

VI - E.E.C. QUALITY POLICY AND LIABILITY FOR FAULTY PRODUCTS. INSURANCE

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Born in MILAN, 25 July 1938. — Finished secondary school studies in 1957 at the LEONARDO DA VINCI State Scientific Grammar School. — Studied the four—year Political Sciences course at the Catholic University of Milan. — Entered GENERALI in 1963. — In 1966 passed over to the staff of the Foreign and Insurance Department of the company. — In 1972 took charge within the department of the section of Automobiles, Civil Liability, Accidents and Illnesses. — In 1976 he took charge of insurance subscription operations for the Civil Liability section of Generali in Italy. — In 1988, in addition to the previous post, he once again took charge of the Foreign and Insurance section, with the post of Subdirector.

Since the creation of the European Community, politicians have imagined European citizens to be “consumers” in a great free supranational market to which can be increasingly entrusted a determining role in Community development.

The consumer, identified in this way, must not be considered as a positive subject synonymous with consumism, even if he is considered as the active foundation of a democratic pluralist system entrusted with protecting the rights of the individual in the economic context.

In this way the consumer becomes the main point of reference in the creation of the “rules of the game” for all company activities within the Community framework.

In other words, the goal is protection of the rights of the European citizen in his role as a consumer, while the means are the rules which businessmen must respect in order to achieve that goal.

The various “EEC Norms” are these regulating instruments.

These instruments are increasingly numerous and more specific, but for ease of presentation they may be grouped into and identified under two essential typologies, for each of which I will try to analyse below all the complexities of insurance.

- A) Protection of the right to compensation for injuries to the person or material damage to goods of the citizen.
- B) Guarantee of intrinsic product quality and protection of the patrimony of the citizen and of his physical integrity or of his goods.

(A)

Norm 85/3/4 is the most emblematic case belonging to the first type of "Rules of the Game": it refers to responsibility for damage caused by defective products.

This Norm aims to encourage an approximation between the reglementary and administrative provisions of member states, leaving to one side, clearly, margins for discretion with respect to well-defined aspects such as the extent of supply of agricultural produce, the risk of development and the maximum guarantee.

The fundamental provisions, on the other hand, which are more binding, modify the responsibilities of producers in the face of users, and determine them better.

The EEC Norm establishes that the producer is responsible for the damage caused by a defect in his product; in order to be able to obtain compensation, the injured party only has to prove the existence of the defect in the product and establish the causal link between the defect and the damage.

It is therefore no longer necessary to demonstrate that the manufacturer is to blame, for the producer is always the person responsible if he cannot demonstrate that he manufactured the product with care and in compliance with the law. These proofs of discharge, which absolve from responsibility, are always laid down and are expounded in the norm (there are six of them, and only six), and are the only ones to which the allegedly responsible party can make reference.

With what has been said so far, you can already see how important is the aggravation of the producer's responsibility, up until now often not regulated by precise norms, or always different in different member states. Under its suggestive outline, the norm greatly extends the category of individuals who are considered to be producers: in the first place the manufacturer of the finished product or one of its components and the producer of a raw material.

The producer is therefore not only the person who presents himself on the market as such, and consequently the end person responsible for the defective goods, but also whoever has participated in production of the goods by supplying any of the components or raw materials.

These individuals are absolved of all responsibility only when the defect causing the damage depends completely on the original concession of the product in which the component or raw material supplied has been incorporated, or else on respect for the instructions given by the final producer of the goods.

Also considered to be a "producer" is the person who, by placing his name, trademark or other distinguishing sign on the product, presents himself as such, although he is not the material producer. Also open to the same system of responsibility is the importer within the Common Market of goods proceeding from non-Community countries, and the trader himself.

In other words, the Norm, by following the philosophy of maximum protection for the consumer, allows the citizen, in the event of becoming an injured party, to apply for entire compensation for the damage to any of those presumed responsible.

It is clear that this man — given that the injured party only has to prove, as we have seen, the existence of the defect in the product which is in his possession and the causal connection between the defect and the damage — shall be obliged to pay the compensation even if the person really responsible for the defect is another individual who might have contributed to the productive process, for example the supplier of the raw material or the manufacturer of a component.

Thus are unleashed the inevitable processes of indemnification for recovery of compensation paid, in spite of the damage being imputable to the error of others.

The insurance cover, which guarantees payment of the damage, also takes care of this

important service, for in the name of the Insured it takes up the process of discovering those truly responsible and the consequent possibilities of backdated action.

Under an objective outline, the norm describes the concept of defective product, defined as a good which "does not offer the safety which may be legitimately expected of it" taking into account all the circumstances, etc. What is the meaning of "safety which may legitimately be expected of it"?

At the end of evaluation of the degree of safety which must be guaranteed for the product not to be defective, and according to the specific type of product, diverse elements are taken into consideration which are not closely related to the production process, such as presentation, the reasonable utilization of the product, the period during which it was put into circulation, the evident characteristics of the product, and the instructions and warnings issued with it.

