institution. Some standards institutions said that they published in a journal summary information on the activities of members in other countries.
16. The explanations given the Commission for the delays in setting up coordinating and distribution arrangements are sometimes only partly justified by a lack of the necessary material facilities.



b) Involvement in national activities and requests for the drawing-up of European standards

17. Article 3 of the Directive, which allows standard Institutions to be involved passively or actively (by sending an observer) in the work of other Institutions or to request that a European standard be drawn up, is important to the attainment of the objectives of the Directive. Involvement of one Institution in the work of another is arranged by direct contact between the national Institutions concerned. Requests are notified to the Commission and other participating members by the central unit.
18. A code of conduct for these arrangements is now being discussed within CEN and CENELEC.
19. Annex 1 (table 1) contains statistics on the application of Article 3 of the Directive. It shows that the number of cases notified is very small. However, the Commission has reason to believe that the actual number of requests for involvement is higher than shown. It would appear that such cases are not always notified to CEN/CENELEC.
20. From the information available the Commission considers that potential barriers to trade have been avoided in several cases by such involvement. It also seems that this instrument is used so that the work done in other Member States may serve as a basis for national work.
21. As regards the possibility in Article 3 of requesting that a European standard be drawn up, the Commission finds that since the procedure started, CEN/CENELEC has had only two cases of a national standards Institution proposing, in the light of another Institution's work, that a European standard be drawn up, whereas some 9 000 new national standardization projects (i.e. transposition with differences of international and European work and specific work) were notified over the same period. For both cases, harmonization work has been started in CEN/CENELEC.

22. To sum up, although the Commission cannot yet assess the extent to which the arrangements for involving institutions in other national standardization activities are actually being used, it finds it regrettable that national standards institutions are not taking advantage of the procedure to propose that European standards be drawn up on subjects on which national standardization work is in progress. This means that virtually no use is being made of an important aspect of the information procedure for the technical integration of the Community.

c) Use of the information at European level

23. After consulting the Member State governments, the Commission asked CEN/CENELEC in 1985 to analyse the information from the procedure regularly with a view to planning European standardization work. In the Commission's view it is primarily up to the standards institutions themselves to supply and use the information for the benefit of European standardization and accordingly to draw up the necessary European standards.
24. Since then CEN and CENELEC have set up several planning committees, in particular for electrical engineering, machinery and construction. These committees are responsible for assessing the need for European standards with the aid of all those concerned. The information available from the information procedure can provide major backup for this programming work.
25. Pursuant to Article 6(3) of the Directive the Commission has since 1985 made some 90 standardization requests to CEN/CENELEC involving the preparation of about 115 European standards. Most requests were common to the European Community and the EFTA countries. They relate to the following fields amongst others: information technology (67), electrical engineering, iron and steel, pressure vessels, gas appliances, toys and motor fuels. By 31 December 1987, 19 European standards had been produced in response to these requests, 18 of them an information technology.

26. The standardization requests to CEN/CENELEC are in line with the Community's harmonization policy. Several of them were for European standards required for the practical implementation of Community directives of the "new approach" type<sup>(1)</sup>. In information technology the requests are designed to establish a set of European standards that will guarantee information and data interchange and compatible working of systems with the required degree of precision, bearing in mind the pace of technological advance. The most recent requests will illustrate the contribution that these new technologies are making to the completion of the internal market (terminal specifications, cards required for the new electronic payment systems).
27. The information procedure has provided valuable information for the preparation of requests; in several cases, for example ISDN<sup>(2)</sup> connector and payment cards, it was information from the procedure that sparked off European standardization work.
28. To sum up, it is clear that information available from the procedure is used mainly by CEN/CENELEC for the systematic programming of European standardization work, bearing in mind in particular the priorities for the completion of the internal market. This programming, a logical consequence of the notification of national standards programmes, has through the Directive become an ongoing task for CEN and CENELEC. As a result of this programming, CEN and CENELEC have in several cases - not counting requests made to them by the Community and EFTA - set up new working parties and made a start on European standardization work (especially in fields where there has been a very large number of national notifications, i.e. construction and mechanical engineering).

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(1) See Council resolution of 7 May 1985, OJ No C 136 of 4 June 1985.

(2) ISDN - Integrated Services Digital Network.

29. Because there has been virtually no demand from national standards institutions for the drawing-up of European standards pursuant to Article 3 of the Directive, the momentum for European standardization comes essentially from systematic programming by the European institutions. Consequently the scope of this programming should be greatly increased in view of the practically constant volume of national standardization activities.
30. Since European standardization is now undergoing substantial expansion, it is also obvious that the procedure will increasingly serve to verify observance of the standstill by national standards institutions and to determine whether work should be transferred from national to European level to complement European standardization activities already underway.

d) The role of the Standing Committee

31. The Commission has consulted the Standing Committee on all requests for European standards. The Commission is well satisfied with the very important preparatory work done by SOGITS<sup>(1)</sup> in examining draft requests relating to information technology. This fruitful cooperation is an example that could well be followed for the preparation of requests in other sectors, especially for the "new approach" Directives. The CEN/CENELEC representatives attend the Committee's discussions. In submitting requests to CEN/CENELEC, the Commission takes into account the opinions delivered by the Committee.
32. The Committee is also kept regularly informed of the progress of European standardization work. On several occasions problems encountered during the standardization work were referred to it.
33. The Committee, enlarged to include representatives of all standards institutions, has held four meetings since 1984. It is clear that the "enlarged committee" will need to meet more frequently, given the substantial increase in European standardization activities.

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(1) SOGITS - Senior Officials Group for Information Technology Standardization.

### 3. EVALUATION

#### a) 1986 survey on the efficiency of the procedure

34. In 1986 the Commission, in cooperation with the EFTA Secretariat General, conducted a survey amongst participants in the procedure to evaluate its efficiency and the use that was being made of the information circulated. An examination of the replies sent in by the CEN/CENELEC members showed that there was no need to modify the arrangements in the Directive. There was a need and demand for improvements only in the practical and technical implementation of these arrangements.
35. In the light of these results possible solutions were discussed in the joint working party mentioned earlier. Its proposals were approved by the Commission after a favourable opinion from the 83/189/EEC Committee on 5 February 1987. They may be summarized as follows:
- improvement of data quality by making it compulsory to specify the subject either by a brief description or by key words; also a reminder to participants to follow more strictly the rules concerning the indication of the sector/subsector;
  - less frequent publication of registers (two editions a year for register 1) allowing greater concentration on national work;
  - a study of possible improvements to the procedure through greater use of computer facilities;
  - request to national standards institutions to ensure that the information is circulated widely to interested parties in their own countries;
  - regular circulation to all participants by the CEN/CENELEC central unit of a table showing the various types of participation requested in national work. Failing a bilateral agreement, each participant may submit problems encountered to the Commission or to the EFTA Secretariat General.

b) Evaluation of the procedure in terms of quantity

36. The latest statistics prepared by CEN/CENELEC give a general picture of the new standardization activities notified in 1987 to the CEN/CENELEC central unit from three additional angles:
- the proportion of new national work in relation to new international and European work<sup>(1)</sup>,
  - the breakdown of new national work by country,
  - the breakdown of new national work by subsector (field of activity).

This leads to the following findings (see also Table II in Annex 1).

37. New national work by EEC countries still accounts for the major share (about 75%) of all new work at national, European and international levels. In 1987, 2 724 national projects were registered compared to 289 European ones. On the basis of statements by participating members, only 7 % of the new national projects have links with European or international work. However more methodical notification of such links may give a brighter picture of the situation.
38. A comparison between the electrical and other fields highlights even more strongly the predominance of national activities over harmonization activities. In the other fields about 89% of new projects notified are national. In contrast far more new work is being started at European level in the electrical field.
39. A breakdown of new work by country shows that in the electrical field and in the other fields respectively about 85% and 50% of the new activities are being carried out in three countries (Germany, France and the United Kingdom) (see Table III in Annex 1).
40. A breakdown of notifications shows that about a quarter of the total number of national notifications concerns 10 of 290 subsectors. Those with the highest number of national notifications are, in decreasing order: aerospace, construction, road vehicles and textiles (see Table IV in Annex 1).

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(1) New work means every new standardization activity entered in the current standardization programme.

In all these fields except textiles the CEN has in the meantime made a start on programming and standardization work.

c) Evaluation of the procedure in terms of quality

41. An analysis of the current situation largely confirms the 1986 analysis:

- The arrangements in the Directive meet the objectives set.
- Technical operation in the CEN/CENELEC central unit gives rise to no major problem.
- The improvements needed mainly concern the introduction of facilities to ensure that the information is usable and transparent.
- Data quality still needs to be improved by the providers of data, i.e. the national standards institutions. Precise indication of the subjects involved in planned work is the most important point. Better compliance with the rules adopted in CEN/CENELEC appears necessary (some members still do not define the scope of the title). Consideration should also be given to introducing an indexing system, the extra work entailed being offset by the additional service it will provide. This system could greatly improve the transparency of the data supplied because the subjects would then be specified, also allowing more direct data access.

