

**FUNCTIONING OF THE "SAFEGUARD CLAUSE" IN THE CONTEXT OF  
NEW APPROACH DIRECTIVES  
UNICE DISCUSSION PAPER**

1. The so-called "safeguard clauses" are an essential element of New Approach directives. They allow member states to stop the placing on the market of such products which conform to a European harmonised standard which, in the opinion of that member state, is not in conformity with the relevant essential requirements. Art. 7 para 1 c) of the Machinery Directive is a typical example. Similar clauses can be found in all other New Approach directives. The role of these clauses is different from that of the safeguard clause in Art. 95 of the Amsterdam treaty. Unlike the latter, the former does not permit member states to deviate from European law but allows them to take measures against products with the justification that the standard applied is not in conformity with the relevant essential requirements. For that reason, the term "formal recourse" is more precise.
2. In UNICE's view, the formal recourse procedure aims at a uniform interpretation of essential requirements in all member states. Therefore, it is an instrument for the perfection of the Single Market. Its application must not disturb the free movement of goods. It is the responsibility of the relevant Committees such as the Machinery Committee following Art. 6 of the Machinery Directive to develop, if needed, interpretations of the essential requirements which are to be applied by all Member States.
3. One of the cornerstones of the New Approach is the shared responsibility of the Commission, Member States and European standardisation organisations (SDOs) for the functioning of the Single Market. This implies that SDOs have the task, based on mandates issued by the Commission after consultation with the Member States, of elaborating the standards needed by the interested parties. The reason for this is that SDOs are better prepared than the Commission and the Member States to bring together the expertise needed for the development of such standards. Formal recourse procedures upset the balance between SDOs, Member States and the Commission, as they give to the Member States the power to correct the results of the standardisation process. For that reason, shared responsibility means that formal recourse must be the exception to the rule that European SDOs develop under their own responsibility the standards needed under the New Approach Directives.

4. The use of the formal recourse procedure has serious disadvantages: industry and SDO' must wait again for a long and cumbersome procedure to come to an end before a final decision on the conformity of the challenged standard is taken. The reference to the standard concerned is then deleted from the Official Journal. Industry can no longer benefit from the presumption of conformity. This discourages the experts who have been involved in the elaboration of the relevant standard and thus weakens the work of European SDOs.
  5. As a result, the use of the formal recourse procedure must be limited to exceptions. There must be clear preconditions for its use and clear rules for the process to be followed by the parties concerned to decide on formal recourse. In UNICE's view, it is not appropriate that a European harmonised standard should no longer benefit from the presumption of conformity if it is challenged by only one Member State or by a member state which has not participated in its elaboration. Furthermore, it should not be possible for Member States to challenge a standard if experts from the relevant authority of this member state have been involved in its elaboration and have not voted against the standard in question. This implies that the Commission will withdraw the publication of a European harmonised standard from the Official Journal (OJ) only if a qualified blocking minority (at least 30 %) of Member States are of the opinion that the standard does not meet the essential requirements and that the relevant issue was not discussed during the elaboration of the standard. Furthermore, before any decision is taken by the relevant committee, the relevant CEN/CENELEC TC should be given the possibility to explain its position. If the publication of a standard is withdrawn from the OJ, the relevant nonconformity shall be clearly explained and a new mandate be issued to European SDOs on that basis without delay.
  6. It is of crucial importance to the functioning of SDO' that the relevant national authorities themselves contribute as early as possible in the technical work. In particular, the national delegations of SDOs should table any requirements essential to safeguard their existing level of protection. This mechanism could also serve as an early warning mechanism.
  7. The motivation for experts from national authorities to involve themselves in the technical elaboration of European harmonised standards should be increased. The Commission should set up a code of conduct for use of the formal recourse procedure. This code of conduct should include at least the points listed above. If sufficiently fair and detailed, such a code of conduct could remove uncertainty for the involved parties and help European standardisation to be more efficient and more accountable.
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