The text of the norm takes great care to add the adverb "legitimately", which should act as a filter for clearly unjustified requirements on the part of consumers. But the formulation is very vague, and it is therefore dangerous owing to the use that could be made of it by marginal judges moved by emotive group pressures and without sufficient knowledge and competence on economic and social phenomena.

What I mean is that it will be necessary for insurers and industrialists to be attentive to the manner in which the judges interpret the provisions of the norm.

Analysis of this norm leads us to understand that in practice the producer must act with the greatest diligence at all times, from drawing up of the plan, through examination of the component accessories, packaging and labelling and, finally, the advertising message with which the product itself is presented.

The insurance instrument at the disposition of businessmen in this sector is more than adequate, for it guarantees against any type or magnitude of error, during all productive phases, from drawing up the plan to drafting of the instructions for use.

But this is not all, for under the outline of damage the insurance cover does not set any limit: the guarantee includes damage to persons (deaths or injuries) and damage to material objects occasioned by any of the goods independently of the use, whether private or professional, to which they are destined.

It is therefore a guarantee which goes beyond the area covered in the new discipline, and which gives to understand that the principal end of the insurance is not only protection of the consumer — the declared objective of the EEC Norm — but also an attempt to guarantee as best possible the entire productive activity of the businessman who professionally and seriously wishes to be protected from the possible damage which his products may occasion on the market.

It is then important to establish when the insurance cover operates. The traditional approach of "losses occurrence", which offers a cover for damage verified during the period of validity of the guarantee, is being replaced by the "claims made" approach which covers, on the contrary, the claims for compensation which arrive from the insured during the period of validity of the insurance.

In short, in this second case the insurer takes upon itself all damage which is potentially already in course, but which has not yet revealed itself.

The advantages of the claims made system for the insured may be summed up as follows:

- The application for compensation is made just within the period of validity of the insurance and, consequently, the capital under guarantee which the application affects is more real with respect to expectations of what is not included in the policy, in such an event, due to damage occurred in the past; the sum agreed at the time may be insufficient due to inflation, or due to a change of direction of the Magistracy, etc.

- Immediate identification of the competent insurer, without the need to go looking for the policy immediately after the accident.
- Admission of the risk of the entire production on the market at the time of stipulation of the policy.

Another aspect to be taken into consideration is the territorial extension of the guarantee. It is possible to extend the cover of the more restricted area (products manufactured and distributed in a single country) to the whole world.

This is a clear advantage for those who export to different countries in which the industry is implanted; it is an essential need for all those who also distribute their own products also in the U.S.A. and Canada; with respect to turnover destined to those countries, given the characteristics of the US juridical system and the considerable demands of local consumers, it is necessary to bring the existing premium up to the risk existing in such countries, where compensation for damages caused by defective products is very frequent and often of the order of millions of dollars.

But this is not all, for the rapid growth in international interchange, whether in the commercial or tourist spheres, brings with it a phenomenon of particular interest to the producer of consumer goods: hidden exports or, more correctly, indirect exports.

A product manufactured in any European country and distributed in its country of origin or in others through European commercial organizations may, without the producer knowing it, be redistributed by those organizations in the countries of North America.

These producers therefore also have the need to extend the guarantee to the products manufactured in a specific country, but distributed in any other country, to the accidents registered in any of those countries.

The insurance will therefore be valid in all parts and will guarantee the indispensable service even before settlement of the damages through compensation claim from the injured party — or alleged injured party — resident in any country. For these purposes it is obviously necessary that the Insurer be solvent, but especially that it have a large and efficient international organization which can in any case guarantee, with the presence of its representatives, the same service provided for compensation claims from European citizens.

(B)

Here we arrive at the second group of the “Rules of the Game”, which no longer refer to injuries or material damage to the consumer, but which tend instead towards protection of the patrimony of the consumer himself, guaranteeing him the quality of goods or services.

I refer now to Norm 84/450, on “Misleading Publicity” of the Convention of 13.4.70 relating to the quality and provision offered by the “organizers” of tourist holidays, but above all to the recent draft norm (April '89) relating to bringing together of Member State legislations on the subject of general product safety.

In view of the impossibility for the Community of harmonizing with vertical norms (specific for unitary products) the standards for each consumer good which exists or which might be manufactured, it was necessary to adopt horizontal sets of norms which imposed other levels of safeguards and unified the norm sets of the Member states on the subject.

According to the proposal all consumer products, of industrial or agricultural origin, including raw materials, components, spare parts and accessories, must not present direct or indirect risks in the utilization for which they are destined or for their foreseeable duration.

In other words, the citizen/consumer has the right to a safe product which meets the requirements and the ends for which he acquired it.

With this new proposal the role and the responsibility of the producer increases, for he has to carry out constant and severe quality control, whether at the time of production or when the product is already on the market. It is also his duty to supply simple, clear and complete operating information and instructions, without forgetting that European products are destined to circulate in the single market and that there might therefore exist problems of linguistic understanding of labels and operating instructions.

While the directive on responsibility for damage caused by defective products, which imposes the obligation for compensation by the producer, has a reparative action, the new normative proposal has a preventive end: to improve the level of safety and of quality of consumer products.