It is also necessary to ensure at all times that draft standards open to public inspection are notified as quickly as possible in view of the relatively tight deadlines.

- Ideas for improving information dissemination, in particular by electronic means, have emerged in 1987. The Commission has asked the CEN/CENELEC central secretariats to make a market survey so as to promote the use of the information and assess ways of achieving that aim.

This survey, to start in the early months of 1988, covers the dissemination of data from a complementary project concerning published standards, the initial phase of which has been carried out by CEN (ICONE project: comparative index of standards in Europe). The national bodies must also step up their efforts to make the data accessible to all interested parties.

- The Commission attaches great importance to the better utilization of available data. In CEN/CENELEC the programming of European standardization must be extended. Steps have been taken to increase substantially the staff of the CEN/CENELEC central secretariat. The Commission's explicit aim is to enable the CEN/CENELEC central unit to make a more detailed analysis of the data and to strengthen its power of initiative so as to promote European standardization.



## Chapter III - INFORMATION PROCEDURE FOR TECHNICAL REGULATIONS

### 1. OPERATION OF THE PROCEDURE

#### a) The system introduced by the Directive

42. Directive 83/189/EEC lays down a mandatory notification system. Its most original feature is the option it gives every Member State, for the first time ever, to block the draft regulations of other Member States for a given period.
43. Under Article 8 (1) the Member States are obliged to communicate to the Commission (which circulates the information) any draft technical regulation falling within the scope of the Directive. There is only one exception to this absolute rule: communication is not required where Member States honour their obligations arising out of Community Directives or commitments arising out of international agreements (Article 10).
44. The date the Commission receives the notified text is also the start of a three-month period known as the standstill period during which the Member State making the notification loses its right to adopt the draft in question. Within that period there are three possibilities open to the Commission and the other Member States:
  - a) they may take no action, in which case the Member State concerned is entitled to adopt the project once the three-month period expires;
  - b) they may make comments which the Member State that has forwarded the draft is asked to take into account when adopting the technical regulation in question (Article 8 (2));
  - c) they may deliver a detailed opinion that the draft should be amended to rule out potential barriers to trade; in that case the Member State concerned must suspend adoption of the technical regulation for six months from the date the Commission receives the draft (Article 9 (1)).

46. However, a procedure for urgent cases is available to the Member States provided they state the grounds warranting its use (Article 9 (3)).
47. The Commission is the cornerstone of the procedure, providing the material infrastructure and coordinating its operation. It receives and circulates notifications and all the reactions from the Member States. It reproduces and translates documents. It maintains a computerized data base that will soon be open to all the Member States - a pilot experiment with some of them is to start shortly. Because of these tasks the Commission has invested in electronic management and transmission facilities, in particular electronic mail. The corresponding applications are now being developed.
48. The Standing Committee of Member State representatives, an advisory body set up by Article 5 of the Directive, is also vital to the efficiency of the procedure. At the moment it meets twice a quarter.
49. Since the Directive merely specified the broad lines of the procedure, the Committee adopted a "Vade-mecum on the functioning of the procedure for the provision of information"<sup>(1)</sup> setting out the practical arrangements. It lays down all the technical details for the circulation of information since the procedure is a complex one and requires appropriate administrative measures for its implementation to be taken both by the Commission and by the Member States. Accordingly central units have been set up in the Member States and at the Commission to coordinate the procedure, provision is made for translations and, to facilitate communications, a telex nomenclature has been established and the telexes have been standardized.
50. All the Member States have taken the administrative measures necessary for implementing the procedure, informing all the ministries concerned, generally by means of a circular, of their obligations under Directive 83/189/EEC and the coordinating role of the central units they have designated. It has to be recognized, however, that such a role is played with varying effectiveness in different Member States: as a result of omissions or administrative structures and traditions, all draft regulations drawn up by ministries or technical departments are not systematically forwarded to those central units for communication to the Commission under the Directive 83/189/EEC procedure.

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(1) Committee on Standards and Technical Regulations, Doc. 2/84.

The coordinating function of the national central units is therefore not ensured to the same extent in all Member States. While in some of them (France and Portugal), coordination is reinforced by interministerial departments, several other Member States admit that they have not yet solved all the domestic problems posed by running the procedure.

51. The Committee has played an important role in the practical application of some of the Directive's provisions. As far as the assessment of notified projects is concerned, the Committee provides a forum for more detailed discussions between the Commission and the Member States, especially on politically sensitive or technically complex matters. Some 30 notified drafts have been examined by the Committee, some of them at several meetings. For such questions the Committee is generally the best place to obtain a consensus. It also gives the Member States an opportunity to bring up unnotified national measures, thereby drawing the Commission's attention to possible infringements.
52. The Commission sees the recent increase in requests from Member States to put notifications on the Committee's agenda as a welcome indication that the dialogue is having the expected effect. Its regular practice now is to put on the agenda notifications on which several detailed opinions have been received.

b) Problems found and solutions proposed

53. The inherent complexity of a procedure for the circulation of information between 12 Member States and the Commission, which in addition deals with technical matters, will inevitably cause operating problems. The main ones that have emerged are as follows:
- (1) Translations
54. The Directive does not put any obligation on the Commission to provide translations since the procedure concerns national drafts. Nevertheless the Commission is aware of the importance of ensuring mutual understanding of the documents exchanged if the procedure is to be fully effective.
55. Despite the lack of any legal obligation, then, it translates all the messages exchanged during the processing of each file either into all the languages (information on the notification) or into some of them, always including the language of the Member State making the notification. As far as the texts of the drafts are concerned, it was agreed in the Vade-mecum that the Commission would obtain the translations it needs for its own requirements and make them available to the Member States.

56. That last point gave rise to problems during the last year covered by this report. On the one hand, because of the increase in the number and volume of notifications, the Commission's translation services have since the autumn of 1986 been unable to provide translations of the drafts quickly enough. On the other hand, during discussions on the proposal to extend the scope of the Directive some Member States said that they needed to receive the drafts translated into their own languages.
57. The Commission believes that every effort should be made to ensure that the notified drafts can be examined as quickly as possible and under conditions guaranteeing that they are properly understood. It is continuing to study ways of extending the range of translations and obtaining them more quickly. A call for tenders to the private sector will be made early in 1988. The Commission will report to the Standing Committee before 30 June 1988 on existing possibilities and the financial implications of any choices.

(ii) Deadlines

58. It has proved difficult to adhere to the deadlines laid down in the Directive. Experience has shown that the reactions of the Commission and of the Member States to notified drafts are generally received right at the end of the three-month period laid down in the Directive so there is not sufficient time for one to influence the other.
59. There are several reasons for this difficulty. It is certainly partly due to the absence or late receipt of translations, which reduces the time available to analyse the texts. Also both the Commission and the Member States need to consult experts when examining technical regulations. It is difficult to obtain these expert opinions rapidly in view of the specific nature, complexity and often length of the draft.
60. Another frequent reason for delays in examining drafts is the lack of the information necessary for their assessment. The notified texts are sometimes worded in such a way that it is not possible to assess their impact on the internal market because essential data are missing. More particularly, a proper analysis of the information received is difficult because the basic texts amended or supplemented by the notified draft are not provided.

61. Experience gained to date shows that the Member States rarely send in such texts and when they do it is only after a specific request by the Commission. The time that elapses between the Commission's request and the Member State's response shortens the period available for detailed examination of the text.
62. The Commission considers that it should be mandatory to send in basic texts whenever they are necessary to the understanding of the notified texts. It welcomed a Parliamentary amendment on those lines during discussions on extending the scope of the Directive.
63. Other delays are due to the failure of the Member State to observe the procedural rules in the Committee despite numerous reminders from the Commission. Incorrect addresses and failure to adhere to the telex layout are the most frequent examples, compounded occasionally by the poor quality of certain communications (illegible texts, etc.).
64. Generally speaking, in view of the time required for translation and transmission, the Commission considers that it might be advisable to extend both the automatic standstill and the standstill following the delivery of a detailed opinion by one month to four and seven months respectively. This would leave the necessary time for a detailed examination of the notified draft.

### (III) Confidentiality

65. Directive 83/189/EEC specifies that information supplied in notifying draft technical regulations must be confidential (Article 8 (4)) but also allows experts in the private sector to be consulted provided that the necessary precautions are taken.
66. This may limit access to the information by the business circles concerned and thereby prevent them from cooperating efficiently with their national administrations. And yet in at least one Member State the draft text is available electronically to the circles concerned while another circulates summary information on the notifications in a publication by a standards institution.

67. Despite assurances by national authorities that the obligation in the Community Directive is being complied with, questions arise about the limits on the disclosure of information during such consultations and on the extent of confidentiality.
68. The Commission considers that confidentiality should perhaps be sacrificed to some degree in favour of transparency of the notified texts, in particular so as to enable the widest possible range of expert opinions to be obtained from the circles concerned. One solution might be to replace the existing automatic confidentiality by confidential treatment of individual cases at the request of a Member State. A large number of delegations in the Standing Committee endorsed that suggestion by the Commission.

## 2. APPLICATION OF THE PROCEDURE

### a) Notifications from the Member States

#### 1) Number of notifications and breakdown by Member State

69. From April 1984 to 31 December 1987 the Commission received a total of 458 notifications of draft technical regulations, very unevenly divided amongst the Member States (see Table 1 in Annex 2).
70. More than half the total number came from two Member States, the Federal Republic of Germany (37,11%) and France (19,86%). Denmark and the United Kingdom accounted for 11,57% and 9,55% respectively but Italy, Belgium and Greece have made very few notifications so far and Luxembourg none. Of the two newest Member States, Spain after two years accounted for 6,76% of the notifications and its share is increasing, while Portugal has notified only four drafts in all.
71. To see how well the Member States are complying with the Directive, however, it is necessary to take into account:
- the timing of the notifications, i.e. changes in their number during the first years the Directive was in operation;

- legislative practice in the Member States and in particular the number of technical regulations produced;
- administrative traditions in the Member States, differing views of the position and role of the public authorities in a market economy and the relative political importance of environmental protection and consumer protection, which are all factors substantially affecting the number of notifications, whatever the degree of industrialization of the Member State;
- the economic and industrial context in each Member State and in particular the level of industrial production.

72. The annual figures show that in some Member States (Germany, Denmark, Spain) the number of notifications has increased each year. However, in other Member States such as the Netherlands, United Kingdom or Italy the rate has stayed the same over the years although the level varies from one country to another.

73. Regardless of the various factors to be taken into account for the analysis, it is nevertheless clear that in some Member States the number of notifications and degree of compliance with the obligations in the Directive are inadequate. The explanations given by certain Member States, mainly alleging internal administrative difficulties in setting up the system or asserting the role of the central units, are no longer relevant since the start-up stage of the procedure is long since over.

#### II) Breakdown of notifications by sector

74. Table 2 in Annex 2 shows that 22,7% of the draft technical regulations notified to the Commission since 1984 concern the mechanical engineering sector, 17% transport, 9.2% domestic appliances, 9% telecommunications and 8.5% chemical products. There are very few notifications concerning medical or electronic equipment and metal materials.

75. That is the overall picture but the sectoral breakdown varies from one Member State to another. Some Member States are also remiss in certain sectors, appearing to issue no regulations at all in fields in which others are extremely active. It is surprising, for example, that Italy and the United Kingdom have notified no draft technical regulations in the mechanical engineering sector, which accounts for approximately 23% of all notifications.
76. The analysis also shows that there is a general trend towards an increase in notifications concerning new technology and mechanical engineering, the latter being a sector in which regulatory activity has picked up after a slight decline in 1985. The pace of notifications concerning transport, including motor vehicles, is declining although it still comes in second place.

III) Use of the procedure for urgent adoption

77. The option open to the Member States to claim urgent grounds so as to adopt regulations before consultation is necessary to counteract any adverse effects that the standstill might have for them in exceptional circumstances.
78. The Directive stipulates quite unambiguously in Article 9 (3) that the Member State must state the grounds warranting urgent adoption and is not dispensed from communicating the text.
79. The Commission has found that all too often these two rules are not observed. The statement of grounds is too brief, not to say sketchy, and the texts are rarely sent in. Procedural provisions were therefore agreed by the Standing Committee in 1987 according to which the grounds warranting urgent adoption must be explained at length and the texts sent into the Commission within seven days following the notification telex claiming the need for urgent action.
80. It is up to the Commission and the Commission alone to assess whether urgent adoption is justified under the provisions of the Directive. It bases its assessment on the objective facts put forward by the Member State to justify an imminent, serious and unforeseeable risk to safety, health or the environment.



81. As regards the number of cases in which the need for urgent action is claimed, the Commission finds that in general moderate use is made of the option: only 6% of all notifications. There was nevertheless a trend towards an increase in 1986 and 1987 when the need for urgency was claimed 19 times out of a total of 28 cases from 1984 to 1987. The Commission has gradually become more strict and particular in assessing the reasons for urgency. Overall it has accepted the claim in half of the cases but that figure falls to one quarter for 1986 and 1987.
82. An analysis of the breakdown by Member State shows that about one third of all claims for urgency come from Italy, representing more than half of the total notifications from that country.
83. The Commission is sorry to say that all too often it finds that national texts have been adopted even before the need for urgency is claimed under the procedure. It is forced to conclude that such claims are often only attempts to justify retrospectively infringements to the Directive. It is now determined to take proceedings systematically against these infringements.

b) Reactions by Member States to notified draft technical regulations

1) Types of reaction\*

- Comments (Article 8(2))

84. The Member States often make comments on notified drafts, attempting in this way to have an indirect influence on regulations in other Member States. Recently, however, comments by Member States have been declining and detailed opinions increasing. Out of a total of 87 comments by Member States, 40 were made in 1986 and 24 in 1987.

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\* the figures given in this and following sections go up to 10 November 1987. They do not include files under examination at that date nor cases received since.

- Detailed opinions (Article 9 (1))

85. The Member States are making increasing use of the possibility of blocking the regulatory process in other Member States. A study of the incidence of their reactions over the years shows that there has been a steady increase in the number of detailed opinions. Of 126 detailed opinions, 36 were submitted in 1986 and 53 in 1987.
86. The Commission regards this increase in the number of detailed opinions, both in absolute terms and in proportion to comments, as a welcome sign of the integrating effect of the procedure. The gradual trend in Member States towards the most typically Community instrument at the expense of comments, which tend to be more of an inter-state character, show that as the information procedure develops there is a greater perception of its purpose and value.
87. The Commission cannot judge the substance of the detailed opinions issued by the Member States. It does not analyse them in detail to assess their nature under the procedure. In other words it is not up to the Commission to evaluate the grounds for complaint before bringing into effect the standstill procedure which in this case is used solely on the initiative of the Member States. Nevertheless the Commission takes the view that by definition a detailed opinion has to be precisely argued and cannot just be confined to a brief indication that the draft under review may create barriers.
88. The problems mentioned earlier with regard to deadlines mean that in practice the detailed opinion generally reaches the Commission on the last day of the three-month period. Since the Member State to which they are addressed may in theory adopt the regulation the next day, it was agreed in the Committee that Commission staff would inform the central unit of the Member State concerned by telephone before sending on the telex.

ii) Analysis by sector

89. An analysis shows that the largest number of reactions from the Member States are received in response to drafts concerning motor vehicles, telecommunications and chemical substances regarded as dangerous.

90. These are either competitive sectors in which the stakes involved are high or fields relevant to the environment, which is a sensitive issue within the Community and more particularly in the political context of certain Member States. It is worth noting that national regulations on mechanical engineering, which account for the majority of the notified drafts, do not appear to arouse criticism from the Member States.

c) The Commission's reaction to notified draft technical regulations

91. The Commission has used the instruments available under the procedure (comments, detailed opinions, announcement of a Directive) in respect of about half of the notifications. It has issued a detailed opinion in about a quarter of the cases.

1) Comments (Article 8 (2))

92. The possibility of making comments without extending the standstill beyond the initial time limit has been used 62 times. This flexible instrument allows the Commission to suggest legal solutions in keeping with Community objectives and to point out the lines of its policy on the various sectors which should influence the implementation of national measures.
93. Comments may also consist of a request for further details on the notified provisions, their meaning, their scope, or the conditions and arrangements for bringing them into force. They may also draw the attention of a Member State to a provision which, although in itself in conformity with Community law, may have several possible applications or interpretations, some of which would be incompatible with the requirements for the free movement of goods, and explain the interpretation the Commission puts on it.
94. The Commission also makes comments when it wishes to remind a Member State of the obligation to send it the implementing texts of the notified draft.

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\* See comment on page 30.

95. Finally the Commission may also include in its communication to a Member State on the results of its examination of a notified draft the information that it plans to make a standardization request to a European Institution concerning certain characteristics of the products covered by the draft.