National authorities must lay down emergency intervention mechanisms for such time as they become aware of the presence of unsafe products on the market. Also envisaged is close cooperation and interchange of information between Community or state authorities.

The intervention of the Insurer in this sector is more problematical. It is of necessity less global, but it is more sophisticated, for it must involve itself more incisively in the technological processes of the company, in its "quality control" area, and finally (though not because it is least important), in the contractual obligations incurred between acquirers and users of the product.

The responsibility of the manufacturer does not in fact end with the extracontractual fact of injuries or material damage, but extends also to all obligations relating to the consumers themselves regarding the obligation to supply products which present the quality and the characteristics agreed in the contract of sale.

Failure to respect these obligations gives rise to damage of delicate patrimonial nature, affecting consumers using products which do not meet their needs.

It is clear that this is the classic risk of the businessman, who will meet with greater success if his professional competence allows him to offer excellent products at the lowest price.

It is nevertheless obvious that the insurer cannot and must not totally assume that risk, for the opposite would lead to disappearance of the basic reason for the company, and the insurer would completely replace the businessman.

There may nevertheless be some cover subsidiary to the basic RC cover for those cases where there occurs patrimonial damage of the type already mentioned, where products distributed and accepted as being suitable later reveal themselves not to be such after a certain time, due to imperfections hidden at first sight.

A first insurance instrument now sufficiently approved and widespread is that known as "recall" cover. This has been a revolution particularly for manufacturers of finished products distributed directly for consumption.

The Insurer commits itself to repay the Insured for the costs of all withdrawal of products after they have been sold or distributed to third parties. The efficacy of the guarantee is explained in cases where as a consequence of defect of design or production it is necessary to withdraw the product from the market:

- Due to the measures and/or prescriptions of the Public Authorities adopted because the product constitutes a danger for the health and physical integrity of end users and consumers;
- Because of bodily injury;

- Given that the defect may jeopardize the health of third parties.

Repayable are:

- Expenses for publicity and communications by means of any suitable medium;
- Necessary transportation expenses for withdrawal of the products from the market;
- Expenses occasioned by work carried out by staff appointed by the Insurer for the product withdrawal operations;
- Expenses necessary for distribution of the products, where such is imposed by the public authorities, or is more economically suitable for product withdrawal.

A second insurance instrument, which we could call simply “product guarantee”, can also bypass the premiss of an eventual order on the part of the authorities, or of danger to the physical integrity of users, but instead make reference to eventual damage of an economic nature borne by the client/destinee, who would be obliged to take action on his own products to modify them or replace the intermediate products or components which do not allow the forecast and agreed performance of the contract to be fulfilled.

The Insurer is obliged to prevent the Insured having to pay the sums owed to third parties for repair or replacement of the products.

Indemnizable up to the cost of the collateral (taken as the industrial cost) of the products defective at the time of the accident are the expenses of repair or replacement of those products in possession of the consumers or end users.

“Repair” is understood to mean modification or rectification of the defective product, including any operations of disassembly and reassembly.

“Replacement” is understood to mean substitution of the defective product, including operations of disassembly and reassembly.

Valuation of the damage shall be calculated without consideration of eventual salvage, and shall in any case correspond to the lower of repair/replacement costs.

In this case it is essential that the Insurer be acquainted with the qualitative standards for the manufacturing and control processes of the company applying for cover of this type.

It is in fact also necessary to draw up a detailed technical questionnaire and an in—depth frequency study carried out by sectorial experts of confidence, whether on the part of the Insurer or the Company, in order to:

- Gather precise information on production systems, destination of the products and contractual obligations undertaken;
- Reconcile quality controls, and as appropriate certification thereof, with maintenance of a corresponding record;
- Identify hidden defects which may make it necessary to use the insurance guarantee, establishing the corresponding time limits.

This second insurance instrument, which guarantees a typically contractual responsibility (with quite major juridical/technological implications), is still not very widespread in the insurance market, and only large groups have started experimental operation in this sector with the creation of specially chosen branches for which they have hired not only insurers, but also experts in the field of technological matters and accident—avoidance, often in contact with product and product control quality control and certification Institutes.

Each of these covers should be considered as accessory to that for Civil Liability for defective products, illustrated in the reference to the Norms of EEC 85/374, which are the basic foundations of same, while the insurer must clearly be the same.

In a resolution of the Council of the European Community which goes back to 14.4.75 (point 14 of Chapter II), devoted to the objectives of Community Policy in relation to consumers, there was a reference as follows "... this is a general guideline destined to improving the situation of the consumer in any sector of production, distribution or provision of services. The objectives of this policy consist in ensuring:

A. Effective protection against risks for the health and safety of the consumer;

B. Effective protection against risks which might affect his economic interests. ...

To finish, I believe that the cover offered by the insurance outlined tends towards provision of a coherent basis for the objectives of the European Community, as evidenced by the active and specific participation of the Insurers, and all other financial operators, in what may have appeared to be a dream in January 1957 in Rome, but which will very soon become a reality: on 31.12.1992.