II) Detailed opinion (Article 9 (1))

96. The Commission has made use of the detailed opinion on national draft technical regulations for about a quarter of the notifications made to it without any great variation from one year to another. 30% of the detailed opinions referred to drafts in the field of mechanical engineering, 17% building and construction and 12% transport and motor vehicles.
97. The Commission has frequently had the occasion to restate in its detailed opinions a number of principles that must be observed to guarantee the free movement of goods in the Community<sup>(1)</sup>.
98. From the constant number of detailed opinions over the years and their often repetitive content the Commission concludes that the concept of "Community dimension" has not yet sufficiently penetrated national administrations. To give these administrations a full picture of all the Community principles to be taken into account in preparing a draft, the Commission intends to publish a guide in the near future.

III) Intention of proposing a directive (Article 9 (2))

99. The drafts notified by the Member States may cover a field in which the Commission has already stated in a programme its intention to start work. They may also draw the Commission's attention to the need to make a rapid start on work that it had not originally planned. In such cases the twelve-month standstill gives the Member State an opportunity to adopt its draft to the Community text and avoid adopting a unilateral solution. However, this option must be used with discretion.

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(1) See Section 3 below for the principles most frequently brought to the attention of the Member States.

100. On the one hand, the purpose of the information procedure is precisely to avoid the need for formal Community harmonization by reducing disparities in national legislation, thus leading to de facto harmonization. On the other hand, the Commission must be sure that it can put forward a proposal within the standstill period imposed on the Member States.
101. The Commission has announced a Community Directive in response to only 33 of the 458 notifications, corresponding to 17 Community Directives to be adopted since the announcement of one and the same Directive may apply to several drafts<sup>(1)</sup>
102. The sectors concerned have been mainly motor vehicles, radio and television and, more recently, machinery. In six cases the Commission was unable to adopt the Directives it had announced within the standstill period imposed on the Member State. In two cases it was eventually unable to carry out its intention of proposing a Directive.

IV) "Announcement of work" letter

103. The Commission uses this method, for which there is no specific provision in the procedure, when a notified draft follows similar lines to work that it has already started but it has no precise idea when that work is likely to be completed.
104. Since in such cases the Commission does not want unnecessarily to force a Member State to shelve for a year work on the same lines as its own, it informs the Member State of its own work so as to avoid possible discrepancies.
105. From the procedural viewpoint it was agreed in the Committee that copies of these letters from the Commission to a Member State would be circulated to all the other states.

v) Examination of previous legislation in a sector

106. One important consequence of the examination of notified drafts is that sometimes the Commission needs to study texts adopted earlier on which the drafts notified to it are based. During its study of the legislative system of a Member State applicable to the sector covered by new regulations, the Commission sometimes detects infringements to Community Law, in which case it may initiate in respect of the texts already adopted the infringement procedure laid down in Article 169 of the EEC Treaty.

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(1) See Table 3 in Annex 2.

### 3. LEGAL ANALYSIS

#### a) Examination of the notified drafts in the light of Articles 30 and seq. of the EEC Treaty

107. Examination of the detailed opinions issued by the Commission and by the Member States reveal a number of commonly raised objections to notified draft regulations. There follows a review of these objections and their legal bases.
108. 1. Many regulations make the importation or marketing of products subject to compliance exclusively with national standards or technical specifications or as an exception allow the possibility of following the specifications in force in other Member States.
109. According to the settled case law of the Court of Justice<sup>(1)</sup> a Member State planning to regulate conditions for the production, sale and use of certain products may not base its regulations exclusively on the situation prevailing on its own market, disregarding production and marketing conditions in other Member States.
110. The Court of Justice specifically reiterated that requirement in the judgment "Failure of a State to fulfill its obligations - type approval for woodworking machines"<sup>(2)</sup>, and on the basis of the principle of proportionality stated that (a Member State) is not entitled to prevent the marketing of a product originating in another Member State which provides a level of protection of the health and life of humans equivalent to that which the national rules are intended to ensure or establish. In this context the Commission has condemned the requirement that the importer must provide proof that manufacturing and inspection methods followed are equivalent to those in force in the importing country. According to the settled case law of the Court of Justice national authorities are free to require the importer to produce any data in his possession useful for an assessment of the facts insofar as they do not already have this information themselves.

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(1) Judgement of the Court of Justice of the European Communities of 20 February 1979, case 120/78 "Cassis de Dijon", ECR 1979, p.649 ff.

(2) Judgment of 28 February 1986, case 188/84, ground 16.

111. However, it is for these authorities to demonstrate that their rules are necessary to give effective protection to interests that are legitimate under Community law and in particular to show that the marketing of the products in question creates a serious risk to public health<sup>(1)</sup>.
112. 2. The principle of proportionality, already mentioned above, has also been used by the Commission as an argument against regulations that are not actually necessary to attain the objective pursued. This is the argument used by the Commission in criticizing drafts prohibiting absolutely the use of certain substances for certain applications, where it would have been possible to lay down maximum levels of use, to define the applications concerned more precisely or to specify performance criteria to be met by the products while leaving it to manufacturers to select the materials used.
113. 3. The Commission asks Member States to incorporate in draft regulations principles involved by the Court of Justice.
114. In many such cases it considers that the lack of conflicting provisions in the regulations is not enough and demands the incorporation of those principles for the information of businessmen. Pursuant to the abovementioned principle of proportionality the Commission emphasises<sup>(2)</sup> the need, in cases where marketing authorizations are required, to make available to businessmen all the necessary information to enable them to follow a procedure which is easily accessible to them and against which they have the right to apply to the courts.

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(1) See in particular the Sandoz judgment of 14 July 1983, case 174/82, ECR page 2445, the Van Bennekom judgment of 30 November 1983, case 227/82, ECR page 3883 and the "Beer Purity Law" judgment, case 178/84 of 12 March 1987.

(2) "Beer Purity Law" judgment, as above, grounds 45 and 46.

115. 4. One of the principles which the Commission has frequently demanded be incorporated in notified drafts is the non-repetition of tests already carried out in another Member State<sup>(1)</sup>.
116. The Commission invariably invokes these principles in respect of texts stipulating that the manufacture of products marketed on national territory must be inspected in the factory by bodies of the Member State in question or that the products have to undergo tests that must be carried out by laboratories situated in that Member State. The same applies when a draft refers to checks or tests to be carried out on the products concerned prior to marketing but does not state who should carry out those tests. Where the text says nothing on that point the Commission always requests incorporation of the principle of accepting the results of checks and tests carried out by bodies and laboratories in other Member States offering suitable and satisfactory guarantees of technical and professional competence and independence.
117. 5. In examining the provisions of notified drafts dealing with tests to be carried out on products, the Commission has sometimes had reason to emphasize the need to treat imported products in the same way as national products. For example, a national regulation stipulating that appliances manufactured under the surveillance by a third party of the methods and facilities used by the manufacturer are exempt from subsequent inspection at the place of installation must also be applicable to products manufactured in another Member State in which the manufacturer has the methods and facilities he uses inspected by a third party on the basis of surveillance methods and criteria equivalent to those applied in the Member State.
118. 6. The Commission has applied all the above principles in examining drafts instituting mandatory certification procedures. The Commission has had to emphasize the fact that these procedures must be essential to the attainment of a legitimate objective and that in any case their sole purpose cannot be to verify compliance with national technical specifications when the objective pursued can be equally well be obtained by compliance with other specifications.

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(1) "Biologische producten" judgment of 17 December 1981, case 272/80, ECR 1981, page 3277, "Meikunle" judgment of 6 June 1984, case 97/83, ECR page 2367 and "Type approval for woodworking machines", previously cited, ground 33.



119. 7. One of the objections frequently made by the Commission in its detailed opinions concerns the requirement for a manufacturer's representative to be established on national territory which appears in many draft regulations<sup>(1)</sup>. In some cases this is one of the conditions to be fulfilled by anyone requesting type approval (which has to be applied for by the manufacturer or his representative established on national territory). In other cases the marketing of a product is subject to compliance with that requirement.

120. 8. As already mentioned, the Commission always sees to it that adequate information for businessmen is guaranteed.

It has therefore objected to drafts which require them to hold an authorization or type approval without specifying the conditions to be met and procedures to be followed. It has also attacked drafts which require the product in question to undergo checks without specifying the results to be obtained or, alternatively, which lay down criteria to be met by products without stating what method is to be used to verify that they do so.

121. 9. The Commission's attention has also been drawn to labelling requirements incompatible with Articles 30 et seq. of the EEC Treaty. This is the case of provisions requiring the label to give information going beyond what is necessary to ensure that the consumer is adequately informed or making it mandatory to satisfy precise labelling requirements contained in national standards without authorizing the marketing of products labelled in another Member State and bearing a label of equivalent information content and scope for the purposes of the objective pursued.

122. Provisions requiring products to be labelled or marked in the national language before the stage at which they are made available to the ultimate consumer are also contrary to Articles 30 et seq. of the EEC Treaty. What counts is that the product be labelled or marked in the national language when it is displayed in a place open to the public. The Commission considers that any other requirement concerning the use of the national language is excessive and disproportionate in relation to the aim of consumer protection.

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(1) Judgment of 2 March 1983, Commission v Belgium, Case 155/82, ECR 1983, p. 531, Judgment of 28 February 1984, Commission v Germany, Case 247/81, ECR 1984, p. 1111.

123. 10 In some cases detailed opinions have pointed out that the notified draft is incompatible with a Community Directive. For example the Commission has several times attacked violations of Directives concerning motor vehicles and Directive 73/23/EEC of 19 February 1973 on the harmonization of the laws of the Member States relating to electrical equipment designed for use within certain voltage limits.
124. Although not exhaustive, the above list gives an idea of the action taken by the Commission and by the Member States to remove barriers to trade that might result from notified provisions. Admittedly, other barriers might arise during the implementation of the adopted text but this advance scrutiny does provide an initial screening. In its detailed opinions the Commission makes a point of suggesting to Member States ways of rendering the notified drafts compatible with Community law.
125. The Commission also emphasizes that the transparency obtained by sending the notified draft to all the Member States should enable them to react to the texts and to cooperate with the Commission in removing unjustified barriers to trade. As these texts are often extremely technical the Commission is not always in a position to identify difficulties that they might cause to industry. Here in particular the Member States have an extremely important role to play since they are entitled to make objections to notified drafts.
- b) Treating the detailed opinion as the letter of formal notice provided for in Article 169 of the EEC Treaty.
126. Delivery of a detailed opinion obliges the state that is the author of the draft to postpone its adoption for six months from the date of the notification. This standstill affords a negotiating period allowing the Member State concerned to send comments to the Commission so as to convince it that the draft is justified or to amend the draft in accordance with the requirements set out in the detailed opinion.

127. The question arose as to what attitude the Commission would take if, despite its pointing out that a draft technical regulation was incompatible with Community law, the Member State nevertheless adopted the draft in question without amending it and without convincing the Commission of its arguments.
128. The Commission considered that it was entitled, once the draft was adopted, to deliver the reasoned opinion provided for in Article 169 of the EEC Treaty<sup>(1)</sup>. The repetition in a letter of formal notice of the objections already set out in a detailed opinion would be a pointless waste of time as the author of the project has already been informed of them. It would lead to a three-stage precontentious period where the Treaty itself only requires two stages.
129. This proposition that the detailed opinion should be treated as a letter of formal notice has not yet been confirmed by the Court of Justice and despite the many arguments in its favour it has been challenged by the French and German authorities. The Commission nevertheless applies it consistently and in every detailed opinion reminds the Member States of the scope it attributes to that opinion.

#### 4 MONITORING THE APPLICATION OF THE DIRECTIVE

130. The Commission feels that quite obviously the number of draft technical regulations notified by some Member States is not representative of their regulatory activity. And yet the Directive puts clear and unequivocal obligations on them: they must notify all draft technical regulations and must observe the standstill periods. It is clear that the failure by Member States to respect these obligations would lead to the creation of serious gaps in the internal market, with potentially damaging trade effects.
131. In view of the importance of this consequence for Community policy and bearing in mind the interests of businessmen, the Commission adopted in 1986 and published in the Official Journal of the European Communities a communication expressing its view that a technical regulation adopted by a Member State in breach of the obligations of the Directive is unenforceable against third parties in the legal system of the Member State in question. It considers that litigants have a right to expect national courts to refuse to enforce such regulations<sup>(2)</sup>.

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(1) See legal analysis in Annex 3.

(2) Commission communication concerning the non-respect of certain provisions of Council Directive 83/189/EEC, attached as Annex 4 to this report.

132. The Commission has done its utmost to detect cases in which a national technical regulation has been adopted in breach of the obligations of the Directive or without taking its detailed opinion into account. It has already initiated infringement proceedings pursuant to Article 169 of the Treaty against most of the Member States.
133. It is nevertheless a fact that the Commission surveillance of the application of the Directive has proved inadequate during the period under review in this report and that its results are imperceptible. In 1986 the Commission started infringement proceedings against seven Member States for a total of 76 cases of national texts that had not been notified in advance pursuant to the Directive. Nevertheless, proceedings under Article 169 of the Treaty were initiated in only about ten cases before 1987.
134. There are several different reasons for this state of affairs. First, the Commission took the view that during the period in which administrative coordination procedures were being introduced and implemented at national level, it would be desirable to take action only against the most blatant infringements that involved both failure to notify and other breaches of Community law.
135. It was also decided, in the spirit of the Directive, to give the prevention of new barriers to the free movement of goods priority over action against failures to comply with the Directive; that is, the processing of notified drafts was put before action against infringements.
136. The volume of work involved in a systematic search for infringements of the Directive is considerable as the official gazettes of the Member States have to be analysed in detail. A full search is complicated by the fact that some Member States have no official gazette or publish technical regulations only in specialized bulletins so that it is very difficult to obtain a comprehensive view. Finally, in some Member States with a decentralized system of government (e.g. the Federal Republic of Germany) some technical regulations may be published not at national level but at regional level.

137. This state of affairs could lead to a discriminatory and unfair situation if it turned out that proceedings were taken only against Member States whose system of official publications made monitoring easier, especially since these are also the Member States that send in more notifications than others. In 1987 the Commission nevertheless continued to make up files on the cases it detected.
138. The Commission is fully aware that systematic, efficient and complete monitoring of the application of the Directive is essential, especially now that its scope is about to be extended. Consequently, in addition to the internal administrative arrangements made in 1987, the Commission will from the beginning of 1988 take the necessary measures to ensure the most comprehensive monitoring possible. It plans to conclude contracts with agencies in each Member State for scrutiny of the technical regulations published in that country. It also intends to take action systematically against Member States who fail to notify many of their drafts. It should be made clear in this context that the bringing of proceedings before the Court of Justice does not in any way invalidate the Commission's argument that unnotified regulations are unenforceable against third parties.

## 5. MONITORING OF MEMBER STATE ACTION IN RESPONSE TO COMMENTS AND DETAILED OPINIONS

139. When the Commission and/or in some cases the Member States make objections to a notified draft, there are several bodies which may discuss the draft. The Commission calls on them depending on the complexity of the case or the way it develops and whether or not the Member State in question complies rapidly with the principles of Community law. It regularly monitors the follow-up to the detailed opinions it issues and will keep Member States better informed on this point by regularly reporting to the Standing Committee.
140. The Commission also wishes to draw the attention of the Member States to the fact that they themselves have a part to play in this monitoring. Their role should not be limited merely to delivering comments or detailed opinions but through the Commission should extend to asking the other Member States how far their comments have been taken into consideration.
141. There follows not an appraisal, which would be difficult, but a review of various methods of verifying the action taken in all cases of notification.
- a) Correspondence subsequent to the delivery of comments and/or detailed opinions.
142. After receiving comments and/or a detailed opinion the Member State issuing a draft sometimes writes to the Commission, in the same way as it would reply to a letter of formal notice, in an attempt to justify its draft or alternatively to give an undertaking to amend it on the lines suggested by the Commission or possibly by other Member States.
- The Commission always circulates that reply to all the other Member States.
143. The Commission considers that if the Directive is to be useful and to have the required transparency Member States must always reply to observations made to them, especially when in the form of a detailed opinion. It has found that this is not yet often enough the case. On 31 December 1987 the Commission found that of 151 detailed opinions and 163 comments (Commission and Member States), the Member States in question had replied only in 119 cases. What is more, these concerned almost exclusively detailed opinions from the Commission. There are very few replies to detailed opinions by the Member States and virtually no replies are ever made to comments.

144. To ensure tighter monitoring of the follow-up, the Commission now regularly enters this item on the agenda for meetings of the Standing Committee.
145. In some cases, too, the Member State sends the Commission a new version of the text for its approval.
146. This correspondence prior to adoption is extremely useful: in some cases it may induce the Commission to revise the view it expressed in the detailed opinion and close the procedure. In other cases the Commission is able to ascertain prior to adoption of the text whether the Member State intends to comply with its requests or those of other Member States. The sending of an amended version to the Commission gives it an opportunity to carry out a final examination before the text is adopted and possibly to suggest a few further amendments; the purpose of this cooperation is to ensure that the texts for adoption give due consideration to the objections made to the notified drafts. In addition, when the Member State fails to fulfill its obligations in full or in part, this informal exchange of information enables the Commission to continue the procedure by sending a reasoned opinion as soon as the text is adopted.
147. The Commission would like to see an increase in these exchanges of information which help towards the adoption of texts compatible with Community law and where necessary speed up infringement proceedings.

b) Discussion of a draft in the Standing Committee

148. At the request of the Commission or national delegations, a number of drafts on which the Commission or Member States delivered detailed opinions have been discussed at meetings of the Committee on Standards and Technical Regulations.
149. In several cases when the text had not yet been adopted, the delegation of the Member State that issued the draft undertook, following the discussions, to bear in mind the comments made at the meeting. Some delegations also undertook to suspend application of the planned measures pending the progress of work within the Council or in the European standards institutions.

150. The discussions also gave national delegations an opportunity to express their desire for harmonization in the sector covered by certain notified drafts.
151. The Commission has sometimes entered on the Committee's agenda draft technical regulations on which detailed opinions have been delivered by the Member States but not by it. The discussions give the Commission a chance to weigh up the arguments put forward by the Member States and the position adopted by the State issuing the draft so as to decide whether it should initiate infringement proceedings pursuant to Article 169 of the EEC Treaty against the text in question once it is adopted.
152. As already stated, the Commission now enters as a matter of course on the Standing Committee's agenda drafts on which several detailed opinions have been delivered. It also welcomes the recent increase in requests from the Member States for drafts to be entered on the agenda.

c) Bilateral discussions

153. Meetings between representatives of the Commission and of the Member State issuing a draft were in some cases organized before expiry of the three-month period for examination of the notified drafts so as to give the Commission all the data needed to evaluate the texts and to decide on what action to take. These meetings also sometimes avoided the need to deliver a detailed opinion where the state issuing a draft agreed to amend it on the lines requested by the Commission. In some instances such meetings followed questions on the notified draft sent by Commission staff to the Member State issuing it.
154. Bilateral meetings were also organized with national authorities after the delivery of detailed opinions so as to examine with the authorities of the Member State that issued the draft the amendments to be made to it to bring it into line with Community law.
155. In the course of its examination of files concerning Articles 30 et seq. of the EEC Treaty, Commission staff also regularly organize "package" meetings with national authorities for discussions on a number of cases of complaints, infringements and notified projects.



156. These discussions provide Commission staff with information on the progress of national procedures and the attitude of the Member State concerned: Is it planning to amend its draft, has the text been adopted and if so in what version, will it be supplemented or clarified by other texts, etc. It also gives national authorities an opportunity to ask Commission staff for information and report on difficulties they are encountering.
157. Meetings have been organized with the Italian, Spanish and French authorities and have given good results.

d) Scrutiny of texts after adoption

158. Article 8 (3) of Directive 83/189/EEC states that "at the express request of a Member State or the Commission, Member States shall communicate to them, without delay, the definitive text of a technical regulation". The Commission sent this request to all the Member States when Directive 83/189/EEC first became operative and repeats it in every detailed opinion. The wording it uses is broader and indicates that the Member States should reply in writing to the Commission's detailed opinions.
159. The Commission finds that in general the Member States take little notice of this request. Admittedly in some cases this may be due to the fairly long period that may elapse before the text is adopted nationally so that the Commission's request is forgotten after a few months. Nevertheless it should be possible to overcome this problem if registers are properly kept in the central units.
160. The Commission emphasizes how important it is for the proper operation of the information procedure that the Member States send in adopted texts. There is no point in checking drafts if the Commission is not in a position later to verify that their author has acted on the objections made. The Commission therefore considers that the obligation in Article 8 (3) of the Directive should be reinforced so that all adopted technical regulations are communicated to it. This would make it easier to monitor the response to comments and obligations and to promote the long-term development of a complete database on technical regulations in the Community on the pattern of what is already done for standards.

## Chapter IV - CONCLUSIONS

161. The Commission believes that Directive 83/189/EEC has already proved its value as a means of producing transparency in respect of national standards and technical regulations. More can and should be done, however, to increase this transparency and to give a fuller opportunity for intervention by interested parties before the creation of obstacles to Intra-Community trade.
162. The Commission has therefore drawn up a number of proposals for action in order to improve the efficiency of the Directive. Some of these proposals have already been approved by the Standing Committee and will soon come into effect. Others may require amendments to the Directive itself; since Directive 83/189/EEC has only just been amended, the Commission will take these up again when the time is ripe.

### 1) Standards.

163. The prevention of a proliferation of divergent national standards is essential if the Community is to achieve a truly integrated market by 1992. The efforts already made by national standards organizations and the CEN/CENELEC central unit in order to operate the procedure have to be acknowledged. Nevertheless, the information procedure on national standards activity is not implemented fully in all parts of the Community and does not provide information in an easily-accessible form to all interested parties. Despite the cost of the material and human resources already involved in running the procedure, it is essential that considerable further efforts be made, at all the relevant levels, to promote and speed up standardization at European level. Users of the procedure should be able to obtain a complete picture not only of ongoing standardization activities but also of already-published standards. Inclusion of data on published standards would further enhance the value of the procedure.

164. The Commission would therefore propose to take action under the following headings :

a) Improvement of the information procedure itself

165. This may be achieved by :

- More complete notifications by national standards organizations.

The Commission and Member States must impress on national standards organizations the importance of giving full, precise and timely information to CEN/CENELEC, using whatever means of influence they have in order to achieve this.

- Wider access to information.

In collaboration with CEN/CENELEC a market study will be commissioned shortly on the possibilities of enhanced access to and use of the information available. This study will examine how interest in standards information could be stimulated, how the information could be refined to meet the needs and how electronic means of distribution could contribute to these aims.

The Commission will also study means which may be available for assisting certain regions of the Community in making this data more accessible.

- The inclusion of published standards.

Negotiations have recently been opened with CEN/CENELEC in order to set up the framework for an integrated information system on draft and published standards in Europe by the end of 1988. Work that has been initiated in the framework of the SPRINT programme (the ICONE projet phase I) will be integrated within the information procedure so that it will cover existing standards. A working group has been set up to study the problems in setting up the integrated system.

b) More effective exploitation of information for the benefit of European Standardization.

166. The main responsibility for exploitation of the notification system for standards falls on CEN/CENELEC. As part of its general policy aimed at reinforcing these organizations, the Commission considers it necessary to strengthen the role of the CEN/CENELEC central unit. In order to improve the use made of the information available under the information procedure, appropriate measures will be prepared between the Commission and CEN/CENELEC in order to ensure that notifications can be more effectively scrutinized by the CEN/CENELEC central unit and that the latter initiates the necessary standardization work at European level.

II) Technical Regulations

167. The information procedure for technical regulations may be improved by some practical adaptations to the procedure itself and by measures to reinforce Commission action to monitor non-compliance with their obligations by Member States.

a) Practical adaptations

168. The Commission has come to the conclusion that improvements could be sought to facilitate the examination of notifications and increase the transparency of the regulations adopted.
- Translation of the drafts into their own language is in the eyes of the Member States vital to transparency and an essential condition for efficient examination of the texts. The Commission, which has already made significant efforts in this direction despite having no legal obligation to do so, has taken the initiative of studying possible ways of having drafts translated rapidly into all official Community languages. It will put the possible options and relevant costs before the Standing Committee for Directive 83/189 by the end of June 1988.
  - After consulting the Standing Committee, the Commission has decided to send a letter to all the Member States requesting them, pursuant to Article 8 paragraph 3 of the Directive, to send it systematically as from 1 July 1988 the definitive text of all notified drafts.
  - In order to bring draft national technical regulations to the notice of European industry, the Commission intends to publish a list of notifications received in the Official Journal of the European Communities.

- The Commission will examine the possibility of setting up a database on the texts of technical regulations notified under the Directive.
- The Commission has also thought of other measures, which it has already put before the Standing Committee, intended to improve the conditions under which the notified drafts are examined. To ensure that all parties have three full months for that examination, the period allowed for comments or detailed opinions (Article 9 paragraph 1) could be extended from three to four months. Similarly, to facilitate the search for common solutions, the confidentiality clause in Article 8 paragraph 4 could be amended so as to be effective only by the Member State making the notification.

169. For practical reasons, mainly connected with the recent amendment of Directive 83/189/EEC the Commission did not wish to put forward these last proposals formally, at this time. However, it will come back to them when time is ripe.

b) Follow-up action in respect of non-compliance

170. The Commission is conscious that Directive 83/189 is not applied with the same rigour in all Member States, and that a large number of national technical regulations notified under the Directive still do not take account of Treaty obligations and recent interpretations of them by the Court of Justice.
171. The Commission's efforts have so far been concentrated on the setting up and extension to all product sectors of the information system; now, after nearly four years experience of the Directive, the Commission considers that Member States should be fully familiar with their obligations and is determined to ensure that these obligations are respected.
172. To this end, the Commission will shortly undertake the following actions :
- In order to have a clearer view of national legislative activity, the Commission will conclude contracts with organizations in each Member State which will be responsible for collecting and examining national official publications in order to identify published technical regulations and for transmitting these to the Commission for analysis and appropriate action;

- Infringement procedures will be brought against Member States which fail to notify draft technical regulations;
  - a limited number of other infringement procedures, which address the principal issues mentioned in the "legal analysis" section of this report, will be pursued as a matter of priority by the Commission;
  - an information campaign on the New Approach will be launched in the last quarter of 1988, during which the Commission will draw attention to the existence of the Directive, to its views on the non-enforceability of unnotified technical regulations, and to the possibilities which exist under Community law to challenge national technical regulations which inhibit Intra-Community trade;
  - a detailed guide to legislative provisions needing to be included in national technical regulations for them to be in full compliance with the principles of Community law concerning the free movement of goods will be prepared in 1988 and circulated to all national authorities responsible for drafting technical regulations.
173. The Commission hopes that the Member States and the European and national standards organizations will cooperate fully in these initiatives, which are intended to accelerate progress towards the realization of the single Community market in which standards and technical regulations play an important part.
174. Opportunities for further examination of the operation of the Directive 83/189/EEC will arise when, starting in 1989, the Commission presents an annual report on this subject, in accordance with the amendment to the Directive recently proposed by the European Parliament and accepted by the Council in Directive 88/182/EEC amending Directive 83/189/EEC.

Annex I  
Table 1

**Table 1 - Application of Article 3 (Request to be involved in national standardization work and request for the drawing-up of a European standard)**

Year	Request for Information	Comment	Request for Involvement	Request for a European Standard
1985	5	14	5	-
1986	8	16	10	1
1987	5	74(*)	5	1

(\*) Following a reminder of the rules sent out by CEN/CENELEC some earlier comments (1985/1986) have been included under 1987.

**ANNEX 1**  
**Table II**

**Table II - Breakdown of new standardization projects started in 1987**

Field Level	Non-electrical		Electrical		Total		Non-electrical share % $\frac{(1) \times 100}{(3)}$
	Number (1)	%	Number (2)	%	Number (3)=(1) +(2)	%	
<b>a. National Work (*)</b>							
a.1.related to European or International work	156	6.1	31	3.0	187	5.2	83.4
a.2.specific (**)	2113	83.1	424	40.4	2537	70.6	83.3
a.3.Total (a.1 + a.2)	2269	89.2	455	43.4	2724	75.8	83.3
b.European work	33	1.3	256	24.4	289	8.0	11.4
c.International work	241	9.5	338	32.2	579	16.1	41.6
d.Total (a+b+c)	2543	100	1049	100	3592	100	70.8

\* - Covers work by CEN/CENELEC members belonging to the EEC.

\*\* - It seems that some CEN/CENELEC members do not systematically notify the existence of a link with European or International work.

Source : notifications to CEN/CENELEC.



ANNEX 1  
Table III

Table III - Breakdown by country of the new standardization projects started at national level in 1987

Countries	Non-Electrical		Electrical		Total	
	Number	%	Number	%	Number	%
a Germany	530	19.4	299	59.3	829	25.7
b France	560	20.5	38	7.5	598	18.5
c United Kingdom	450	16.5	91	18.1	541	16.7
d Italy	326	12.0	22	4.3	348	10.8
e Other EEC countries	403	14.8	5	1.0	408	12.6
f EEC total	2269	83.2	455	90.3	2724	84.3
g EFTA countries	458	16.8	49	9.7	507	15.7
h Total (f+g)	2727	100	504	100	3231	100

Source : notifications to CEN/CENELEC.

ANNEX 1  
Table IV

**Table IV - The ten most important sub-sectors for national standardization in 1987**

SUB-SECTOR		Number of
Code	Description	notifications
T02	Aerospace	233
B02	Building/structures	201
T03	Road vehicles	170
N05	Textiles	169
H04	Sports equipment	161
M01	Steel	161
T01	Shipbuilding	152
I05	Iron pipes	145
I02	Fasteners	143
C01	Food products	142
Total	-	1677

Note 1 : In the absence of figures on new work started, this breakdown is based on the number of notifications and therefore also covers the transfer of previously planned work to the public inspection stage.

Note 2 : The two major electrical sub-sectors in 1987 were :

- electrical accessories (code W 11) : 126 notifications
- electric cables (code W 08) : 100 notifications.

Source : notifications to CEN/CENELEC.

Annex 2  
Table 1

INFORMATION PROCEDURE FOR TECHNICAL REGULATIONS  
Notification (Article 8(1))  
Comments (Article 8(2))  
Detailed opinion (Article 9(1))  
Intention to prepare a Directive (Article 9(2))

Cumulative data (from April 1984)

Member State	Notifications	Comments		Detailed opinion		Intention to prepare a Directive
		MS*	Commission	MS*	Commission	
Belgium	15	4	1	11	2	1
Denmark	53	17	4	12	13	4
Germany	170	23	29	62	50	16
Spain	27	2	0	5	7	1
France	91	31	11	13	29	3
Greece	10	3	0	0	5	0
Irish	6	2	1	1	1	1
Italy	15	0	1	3	4	0
Luxemburg	0	0	0	0	0	0
The Netherland	24	9	6	6	2	5
United-Kingdom	43	8	5	11	8	2
Portugal	4	2	4	2	4	0
Community	458	101	62	126	125	33
Total						

(\*)The figures in this column show the number of comments or detailed opinions received by each Member State.

Annex 2  
Table 2

BREAKDOWN OF NOTIFICATIONS BY SECTOR

Cumulative data (from April 1984)

SECTEUR	B	D	DK	E	F	GR	IRL	I	NL	P	UK	EEC: SUM:
Mechanical engineering	5	72	2	7	12	3	0	0	0	3	0	104
Building and construction	0	14	1	8	8	4	1	2	0	0	0	38
Metallic materials	0	0	4	0	1	0	0	0	0	0	0	5
Products for households	1	11	3	2	7	1	1	2	4	0	10	42
Chemicals	1	7	5	1	11	0	0	1	9	0	4	39
Non-metallic materials	1	2	4	2	9	0	1	0	1	0	2	22
Transport	4	41	8	2	13	0	0	4	3	0	6	81
Electrical engineering	0	4	9	2	8	0	2	3	0	0	1	29
Electronics excluding telecommunications	0	6	1	0	4	0	0	1	0	0	0	12
Health and medical equipment	2	4	1	0	5	0	0	0	1	0	0	13
Optics and measurement instruments	1	1	1	2	10	0	1	0	1	0	11	28
Electrotechnical sector	0	1	0	1	1	1	0	0	0	0	0	4
Telecommunications	0	6	14	0	2	1	0	2	5	1	10	41
<b>TOTAL BY COUNTRY</b>	<b>15</b>	<b>169</b>	<b>53</b>	<b>27</b>	<b>91</b>	<b>10</b>	<b>6</b>	<b>15</b>	<b>24</b>	<b>4</b>	<b>44</b>	<b>458</b>

Annex 2  
Table 3  
Table 3-1

INTENTION TO PROPOSE A DIRECTIVE (ARTICLE 9 (2))

Abbreviated title of Directive	Notification concerned	Abbreviated title of notification	Deadline	Date of adoption by Commission	Number of Directive adopted
Dangerous chemical substances in objects intended for children	84/0017/UK 84/0019/IRL 85/0004/DK 85/0009/NL	Push chairs Teats Teats and dummies Toys	30.10.85 15.11.85 10.01.86 21.01.86	10.10.86	
Classification, packing and labelling of dangerous subst.	85/0068/F 85/0018/F	Toys and nautical toys MOCA	15.11.86 02.04.86	10.10.86 18.07.85	86/431/EEC
Classification, packaging and labelling of dangerous preparation MOCA	85/0018/F	MOCA	02.04.86	29.01.87	
Pressure vessels Rear windows of vehicles	85/0020/DK 85/0025/DK	Pressure vessels Rear windows of vehicles	30.04.86 26.04.86	07.03.86	87/404/EEC
Spray and chipping suppressors	85/0032/B	Spray suppressors on heavy vehicles	14.06.86	26.01.87	
Braking of trailers and tractors	85/0050/D	Braking of trailers and tractors	18.09.86		
Mobile forestry and agricultural machines	85/0071/F	Agricultural tractors	03.12.86	23.12.86	

Annex 2  
Table 3  
Table 3-2

INTENTION TO PROPOSE A DIRECTIVE (ARTICLE 9 (2))

Abbreviated title of Directive	Notification concerned	Abbreviated title of notification	Deadline	Date of adoption by Commission	Number of Directive adopted
Sulphur content for fuels	85/0080/NL	Heating installations: gas emission	22.12.86	26.01.87	87/219/EEC
Frequency bands- radio transmitters/ receivers	86/0058/NL	Radio specifications- frequency band 933/ 935 MHz	16.09.87	30.01.87	
Approximation of the laws of the Member relating to machinery	86/0143/D	Technical equipment for restaurants	14.01.88	25.11.87	
"	86/0144/D	Safety of woodsaws	14.01.88	"	
"	86/0145/D	Technical equipment for bakeries	14.01.88	"	
"	87/0018/D	Papermaking machines	21.03.88	"	
"	87/0019/D	Bench-mounted saws	21.03.88	"	
"	87/0024/D	Car Washes	24.03.88	"	
"	87/0050/D	Screw conveyers for emptying silos	02.05.88	"	
"	87/0094/D	Compressers	04.07.88	"	
"	87/0112/D	Riveting machines	29.07.88	"	
Approximation of the laws of the Member State relating to machinery	87/0141/D	Packing machines	30.09.88		
Electromagnetic compatibility	87/0023/D	Radio reception- antennas	24.05.88	03.11.87	
Equipment for data transmission on the	87/0026/D	Telephone networks- modems	24.03.88		
"	87/0114/D	"	25.07.88		
"	87/0143/D	"	06.10.88		

Annex 2  
Table 3  
Table 3.3

INTENTION TO PROPOSE A DIRECTIVE (Article 9 (2))

:Abbreviated title :of Directive :	: Notification : concerned :	: Abbreviated title of : of notification :	: Deadline :	: Date of : by Commission :	: Number of : Directive : adopted :
:Nominal quantities :and capacities :permitted for pre- :packaged products :	: 87/0032/E :	: Packages for : detergents :	: 08.04.88 :	: :	: :
:Dangerous preparations :	: 87/0068/D :	: Pentochlorophenal :	: 13.06.88 :	: 29.01.87 :	: :
: :" :	: 87/0115/NL :	: Prohibition f DBB :	: 24.07.87 :	: 29.01.87 :	: :
:(NET) for cordless :telephones :	: 87/0116/UK :	: Cordless telephones :	: 01.08.88 :	: :	: :
:Sulphur content of :heavy fuel oil and coal: :	: 87/0128/DK :	: Sulphur content in : fuels :	: 22.08.88 :	: :	: :
:Pharmaceutical products: :based on human blood or: :blood constituents :	: 87/0124/NL :	: Blood transfusion- : blood and derived : products :	: 22.08.88 :	: :	: :
:Number of Directives : 18	:	:	:	:	:

Annex 3

Legal justification for treating the detailed opinion delivered under Article 9(1) of Directive 83/189/EEC as the letter of formal notice provided for in Article 169 of the EEC Treaty.

As stated in section (b) on page 42, the question has arisen as to the attitude the Commission should take when, despite its comments on the incompatibility of a draft technical regulation with Community law, the Member State in question adopts the draft without amending it and without convincing the Commission of its arguments.

The first stage in the infringement procedure pursuant to Article 169 of the EEC Treaty generally consists of sending a letter of formal notice. This has two functions: it allows the Member State to negotiate and put forward its viewpoint and gives it an opportunity to fulfil its obligations. Under the Directive 83/189/EEC procedure, this new function is performed by the detailed opinion delivered by the Commission. Article 169 of the Treaty does not in fact stipulate the method to be used by the Commission to allow a Member State to put forward its comments. The Court of Justice has itself recognized<sup>(1)</sup> that a Member State can effectively be given formal notice to submit its observations by a letter from the Commission, prior to the letter of formal notice, setting out the precise reasons which led it to conclude that the Member State had failed to fulfil its obligations. The fact that the Commission did not, in its letter of formal notice, reiterate the obligations which, in its view, were incumbent on that State and which had been disregarded did not have the effect of depriving the government in question of the opportunity of submitting its observations.

Admittedly the detailed opinion issued by the Commission under the Directive 83/189/EEC procedure relates to a text that is at the draft stage when the opinion is delivered. However, Article 169 of the Treaty states that, if the Commission considers that a Member State has failed to fulfil an obligation, it shall deliver a reasoned opinion after giving the State concerned the opportunity to submit its observations.

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(1) Judgment of 15 December 1982, Commission v Denmark, case 211/81, ECR p. 4547.



This request constitutes an essential guarantee for the State but does not necessarily have to be made at a time when the failure to fulfill an obligation already exists; it is enough if the text to which the request relates does not differ - as regards the contentious provisions - from the text whose adoption gives rise to a breach of Community law and that the request be based on the same grounds and submissions as the reasoned opinion.

Since this is the situation that prevails when the Commission issues a detailed opinion on provisions incompatible with Community law which are later reproduced without substantial changes in an adopted text, the Commission took the view that it was entitled, once the text was adopted, to deliver the reasoned opinion referred to in Article 169 of the EEC Treaty.

The Commission has consistently applied that argument and, whenever it sends a detailed opinion, it reminds the Member States of the scope it attributes to it.

It first points out that, were the draft under examination to be adopted without due consideration being given to the comments in the detailed opinion, it would infringe Articles 30 et seq. of the EEC Treaty (or some other provision of Community law). The Commission then states: "In that case this detailed opinion would have to be regarded as a letter of formal notice for the purposes of Article 169 of the EEC Treaty and the ...government would be obliged to submit its observations on the views expressed above concerning the compatibility of the provisions in question with Articles 30 et seq. of the EEC Treaty (or any other provision) within 30 days following the adoption of the draft technical regulation under examination. After examining these observations, the Commission reserves the right, where appropriate, to deliver a reasoned opinion pursuant to Article 169 of the EEC Treaty. It also reserves the right to deliver a reasoned opinion should the observations requested not reach it by the deadline".

OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES

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Commission communication concerning the non-respect of certain provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations

(86/C 245/05)

A major feature of the Community's policies for completing the internal market is the prevention of the creation of new national obstacles to intra-Community trade. In this context, the Commission wishes to draw the attention of Member States and other interested parties to the fact that national technical standards and regulations adopted in breach of Directive 83/189/EEC are unenforceable against third parties and, the Commission would expect national courts to refuse to enforce them.

Experience shows that a State's membership of the Community is not always sufficiently reflected in the attitudes and outlook of its administration. When Member State governments deem new acts or regulations to be necessary for national purposes, they do not always or automatically, in drafting their national instruments, take account of the Community dimension or of the need to minimise the difficulties for trade between Member States. Opportunities are thus lost of making simple and inexpensive improvements.

In order to prevent the erection of new barriers, Directive 83/189/EEC now requires all Member States to communicate to the Commission, all draft technical regulations for industrial products (with the exception of food products for human consumption pharmaceutical and cosmetic products) so that the Commission can examine them prior to their adoption in national law.

Upon notification, the Directive requires Member States, other than in the special cases referred to in Article 9 (3) of the Directive (urgent reasons relating to the protection of public health or safety), to suspend the adoption of technical regulations:

- automatically for a period of three months;
- for a period of six months when the Commission or another Member State raises a serious objection;

- for a period of 12 months dating from the initial communication, when the Commission decides to initiate Community legislation in the field covered by the draft national legislation.

The Directive thus enables the Commission and the other Member States to play an important role in preventing the creation of new technical barriers to trade. The Commission is thereby given an opportunity to warn a Member State of cases where draft technical regulations, if adopted, would run counter to Community law, and in particular the provisions of Article 30 of the Treaty. In such a case, the Member State can modify its draft in order to avoid creating barriers to trade. In the case where a national draft regulation might be justified under Article 36 but might nonetheless create barriers to intra-Community trade, the Commission can henceforth oblige the Member State to suspend the adoption of its technical regulation for a period of 12 months to enable the Commission to initiate Community legislation on the subject.

Member States obligations are therefore clear and unequivocal:

- 1) they must notify all draft technical regulations falling under the Directive;
- 2) they must suspend the adoption of the draft technical regulations automatically for three months other than in the special cases covered by Article 9 (3) of the Directive;
- 3) they must suspend the adoption of the draft technical regulations for a further period of three or nine months depending on whether objections have been raised or whether Community legislation is envisaged.

It is clear that the failure by Member State to respect their obligations under this information procedure would lead to the creation of serious loopholes in the internal market, with potentially damaging trade effects.

The Commission therefore considers that when a Member State enacts a technical regulation falling within the scope of Directive 83/189/EEC without notifying the draft to the Commission and respecting the standstill obligation, the regulation thus adopted is unenforceable against third parties in the legal system of the Member State in question. The Commission therefore considers that litigants have a right to expect national courts to refuse to enforce national regulations which have not been notified as required by Community law.